ADVISORY COMMITTEE ON CRIMINAL RULES

File Copy

Cape Elizabeth, Maine
October 19-20, 1998

CRIMINAL RULES COMMITTEE MEETING

October 19-20, 1998
Cape Elizabeth, Maine

I. PRELIMINARY MATTERS

A. Remarks and Administrative Announcements by the Chair

B. Approval of Minutes of April, 1998, Meeting in Washington, D.C.

C. Minutes of Standing Committee Meeting, June 1998.

D. Criminal Rules Agenda Docketing.

III. CRIMINAL RULES UNDER CONSIDERATION

A. Rules Approved by Standing Committee Pending Before Judicial Conference (Memo).

1. Rule 6. Grand Jury (Presence of Interpreters; Return of Indictment)..
2. Rule 11. Pleas (Acceptance of Pleas and Agreements, etc).
3. Rule 24(c). Alternate Jurors (Retention During Deliberations).
4. Rule 54. Application and Exception (Conforming Amendment).

B. Rules Approved by Supreme Court and Pending in Congress (No Memo).

1. Rule 5.1. Preliminary Examination; Production of Witness Statements.
2. Rule 26.2. Production of Witness Statements, Applicability to Rule 5.1 Proceedings.
3. Rule 31. Verdict; Individual Polling of Jury.
4. Rule 33. New Trial; Time for Filing Motion.

5. Rule 35(b). Correction or Reduction of Sentence; Changed Circumstances.

6. Rule 43. Presence of Defendant; Presence at Reduction or Correction of Sentence.

C. Proposed Amendments to Rules of Criminal Procedure

1. **Rule 10, Arraignment & Rule 43, Presence of Defendant.** Proposed Amendments to Permit Defendant to Waive Personal Appearance at Arraignment and Plea (Memo).

2. **Rule 12.2, Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition.** Proposed Amendment Re Notice and Ordering Of Mental Examination For Defendant. (Memo).

3. **Rule 26. Taking of Testimony.** Proposed Amendment to Permit Taking of Testimony from Remote Location. (Memo).

4. **Rule 30. Instructions**. Proposed Amendments Regarding Timing Of Submission of Proposed Instructions And Preservation Of Error (Memo).

5. **Rule 32. Sentence and Judgment.** Proposal by Committee on Criminal Law Regarding Disclosure of Presentence Reports. (Memo).

6. **Rule 32.2. Criminal Forfeiture.** Reconsideration of Proposed New Rule; Report of Subcommitee (Memo).

7. **Rule 43. Presence of Defendant.** Proposed Amendments re Teleconferencing for Initial Appearance and Arraignment (Memo)

8. **Rules Governing Habeas Corpus Proceedings;** Report of Subcommittee. (Memo)

D.. Rules and Projects Pending Before Advisory Committees, Standing Committee and Judicial Conference

1. Rules Governing Attorney Conduct; Status Report

2. Electronic Filing of Comments on Proposed Rules Changes

E. Status Report on Proposed Restyling of Criminal Rules

F. Status Report on Legislation Affecting Federal Rules of Criminal Procedure.

IV. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

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Item I A-B

MINUTES [DRAFT]
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

April 27-28, 1998
Washington, D.C.

The Advisory Committee on the Federal Rules of Criminal Procedure met at the Thurgood Marshall Federal Judiciary Building in Washington, D.C. on April 27th and 28th 1998. These minutes reflect the discussion and actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Davis, Chair of the Committee, called the meeting to order at 8:30 a.m. on Monday, April 27, 1998. The following persons were present for all or a part of the Committee's meeting:

Hon. W. Eugene Davis, Chair
Hon. Edward E. Carnes
Hon. George M. Marovich
Hon. David D. Dowd, Jr.
Hon. John M. Roll
Hon. Tommy E. Miller
Hon. Daniel E. Wathen
Prof. Kate Stith
Mr. Robert C. Josefsberg, Esq.
Mr. Darryl W. Jackson, Esq.
Mr. Henry A. Martin, Esq.
Mr. Roger Pauley, Jr., designate of the Asst. Attorney General for the Criminal Division
Professor David A. Schlueter, Reporter

Also present at the meeting were: Hon. Alicemarie Stotler, Chair of the Standing Committee on Rules of Practice and Procedure; Hon. William Wilson, member of the Standing Committee and liaison to the Advisory Committee; Professor Daniel Coquillette, Reporter to the Standing Committee; Mr. Peter McCabe and Mr. John Rabiej from the Administrative Office of the United States Courts; Mr. James Eaglin from the Federal Judicial Center; Mr. David Pimentel, Judicial Fellow at the Administrative Office; Mr. Joseph Spaniol, Consultant to the Standing Committee; and Ms. Mary Harkenrider from the Department of Justice. The attendees were welcomed by the chair, Judge Davis

II. HEARING ON PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

The Committee's regularly scheduled business meeting was preceded by a public comment hearing on proposed amendments to Rules 11 and 32.2, during which the Committee heard from four witnesses: Hon. Paul D. Borman (E.D. Mich.) who addressed the proposed amendments to Rule 11; Mr. Bo Edwards and Mr. David Smith, who spoke on behalf of the National Association of Defense Lawyers on proposed new rule 32.2; and Mr. Stephan Cassella who spoke on behalf of the Department of Justice on Rule 32.2.

III. APPROVAL OF MINUTES OF OCTOBER 1997 MEETING*

Judge Marovich moved that the Minutes of the Committee's October 1997 meeting in Monterey, California be approved. Following a second by Judge Roll, the motion carried by a unanimous vote.

IV. RULES APPROVED BY STANDING COMMITTEE AND JUDICIAL CONFERENCE AND PENDING BEFORE THE SUPREME COURT

The Reporter informed the Committee that at its January 1998 meeting, the Standing Committee had approved and forwarded to the Judicial Conference the amendments to the following rules, which were also approved by the Judicial Conference at its Spring 1998 meeting:

1. Rule 5.1 (Preliminary Examination; Production of Witness Statements);
2. Rule 26.2 (Production of Witness Statements; Applicability to Rule 5.1 Proceedings);
3. Rule 31 (Verdict; Individual Polling of Jurors);
4. Rule 33 (New Trial; Time for Filing Motion);
5. Rule 35(b) (Correction or Reduction of Sentence; Changed Circumstances); and
6. Rule 43 (Presence of Defendant; Presence at Reduction or Correction of Sentence).

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* Although some items on the agenda were discussed out of sequence, these Minutes reflect the Committee's discussion in the order the items were listed on its Agenda.

V. RULES PUBLISHED FOR PUBLIC COMMENT AND PENDING FURTHER REVIEW BY ADVISORY COMMITTEE

The Reporter informed the Committee that it had received a total of 24 written comments on the Committee's proposed changes to the following rules: Rule 6. Grand Jury (Presence of Interpreters; Return of Indictment); Rule 7. The Indictment and Information (Conforming Amendment); Rule 11. Pleas (Acceptance of Pleas and Agreements, etc.); Rule 24(c). Alternate Jurors (Retention During Deliberations); Rule 30. Instructions (Submission of Requests for Instructions); Rule 31. Verdict (Conforming Amendment); Rule 32. Sentence and Judgment (Conforming Amendment); Rule 32.2. Forfeiture Procedures; Rule 38. Stay of Execution (Conforming Amendment); and Rule 54. Application and Exception.

A. Rule 6. Grand Jury (Presence of Interpreters; Return of Indictment)

The Chair provided background information on the development of the amendments to Rule 6, in particular the provision in Rule 6(d) for providing for interpreters in the grand jury deliberations. While the Advisory Committee had originally proposed that only interpreters for hearing impaired grand jurors be permitted, the Standing Committee had amended the Rule for publication to include all interpreters, in order to obtain public comment on the issue. The Reporter informed the Committee that of the comments received on that proposal, several judges opposed the amendment on the ground that 28 U.S.C. § 1385(b) requires that all petit and grand jurors must speak English. Thus, to the extent that the proposed rule permits language interpreters to take part in the deliberations, it is inconsistent with that statute.

Following brief discussion about extending the provision only to hearing and speech impaired jurors, Judge Carnes moved that the Rule be amended to provided for only those interpreters. Judge Roll seconded the motion, which carried by a unanimous vote.

With regard to the proposed amendment to Rule 6(f), which permits the foreperson or deputy foreperson of the grand jury to return an indictment on behalf of the grand jury, the Reporter noted that two commentators were opposed to the amendment on the ground that it unnecessarily insulates the grand jury from the court. Judge Miller seconded that view. Several other members indicated that although it might insulate the jurors, the rule gives discretion to the judge to require the jurors to personally appear and that it can be an effective cost and time-saving measure because the grand jurors do not have to wait until a judge is free from a busy docket to take the indictment.

Judge Dowd moved that the amendment be approved and forwarded to the Standing Committee as published. Judge Roll seconded the motion, which carried by a 9

to 2 vote.

B Rule 7. The Indictment and Information (Conforming Amendment).

The Reporter indicated that the Committee had received no written comments on the proposed conforming amendment to Rule 7 regarding forfeitures vis a vis the indictment. Judge Dowd moved that the amendment be approved and forwarded to the Standing Committee as published. Judge Miller seconded the motion, which carried by a vote of 9 to 2.

C. Rule 11. Pleas (Acceptance of Pleas and Agreements, etc.)

Following a brief discussion on the proposed amendment to Rule 11(a)(1), which is simply a technical change on the definition of an organizational defendant, Judge Dowd moved that the amendment be approved and forwarded as published. Following a second by Judge Roll, the Committee approved the amendment by a vote of 9 to 2.

The Reporter informed the Committee that of those commenting on the proposed change to Rule 11(c)(6)--which requires the judge to question an accused about any provision in a plea agreement which requires the accused to waive an appeal or collateral review of the sentence--a majority opposed the amendment, including several judges, the NADCL, and a committee of the American College of Trial Lawyers. The gist of the commentators' objections centers on opposition to the proposition that an accused could be required to waive an appeal of his her sentence and that by amending the Rule, the Committee is approving of that practice. The Chair indicated that the Committee could add a disclaimer to the Note and Judge Marovich stated that the purpose behind the proposal was to require a judicial inquiry into an existing practice in some districts, with or without the amendment. The discussion focused on the question of whether the practice was authorized and the role of the Committee, if any, in commenting on the legality of waiver provisions. Judge Carnes observed that some of the commentators had opposed the amendment to argue their substantive disagreement with the waiver provisions. He thereafter moved that the published amendment be approved and forwarded to the Standing Committee. Judge Marovich seconded the motion which carried by a vote of 9 to 2. The Committee also directed the Reporter to include removal of the final two sentences in the second paragraph of the Note and include language to reflect that the Committee did not intend to signal approval of wavier of appeal provisions.

With regard to the proposed amendment to Rule 11(e), the Reporter informed the Committee that only a few commentators had addressed the change, including the American Bar Association which believed the amendment would unduly bind the trial court to sentencing guidelines. Following a brief discussion, Mr. Martin moved, and

Judge Miller seconded, to approve and forward the amendment as published. The motion carried by a vote of 11 to 0. Judge Dowd moved that language be added to the Committee Note which pointed out that the trial judge retains discretion to reject the plea agreement. Professor Stith seconded the motion which also carried by vote of 11 to 0.

D. Rule 24(c). Alternate Jurors (Retention During Deliberations)

The Committee was informed that only six commentators had provided comments on the proposed amendment to Rule 24(c) which would permit the judge to retain any alternate jurors after the jurors retire for deliberations. Of those, three supported the amendment while the NADCL and the ABA are opposed to the change because there is currently no explicit provision in the rule permitting the judge to make substitutions after the jury retires. Following brief discussion, Mr. Josefsberg moved, and Judge Dowd seconded, that the Committee approve that amendment as published and forward it to the Standing Committee. The motion carried unanimously. The Committee also suggested some changes to the Note regarding the interplay between Rules 23 and 24.

E. Rule 30. Instructions (Submission of Requests for Instructions)

The Reporter informed the Committee that of the eight comments received on the proposed amendment to Rule 30--which would permit the judge to require the parties to submit their requested instructions pretrial. The amendment is opposed by the NADCL but supported by the American College of Trial Lawyers. The Reporter also indicated that the Civil Rules Committee is currently working on amendments to Civil Rule 51, a counterpart to Criminal Rule 30. That Committee was also considering possible amendments to clarify the provisions in that rule concerning preservation of error vis a vis instructions. Following discussion by the Committee to the effect that it would be better to hold Rule 30 and continue consideration of additional amendments, Judge Marovich moved that the amendment be tabled discussion at the Committee's next meeting. Justice Wathen seconded the motion, which carried by a vote of 9 to 2.

F. Rule 31. Verdict (Conforming Amendment).

The proposed amendment to Rule 31(e), which conforms the rule to proposed new rule 32.2 regarding forfeitures had received no comments. Judge Dowd moved that the amendment be approved and forwarded as published. Judge Miller second the motion which carried by an 8 to 3 vote.

G. Rule 32. Sentence and Judgment (Conforming Amendment)

The Reporter informed the Committee that it had received no written comments on the amendment to Rule 32(d), which conforms that rule to new Rule 32.2 (forfeiture procedures). Judge Dowd moved, and Judge Miller seconded, that the amendment be approved and forwarded to the Standing Committee. That motion carried by a 9 to 2 vote.

H. Rule 32.2. Forfeiture Procedures.

Judge Dowd, chair of the Rule 32.2 Subcommittee, moved that the rule be approved and forwarded to the Standing Committee; Judge Miller seconded the motion. Judge Dowd informed the Committee that the members of the subcommittee had focused on several potential problem areas or questions regarding the proposed draft. He noted that one of the key points was resolution of the right to jury trial, which existed under the current practice under Rule 31(e), which requires the jury to return a special verdict on the issue of forfeiture. Several members responded by noting that the proposal was linked with the Supreme Court's decision in *Libretti v. United States*, 116 S.Ct. 356 (1995). Several members read that case to say that there is no constitutional right to a jury trial in deciding criminal forfeiture issues. Others questioned whether, even assuming that was the Court's holding, it was wise to abrogate the existing system of involving the jury in the decision.

Other members raised concerns about the language in proposed subdivision (b) which indicated that the defendant was not permitted to show that the property belonged to someone else and that if no third party files a claim to the property to be forfeited, the rule assumes that the defendant's interest in the property was exclusive and the court could forfeit the property in its entirety. Judge Dowd submitted additional language proposed by the subcommittee which would address that issue. The new language, to be inserted at subdivision (b) would require the court, if no third party filed a claim, to determine if the accused had an interest in the property and the extent of the defendant's interest. The Committee agreed with the proposed addition.

Mr. Martin indicated that he opposed the proposed rule. In his view, the rule unnecessarily abrogated the right to jury trial.

Judge Stotler raised questions about whether the Federal Rules of Evidence applied at the ancillary proceeding under (d)(1). Following brief discussion, the Committee voted to add (d)(5) which would explicitly state that the ancillary proceeding is not a part of sentencing. As such, the Rules of Evidence would apply. The Subcommittee later submitted to the Committee proposed language which would clarify subdivision (f) which spells out the procedures for forfeiting subsequently discovered property or

substitute property.

The Committee voted 9 to 2 to approve new Rule 32.2, as amended, and forward it to the Standing Committee. The Reporter and the Subcommittee were asked to make the conforming changes to both the rule and the Note.

I. Rule 38. Stay of Execution (Conforming Amendment).

The amendment to Rule 38, which conforms the rule to proposed new Rule 32.2, received no written comments. Judge Dowd moved that the amendment be approved and forwarded to the Standing Committee. Ms. Harkenrider seconded the motion, which carried by a vote of 9 to 2.

J. Rule 54. Application and Exception.

Following a very brief discussion on the proposed amendment to Rule 54--a technical conforming amendment--Judge Dowd moved that the amendment to approved and forwarded to the Standing Committee. Judge Carnes seconded the motion which carried by a unanimous vote of the Committee.

VI CRIMINAL RULES CURRENTLY UNDER CONSIDERATION BY ADVISORY COMMITTEE

A. Rule 5(c). Initial Appearance Before the Magistrate Judge. Proposed Amendment.

Judge Davis provided a brief overview of a proposed amendment to Rule 5(c) which would permit a magistrate judge to grant a continuance in a preliminary examination over a defendant's objection. He noted that the Committee had previously considered the matter at its April 1997 meeting and that because the amendment would have directly contradicted 18 U.S.C. § 3060, that it had been referred to the Standing Committee with a recommendation that the Committee take steps to initiate an amendment to the statute. The Standing Committee responded by referring the proposal back to the Advisory Committee and indicating that the most appropriate method of effecting a change would be to follow the procedures in the Rules Enabling Act. At its October 1997 meeting, the Advisory Committee defeated a motion to amend Rule 5(c). Although that position was reported to the Standing Committee, the Judicial Conference subsequently instructed the Advisory Committee to propose an amendment.

Following discussion on the proposed amendment, Mr. Martin moved that Rule 5(c) be amended to permit a magistrate judge to grant a continuance in a preliminary hearing, over the objection of the accused. Judge Miller seconded the motion, which carried by a unanimous vote.

A discussion ensued addressing the issue of whether any proposed amendments should be published for comment in light of the fact that the Standing Committee's Style Subcommittee is currently working on restyling all of the Criminal Rules. A consensus emerged that unless an amendment was essential, it should be deferred pending the restyling project rather than going through piecemeal publication and amendments.

B. Rule 10, Arraignment & Rule 43, Presence of Defendant.

The Reporter presented proposed amendments on Rules 10 and 43 which would permit a defendant to waive personal appearance. The draft amendment would require the accused to waive that appearance in writing and would require approval of the court. Mr. Josefsberg moved that the draft be adopted and forwarded to the Standing Committee with a recommendation that it be published for public comment. Mr. Martin seconded the motion. During the discussion which followed, several members suggested that this amendment should perhaps wait until the Committee could more fully consider a possible amendment which would permit an accused to waive personal appearance for certain pleas, e.g., no contest pleas or pleas to a superseding indictment. The Committee voted unanimously to table the proposal. Mr. Martin and Judge Miller will work with the Reporter to consider additional amendments to the Rules.

C. Rule 12.2, Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition .

The Reporter submitted to the Committee a draft amendment to Rule 12.2 which reflected the Committee's discussions at its October 1997 meeting. Rule 12.2, would accomplish two results. First, a defendant who intends to introduce expert testimony on the issue of mental condition at a capital sentencing proceeding would be required to give notice of an intent to do so. And second, the rule would make it clear that the trial court would have the authority to order a mental examination of a defendant who had given such notice.

The Reporter indicated that following the October 1997 meeting, the Department of Justice had submitted suggested language which also included suggested procedures for releasing the results of the examination to an attorney for the government before a guilty verdict on a capital crime had been returned. any procedure short of sealing the results of the examination might be appropriate. The Reporter continued by noting that he had

drafted some alternative language, which might better address the issue of disclosure of the results of the examination--assuming that the Committee decides to permit some form of early disclosure. He noted that the issue of disclosure raises several sub-issues: First, what dangers, if any, might be presented by releasing the results of the examination before the defendant has actually been convicted of at least one capital crime? Second, assuming that early disclosure is permitted, what standards should be used, if any, in deciding whether to release the results? Third, assuming early disclosure is permitted, should both sides be permitted to request such? And fourth, if the court is to consider the issue of whether the results of the examination will not tend to incriminate the defendant on the question of guilt or innocence, *see* Rule 12.2(c)(i), should the defendant be permitted to contest that averment. If so, wouldn't that require disclosure to the defendant beforehand?

Judge Carnes observed that currently, a court-ordered report is normally released when it is completed. And Mr. Pauley noted that the draft rule conforms to the prevailing, albeit limited, practice in the courts. Ms. Harkenrider discussed the various policy issues underlying the proposal and the need for some clarification of the trial court's authority in this area. During the discussion, several members raised concerns about the impact of the proposed amendments on the accused's self-incrimination and due process rights. Following additional discussion, a consensus emerged that further discussion of the amendments should be deferred until the Committee's Fall 1998 meeting. The Reporter was asked to research those constitutional concerns.

D. Rule 24(b). Trial Jurors. Proposed Amendment to Equalize Number of Peremptory Challenges.

Following a brief discussion about the background and history of various proposals concerning equalization of the number of peremptory challenges, the Reporter explained the proposed amendment to Rule 24(b) before the Committee. That draft reflected the vote of the Committee at its October 1997 meeting that each side should be entitled to 10 peremptory challenges in a felony case; that would increase the number of challenges available to the prosecution by four.

Judge Dowd moved that the proposed amendment to Rule 24(b) be approved and forwarded to the Standing Committee for publication. Judge Roll seconded the motion.

Judge Wilson indicated that he was opposed to the amendment; in his view, the amendment would give an advantage to the government and that the government does not always use all of its peremptory challenges. Judge Roll commented that in his experience, juries do not understand why the government has less challenges than the defense. Judge Dowd favored the proposal but Professor Stith observed that there might be potential problems. Mr. Josefsberg saw no problems with the current system and reminded the Committee that during the trial, the government has other advantages in the adversarial

aspects of the trial; he did not see where the current allocation of peremptory challenges disadvantaged the government. Judge Miller observed that providing for extra challenges would probably increase the number of jurors required for the pool and that in turn could increase trial costs.

Following additional brief discussion, the Committee voted 6 to 5 to approve the amendment, with the understanding that it should be deferred for publication until the restyling changes were also published--absent any compelling need for doing so sooner.

E. Rule 26. Taking of Testimony. Proposed Amendment to Permit Taking of Testimony from Remote Location.

The Reporter explained the draft amendments to Rule 26 which would permit the court to receive testimony from a remote location, via electronic video transmission. He noted that two drafts had been presented; the first favored deposition testimony over remote transmissions by requiring the court to first find "compelling circumstances" for using the remote transmission. An alternative draft, he noted, would place the remote transmission method on the same plane as a deposition. That is, the court would only need to first find that the witness was unavailable to testify in the court. Under both drafts the court would be required to establish adequate safeguards for the transmission. Judge Carnes expressed concern about the definition of the term "compelling circumstances." And Judge Roll asked what sort of safeguards the court might reasonably impose; the Reporter responded that taking steps to secure the transmission only for courtroom use would be an example. Mr. Pauley suggested that it would be helpful to continue the discussion at the Fall 1998 meeting. The Committee agreed.

F. Rule 32. Sentence and Judgment. Proposal by Committee on Criminal Law Regarding Disclosure of Presentence Reports.

Judge Davis pointed out that the Judicial Conference's Committee on Criminal Law is considering several options for dealing with disclosure of presentence reports to persons other the parties to the case. One of the options under consideration by that Committee is the adoption of a model local rule on the topic. The issue apparently arose from a question posed to the General Counsel's office. The question is whether any sort of rule or guideline should be promulgated which addresses the authority of the court to release the otherwise confidential report to someone other than the parties. The Reporter added that although the Committee has not been presented with any specific proposal for a local rule or a proposed change to Rule 32, the Committee might wish to at least take a position on whether it, at least in theory, supports such a change.

Judge Roll indicated that he frequently receives requests for the presentence reports; in those cases he redacts sensitive information from the report. Judge Davis indicated that he disfavored use of a local rule; Ms. Harkenrider echoed that sentiment. She stated that this sort of issue required a national rule which would insure greater uniformity. Justice Wathen observed that the Committee should consider the issue of the free flow of information from a federal court's file to a state court's file.

Following additional discussion, Judge Davis indicated that he would appoint a subcommittee to study the question and inform Judge Kazen, Chair of the Criminal Law Committee, of the Advisory Committee's discussion. He indicated that the matter would be on the agenda for the Fall 1998 meeting.

G. Rule 32.1. Revocation or Modification of Probation or Supervised Release; Correction of Terminology re Magistrate Judge.

The Reporter pointed out to the Committee that the proposed amendment to Rule 32.1 was purely technical and could wait until the restyling project was underway. The Committee agreed.

H. Rule 41. Search and Seizure. Proposed Amendment Regarding Warrant Based on Telephonic Statements by Affiant.

Judge Dowd suggested that the Committee consider a possible amendment to Rule 41(c)(2)(D). He informed the Committee that he had recently sat on a case at the Sixth Circuit in which there was no recording of the affiant's telephone call to the magistrate to request a warrant as provided under Rule 41(c). The majority concluded that although the requirements of that rule had been violated, that violation was not sufficient to suppress the evidence which was discovered during the subsequent search. Judge Dowd indicated that he had dissented in that case.

Judge Dowd noted that an amendment in 1977 originally included a requirement that a transcript be made of the sworn oral testimony setting out the grounds for the issuance of the warrant, that it be signed by the affiant in the presence of the magistrate, and filed with the court. That requirement was apparently removed by Congress when it reviewed the amendment under the Rules Enabling Act. He suggested that the Committee consider placing that requirement back into Rule 41.

In the ensuing discussion, several members of the Committee observed that the current rule provides for the issuing magistrate to certify the transcript of any telephonic transmissions used to obtain a warrant and that requiring the affiant to appear personally before the magistrate would impose another burden on affiants and magistrates.

Following additional discussion, the Committee decided not to take any action to amend Rule 41 at this time.

I. Rule 43. Presence of Defendant.

The Committee briefly discussed the issue of an accused waiving his or her presence at entry of pleas, especially at those for superseding indictments. Mr. Martin and Judge Miller agreed to study the matter further, with a view toward possibly adding this matter to the Fall 1998 meeting agenda.

J. Rule 46. Release From Custody. Proposed Legislation Regarding Forfeiture of Bond for Reasons Other Than Failure to Appear.

Judge Davis informed the Committee that Representative Bill McCullum (Fla.) had introduced H.R. 2134, "Bail Bond Fairness Act," which would amend Rule 46(e) to limit the authority to revoke bonds to those situations where a defendant has failed to appear. Under current practice a magistrate or judge may impose conditions which are not limited to failures to appear, e.g., to remain in particular location or to refrain from violating the law, etc. Judge Davis indicated that he had testified at hearings held by Representative McCullum on the issue and that Mr. McCullum had subsequently agreed to delay any further action on his proposal until the Advisory Committee had an opportunity to review the matter under the Rules Enabling Act and decide whether to propose and forward to the Standing Committee an amendment of its own.

Judge Miller stated that in response to a request from Judge Davis he had conducted a poll of magistrate judges to determine the extent to which this might be an issue. The results of that poll indicated that many do not use corporate sureties but instead release a defendant on personal recognizance or when a friend or family member posts personal property or signs an unsecured bond. Some do revoke bond for reasons other than nonappearance. He indicated that in those districts the magistrates believe strongly that holding a relative's or friend's assets insure compliance with release conditions.

Professor Stith expressed the view that the statute does not authorize such use of bonds but Judge Roll responded that his circuit has approved of the practice. Mr. Josefsberg indicated that forfeiting bonds on conditions other than nonappearance penalizes the accused and whomever has posted the bond, in some cases family members. Judge Miller opined that removing the option of forfeiting bonds for nonappearance would get a negative reaction from magistrate judges and the defense bar. He note that such procedures seem to be used in selected situations where the family of the accused is

willing to take a risk and bear the burden on noncompliance with the conditions set by the magistrate.

Mr. Martin questioned whether a magistrate would realistically order forfeiture of a family home if an accused failed to meet the conditions of release. He recognized that the system tended to punish those friends and family members who have lost control over an accused. Judge Miller added that the practice had apparently been approved in some case law. Mr. Pauley indicated that if a forfeiture is later determined to be inappropriate there is a procedure for seeking remission. He added that the Department of Justice opposes the legislation and that permitting forfeiture for nonappearance can provide some protection for victims, from defendants who do not fear going to jail. Mr. Josefsberg expressed concern that there is a real risk that family members or friends who have posted bond will be harmed. He worried that some defense counsel might simply tell a surety to sign the bond without fully informing them of the problems that might follow if the defendant violates conditions of the bond.

Ms. Harkenrider expressed the view that threatening to forfeit a bond for having unauthorized contact with victims is beneficial; Judge Roll responded that he did not see witness intimidation as the real problem in these situations. Following additional brief discussion, Judge Marovich moved that the Committee adopt the language suggested by Congress--which would limit forfeiture of bonds to nonappearance only. Judge Roll seconded the motion. That motion failed by a vote of 5 to 6. In additional discussion, it was agreed that the vote expressed the Committee's opposition (by a narrow margin) to attempts to limit the magistrate's ability to order forfeiture of bond for conditions other than nonappearance.

K Rule 49. Service and Filing of Papers. Proposed Amendment to Provide for Facsimile Transmission of Notice.

The Reporter informed the Committee that it had received a recommendation that Rule 49(c) be amended to permit courts to provide notice by facsimile transmissions. Similar amendments would be made to Appellate Rule 3(d) and Civil Rule 77(d). Judge Stotler informed the Committee that this proposal would probably require coordination with the technology subcommittee of the Standing Committee and require uniformity of language. She recommended that the item remain on the Committee's continuing agenda.

L. Rules Governing Habeas Corpus Proceedings; Report of Subcommittee.

Judge Carnes, chair of the habeas corpus rules subcommittee, reported that the subcommittee and conducted a preliminary review of the Rules Governing § 2254

Proceedings (State Custody) and § 2255 Proceedings (Federal Custody) and had prepared a written report with recommendations. He indicated that the subcommittee had focused not only on the potential inconsistencies in the time for filing responses, but also on the question of whether the rules should apply to § 2241 proceedings. Following additional discussion about other areas which might be studied, Judge Miller, a member of the subcommittee, indicated that he would poll magistrate judges on how they handle some of the issues raised in the discussion. The Reporter also suggested the possibility of merging all of the habeas rules into one set of rules. Judge Davis indicated that the matter would be on the agenda for the Committee's Fall 1998 meeting for further discussion.

VII. RULES AND PROJECTS PENDING BEFORE STANDING COMMITTEE AND JUDICIAL CONFERENCE

A. Rules Governing Attorney Conduct; Possible Amendments to Rules of Criminal Procedure.

Professor Coquillette, Reporter to the Standing Committee reported to the Committee that the Standing Committee was seeking the Advisory Committee's input on the adoption of a uniform set of rules to govern attorney conduct. That project had originated from Congress' general concerns in 1988 that there be a uniform set of rules governing local practice; that concern had led to what is referred to as the Local Rules Project. The focus was now on the issue of governing attorney conduct. He provided a brief overview of some of the problems that the federal courts and attorneys have faced in determining what particular rule of professional responsibility, might control in a particular instance. In particular he noted that the Department of Justice was interested in the issue of uniformity, given the fact that its attorneys may be subjected to inconsistent or conflicting rules of conduct.

He indicated that it appeared that there were basically three options for proceeding. The first option would be to adopt a single federal rule which would provide that the federal courts were bound by the state rules in which the court was located. That option had been labeled as the "Dynamic Conformity Rule." The second option would be to adopt a narrow set of core rules which would focus on particular federal court problems and leave the remainder of the issues to be resolved under state standards. In his view, this option would be narrower than what the federal courts currently have. The third option would be to adopt a complete set of Rules Governing Attorney Conduct for Federal Courts. So far, he said, there was not much support for this third option.

He suggested that the Committee consider several questions: First, which option would it tend to favor? Second, if a set of rules were to be adopted, how might they be incorporated, if at all, in the existing Rules of Procedure? And third, are there any technical suggestions which might inform the process of drafting and adopting new rules?

He added that he envisioned the formation of a special ad hoc committee composed of members from the Advisory Committees to consider the issues.

Several members recognized the problems that can arise at the trial court level and endorsed the general idea of resolving the problem. Following additional discussion, Judge Dowd moved that the Chair appoint two members to serve on an ad hoc committee. Judge Miller seconded the motion, which carried by a unanimous vote. The Committee took no position on whether to adopt a "dynamic conformity rule," a core set of rules, or a complete set of rules governing attorney conduct.

B. Local Rules Project; Effective Date for Rules.

The Reporter provided background information on a pending proposal before the Standing Committee that the respective rules of procedure be amended, in a uniform fashion, to provide that local rules be made effective on a set date each year and that a local rule not be effective until it had been received in the Administrative Office. Mr. Rabiej reported that the other Advisory Committees had not yet approved any particular language. It was decided to defer any further action on the matter pending the drafting of specific, uniform language.

C. Electronic Filing of Comments on Proposed Rules Changes.

Mr. Rabiej informed the Committee that the other Advisory Committees had approved a pilot program for receiving public comments on published rules via electronic mail services. Following a brief explanation of how the program would operate, the Committee approved the use of a two-year pilot program for receiving e-mail comments on the criminal rules.

D. Criminal Rule 27. Proof of Foreign Record.

Judge Stotler informed the Committee that the Federal Rules of Evidence Committee is considering an amendment to those Rules regarding proof of a foreign record--a topic currently covered at Civil Rule 44 and indirectly Criminal Rule 27. The Criminal Rule simply incorporates the civil rule regarding proof of such records. Following a brief discussion, it was the view of the Committee that the matter be continued on its docket pending any proposed amendments from either the Civil Rules or Evidence Rules Committee.

E. Status Report on Proposed Restyling of Criminal Rules.

The Reporter indicated that the Committee had been informed by Judge Parker, Chair of the Subcommittee on Style, that the subcommittee anticipated submitting its proposed changes to the Rules of Criminal Procedure on December 1, 1998. The restyled Appellate Rules are to go into effect on that same date, assuming that Congress makes no changes to the rules.

VIII. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

The Chair reminded the Committee that its next meeting would be held on October 19th and 20th in Maine.

IX. ADJOURNMENT

The meeting was adjourned at 12:05 on Tuesday, April 28th, 1998.

Respectfully submitted,

David A. Schlueter
Professor of Law
Reporter

Item IC

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 18-19, 1998
Santa Fe, New Mexico

DRAFT MINUTES

The midyear meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Santa Fe, New Mexico, on Thursday and Friday, June 18-19, 1998. The following members were present:

Judge Alicemarie H. Stotler, Chair
Judge Frank W. Bullock, Jr.
Professor Geoffrey C. Hazard, Jr.
Judge Phyllis A. Kravitch
Gene W. Lafitte, Esquire
Patrick F. McCartan, Esquire
Judge James A. Parker
Sol Schreiber, Esquire
Judge Morey L. Sear
Alan C. Sundberg, Esquire
Judge A. Wallace Tashima
Chief Justice E. Norman Veasey
Judge William R. Wilson, Jr.

Deputy Attorney General Eric H. Holder, Jr. represented the Department of Justice and attended part of the meeting. He was accompanied by Deborah Smolover and Stefan Cassella of the Department. Judge John W. Lungstrum articipated as a liaison from the Court Administration and Case Management Committee.

Providing support to the committee were: Professor Daniel R. Coquillette, reporter to the committee; Peter G. McCabe, secretary to the committee; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office of the United States Courts; and Mark D. Shapiro, deputy chief of that office.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Will L. Garwood, Chair
Professor Patrick J. Schiltz, Reporter
Advisory Committee on Bankruptcy Rules —
Judge Adrian G. Duplantier, Chair
Professor Alan N. Resnick, Reporter
Advisory Committee on Civil Rules —
Judge Paul V. Niemeyer, Chair
Professor Edward H. Cooper, Reporter

Advisory Committee on Criminal Rules —
Judge W. Eugene Davis, Chair
Professor David A. Schlueter, Reporter
Advisory Committee on Evidence Rules —
Judge Fern M. Smith, Chair
Professor Daniel J. Capra, Reporter

Professor Richard L. Marcus, special reporter to the Advisory Committee on Civil Rules, participated in the meeting and shared in the presentation of the advisory committee's report.

Also participating in the meeting were: Joseph F. Spaniol, Jr. and Bryan A. Garner, consultants to the committee; Professor Mary P. Squiers, project director of the local rules project; Thomas E. Willging and Marie Leary of the Research Division of the Federal Judicial Center; and Jean Ann Quinn, law clerk to Judge Stotler.

INTRODUCTORY REMARKS

Changes in Committee Membership

Judge Stotler introduced Mr. McCartan and welcomed him to his first meeting as a committee member. She reported that her own term on the committee and that of Mr. Sundberg were due to expire on October 1, 1998. She expressed great satisfaction that the Chief Justice had just named Judge Anthony J. Scirica to succeed her as committee chair on October 1, 1998. She also congratulated Chief Justice Veasey on his imminent succession to the presidency of the Conference of Chief Justices. Following committee tradition, all the members, participants, and observers introduced themselves in turn and made brief remarks.

March 1998 Judicial Conference Action

Judge Stotler reported that the Judicial Conference at its March 1998 meeting had adopted the recommendation of the Advisory Committee on Criminal Rules that the Conference oppose pending legislation that would reduce the size of the grand jury. She added that the Director of the Administrative Office had sent a letter on behalf of the Conference to Representative Goodlatte, sponsor of the legislation, stating the reasons for opposition.

Judge Stotler stated that the Conference had discussed proposals to remove the current prohibition in 18 U.S.C. § 3060 and FED. R. CRIM. P. 5(c) preventing a magistrate judge from granting a continuance of a preliminary examination in the absence of consent by the defendant.

Although the Magistrate Judges Committee had recommended that the Conference seek an amendment to the statute, it was suggested during Conference deliberations that the better course would be to follow the rulemaking process and amend Rule 5(c). Judge Stotler emphasized that this procedural matter had demonstrated the need for close coordination with other committees of the Judicial Conference on legislative proposals.

Judge Stotler reported that she had written a letter to Mr. Mecham, Director of the Administrative Office, expressing concern over a growing tendency in the Congress to pursue legislation that would amend the federal rules directly or otherwise circumvent the Rules Enabling Act. She noted, for example, that several provisions in the pending, comprehensive bankruptcy legislation — especially sections dealing with bankruptcy forms — reflected unfamiliarity with the rulemaking process established by the Act.

Judge Stotler said that she had acknowledged to Mr. Mecham the success of the Administrative Office's legislative efforts to protect the rulemaking process and deflect harmful statutory proposals. She had also urged greater interchange and dialog between the Legislative Affairs Office of the Administrative Office and the advisory committees, as well as additional dialog with both members and staff of the Congress.

Judge Stotler noted that Judge Niemeyer would represent the rules committees at the June 29, 1998 meeting of the long range planning committee liaisons of the Judicial Conference. She emphasized that defending the Rules Enabling Act process was a priority goal of the committee's long range planning process. Other long range planning priorities of the committee included restyling the federal rules and addressing the impact of technology on the rules.

Judge Sear reported that he had appeared at Judge Stotler's request on behalf of the committee before the ad hoc committee of the Judicial Conference studying: (1) the respective mission and authority of the Federal Judicial Center vis a vis the Administrative Office in education and training; and (2) the advisability of creating a special mechanism to resolve disputes between the two organizations. He stated that the ad hoc committee had emphasized that the Judicial Conference is the policy-making body for the judiciary, and that the Federal Judicial Center is the judiciary's primary educational body, but that the Administrative Office needs to maintain its own educational programs. He added that an interagency coordinating committee of senior managers of the two agencies had been formed to resolve disputes, but it was not expected that there would be a need for the committee to meet.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on January 8-9, 1998.

REPORT OF THE ADMINISTRATIVE OFFICE

Legislative Report

Mr. Rabiej reported that 28 bills and three joint resolutions were pending in the Congress that would affect the rules process. Summaries of each of the provisions, he noted, were set forth in the agenda report of the Administrative Office. (Agenda Item 3A) He added that 11 letters had been sent to the Congress on these legislative provisions expressing the views and concerns of the rules committees, and in some cases those of the Judicial Conference.

Mr. Rabiej stated that Judge Davis, chair of the Advisory Committee on Criminal Rules, had testified before the House Judiciary Subcommittee on Crime on proposed legislation that would amend FED. R. CRIM. P. 46 to authorize forfeiture of a bail bond only if the defendant fials to appear as ordered by the court.

He reported that the House had passed H.R. 1252. Section 3 of that legislation, now pending in a separate bill in the Senate, would authorize an interlocutory appeal of a decision to grant or deny certification of a class action. He pointed out that Judge Niemeyer had written to Senators Hatch and Leahy urging that they oppose section 3 on the grounds that: (1) it would achieve substantially the same results as new Rule 23(f) approved by the Supreme Court and due to take effect on December 1, 1998; and (2) it suffered from drafting problems that would introduce confusion and generate satellite litigation. He expressed confidence that if the legislation proceeded further, section 3 would either be eliminated or converted to a provision accelerating the effective date of new Rule 23(f).

Mr. Rabiej noted that S. 1352, introduced by Senator Grassley, would undo the 1993 amendments to FED. R. CIV. P. 30(b) and take away from parties the flexibility to use the most economical method of reporting depositions.

He pointed out that Judge Niemeyer had informed Representative Coble, chair of the House Judiciary Subcommittee on Courts and Intellectual Property, that the Advisory Committee on Civil Rules was planning to publish a proposed abrogation of the copyright rules for comment. At Mr. Coble's request, though, the committee had decided to defer the matter for another year.

Mr. Rabiej reported that the committee had notified Senator Kohl that the advisory committee had completed its discussion of protective orders and had decided to oppose his legislation that would require a judge to make particularized findings of fact before issuing a protective order under FED. R. CIV. P. 26(c). Mr. Rabiej also reported that the Administrative Office was continuing to monitor a bill that would federalize most class actions.

Administrative Actions

Mr. Rabiej reported that the Administrative Office was ready to place proposed amendments to the federal rules on the Internet for public comment. Some members suggested that the bar should be informed through notices in legal journals and newspapers about the opportunity to send comments electronically regarding the amendments on the Administrative Office's home page.

REPORT OF THE FEDERAL JUDICIAL CENTER

Ms. Leary presented an update on the Federal Judicial Center's recent publications, educational programs, and research projects. (Agenda Item 4) She noted that the Center had conducted nearly 1,500 educational programs in 1997 that had reached 41,000 participants. The number of people reached, she said, will increase as a result of the new programs being developed for the Federal Judiciary Television Network.

She mentioned that the Center had more than 40 research programs pending and referred specifically to two of them: (1) a study of mass torts, focusing on policy and case management issues in the settlement of mass torts; and (2) a study on the use of expert testimony, specialized decision makers, and case management innovations in the National Vaccine Injury Compensation Program.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Garwood presented the report of the advisory committee, as set forth in his memorandum and attachments of May 12, 1998. (Agenda Item 5) -

Judge Garwood stated that the advisory committee had approved several proposed amendments at its April 1998 meeting. But the committee had decided not to seek authority to publish the proposals for comment. Rather, it would hold them for publication in 1999 or 2000.

Judge Garwood said that a great deal of praise was due to Judge Logan for his prodigious and very successful efforts in achieving a complete restyling of the appellate rules. He noted that the restyled rules had recently been approved by the Supreme Court and would take effect on December 1, 1998.

Professor Schiltz reported that the advisory committee was considering a number of other potential changes in the appellate rules, but it wanted the bar to become familiar with the new, restyled appellate rules before requesting authority to publish any further proposed

amendments. He added that several of the most recent changes approved by the advisory committee were intended to address complaints by the bar about the proliferation of local court rules. The advisory committee had decided to approve certain national provisions in order to promote national uniformity.

He pointed out that the advisory committee was very supportive of the concept of establishing a uniform effective date for all local rules. He added that it had approved a proposed amendment to FED. R. APP. P. 47(a)(1) that would establish an effective date of December 1 for all revisions to local court rules. The amendment would allow a court to establish a different effective date for a specific rule only if there were an "immediate need" for the rule. It would also provide that a local rule may not take effect until it is received in the Administrative Office. He noted, however, that the Administrative Office wanted an opportunity to study the likely administrative and logistical consequences flowing from the proposal.

Professor Schiltz reported that the advisory committee had announced at the last Standing Committee meeting that its priority long-term project was to consider promulgating uniform national rules on unpublished opinions in the courts of appeals. But, he said, that after careful consideration, the matter was removed from the committee's agenda.

Professor Schiltz also reported that the advisory committee at its last meeting had discussed the desirability of: (1) shortening the length of the Rules Enabling Act process; and (2) permitting public comments on proposed rules amendments to be submitted to the Administrative Office electronically through the Internet. He said that the consensus of the Advisory Committee on Appellate Rules was that the Rules Enabling Act process is too long, but it did not have specific recommendations to shorten it. With regard to Internet comments, the advisory committee favored the proposal.

He said that the advisory committee had also addressed whether there was a need for national rules governing attorney conduct. He noted that a national standard of conduct was set forth in FED. R. APP. P. 46, that the rule had worked well, and that the advisory committee was not aware of serious problems with attorney conduct in the courts of appeals. He added that the advisory committee would be pleased to appoint members to serve on an ad hoc committee to consider attorney conduct, but the committee had no special expertise in this area. He also pointed out that some members of the advisory committee had expressed reservations regarding the proposed draft national rules on attorney conduct. He noted that they were broad in scope, and some of them went beyond conduct related to federal court proceedings. They governed, for example, conduct in a law office, such as confidentiality of client matters. Members of the advisory committee had also expressed concern as to possible limits on the authority of the rules committee to promulgate rules in this area.

Judge Stotler asked Judge Garwood and Professor Schiltz to share these comments and any other reservations of the advisory committee with the reporters of the other rules committees.

Professor Coquillette noted for the record that he personally did not advocate adoption of the 10 illustrative federal attorney conduct rules. He noted that he had been asked as reporter to prepare them only as a model of what national rules might encompass. He said that any set of national rules that the Standing Committee might adopt could be narrower than the 10 draft rules. He added that there was substantial support for a single national rule or a very small number of national rules.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Duplantier presented the report of the advisory committee, as set forth in his memorandum and attachments of May 11, 1998. (Agenda Item 6)

Rules Amendments for Judicial Conference Approval

Judge Duplantier reported that the advisory committee was recommending that the Judicial Conference approve proposed amendments to 16 rules. The proposals had been published in August 1997. The advisory committee had considered the comments at its March 1998 meeting and was now seeking final approval of the amendments.

Professor Resnick stated that seven of the 16 amendments dealt with the issue of an automatic 10-day stay of certain bankruptcy court orders which, if not stayed, could effectively moot any appeal by the losing party. Three of the amendments dealt with narrowing certain notice requirements. Several of the remaining amendments, he said, involved technical matters.

10-Day Stay Provision

FED. R. BANKR. P. 7062 and 9014

Professor Resnick explained that FED. R. BANKR. P. 7062, which applies to all adversary proceedings, incorporates FED. R. CIV. P. 62 by reference and imposes a 10-day stay on the enforcement of all judgments. The advisory committee would not change this provision.

Bankruptcy Rule 9014 governs contested matters, which are initiated by motion. It specifies that Rule 7062 (and Civil Rule 62) apply to contested matters, unless the court directs otherwise. But Rule 7062 — the adversary proceeding rule — sets forth a laundry list

of specific categories of matters, added piece by piece over the years, that are excepted from the 10-day stay provision, all of them contested matters.

Professor Resnick said that the current structure and interaction of these rules was awkward, and it had caused problems in application. As a result, the advisory committee had appointed an ad hoc subcommittee to take a fresh look at the operation and effect of the 10-day stay on all types of contested matters.

After considerable study, the subcommittee and the full advisory committee concluded that it was appropriate to restructure the rules and separate the procedures for adversary proceedings from those for contested matters. First, it had decided to eliminate from Rule 9014 the reference to FED. R. BANKR. P. 7062 (and Civil Rule 62). Second, it would remove the list of excepted contested matters from Rule 7062. As a result, the rules would provide that orders in contested matters — unlike orders in adversary proceedings — would become effective upon issuance, and there would be no 10-day stay.

The committee decided, however, that there were a few types of contested matters to which the 10-day stay should apply as a matter of policy. Professor Resnick explained that the committee had concluded that it was best to relocate the stay provisions for these matters to the specific rules governing these contested matters.

FED. R. BANKR. P. 3020

Professor Resnick noted that Rule 3020 governs confirmation of a plan. He explained that the law today is ambiguous as to whether the court's confirmation order is stayed automatically. The advisory committee would amend the rule to make it clear that an order confirming a plan is stayed for 10 days after the entry of the order to allow a party to file an appeal. He added, though, that a bankruptcy judge would have discretion not to apply the 10-day stay in an individual case, or to shorten the length of the stay.

FED. R. BANKR. P. 3021

Professor Resnick stated that the proposed change in Rule 3021 was a technical amendment conforming to amended Rule 3020 and the 10-day stay of an order confirming a plan.

FED. R. BANKR. P. 4001

Professor Resnick stated that the proposed amendment to Rule 4001, dealing with relief from the automatic stay under section 362 of the Bankruptcy Code, was the most controversial proposal contained in the package of published amendments. He explained that, under the proposed revision, the parties would have 10 days to file an appeal from a judge's

order granting a motion for relief from the automatic stay unless the judge ordered immediate enforcement.

He noted that the advisory committee had received 13 letters during the public comment period addressing this provision, the majority of which had expressed opposition to the amendment. Several commentators were concerned that it would not be fair to give a debtor — whose request to life the automatic stay under section 362 of the Bankruptcy Code is denied by the court — an additional automatic 10 days enjoyment of the premises or automobile that is the subject of the lift-stay motion. Professor Resnick said that the advisory committee had debated the merits of the matter carefully and had voted to proceed with the amendment on the merits. He added that the moving party may always ask for immediate enforcement of an order lifting the stay, and the court has authority to include a provision for immediate enforcement in its order.

FED. R. BANKR. P. 6004

Professor Resnick explained that Rule 6004 governs court orders authorizing the use, sale, or lease of property. He said that the most common use of the rule involves application by the debtor to sell assets out of the ordinary course of business. He reported that the advisory committee concluded that this was the type of order that should be stayed for 10 days to allow the losing party to file an appeal. The 10-day stay was necessary because otherwise the holder of the property could sell it immediately to a good faith purchaser and effectively moot any appeal.

FED. R. BANKR. P. 6006

Professor Resnick said that the advisory committee proposed a similar provision in Rule 6006. He explained that the assignment of an executory contract was akin to a sale of property under Rule 6004, and an order authorizing the assignment should be stayed for 10 days to allow an appeal before the assignment is consummated.

Professor Resnick said that the proposed amendments to rules 3020, 3021, 4001, 6004, and 6006 were based on considerations of fundamental fairness. The advisory committee was aware of the need for finality of judgments but, on balance, it believed that it was necessary to establish a presumption of a 10-day stay in these discrete categories of contested matters in order to prevent a party's right of appeal from being mooted.

Some of the members expressed concern over the proposed amendments on the ground that they would delay time-sensitive matters and shift the burden from the losing party to the successful moving party. They stated that in ordinary civil litigation, there are not the same time-sensitive considerations as in bankruptcy.

Professor Resnick explained that ordinarily in civil cases there is a 10-day stay of all judgments. The proposed amendments to the bankruptcy rules, however, would provide a general rule that there is no 10-day stay in contested matters. But the above amendments to Rules 3020, 3021, 4001, 6004, and 6006 were designed as specific exceptions to the general rule. Moreover, the moving party can always ask the judge to waive the 10-day stay on the grounds that there is time sensitivity in a given case. In other words, in the specified excepted categories of contested matters the proposed amendments give the losing party 10 days to appeal the judgment, as under FED. R. CIV. P. 62.

The committee approved the proposed amendments to Rules 3020, 3021, 4001, 6004, and 6006 by a vote of 8 to 4. It approved all the other proposed amendments without objection.

B. Other Proposed Amendments

FED. R. BANKR. P. 1017

Professor Resnick stated that Rule 1017 currently provides that when a motion to dismiss is made — either for failure of the debtor to file schedules or for failure to pay the filing fee — the clerk must send notice of the motion to all creditors. He explained that the advisory committee had been asked by the Administrative Office to save money by considering limits on the amount of noticing to be performed by the clerk. The proposed amendment would have the clerk serve notice of the motion only on the debtor, the trustee, and such other entities as the court may direct.

A new subdivision 1017(c) would be added to specify the parties who are entitled to receive notice of the motion to dismiss. Professor Resnick explained that without the new subdivision there would be a gap in the rules, in that there would be no way to ascertain who must receive notice of the motion.

Professor Resnick pointed out, however, that in the new "litigation package" of amendments recommended by the advisory committee for publication, the substance of Rule 1017(c) would be moved to Rule 9014 as part of a general restructuring of the rules dealing with litigation and motion practice. Accordingly, if the litigation package were to become law on schedule, the new subdivision 1017(c) would remain in effect for only one year.

The advisory committee, he said, was very sensitive to the general policy of avoiding frequent changes in the rules, especially when changes are proposed in the same rule. Nevertheless, if the litigation package were not to become law, the change in Rule 1017(c) would be needed permanently.

FED. R. BANKR. P. 1019

Professor Resnick stated that Rule 1019 governs conversion of a case from chapter 11, 12, or 13 to chapter 7. He noted that there is uncertainty in practice as to what document should be filed by one seeking to recover preconversion administrative expenses. Therefore, the advisory committee would amend subdivision (6) to specify that a holder of an administrative expense claim incurred after commencement of the case but before conversion must file a request for payment under section 503 of the Code, rather than a proof of claim. Notice of the conversion would be given to the administrative expense creditors.

He noted that the advisory committee had made a change in the rule following the public comment period by deleting a deadline for filing requests for payment of preconversion administrative expenses that would be applicable in all cases. Instead, the rule would have the court fix the deadline.

FED. R. BANKR. P. 2002

Professor Resnick reported that the proposed change in Rule 2002(a)(4) conformed the rule to the changes proposed in Rule 1017.

FED. R. BANKR. P. 2003

Professor Resnick stated that Rule 2003(d) deals with disputed elections of chapter 7 trustees. He explained that Rule 2007.1 — which governs disputed elections of chapter 11 trustees — was better written and clearer. Accordingly, the advisory committee had chosen to conform the language of Rule 2003 to that of Rule 2007.1.

FED. R. BANKR. P. 4004

Professor Resnick reported that the language of Rule 4004(a) would be amended to clarify that a complaint objecting to discharge must be filed within 60 days after the first date set for the meeting of creditors, whether or not the hearing is held on that date. Rule 4004(b) would be amended to specify that a motion to extend the time for filing a complaint objecting to discharge must be "filed," rather than "made."

FED. R. BANKR. P. 4007

Professor Resnick explained that Rule 4004 governs denial of a discharge, while Rule 4007 governs the dischargeability of a particular debt. He said that the proposed changes in Rule 4007 were parallel to those proposed in Rule 4004.

FED. R. BANKR. P. 7001

Professor Resnick pointed out that under the present rule, a request for injunctive relief requires the filing of an adversary proceeding. But in practice an injunction is often embodied in a chapter 11 plan, and adversary proceedings are not in fact commenced. The advisory committee proposed conforming the rule to the practice and provide explicitly that an adversary proceeding is not necessary to obtain injunctive or other equitable relief, if that relief is specified in a chapter 9, 11, 12, or 13 plan.

Professor Resnick stated that Department of Justice representatives had expressed reservations to the advisory committee that the proposed amendment did not provide adequate procedural protections to all parties that might be affected by injunctive relief. They suggested, for example, that injunctive relief provisions might be embedded in plans that parties would likely not see or recognize in the absence of an adversary proceeding.

Deputy Attorney General Holder and Professor Resnick added that the Department had been discussing the matter with the advisory committee. As a result, its initial objections had now been withdrawn with the understanding that Mr. Kohn of the Department would be presenting the advisory committee at its October 1998 meeting with proposed procedural protections for inclusion in other bankruptcy rules.

FED. R. BANKR. P. 7004

Professor Resnick stated that the proposed change in Rule 7004(e) would provide that the 10-day limit for service of a summons does not apply to service made in a foreign country.

FED. R. BANKR. P. 9006

Professor Resnick reported that the proposed change in Rule 9006(b), governing time, was a purely technical amendment that had not been published for public comment. He explained that the rule currently provides that a court may not enlarge the time specified in Rule 1017(b)(3). But since the advisory committee would abrogate Rule 1017(b)(3), the cross-reference in Rule 9006 would need to be eliminated.

The committee approved the proposed amendments without objection. It further voted to approve the amendment to Rule 9006 without publication.

Amendments for Publication

A. Litigation Package

Judge Duplantier reported that the Federal Judicial Center, at the request of the advisory committee, had conducted an extensive survey of the bench and bar in 1995 inquiring as to the effectiveness of the Federal Rules of Bankruptcy Procedure. The survey results had indicated general satisfaction with the rules, but had identified motion practice and litigation in connection with "contested matters" as areas of significant dissatisfaction that needed improvement.

He added that the bar had complained that the national rules had left too many procedures for handling contested matters to local variation. Some of the local rules, moreover, are inconsistent with the national rules. Many local rules, for example, require a response to a motion, even though the national rules do not require a response. In addition, the national rules specify that a motion must be served five days before a hearing on a motion. Local rules, however, often specify different time frames.

The advisory committee, accordingly, undertook to address in a comprehensive manner the problems of litigation and motion practice. Judge Duplantier stated that the project had proven to be very complex and controversial. The committee had appointed a special subcommittee, which worked for two years to produce a package of proposed amendments. In turn, the full advisory committee addressed the proposals at four meetings, and it had approved a package of amendments that it believed would provide substantially better guidance and national uniformity for the bar. He added, however, that two members of the advisory committee had dissented on the proposals, largely on the grounds that they believed that litigation and motion practice should be left to local practice.

Professor Resnick added that the terminology currently used in the Federal Rules of Bankruptcy Procedure is confusing. He pointed out that the proposed amendments would not affect "adversary proceedings," which are akin to civil law suits in the district courts and are governed largely by the Federal Rules of Civil Procedures. Rather, they would govern the handling of proceedings that are presently called "contested matters."

"Contested matters," generally, are proceedings commenced by motion that initiate litigation unrelated to other litigation that may be pending in a bankruptcy case. But they are not akin to the kinds of motions filed in the district courts, which typically involve matters within a pending civil action. Rather, they embrace such subjects as the rejection of an executory contract, relief from the automatic stay, requests to obtain financing, and the appointment of a trustee in a chapter 11 case.

Professor Resnick said that the purpose of the proposed amendments is to provide greater guidance and uniformity in handling these important matters. At the same time, the amendments would allow more routine, non-contested matters to be resolved quickly, and normally without a hearing. The advisory committee's general restructuring would, thus, create three principal categories of bankruptcy proceedings: (1) adversary proceedings, governed by Part VII of the rules; (2) motions, governed by amended Rule 9014; and (3) applications, governed by amended Rule 9013.

The proposed amendments to Rules 9013 and 9014, he said, constituted the heart of the proposed package of amendments.

FED. R. BANKR. P. 9013

The amended Rule 9013 would establish a new category of proceedings called "applications," consisting of the 14 specific categories of matters set forth in subdivision 9013(a). These proceedings are normally non-controversial and unopposed, and the rule would allow them to be handled quickly and inexpensively. Included, for example, are such matters as motions to jointly administer a case and motions for routine extensions of time.

Rule 9014 would be the default rule. Accordingly, if a matter were not specifically listed as an application in subdivision (a), it would be governed by Rule 9014 or another rule expressed designated in Rule 9014(a).

Subdivision 9013(b) sets forth the requirements for requesting relief by application, and subdivision (c) specifies the manner of service. An application need not be served in advance and may be served at the same time that it is presented to the court. Service may be made in any manner by which a motion may be served under the bankruptcy rules, including service by electronic means, if authorized by local rule. Professor Resnick pointed out that the provision for electronic service represented an advance over FED. R. BANKR. P. 5005, which authorizes electronic means only for the filing of papers with the court.

A member of the committee asked why the advisory committee had chosen the term "application," rather than "motion." He pointed out that FED. R. CIV. P. 7 states explicitly that "an application for an order shall be by motion." Professor Resnick responded that the civil rules and the bankruptcy rules simply do not use the same terminology. He noted that a difference is made in bankruptcy between applications and motions. An application, in effect, is something less significant than a motion.

FED. R. BANKR. P. 9014

Professor Resnick explained that Rule 9014, as amended, would create a new category of proceedings called "administrative proceedings." They include more complex matters than applications and are more likely to be contested. Yet they do not require all the procedures of adversary proceedings under Part VII of the bankruptcy rules.

Subdivision 9014(a) carves out certain proceedings from the scope of Rule 9014, including involuntary bankruptcy petitions, petitions to commence an ancillary proceeding under section 304 of the Bankruptcy Code, bankruptcy appeals, adversary proceedings, and motions within adversary proceedings.

Professor Resnick stated that Rule 9014(b) provides that a request for relief in an administrative proceeding must be made by written motion entitled an "administrative motion." Unless made by a consumer debtor, the motion must be accompanied by supporting affidavits.

Rule 9014(c) governs service and provides that a copy of an administrative motion must be served at least 20 days before the hearing date on the motion. A response to the motion must be filed at least five days before the hearing. These dates currently are governed by local rules, which vary substantially from district to district. The proposed amendment to Rule 9014(c) also specifies the entities that must receive notice of the motion. Service may be made by any means by which a summons may be served or by electronic means if authorized by local rule. If the respondent fails to respond to the motion, the court may issue an order without a hearing.

Professor Resnick said that subdivision 9014(h) provides that the discovery provisions of the Federal Rules of Civil Procedure would be made applicable in administrative proceedings, with two exceptions: (1) the initial disclosure provisions of FED. R. CIV. P. 26(a); and (2) the requirement of a meeting of the parties under FED. R. CIV. P. 26(f). In addition, the 30-day time periods specified in the civil discovery rules, *i.e.*, FED. R. CIV. P. 30(e), 33(b)(3), 34(b), and 36(a), would be reduced to 10 days in order to expedite the processing of administrative proceedings.

Under subdivision 9014(i), witnesses would not be brought to an initial hearing. Professor Resnick explained that local rules of court currently contain great variations on this point. Under the proposed national rule, the court would conduct a hearing on the specified hearing date to determine whether there is a material issue of fact or law. The judge at that time would determine whether there is a need for an evidentiary hearing.

The amended rule provides that no testimony may be given at the initial hearing unless the parties consent or there is advance notice. If the court finds that there is an issue of fact,

the hearing becomes a status conference. The evidentiary hearing would be held at a later date. The rule, however, provides exceptions for certain time-sensitive matters, such as relief from the automatic stay and preliminary hearings on the use of cash collateral or obtaining credit.

Professor Resnick pointed out that the proposed new subdivision 9014(j) would make FED. R. CIV. P. 43 inapplicable at an evidentiary hearing on an administrative motion. The advisory committee, he said, had decided as a matter of policy that live testimony, rather than affidavits, should be required at the hearing. He added that new subdivision 9014(l) specifies several of the Part VII adversary proceeding rules that would apply to administrative proceedings.

Finally, subdivision 9014(o) would operate as a safety valve and would authorize the court, for cause, to change any procedural requirements of the rule. But it requires the court to give the parties notice of any proposed changes in the requirements.

OTHER RULES

Professor Resnick reported that the advisory committee had determined that a few proceedings in the bankruptcy courts simply did not fit well into one of the three major categories of adversary proceedings, administrative motions, and applications. Therefore, it had excluded these proceedings from Rule 9014(a) and would have them governed by other specific rules. He offered as examples FED. R. BANKR. P. 2014, which would prescribe special procedures for the employment of an attorney, and FED. R. BANKR. P. 3020, which would govern the confirmation of a chapter 11 plan.

Professor Resnick explained that most of the remaining amendments in the litigation package were conforming changes to accommodate the provisions of Rules 9013 and 9014.

Judge Duplantier asked the Standing Committee to approve:

(1) publishing the proposed litigation package, consisting of amendments to FED. R. BANKR. P. 1006, 1007, 1014, 1017, 2001, 2004, 2007, 2014, 2016, 3001, 3006, 3007, 3012, 3013, 3015, 3019, 3020, 4001, 6004, 6006, 6007, 9006, 9013, 9014, 9017, 9021, and 9034 ;

(2) publishing the accompanying commentary to the amendments, entitled, *Introduction to Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy Procedure Relating to Litigation and Motion Practice,* as a guide to bench and bar; and

(3) providing a five-month public comment period from August 1, 1998, to January 1, 1999.

Professor Resnick noted that the litigation package included amendments to 27 different rules. He said that the volume of the changes made it difficult to follow without an explanation focusing on the heart of the changes, set forth in Rules 9013 and 9014. Therefore, the advisory committee's accompanying commentary had been prepared to assist the Standing Committee and the public during the publication period. It was not intended to become a permanent committee note.

The committee approved the litigation package and the accompanying commentary for publication without objection. It also approved the proposed five-month public comment period without objection.

Other Rules Amendments

Judge Duplantier reported that the advisory committee recommended publication of changes in several other rules, three of which deal with providing notice to government entities.

Government Notice Provisions

FED. R. BANKR. P. 1007

Professor Resnick stated that Rule 1007 requires the debtor to file schedules and statements. The proposed amendments to Rule 1007(m) would provide that if the debtor lists a governmental unit as a creditor in a schedule or statement, it must identify the specific department, agency, or instrumentality of the governmental unit through which it is indebted. Failure to comply with the requirement, however, would not affect the debtor's legal rights.

FED. R. BANKR. P. 2002

Professor Resnick stated that when the government is a creditor, the debtor must mail notices both to the pertinent government department and the United States attorney. He noted that the Department of Justice had complained that the United States attorney normally receives notices, but frequently does not know which government agency is involved. Accordingly, the proposed amendment to Rule 2002(j)(5) would require that the appropriate governmental department, agency, or instrumentality be identified in the address of any notice mailed to the United States attorney.

FED. R. BANKR. P. 5003

The proposed amendments to Rule 5003, dealing with records kept by the clerk, would require the bankruptcy clerk to maintain a register of the mailing addresses of federal and state governmental units within the state where the court sits.

Professor Resnick stated that concern had been expressed that if updates to the register were too frequent, lawyers might not have the latest edition at hand. Pending legislation in the House of Representatives would require the clerks to maintain a register and update it quarterly. The advisory committee, however, had decided that annual updates were sufficient.

The proposed amendment would not require the clerk to list more than one mailing address for any agency. But the clerk may do so and include information that would enable a user of the register to determine which address is applicable.

The mailing address listed on the register would be presumed conclusively to be the correct agency address. But failure by the debtor to check the register and use the proper address would not invalidate a notice if the agency in fact received the notice. Thus, the register would serve as a "safe harbor." A debtor who used it would be protected, and a debtor who did not would act at its own peril.

Other Provisions

FED. R. BANKR. P. 1017

The proposed amendment to Rule 1017, dealing with dismissal or conversion of a case, would authorize the court to rule on a timely-filed request for an extension of time to file a motion to dismiss a case for substantial abuse, whether or not it ruled on the request before or after expiration of the 60-day deadline specified in the rule.

FED. R. BANKR. P. 2002

Professor Resnick explained that the proposed amendment to Rule 2002(a)(6), dealing with notices, would provide an adjustment for inflation. Under the current rule, notice of a hearing on a request for compensation or expenses must be given if the request exceeds $500. The rule has remained unchanged since 1987. The advisory committee would raise the threshold amount to $1,000.

FED. R. BANKR. P. 4003

Professor Resnick said that the proposed amendment to Rule 4003, dealing with exemptions, was very similar to that proposed in Rule 1017. A party currently has 30 days to object to the list of property claimed as exempt by the debtor unless the court extends the time period. Case law has held that the court must actually rule on the extension request within the 30-day period. The amendment would permit the court to grant a timely request for an extension of time to file objections to the list, as long as the request is made within the 30-day period.

FED. R. BANKR. P. 4004

Professor Resnick explained that the proposed change to Rule 4004, dealing with the grant or denial of discharge, is a technical one, designed to conform to the proposed change in Rule 1017(e). It would provide that a discharge will not be granted if a motion is pending requesting an extension of time to file a motion to dismiss the case for substantial abuse.

The committee voted to approve the above amendments for publication without objection.

Proposed Amendments to the Official Forms

OFFICIAL FORMS 1 AND 7

Professor Resnick stated that the reasons for the proposed changes to the Official Forms were set forth at Tab 6D of the agenda book.

The committee voted to authorize publication of the amendments to the Official Forms without objection.

National Bankruptcy Review Commission Recommendations

Professor Resnick reported that the advisory committee was studying the recommendations contained in the October 1997 report of the National Bankruptcy Review Commission. He noted that the report was more than 1,300 pages long and contained 172 recommendations, some of which called specifically for changes in the Federal Rules of Bankruptcy Procedure and were addressed to the advisory committee.

Judge Duplantier noted that the Committee on the Administration of the Bankruptcy System was taking the lead for the Judicial Conference in preparing and coordinating responses to the Commission's various recommendations. It had referred a number of recommendations to the Advisory Committee on Bankruptcy Rules, which in turn had decided that it would not take a position on any Commission recommendations that called for substantive changes in the Bankruptcy Code as a precedent to rules amendments. Several of the recommendations, however, called on the advisory committee to make changes in the rules and forms independent of legislative action. The advisory committee concluded that the appropriate response was to recommend that the provisions of the Rules Enabling Act be followed with regard to such rules-related recommendations.

Professor Resnick also pointed out that many of the Commission's recommendations called for substantive changes in the Bankruptcy Code. In addition, he said, comprehensive bankruptcy legislation is pending in the Congress that would change many of the substantive

provisions of the Code. He said that legislative enactment of these provisions would require the advisory committee to draft amendments to the bankruptcy rules to implement the statutory changes.

Judge Sear moved to adopt the recommendations of the advisory committee regarding the report of the National Bankruptcy Review Commission. **The committee voted to approve the recommendations without objection.**

Informational Items

Judge Duplantier reported that the advisory committee had considered the issue of establishing a uniform effective date for local rules. It concluded that the issue was not very important, but that if a single date were chosen, it should be December 1 of each year. It also concluded that a safety valve should be provided in the rule to take care of emergencies and newly-enacted legislation.

Professor Resnick reported that the advisory committee had considered the proposal to permit the public to comment on proposed rule amendments by e-mail. It favored implementing the proposal for a trial period, but was of the view that e-mail comments should be treated the same as written comments.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Niemeyer presented the report of the advisory committee, as set forth in his memorandum and attachments of May 18, 1998. (Agenda Item 7)

Amendments for Judicial Conference Approval

FED. R. CIV. P. 6

Professor Cooper reported that the proposed change to Rule 6, dealing with computing time, was purely technical. He explained that a conforming amendment was needed in Rule 6(b) to reflect the abrogation of Rule 74(a) in 1997. The rule would be amended to delete its reference to Rule 74(a). He added that since the change was technical, there was no need to publish it for public comment.

FORM 2

Professor Cooper reported that paragraph (a) of Form 2 sets forth an allegation of jurisdiction founded on diversity of citizenship. It asserts that the matter in controversy exceeds $50,000. But the governing statute, 28 U.S.C. § 1332, had been amended to raise the

diversity jurisdiction threshold amount to its current level of $75,000. The advisory committee recommended that the language of Form 2 be amended to refer to the statute itself, rather than to any specific dollar amount.

Professor Cooper added that the advisory committee was of the view that this, too, was a technical change that did not require publication.

The committee approved the amendments to Rule 6 and Form 2 without objection and voted to forward them to the Judicial Conference without publication.

Amendments for Publication

Discovery Package

Judge Niemeyer reported that the advisory committee had been debating discovery issues for several years. Among other things, it had considered proposed amendments to FED. R. CIV. P. 26(c) as an alternative to pending legislation that would narrow or restrict the use of protective orders. More importantly, the committee had to address the impact on the district courts of the expiration of the Civil Justice Reform Act of 1990. Specifically, it had to decide whether the 1993 amendments to the civil rules — largely inspired by the Act and authorizing local variations in pretrial procedures — should be continued permanently or amended in certain respects.

The advisory committee had appointed a special discovery subcommittee — chaired by Judge David F. Levi and staffed by Professor Richard L. Marcus as special reporter — to study these issues and to take a comprehensive look at the architecture of discovery itself. Judge Niemeyer said that the subcommittee had been asked to address such matters as whether discovery is too expensive in light of its contribution to the litigation process. And, if it is too expensive, are there changes that could be made that would preserve the existing system, which promotes disclosure of information, yet produce cost savings? He added that the subcommittee had also been asked to consider restoring greater national uniformity to the rules by eliminating or reducing local "opt out" provisions authorized by the 1993 amendments.

Judge Niemeyer reported that the advisory committee had conducted an important conference at Boston College Law School with leading members of all segments of the bar, interested organizations, the bench, and academia. It had also asked the Federal Judicial Center to conduct a survey of lawyers on discovery matters. The data from that survey showed that about 50% of the cost of litigation is attributable to discovery, and that in the most complex cases that percentage rises to about 90%. The lawyers responded that discovery was very expensive, and 83% of them stated that they favored certain changes in the discovery

rules. In particular, they expressed support for providing: (1) greater access to judges on discovery matters; and (2) national uniformity in procedures.

Judge Niemeyer reported that there had been a consensus among the participants at the Boston College conference that:

1. Full disclosure of relevant information is an important element of the American discovery system that should be preserved.

2. Discovery works very well in a majority of cases.

3. In those cases when discovery is actively used, both plaintiffs and defendants believe that it is unnecessarily expensive. Plaintiffs complain that depositions are too numerous and expensive, and defendants complain most about the costs of document production, including the costs of selection, review to avoid waiver of privileges, and reproduction.

4. Where initial mandatory disclosure is being used, it is generally liked and is generally seen as reducing the cost of litigation.

5. National uniformity is strongly supported, and the local rule options authorized by FED. R. CIV. P. 26 should be eliminated.

6. The cost of discovery disputes could be reduced by greater judicial involvement.

7. The costs of document production are attributable in large part to the review of documents necessary to avoid waiver of the attorney-client privilege. Costs could be reduced if there could be a relaxation of the waiver rules for discovery purposes. (The advisory committee, however, was initially of the view that because privileges are generally governed by state law, it might be difficult to address this matter through the federal civil rules.)

8. Discovery costs could be reduced by imposing presumed limits on the length of depositions and the scope of discovery, particularly with regard to the production of documents.

9. An early discovery cutoff date and a firm trial date are the most effective ways of reducing costs. (The advisory committee concluded, however, that this matter could best be addressed by the Court Administration and Case Management Committee and by education of judges, rather than by rule amendments.)

Judge Niemeyer stated that the special discovery subcommittee had considered a wide variety of ideas and had presented the advisory committee with several different options. The central goal was to reduce the costs of discovery without undercutting the basic principles of open disclosure of relevant information. The advisory committee considered all the alternatives and concluded that any package of amendments that it would propose should be designed to enjoy general support from both plaintiffs and defendants.

He added that the political aspects of changes in the discovery rules were very important. Plaintiffs and defendants simply do not agree on some procedural matters. Nevertheless, the advisory committee was of the view that the package it had selected was very well balanced and fairly addressed the concerns of both sides. Judge Niemeyer reported that the advisory committee had chosen to proceed with proposals on which the vote was unanimous or represented a strong majority. On close votes, the committee either dropped the proposal or modified it to satisfy a significant majority.

Judge Niemeyer explained that the package adopted by the advisory committee did not reduce discovery. Rather, it would narrow attorney-managed discovery and make some of it court-managed discovery. The committee's proposal would limit attorney-managed discovery under FED. R. CIV. P. 26(b) to any matter, not privileged, that is relevant to a claim or defense of a party. Broader discovery of matters relevant to "the subject matter involved in the pending action" would still be available to the parties, but only on application to the court.

A proposed amendment to FED. R. CIV. P. 34(b) would authorize the court to limit discovery or require the party seeking discovery to pay part or all of the reasonable expenses incurred by the responding party. Judge Niemeyer reported that the special discovery subcommittee had recommended placing that provision in Rule 26, but the full advisory committee decided to retain it as an amendment to Rule 34. It also decided to include a note on the matter in the publication and invite public comment on the proper placement of the provision.

One of the members expressed strong opposition to the proposed changes, especially the amendment limiting the scope of attorney-managed discovery, and he described the amendments as "revolutionary." He said that they would "throw out" the present discovery system, which was well understood by the bar and had worked very well, and replace it with a system that required judges, rather than lawyers, to make discovery decisions. He also strongly objected to the amendment to Rule 34 authorizing the court to order cost sharing, which he described as "cost shifting." He predicted that defense lawyers would routinely challenge discovery requests by plaintiffs and seek to shift the costs of discovery to the plaintiffs.

Professor Cooper stated that the discovery subcommittee had not been discharged. It would continue to consider other matters, including the advisability of providing limited initial

disclosure of documents without waiving attorney-client privileges in order to reduce the burdens of document production and a presumptive age limit on the production of documents. It would also explore whether it would be practicable to develop discovery protocols or guidelines for various kinds of civil cases.

Professor Cooper also reported that the advisory committee had decided not to proceed further with proposals to amend the protective order provision of FED. R. CIV. P. 26(c).

Several members of the committee complimented the advisory committee and its discovery subcommittee on producing a well-researched, carefully-crafted, and objective package of amendments that, they said, managed to accommodate many difficult and competing considerations and achieve national uniformity. They said that although they might have reservations about individual provisions in the proposed discovery package, they favored publication of all the proposed amendments.

Judge Niemeyer asked Professor Marcus to describe the proposed amendments to each of the rules.

FED. R. CIV. P. 5

Professor Marcus stated that the proposed amendment to Rule 5(d) would provide that discovery materials need not be filed until they are used in a proceeding or the court orders that they be filed. He explained that the rule had been amended in 1980 to authorize a court to order that discovery materials not be filed with the clerk of court. Before that time, they had been filed routinely with the courts.

He reported that by the late 1980's about two thirds of the district courts had promulgated local rules prohibiting the filing of discovery materials generally. The Standing Committee's Local Rules Project had concluded that these rules were inconsistent with the national rules but had suggested consideration of amendment of the national rule. He added that the Judicial Council of the Ninth Circuit had recently recommended that Rule 5(d) be amended to authorize local rules to prohibit the filing of discovery materials, but the advisory committee had decided not to pursue that course of action.

Instead, the advisory committee had decided to propose a national rule that would excuse the filing of discovery materials and supersede existing local rules. The proposed Rule 5(d), which includes disclosures under Rule 26(a)(1) or (2) as well as discovery information, would provide that these materials "need not be filed." The committee note makes it clear that deposition notices and discovery objections would be covered by the rule. But medical examinations under Rule 35 would be unaffected by the amendment. Professor Cooper added that although discovery responses need not be filed under the proposed amendment, they could be filed if a party wished to file them.

Some members of the committee stated that clerks of court were experiencing serious space problems and that the filing of discovery materials would create burdens and costs for the courts. They suggested that the national rule be amended to prohibit the filing of all discovery materials except with court permission. Professor Marcus responded that public access to discovery materials was a controversial matter. Moreover, some lawyers wanted to reserve the opportunity to file certain materials with the clerk.

Judge Niemeyer noted that when Rule 5(d) had been amended in 1980, the press had expressed opposition on the grounds that the amendment would restrict its access to "court records." He added that the advisory committee had been concerned that a national rule banning the filing of discovery materials might provoke similar controversy and impede eventual passage of the amendment. Accordingly, it had decided to make only a modest change that would allow, but not require, parties to file materials.

Several members of the committee stated, however, that there was no requirement that discovery materials be made public, since they are not part of the public record unless actually used in a case. Justice Veasey moved to substitute the words "must not be filed" for the words "need not be filed" in line 7 of the proposed amendment to Rule 5(d). **The committee voted to approve the substitution without objection.**

Two of the members suggested that the proposed amendment include a provision placing an explicit responsibility on attorneys to preserve discovery materials. Other members stated, however, that local rules and case law adequately cover this matter.

The committee approved the proposed amendment for publication with one objection.

FED. R. CIV. P. 26

Professor Marcus reported the advisory committee had decided as a matter of policy to seek national uniformity in the rules regarding initial disclosures under Rule 26(a). He pointed out that mandatory disclosure was a controversial matter among the bench and bar, with strong views expressed both for and against it. He said that the advisory committee had considered three options: (1) to make the current Rule 26(a)(1) mandatory in all districts; (2) to abrogate Rule 26(a)(1) and preclude initial disclosure everywhere; or (3) to fashion a form of disclosure that would be nationally acceptable.

The advisory committee chose the third course. To that end, the proposed amendments to Rule 26(a)(1) would limit a party's disclosure obligation to materials "supporting its claims or defenses." Professor Marcus emphasized that the revised rule would promote national uniformity by eliminating the explicit authority of a court under the current rule to opt out of the disclosure requirements by local rule.

Two members questioned whether the phrase "supporting its claims or defenses" was broad enough to cover information that controverted an opponent's claims or defenses. They noted that this issue had been addressed in the committee note, but suggested that more comprehensive language might be incorporated in the rule itself. Professor Cooper responded that the advisory committee had deliberately chosen the language to be consistent with language already used elsewhere in the discovery rules. He pointed out, for example, that FED. R. CIV. P. 26(b), which defines the scope of discovery, refers only to "claims and defenses." He added that claims and defenses includes denials, but not impeaching materials.

One of the members suggested publishing alternative language on the scope of disclosure and soliciting public comment on the two versions. Judge Niemeyer responded that the advisory committee was of the view that only one version should be published for comment.

Professor Marcus stated that subparagraph 26(a)(1)(E) sets forth a list of 10 categories of civil actions that would be exempt from the initial disclosure requirements of the rule. He explained that discovery would be an unnecessary burden in these types of cases. He also pointed out that, after consulting with the chair and reporter of the Advisory Committee on Bankruptcy Rules, the two bankruptcy exceptions set forth as items (i) and (ii) in the subparagraph were unnecessary. Accordingly, Judge Niemeyer, Professor Cooper, and Professor Marcus suggested eliminating them from the proposed amendment.

Some of the members asked whether the list of exemptions in Rule 26(a)(1)(E) was accurate and complete. Professors Marcus and Cooper responded that the advisory committee expected to use the public comment process to refine the list further. They noted that the publication would flag the issue and ask for public comment on whether the types of civil cases listed were proper for exclusion, whether they were properly characterized, and whether other categories of cases should also be excluded.

Professor Marcus pointed out that the parties would be given 14 days, rather than 10 days, following the conference of attorneys under Rule 26(f) to make the required disclosures. Later-added parties would have to make their disclosures within 30 days, unless a different time were set by stipulation. And minor changes would be made in paragraphs 26(a)(3) and (4) to conform with the proposed changes in Rule 5(d) on the filing of disclosure materials.

Professor Marcus said that the proposed amendments to Rule 26(b)(1) would limit attorney-controlled discovery. But the court would have authority to permit discovery beyond matters related to the claims or defenses of a party. The language would be amended to make it clear that evidence sought through discovery must be relevant, whether or not admissible at trial. He pointed out that a new sentence had been added at the conclusion of paragraph (b)(1) to call attention to the limitations on excessive or burdensome discovery imposed by subdivision 26(b)(2)(i), (ii), and (iii).

Professor Marcus pointed out that the amendments to Rules 26(d) and 26(f), dealing with the timing and sequence of discovery and the conference of the parties, were linked. The language of both provisions would be amended to exclude "low end" cases, *i.e.*, the categories of cases exempted from initial disclosure requirements under Rule 26(a)(1)(E). He added that the amended rule would require that the conference of the parties under Rule 26(f) be held seven days earlier than currently in order to give the court more time to consider the report and plan arising from the conference. The amended rule would no longer require a face-to-face meeting of parties or attorneys, but a court could by local rule or order require in-person participation.

The committee approved the proposed amendments, with the change to Rule 26(a)(1)(E) described above, for publication with one objection.

FED. R. CIV. P. 30

Professor Marcus stated that Rule 30(d)(2) would be amended to limit the duration of depositions. Unless otherwise authorized by the court or stipulated by the parties and the deponent, a deposition would be limited to one day of seven hours. The rule would also be amended to include non-party conduct within the rule's prohibition against individuals impeding or delaying the examination.

Some of the members expressed doubts that a uniform limit on the length of depositions would be effective in practice, especially in multi-party cases. They noted that many variables had to be considered, and attorneys often do not have control over the course of their own depositions. They suggested that time limits on depositions would be difficult to regulate by rule and would best be left to the attorneys and discovery plans. Professor Marcus responded that there had been a strong majority on the advisory committee for making the change. Many attorneys have complained that overlong depositions result in undue costs and delays. Professor Cooper added that Rule 26(b)(2) currently authorizes a court to impose limits on the number and length of depositions. Moreover, a court would retain the power to extend a deposition on a party's request.

One member recommended that the amended rule require that the party taking the deposition notify the deponent 10 days in advance which documents owuld be the sugject of interrogation, that the moving party send the deponent pertinent documents in advance, and that the deponent be required to read the documents before taking the deposition. Some of the members agreed with the substance of the recommendation, but they suggested that the matter was one that should be left to good practice and trial strategy, rather than national rule. Judge Niemeyer added that the member's point was well taken, but that lawyers had told the advisory committee that the problem of unprepared witnesses rarely arose with experienced attorneys. In addition, there was a concern that deponents would be swamped with unrealistic volumes of documents submitted to protect any possible opportunity for use. Therefore, the

advisory committee had decided not to include in the amendments an express requirement that the deponent read certain documents in advance.

The committee approved the proposed amendments for publication by a vote of 6 to 4.

FED. R. CIV. P. 34

Professor Marcus stated that the proposed amendment to Rule 34(b) would provide that when a discovery request exceeds the limitations of Rule 26(b)(2), the court could limit the discovery or require that the requesting party pay part or all of the reasonable expenses of producing it.

One of the members strongly objected to this provision, stating that it would be used routinely by defense counsel to shift costs to plaintiffs, thereby driving many poor or economically-limited litigants out of the court system. He said that it would alter the entire philosophy of federal practice and should be rejected. He added that the courts already had the power to limit discovery and should not be given the authority to impose costs on the parties requesting discovery, except in very large cases.

But another member disagreed, countering that the "discovery" problem was real and needed to be addressed. He said that the proposed advisory committee amendment was neutral and applied equally to defendants and plaintiffs. He added that it was inappropriate to characterize it as an attempt to drive poor litigants out of the court system.

One member observed that the proposed amendments to Rules 26(b) and 34(b) would establish two different regimes of discovery, which might be denominated as "regular discovery" and "supplemental discovery." The former would be self-executing and without cost to the requesting party. The latter, though, would require court approval and could entail the payment of costs by the requesting party. Judge Niemeyer agreed with this characterization.

Judge Niemeyer added that the advisory committee would invite public comment on whether the cost-bearing provision was properly placed as an amendment to Rule 34(b) or should be added to Rule 26(b)(2), dealing with discovery scope and limits.

The committee approved the proposed amendments for publication by a vote of 7 to 3.

FED. R. CIV. P. 37

Professor Marcus pointed out that the proposed change in Rule 37, dealing with sanctions, would add a cross-reference to Rule 26(e)(2). This would close a gap left by the 1993 amendments to the rules and authorize sanction power for failure to supplement discovery responses.

The committee approved the proposed amendment for publication without objection.

Service on the United States

Judge Niemeyer reported that the advisory committee had received a request from the Department of Justice to allow additional time for the government to respond in cases when an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with the performance of official duties. The committee agreed with the Department's position and recommended publishing proposed amendments to Rules 4 and 12.

FED. R. CIV. P. 4

Professor Cooper stated that when an officer of the United States is sued in an individual capacity, the proposed rule would give the officer 60 days in which to answer. Subparagraph 4(i)(2)(A) would govern service in cases when an officer of the United States is sued in an official capacity. Subparagraph 4(i)(2)(B) would govern service of an officer sued in an individual capacity for acts or omissions incurring "in connection with the performance of duties on behalf of the United States." Professor Cooper pointed out that the quoted language had been crafted carefully with the assistance of the Department of Justice and was designed to avoid using existing terms such as "color of office" or "scope of employment" or "arising out of the employment," because these terms had developed particular meanings over time.

Under subparagraph 4(i)(2)(B), when a federal officer or employee is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States, service must be effected on both the officer or employee and the United States. The advantage of requiring service on the United States is that under Department of Justice regulations, the Department ordinarily defends officers sued individually if their acts were committed in the course of business.

Professor Cooper explained that new subparagraph 4(i)(3)(B) would allow a reasonable time to correct a service defect. Thus, if a plaintiff served only the affected officer

or employee, additional time would be provided to correct the defect and effect service on the United States.

Deputy Attorney General Holder stated that the rule was beneficial and would provide a single set of clear and understandable rules to govern all suits against the United States.

FED. R. CIV. P. 12

Professor Cooper stated that the proposed changes to Rule 12, dealing with defenses and objections, would provide that a response is due by the United States or an officer or employee sued in an individual capacity within 60 days after service. He added that the Department of Justice needed 60 days to determine whether to provide representation to the defendant officer or employee. Thus, the response time would be the same, whether the officer or employee were sued in an individual capacity or an official capacity.

The committee approved the amendments to Rules 4 and 12 for publication without objection.

Informational Items

Judge Niemeyer provided the committee with a status report on the work of the Working Group on Mass Torts. He said that the issues raised in mass tort litigation were very complex and controversial, and the working group had conducted meetings with some of the most experienced judges, lawyers, and academics in the country. He added that the group was planning on producing a report that would describe mass-tort litigation and identify problems that may deserve legislative and rulemaking attention. He expressed the hope that the report could also present a preliminary blueprint for action by identifying the legislative and rulemaking steps that might be taken to reduce the problems. He expected that the working group force would file a draft report in time for consideration by the Standing Committee at its January 1999 meeting.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Davis presented the report of the advisory committee, as set forth in his memorandum and attachments of May 15, 1998. (Agenda Item 8)

Rules Amendments for Judicial Conference Approval

Judge Davis reported that the Standing Committee had approved publication of proposed amendments to eight rules and the addition of one new rule at its June 1997 meeting. The advisory committee had considered the public comments at its April 1998 meeting and

had conducted a public hearing addressing the proposed amendments on Rule 11 pleas and criminal forfeiture.

FED. R. CRIM. P. 6

Judge Davis stated that there were two amendments proposed in Rule 6, dealing with grand juries. The first, in subdivision 6(d), would authorize the presence of interpreters during deliberations to assist grand jurors who are hearing or speech impaired. He explained that under the current rule, no person other than the grand jurors themselves may be present during deliberations.

As authorized for publication by the Standing Committee, the rule had been broader in scope and would have allowed all types of interpreters to be present with the grand jury. But comments were received that it would not be legal to have interpreters assist jurors who do not speak English, since 28 U.S.C. § 1865 requires that all grand jurors and petit jurors speak English. Accordingly, the advisory committee modified the amendment to permit only interpreters assisting hearing or speech impaired grand jurors to be present during deliberations and voting.

The second amendment would modify subdivision 6(f) to permit the grand jury foreperson to return the indictment in open court. The present rule requires that the whole grand jury be present for the return.

The committee approved the proposed amendments without objection.

FED. R. CRIM. P. 11

Judge Davis and Professor Schlueter pointed out that three changes were proposed in Rule 11, governing pleas. The first would make a technical change in subdivision 11(a) to conform the definition of an organizational defendant to that in 18 U.S.C. § 18.

The second change would amend Rule 11(e)(1) to reflect the impact of the Sentencing Guidelines on guilty pleas. It would recognize that a plea agreement may specifically address a particular sentencing guideline, a sentencing factor, or a policy statement accompanying a sentencing guideline or factor. The proposed change would distinguish clearly between a plea agreement under subparagraph 11(e)(1)(B), which is not binding on the court, and one under subparagraph 11(e)(1)(C), which is binding once it is accepted by the court.

Some members of the committee expressed concern that the proposal would remove the court further from the sentencing process and give greater authority to the United States attorney and defense counsel. They pointed out, for example, that a judge might accept a plea initially, but later be required to reject it when the facts become known. The case, then, would

have to be tried after considerable delay. Professor Schlueter responded that the advisory committee wanted only to address the reality of the current practice, under which the parties reach an agreement with regard to specific guidelines or factors. He added that a judge may always accept or reject such a plea agreement.

Judge Davis stated that the third proposed change, to Rule 11(c)(6), was also controversial, particularly with defense counsel. It would reflect the increasing practice of including provisions in plea agreements requiring the defendant to waive the right to appeal or to collaterally attack the sentence. The amendment would require the court to determine whether the defendant understands any provision in the plea agreement waiving such rights. A majority of the public comments had opposed the amendment, largely on the grounds that it would be seen as an endorsement of the practice of waiving appellate rights.

Judge Davis pointed out that most courts had upheld the kinds of waivers contemplated in the amendment, and the Criminal Law Committee of the Judicial Conference had recommended the provision to the advisory committee. The advisory committee, however, decided to add a sentence to the committee note stating that: "Although a number of federal courts have approved the ability of a defendant to enter into such waiver agreements, the Committee takes no position on the underlying validity of such waivers."

The committee approved the proposed amendment to Rule 11(e) by a vote of 11 to 1. It approved the other amendments to Rule 11 without objection.

FED. R. CRIM. P. 24

Judge Davis reported that the proposed change to Rule 24(c), dealing with trial jurors, would give a trial judge discretion to retain alternate jurors if a juror becomes incapacitated during the deliberations. The current rule explicitly requires the court to discharge all alternate jurors when the jury retires to deliberate.

One member pointed out that the committee note set forth certain procedural protections to insulate the alternate jurors during the deliberative process. It stated that if alternates are in fact used, the jurors must be instructed that they must begin their deliberations anew. He recommended that the latter provision be placed in the language of the rule itself.

Judge Davis agreed to insert additional language in the rule. Accordingly, Judge Stotler asked him and Professor Schlueter to draft appropriate text and present it to the committee later in the meeting.

After consultation with the Style Subcommittee and further committee deliberations, Judge Davis and Professor Schlueter suggested adding the following language at the end of

paragraph 24(c)(3): "If an alternate replaces a juror after deliberations have begun, the court shall instruct the jury to begin its deliberations anew."

The committee voted without objection to approve the proposed amendment.

FED. R. CRIM. P. 32.2

Judge Davis reported that the proposed new Rule 32.2 was the heart of a major revamping and reorganization of the criminal forfeiture rules. He noted that the government proceeds in criminal forfeiture on an *in personam* theory. There must be a finding of guilt in order to forfeit property.

He explained that new Rule 32.2 states that no judgment of forfeiture may be made unless the government alleges in the indictment or information that the defendant has an interest in property that is subject to forfeiture in accordance with an applicable statute. Accordingly, a conforming change would be made in Rule 7(c)(2), prescribing the nature and contents of the indictment or information, to make it clear to the defendant that the government is seeking to seize his or her property.

Judge Davis pointed out that paragraph (b)(1) contained the principal change in the criminal forfeiture amendments and had attracted the most comments from the public. The new rule would eliminate any right of the defendant to a jury trial on the forfeiture count. The provision flowed from the decision of the Supreme Court in *Libretti v. United States,* 516 U.S. 29 (1995), where the Court held that criminal forfeiture is a part of sentencing. A defendant, accordingly, is not entitled to a jury trial on the forfeiture count.

The judge would have to make a decision on the nexus of the property to the offense "as soon as practicable after entering a guilty verdict or accepting a plea of guilty or nolo contendere." This language would replace current Rule 32.1(e). Under the current rule, after returning a guilty verdict, the jury is required to hear evidence and enter a special verdict on the forfeiture count. Under the proposed rule, however, the jury would be excused once it has returned a guilty verdict, and the court would proceed right away on its own to decide upon forfeiture of the applicable property. The judge may use the evidence accumulated during the course of the trial or in the plea agreement, and it may take additional evidence at a post-trial hearing.

One of the members expressed concern as to whether the new rule afforded the defendant the opportunity to contest an allegation by the government that the property in question had been purchased with drug proceeds. Judge Davis responded that the court has considerable discretion to take evidence at a hearing and allow both sides to present additional evidence. The judge would not be required to hold a hearing, but would surely do so if a party asked for one. And the judge would have to hold a hearing if there were a dispute as to the

facts. A hearing would be held, for example, if the defendant were to claim that he or she had purchased the property legitimately, without using drug proceeds. Professor Schlueter added that the rule was designed to give the trial judge maximum discretion and therefore did not specify all the steps that the judge must follow.

Judge Davis said that if a third party comes forward to assert an interest in the forfeited property, the court must conduct an ancillary proceeding. It would have discretion to allow the parties to conduct appropriate discovery. At the conclusion of the ancillary proceeding, the court must enter a final order of forfeiture. It would amend the preliminary order of forfeiture, if necessary, to account for disposition of the third-party petition.

Judge Davis stated that proposed Rule 32.2(b) contained two principal provisions. First, the court, rather than the jury, would determine whether there is a nexus between the offense and the property. Second, the court would defer until a later time the question of the defendant's interest in the property. Since *Libretti v. United States* had made it clear that criminal forfeiture is a part of sentencing, it makes sense for the judge, rather than the jury, to decide the ownership questions. He added that in most cases defense counsel currently waives a jury trial on forfeiture issues.

He added that subsection (b)(2) covers the situation when the court decides that the nexus between the property and the offense has been established, but no third party appears to file a claim to the property. In that case, the court may enter a final order forfeiting the property in its entirety. He said that the advisory committee had added a proviso after publication that the court must determine, consistent with the *in personam* theory of criminal forfeiture, that the defendant had an interest in the property.

Subsection (b)(3) states that the government may seize the property, and the court may impose reasonable conditions to protect the value of the property pending appeal.

Subdivision 32(c) would require an ancillary proceeding if a third party appears to claim an interest in the property. Paragraph (c)(4) was added following publication to make it clear that the ancillary proceeding is not a part of sentencing. Therefore, the rules of evidence would be applicable. Although the ancillary proceeding was designed to protect the rights of third parties, the defendant would have a right to participate in it. At the conclusion of the proceeding, the court would be required to file a final order of forfeiture of the property.

Subdivision (d) would authorize the court to issue a stay or impose appropriate conditions on appeal. Subdivision (e) would govern subsequently located property. The court would retain jurisdiction to amend a forfeiture order if property were located later. It also could enter an order to include substitute property.

In conclusion, Judge Davis summarized the sequence of events under the new Rule 32.2 as follows: the jury's verdict, a preliminary order of forfeiture by the court, a third party's petition, an ancillary proceeding, and a final order of forfeiture.

Some members pointed out that a defendant has the right to a jury trial in a civil forfeiture proceeding. They expressed concern about taking away the defendant's right to jury trial in criminal forfeiture proceedings, even though that right might not be constitutionally required under *Libretti v. United States*. One member added that he would vote against the proposal, as written, but would be inclined to support it if it retained the right to a jury trial on the single issue of the nexus of the property to the offense.

The committee rejected the proposed amendment by a vote of 7 to 4.

FED. R. CRIM. P. 7, 31, 32, and 38

Judge Davis said that the advisory committee would withdraw the amendments to these rules because they were part of the proposed criminal forfeiture package and were designed to conform to the proposed new Rule 32.2.

FED. R. CRIM. P. 54

Judge Davis stated that the change in Rule 54, dealing with application of the criminal rules, was purely technical. It would eliminate the current rule's reference to the Canal Zone, which no longer exists.

The committee approved the proposed amendment without objection.

Informational Items

Judge Davis stated that the advisory committee had discussed the draft attorney conduct rules at its April 1998 meeting. Some of the lawyer members on the committee, he said, had expressed opposition to the concept of having another set of conduct rules. The advisory committee agreed to appoint two of its members to serve on the ad hoc attorney conduct committee.

FED. R. CRIM. P. 5

Judge Davis reported that the advisory committee had approved a proposed amendment to Rule 5(c) that would authorize a magistrate judge to grant a continuance of a preliminary examination without the consent of the defendant. But, he added, the advisory committee had voted not to seek publication of the amendment until a later date.

He explained that the proposed amendment would conflict with 18 U.S.C. § 3060(c). Therefore, the advisory committee had recommended at its April 1997 meeting that the Judicial Conference seek a change in the statute. The Standing Committee, however, at its June 1997 meeting decided that it would be more appropriate to propose a change to Rule 5(c) through the Rules Enabling Act process. Accordingly, it remanded the matter back to the advisory committee for further action.

At its October 1997 meeting, the advisory committee considered the issue again. It decided not to pursue an amendment to Rule 5(c) and so advised the Standing Committee. The Magistrate Judges Committee, however, presented the issue to the Judicial Conference at its March 1998 session with a request for a change in the statute.

Judge Davis added that the Judicial Conference had considered the matter, and following the Conference session, the chair of the Executive Committee had asked the advisory committee to consider publishing a proposed amendment to Rule 5(c). As a result, the advisory committee approved an amendment at its April 1998 meeting. But it decided not to seek publication on the grounds that: (1) the proposed amendment itself was not crucial, and (2) the committee had begun restyling the body of criminal rules and wished to avoid making piecemeal amendments in the rules until that process had been completed.

Judge Stotler said that the larger issue debated by the Judicial Conference at its March 1998 session was how best to coordinate proposed rules changes with proposed legislative changes. She emphasized that the debate had underscored the need for the rules committees to work closely with other committees of the Conference in coordinating changes that affect both rules and statutes. She added that the Executive Committee had acquiesced in the advisory committee's decision to defer publication of the proposed amendment to Rule 5(c).

FED. R. CRIM. P. 30

Professor Schlueter reported that the advisory committee had published a proposed amendment to Rule 30 that would permit the court to require the parties to submit pretrial requests for instructions. But, he noted, the Advisory Committee on Civil Rules was considering similar changes to FED. R. CIV. P. 51. Therefore the criminal advisory committee had decided to defer presenting the matter to the Standing Committee until further action is taken with regard to proposed amendments to the civil rule.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Smith presented the report of the advisory committee, as set forth in her memorandum and attachments of May 1, 1998. (Agenda Item 9)

Amendments for Publication

Judge Smith reported that at the January 1998 meeting, the Standing Committee had authorized the advisory committee to publish proposed amendments to FED. R. EVID. 103, 404, 803, and 902. It was understood that these amendments would be included in the same publication as any additional amendments approved at the June 1998 meeting. She added that the advisory committee was sensitive to the need to limit the number and frequency of changes in the rules. Therefore, it did not expect to recommend further amendments for some time, unless required by legislative developments.

Judge Smith said that the decision of the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), had generated a great deal of controversy regarding testimony by expert witnesses. The advisory committee had decided as a matter of policy to delay acting on potential changes in the rules in order to allow sufficient time for case law to develop at both the trial and appellate levels on the impact of the decision. The committee, however, believed that the time was now appropriate to proceed. Accordingly, it voted to seek authority to publish amendments to three rules dealing with testimony of witnesses. She added that all the amendments had been designed to clarify *Daubert*, yet the advisory committee wished to make as few changes as possible in the existing rules of evidence.

FED. R. EVID. 702

Judge Smith stated that Rule 702, governing expert testimony, was the focal point of the *Daubert* decision. The advisory committee simply would add language at the end of the existing rule reaffirming the role of the district court as gatekeeper and providing guidance in assessing the reliability and helpfulness of proffered expert testimony. The amendment would make it clear that expert testimony of all types — scientific, technical, and specialized — are subject to the court's gatekeeping role.

Judge Smith pointed out that the *Daubert* decision had set forth a non-exclusive checklist of factors for the trial courts to consider in assessing the reliability of scientific testimony. The advisory committee had made no attempt to codify these factors, as *Daubert* itself made clear that they were not exclusive. Moreover, case law has added numerous other factors to be considered in individual cases in determining whether expert testimony is sufficiently reliable.

Judge Smith said that the *Daubert* decision also addressed the issue of methodology. It requires a judge to review both the methodology used by the expert and how it has been applied to the facts. She added that application of these factors to expert testimony will necessarily vary from one kind of expertise to another. She emphasized that the trial courts had demonstrated considerable ingenuity and wisdom in applying *Daubert*. The advisory

committee, thus, determined that it was not necessary to set forth any specific procedural requirements in the rule for the trial courts to follow.

Some members expressed concern about the meaning of the terminology "sufficiently based upon," as used in the phrase "the testimony is sufficiently based upon reliable facts or data." Professor Capra explained that the opinion of an expert might be based on reliable information, but it must also be based on sufficient facts or data. The phrase, thus, refers to the quantity, rather than the quality, of the information.

One member questioned whether there was a need to change the rule at all at this point. Professor Capra responded that the advisory committee had been unanimous in favoring amendments to the rule. He noted that the developing case law was inconsistent as to whether *Daubert* applies to all kinds of experts. Moreover, he said, legislation had been introduced in the Congress to modify the rule through legislation. Judge Smith affirmed the need to amend the rule at this point, and she emphasized again that the advisory committee had attempted to change the current rule as little as possible.

FED. R. EVID. 701

Judge Smith reported that the advisory committee would add a clause to the end of Rule 701, which deals with testimony by lay witnesses. The addition would clarify and emphasize the opening clause of the rule, which limits application of the rule to a witness who is not testifying as an expert. The rule then proceeds to state the limits on the testimony of a lay witness. Therefore, the amendment makes it clear that a lay witness may not provide testimony based on scientific, technical, or other specialized knowledge. She added that the advisory committee had been concerned over a growing tendency among attorneys to attempt to evade the expert witness rule by using experts as lay witnesses.

Judge Smith pointed out that representatives from the Department of Justice disagreed with the proposed amendment. They had said that the amendment would conflict with FED. R. CIV. P. 26 and require additional efforts by United States attorneys in providing reports of experts. Ms. Smolover of the Department stated that the agency believed that the amendment would effect a significant change in the law. She added that it attempted to draw a bright line between specialized knowledge and non-specialized knowledge in an area that was especially murky. She proceeded to provide two examples of factual situations where it would be difficult to distinguish specialized knowledge from non-specialized knowledge.

Professor Capra responded that three states currently have evidence rules in place that are similar to the proposed amendment and distinguish sharply between expert and lay testimony. He said that the courts in those states had experienced no difficulties in applying the rules. And, he said, the courts — federal and state — make these kinds of distinctions every day.

Judge Smith added that there may be close calls in some factual situations, but the courts normally handle these distinctions very well. She said that the potential harm that may be caused by attempts to evade Rule 702 greatly outweigh any problems of potential uncertainty in distinguishing between specialized knowledge and non-specialized knowledge in certain cases. Several members of the committee expressed their agreement with Judge Smith on this point.

Judge Stotler asked the trial judges attending the meeting whether they had encountered problems in distinguishing expert testimony from lay testimony. Several of the judges responded that they already applied the law in the manner specified in the proposed amendment, and they had experienced no difficulty in doing so. They expressed strong support for the proposed amendment and stated that it would provide the bar with additional, necessary guidance on distinguishing among categories of proposed testimony and complying with the requirements of FED. R. CIV. P. 26 for an advance written report of expert testimony.

The members proceeded to discuss how the proposed amendment would be applied to a number of hypothetical situations. They generally anticipated few practical problems, but some noted that problems arise with regard to treating physicians. It was pointed out that the committee note to FED. R. CIV. P. 26 states explicitly that a written report of expert testimony is not needed from a treating physician. It was reported by several, though, that some attorneys call treating physicians as observing witnesses under Rule 701, but then attempt to use them as expert witnesses under Rule 702. Professor Capra emphasized that although there are "mixed" witnesses, the committee note accompanying the proposed amendment makes it clear that the rule distinguishes between expert and lay *testimony*, rather than between expert and lay *witnesses*.

FED. R. EVID. 703

Judge Smith reported that the advisory committee had been concerned about a growing tendency to attempt to present hearsay evidence to the jury in the guise of materials supporting expert testimony. Accordingly, the proposed amendment to Rule 703, dealing with bases of opinion testimony by experts, would provide that when an expert relies on underlying information that is inadmissible, only the expert's conclusion — and not the underlying information — would ordinarily be admitted. The trial court must balance the probative value of the underlying information against the safeguards of the hearsay rule, with the presumption that the facts or data upon which an expert bases an opinion or inference will not be admitted.

The committee approved proposed amendments to FED. R. EVID. 701, 702, and 703 for publication without objection.

Informational Items

Professor Capra reported that the advisory committee had approved the suggestion that the use of electronic mail be authorized for transmitting public comments on proposed amendments to the secretary.

He stated that the advisory committee was continuing to consider the impact of computerized evidence on the Federal Rules of Evidence, and it had produced a detailed report on the matter for the chairman of the Technology Subcommittee. The advisory committee had concluded that the courts were simply not having problems in applying the evidence rules to computerized records. Moreover, the committee had determined that it would be very difficult to amend the rules expressly to take account of computerized evidence. It would require changes in many of the rules or the drafting of new and difficult definitional provisions.

Professor Capra noted that Judge Stotler had asked the advisory committee to consider whether FED. R. CIV. P. 44 should be abrogated in light of its overlap with certain of the evidence rules. He explained that the committee had researched the matter in detail, had consulted with the Advisory Committee on Civil Rules, and had concluded that there was not a complete overlap between Rule 44 and the evidence rules. Moreover, there was no indication of any problems in the case law. Therefore, the committee decided not to pursue abrogating the rule.

Professor Capra reported that legislation had been introduced in the Congress to provide for a parent-child evidentiary privilege. The House bill would directly amend FED. R. EVID. 501 to include such a privilege, and the Senate bill would require the Judicial Conference to report on the advisability of amending the Federal Rules of Evidence to include a parent-child privilege. The advisory committee had considered the matter and concluded that the evidence rules should not be amended to include any kind of parent-child privilege.

Professor Capra stated that the proposed privilege would be contrary to both state and federal common law. Moreover, it would not be appropriate to create it by amending the Federal Rules of Evidence, since the Congress had rejected a detailed list of privileges in favor of a common law, case-by-case approach. Professor Capra added that the advisory committee had prepared a proposed response to the Congress to that effect.

Judge Smith said that the Congress had expressed a good deal of interest in privileges in recent years, including a possible rape counselor privilege, a tax preparer privilege, and now a parent-child privilege. She said that she had written to Congress stating that a piecemeal, patchwork approach to privileges would be a mistake. FED. R. EVID. 501 had worked well in practice, and if the Congress were to act at all, it should consider making a comprehensive review of all privileges.

Professor Capra noted that the advisory committee had completed a two-year project to notify the public that certain advisory committee notes to the Federal Rules of Evidence may be misleading. He stated that the report identified inaccuracies and inconsistencies created because several of the rules adopted by the Congress in 1975 differed materially from the version approved by the advisory committee. He stated that the committee's report would be printed by the Federal Judicial Center and would appear in Federal Rules Decisions.

ATTORNEY CONDUCT

Professor Coquillette summarized his May 18, 1998, Status Report on Proposed Rules Governing Attorney Conduct, set forth as Agenda Item 10. He recommended the appointment of an ad hoc committee to work on attorney conduct matters consisting of two members from each of the advisory committees, Chief Justice Veasey, Professor Hazard, and representatives from the Department of Justice.

He stated that the debate, essentially, had come down to two options. The first would be to have a single dynamic conformity rule that would eliminate all local rules and leave attorney conduct matters up to the states. The second would be to adopt a very narrow core of specific federal rules on attorney conduct. He said that there were serious differences of opinion on these options, and the ad hoc committee would seek to reach a consensus on the matter.

Professor Coquillette pointed out that misleading articles had appeared stating that the committee was proposing enactment of the 10 draft attorney conduct rules. He noted that the rules had been drafted only for internal debate and added that American Bar Association officials had been informed that the committee was not making any proposals at this point.

He stated that another misconception had been that the committee was proposing to increase the amount of federal rulemaking regarding attorney conduct. In fact, he said, the committee was trying to accomplish just the opposite. The thrust of the committee's discussions to date had been to reduce the number of local federal court rules and turn attorney conduct matters over generally to the states.

Finally, Professor Coquillette said that the study of attorney conduct would not be completed quickly. Time would be needed to coordinate efforts with the American Bar Association, the American Law Institute, and other bar groups. Time would also be needed to study attorney conduct issues in a bankruptcy context. Accordingly, the only action needed was for the Standing Committee to affirm the appointment of the ad hoc committee.

The committee voted without objection to appoint an ad hoc committee to study attorney conduct matters.

Professor Coquillette noted that the Court Administration and Case Management Committee had provided the committee with a set of principles to govern conduct in alternate dispute resolution proceedings. He said that no action was required on the part of the committee, but pointed out that there is likely to be more activity in this area at the local and national levels.

Professor Coquillette reported that two bills had been introduced in the Congress to govern attorney conduct. He said that the committee should respond to Congressional inquiries by referring to the ongoing attorney conduct project.

LOCAL RULES AND UNIFORM NUMBERING

Professor Squiers reported that about 70% of the district courts had renumbered their local rules, as required by the Judicial Conference. One member suggested that the circuit councils should be asked to assist the remaining courts in complying with the renumbering requirement.

Professor Squiers reported that the Civil Justice Reform Act of 1990 had expired and that many of the provisions contained in the district courts' individual civil justice expense and delay reduction plans had now been incorporated into local rules. The status and legality of other procedural requirements contained in local plans, however, was uncertain.

Judge Stotler praised the efforts of the Local Rules Project and pointed out that it had identified many good local rules that have now been adopted as national rules. She asked whether it would be helpful for the committee to commission a new national survey of local rules in light of the renumbering project, the 1993 amendments to the civil rules, and the expiration of the Civil Justice Reform Act. She suggested that Professor Squiers might consider preparing a specific proposal for committee consideration, including a provision for obtaining appropriate funding for a survey.

REPORT OF THE STYLE SUBCOMMITTEE

Judge Parker reported that the Supreme Court had approved the restyled body of appellate rules with one minor amendment. He said that the restyling project had been successful because of the leadership shown by Judges Stotler and Logan and the hard work and expertise of Professor Mooney and Mr. Garner. Judge Stotler added that a great debt was also due to Judge Robert Keeton, who had initiated the project, and to Professor Charles Alan Wright, Judge George Pratt, and Judge James Parker.

Judge Parker said that the next project would be to restyle the body of criminal rules. He noted that a first draft had been prepared and would be considered by the Style Subcommittee. A final draft would likely be submitted to the Advisory Committee on Criminal Rules by December 1, 1998.

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Mr. Lafitte referred to the docket sheet of technology issues set forth in the agenda book. He pointed out that electronic filing of court papers was the most significant technological development that would affect the federal rules. He noted that Mr. McCabe and his staff had prepared a paper summarizing the rules-related issues that had been raised in the 10 electronic filing pilot courts. He added that the paper would be circulated to the reporters and considered by the advisory committees.

PROPOSALS TO SHORTEN THE RULEMAKING PROCESS

Judge Stotler stated that the Executive Committee of the Judicial Conference had asked the committee to consider ways to reduce the length of the rulemaking process. Each of the advisory committees had discussed the matter and had concurred in principle that there should be some shortening of the process. No specific proposals, however, had been forwarded.

At Judge Stotler's request, Mr. Rabiej distributed and explained a chart setting forth the time requirements for the rules process and setting forth various ways in which the times might be reduced. He noted that some of the suggestions made for shortening the process are controversial. He proceeded to explain each of the proposed scenarios.

Mr. Rabiej stated that proposed amendments are normally presented to the Supreme Court following the September meeting of the Judicial Conference each year. He explained that, except in emergency situations, the Conference does not send proposals to the Court following the March Conference meetings because the justices do not have sufficient time to act on them before the May 1 period specified in the Rules Enabling Act.

One member questioned the need to shorten the process and asked the chair whether a policy decision had been made to shorten the process. She replied that no decision of the kind had been made, but that the Executive Committee had asked the rules committees to consider the issue. She added that the amount of time needed to consider a rule depends largely on the nature of the particular rule.

Another member suggested that it would be better to leave the existing, deliberative process in place, but to consider developing an emergency process that could be used to address special circumstances requiring prompt committee action. Several other members concurred in this judgment and suggested the need to develop a fast track procedure.

Several members noted that the need for accelerated treatment of an amendment usually arises because the Congress or the Department of Justice decides to act on a matter through legislation. They observed that the Congress in several instances has decided not to wait for the orderly and deliberative promulgation of a rule because the process was seen as taking too long. The chair replied that the advisory committees might consider certifying a particular rule for fast track consideration.

One of the participants suggested that consideration be given to eliminating one or more of the six entities that participate in considering an amendment, *i.e.*, advisory committee, public, standing committee, Judicial Conference, Supreme Court, and Congress. Others responded, however, that each entity plays an important part in the process. Therefore, it would be unwise, both substantively and politically, to consider elimination of any of them. Members pointed to the important role played by the standing committee in assuring quality and consistency in the rules and that of the Supreme Court in giving the rules great prestige and credibility.

One member recommended that the committees adopt a fixed schedule for submitting proposed amendments to the rules as packages, such as once every five years. The advisory committees could stagger their changes so that civil rules, for example, might be considered in one year and criminal rules in the next. He advised the committee to accept the inevitability that: (1) emergencies will arise on occasion; and (2) the Congress or the Department of Justice will continue to press for action outside the Rules Enabling Act when they feel the political need to do so. He concluded, therefore, that the committees should establish a firm schedule for publishing and approving rules amendments in multi-year batches, but also take due account of emergencies, political initiatives, and statutory changes.

Judge Stotler suggested that further thought be given to the issue of shortening the length of the rulemaking process and that additional discussion take place at the next committee meeting. She also suggested that further thought be given to the issue of making the chairs of the advisory committees voting members of the Standing Committee.

NEXT COMMITTEE MEETINGS

The committee is scheduled to hold its next meeting on Thursday and Friday, January 7 and 8, 1999. Judge Stotler asked the members for suggestions as to a meeting place so that

the staff could begin making reservations. She also asked the members to check their calendars and let the staff know their available dates for the June 1999 committee meeting.

Respectfully submitted,

Peter G. McCabe
Secretary

Item ID

AGENDA DOCKETING

ADVISORY COMMITTEE ON CRIMINAL RULES

Proposal	Source, Date, and Doc #	Status
[CR 4] — Require arresting officer to notify pretrial services officer, U.S. Marshal, and U.S. Attorney of arrest	Local Rules Project	10/95 — Subc appointed 4/96 — Rejected by subc **COMPLETED**
[CR 5] — Video Teleconferencing of Initial Appearances and Arraignments	Judge Fred Biery 5/98	5/98 — Referred to chair and reporter for consideration **PENDING FURTHER ACTION**
[CR 5] — To allow initial appearances, arraignments, attorney status hearings, and possibly petty pleas to be taken by video conferencing.	Judge Durwood Edwards 6/98	6/98 — Referred to chair and reporter for consideration **PENDING FURTHER ACTION**
[CR 5(a)] — Time limit for hearings involving unlawful flight to avoid prosecution arrests	DOJ 8/91; 8/92	10/92 — Subc appointed 4/93 — Considered 6/93 — Approved for publication 9/93 — Published for public comment 4/94 — Revised and forwarded to ST Cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 12/95 — Effective **COMPLETED**
[CR 5(c)] — Misdemeanor defendant in custody is not entitled to preliminary examination. Cf CR58(b)(2)(G)	Magistrate Judge Robert B. Collings 3/94	10/94 — Deferred pending possible restylizing efforts **PENDING FURTHER ACTION**
[CR 5(c)] — Eliminate consent requirement for magistrate judge consideration	Judge Swearingen 10/28/96 (96-CR-E)	1/97 — Sent to reporter 4/97 — Recommends legislation to ST Cmte 6/97 — Recommitted by ST Cmte 10/97—Adv. Cmte declines to amend provision. 3/98 — Jud Conf instructs rules committees to propose amendment 4/98 — Approves amendment, but defers until style project completed 6/98 — Stg Comte concurs with deferral **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 5.1] — Extend production of witness statements in CR26.2 to 5.1.	Michael R. Levine, Asst. Fed. Defender 3/95	10/95 — Considered 4/96 — Draft presented and approved 6/96 — Approved by ST Cmte 8/96— Published for public comment 4/97— Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court **PENDING FURTHER ACTION**
[CR 6] — Statistical reporting of indictments	David L. Cook AO 3/93	10/93 — Committee declined to act on the issue **COMPLETED**
[CR6(a)] — Reduce number of grand jurors	H.R. 1536 introduced by Cong Goodlatte	5/97 — Introduced by Congressman Goodlatte, referred to CACM with input from Rules Cmte 10/97—Adv Cmte unanimously voted to oppose any reduction in grand jury size. 1/98—ST Cmte voted to recommend that the Judicial Conference oppose the legislation. 3/98 — Jud Conf concurs **COMPLETED**
[CR 6(d)] — Interpreters allowed during grand jury	DOJ 1/22/97 (97-CR-B)	1/97 — Sent directly to chair 4/97 — Draft presented and approved for request to publish 6/97 — Approved by ST Cmte for publication 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Approved by Stg Comte **PENDING FURTHER ACTION**
[CR 6(e)] — Intra-Department of Justice use of Grand Jury materials	DOJ	4/92 — Rejected motion to send to ST Cmte for public comment 10/94 — Discussed and no action taken **COMPLETED**
[CR 6(e)(3)(C)(iv)] — Disclosure of Grand Jury materials to State Officials	DOJ	4/96 — Cmte decided that current practice should be reaffirmed **COMPLETED**
[CR 6(e)(3)(C)(iv)] — Disclosure of Grand Jury materials to State attorney discipline agencies	Barry A. Miller, Esq. 12/93	10/94 — Considered, no action taken **COMPLETED**
[CR6 (f)] — Return by foreperson rather than entire grand jury	DOJ 1/22/97 (97-CR-A)	1/97 — Sent directly to chair 4/97— Draft presented and aprroved for publication 6/97 — Approved by ST Cmte for publication 8/97— Published for public comment **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR7(c)(2)] — Reflect proposed new Rule 32.2 governing criminal forfeitures		4/97— Draft presented and approved for publication 6/97 — Approved by ST Cmte for publication 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Withdrawn in light of R. 32.2 rejection by Stg. Comte **PENDING FURTHER ACTION**
[CR8(c)] — Apparent mistakes in Federal Rules Governing § 2255 and § 2254	Judge Peter C. Dorsey 7/9/97 (97-CR-F)	8/97 — Referred to reporter and chair 10/97—Referred to subcom for study **PENDING FURTHER ACTION**
[CR 10] — Arraignment of detainees through video teleconferencing	DOJ 4/92	4/92 — Deferred for further action 10/92 — Subc appointed 4/93 — Considered 6/93 — Approved for publication by ST Cmte 9/93 — Published for public comment 4/94 — Action deferred, pending outcome of FJC pilot programs 10/94 — Considered **PENDING FURTHER ACTION**
[CR 10] — Guilty plea at an arraignment	Judge B. Waugh Crigler 10/94	10/94 — Suggested and briefly considered **DEFERRED INDEFINITELY**
[CR 10] — Defendant's presence not required		10/97 — Considered in lieu of video transmission 4/98 — Approved for publication, but deferred until completion of style project **PENDING FURTHER ACTION**
[CR 11] — Magistrate judges authorized to hear guilty pleas, and inform accused of possible deportation	James Craven, Esq. 1991	4/92 — Disapproved **COMPLETED**
[CR 11] — Advise defendant of impact of negotiated factual stipulation	David Adair & Toby Slawsky, AO 4/92	10/92 — Motion to amend withdrawn **COMPLETED**
[CR 11(c)] — Advise defendant of any appeal waiver provision which may be contained in plea agreement	Judge Maryanne Trump Barry 7/19/96 (96-CR-A)	10/96 — Considered, draft presented 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98 — Approved and forwarded to Stg Cmte 6/98 — Approved by Stg Comte **PENDING FURTHER ACTION**
[CR 11(d)] — Examine defendant's prior discussions with an government attorney	Judge Sidney Fitzwater 11/94	4/95 — Discussed and no motion to amend **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 11(e)] — Judge, other than the judge assigned to hear case, may take part in plea discussions	Judge Jensen 4/95	10/95 — Considered 4/96 —Tabled as moot, but continued study by subcommittee on other Rule 11 issues **DEFERRED INDEFINITELY**
[CR 11(e)(4) — Binding Plea Agreement (Hyde decision)	Judge George P. Kazen 2/96	4/96 — Considered 10/96 — Considered 4/97 — Deferred until Sup Ct decision **COMPLETED**
[CR 11(e)(1) (A)(B) and (C)] — Sentencing Guidelines effect on particular plea agreements	CR Rules Committee 4/96	4/96 — To be studied by reporter 10/96 — Draft presented and considered 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment **PENDING FURTHER ACTION**
[CR 11]—Pending legislation regarding victim allocution	Pending legislation 97-98	10/97—Adv Cmte expressed view that it was not opposed to addressing the legislation and decided to keep the subcommittee in place to monitor/respond to the legislation.
[CR 12] — Inconsistent with Constitution	Paul Sauers 8/95	10/95 — Considered and no action taken **COMPLETED**
[CR 12(b)] — Entrapment defense raised as pretrial motion	Judge Manuel L. Real 12/92 & Local Rules Project	4/93 — Denied 10/95 — Subcommittee appointed 4/96 — No action taken **COMPLETED**
[CR 12(i)] — Production of statements		7/91 — Approved by ST Cmte for publication 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR12.2]—authority of trial judge to order mental examination.	Presented by Mr. Pauley on behalf of DOJ at 10/97 meeting.	10/97—Adv Cmte voted to consider draft amendment at next meeting. 4/98 — Deferred for further study of constitutional issues **PENDING FURTHER ACTION**
[CR 16] — Disclosure to defense of information relevant to sentencing	John Rabiej 8/93	10/93 — Cmte took no action **COMPLETED**
[CR 16] — Prado Report and allocation of discovery costs	'94 Report of Jud Conf	4/94 — Voted that no amendment be made to the CR rules **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 16] — Prosecution to inform defense of intent to introduce extrinsic act evidence	CR Rules Committee '94	10/94 — Discussed and declined **COMPLETED**
[CR 16(a)(1)] — Disclosure of experts		7/91 — Approved by for publication by St Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 16(a)(1)(A)] — Disclosure of statements made by organizational defendants	ABA	11/91 — Considered 4/92 — Considered 6/92 — Approved by ST Committee for publication, but deferred 12/92 — Published 4/93 — Discussed 6/93 — Approved by ST Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 12/94 — Effective **COMPLETED**
[CR 16(a)(1)(C)] — Government disclosure of materials implicating defendant	Prof. Charles W. Ehrhardt 6/92 & Judge O'Brien	10/92 — Rejected 4/93 — Considered 4/94 — Discussed and no motion to amend **COMPLETED**
[CR 16(a)(1)(E)] — Require defense to disclose information concerning defense expert testimony	Jo Ann Harris, Asst. Atty. Gen., CR Div., DOJ 2/94; clarification of the word "complies" Judge Propst (97-CR-C)	4/94 — Considered 6/94 — Approved for publication by ST Cmte 9/94 — Published for public comment 7/95 — Approved by ST Cmte 9/95 — Rejected by Jud Conf 1/96 — Discussed at ST meeting 4/96 — Reconsidered and voted to resubmit to ST Cmte 6/96 — Approved by ST Cmte 9/96 — Approved by Jud Conf 4/97 — Approved by Sup Ct 12/97 — Effective **COMPLETED** 3/97 — Referred to reporter and chair **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 16(a) and (b)] — Disclosure of witness names and statements before trial	William R. Wilson, Jr., Esq. 2/92	2/92 — No action 10/92 — Considered and decided to draft amendment 4/93 — Deferred until 10/93 10/93 — Considered 4/94 — Considered 6/94 — Approved for publication by ST Cmte 9/94 — Published for public comment 4/95 — Considered and approved 7/95 — Approved by ST Cmte 9/95 — Rejected by Jud Conf **COMPLETED**
[CR 16(d)] — Require parties to confer on discovery matters before filing a motion	Local Rules Project & Mag Judge Robert Collings 3/94	10/94 — Deferred 10/95 — Subcommittee appointed 4/96 — Rejected by subcommittee **COMPLETED**
[CR23(b)] — Permits six-person juries in felony cases	S. 3 introduced by Sen Hatch 1/97	1/97 — Introduced as § 502 of the Omnibus Crime Prevention Act of 1997 10/97—Adv. Cmte voted to oppose the legislation 1/98— ST Cmte expressed grave concern about any such legislation. **COMPLETED**
[CR 24(a)] — Attorney conducted voir dire of prospective jurors	Judge William R. Wilson, Jr. 5/94	10/94 — Considered 4/95 — Considered 6/95 — Approved for publication by ST Cmte 9/95 — Published for public comment 4/96 — Rejected by advisory cmte, but should be subject to continued study and education; FJC to pursue educational programs **COMPLETED**
[CR 24(b)] — Reduce or equalize peremptory challenges in an effort to reduce court costs	Renewed suggestions from judiciary; Judge Acker (97-CR-E); pending legislation S-3.	2/91 — ST Cmte, after publication and comment, rejected CR Cmte 1990 proposal 4/93 — No motion to amend 1/97 — Omnibus Crime Control Act of 1997 (S.3) introduced [Section 501] 6/97 — Stotler letter to Chairman Hatch **COMPLETED** 10/97—Adv. Cmte decided to take no action on proposal to randomly select petit and venire juries and abolish peremptory challenges. 10/97—Adv. Cmte directed reporter to prepare draft amendment equalizing preemptory challenges at 10 per side. 4/98 — Approved, subject to Stg Comte determination when to publish **PENDING FURTHER ACTION**
[CR 24(c)] — Alternate jurors to be retained in deliberations	Judge Bruce M. Selya 8/96 (96-CR-C)	10/96 — Considered and agreed to in concept; reporter to draft appropriate implementing language 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98 — Approved and forwarded to Stg Cmte 6/98 — Approved by Stg Comte **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 26] — Questioning by jurors	Prof. Stephen Saltzburg	4/93 — Considered and tabled until 4/94 4/94 — Discussed and no action taken **COMPLETED**
[CR 26] — Expanding oral testimony, including video transmission	Judge Stotler 10/96	10/96 — Discussed 4/97 — Subcommittee will be appointed 10/97—Subcommittee recommended amendment. Adv Cmte voted to consider a draft amendment at next meeting. 4/98 — Deferred for further study **PENDING FURTHER ACTION**
[CR 26] — Court advise defendant of right to testify	Robert Potter	4/95 — Discussed and no motion to amend **COMPLETED**
[CR 26.2] — Production of statements for proceedings under CR 32(e), 32.1(c), 46(i), and Rule 8 of § 2255		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 26.2] — Production of a witness' statement regarding preliminary examinations conducted under CR 5.1	Michael R. Levine, Asst. Fed. Defender 3/95	10/95 — Considered by cmte 4/96 — Draft presented and approved 6/96 — Approved by ST Cmte 8/96 — Published for public comment 4/97— Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Jud Conf approves 4/98 — Approved by Supreme Court **PENDING FURTHER ACTION**
[CR26.2(f)] — Definition of Statement	CR Rules Cmte 4/95	4/95 — Considered 10/95 — Considered and no action to be taken **COMPLETED**
[CR 26.3] — Proceedings for a mistrial		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 29(b)] — Defer ruling on motion for judgment of acquittal until after verdict	DOJ 6/91	11/91 — Considered 4/92 — Forwarded to ST Cmte for public comment 6/92 — Approved for publication, but delayed pending move of RCSO 12/92 — Published for public comment on expedited basis 4/93 — Discussed 6/93 — Approved by ST Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 12/94 — Effective **COMPLETED**
[CR 30] — Permit or require parties to submit proposed jury instructions before trial	Local Rules Project	10/95 — Subcommittee appointed 4/96 — Rejected by subcommittee **COMPLETED**
[CR 30] — discretion in timing submission of jury instructions	Judge Stotler 1/15/97 (97-CR-A)	1/97 — Sent directly to chair and reporter 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98 — Deferred for further study **PENDING FURTHER ACTION**
[CR 31] — Provide for a 5/6 vote on a verdict	Sen. Thurmond, S.1426, 11/95	4/96 — Discussed, rulemaking should handle it **COMPLETED**
[CR 31(d)] — Individual polling of jurors	Judge Brooks Smith	10/95 — Considered 4/96 — Draft presented and approved 6/96 — Approved by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court **PENDING FURTHER ACTION**
[31(e)] — Reflect proposed new Rule 32.2 governing criminal forfeitures		4/97— Draft presented and approved for publication 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Withdrawn in light of rejection of R. 32.2 by Stg Comte **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 32] — Amendments to entire rule; victims' allocution during sentencing	Judge Hodges, before 4/92; pending legislation reactivated issue in 1997/98.	10/92 — Forwarded to ST Cmte for public comment 12/92 — Published 4/93 — Discussed 6/93 — Approved by ST Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 12/94 — Effective **COMPLETED** 10/97—Adv Cmte expressed view that it was not opposed to addressing the legislation and decided to keep the subcommittee in place to monitor/respond to the legislation. **PENDING FURTHER ACTION**
[CR 32]—mental examination of defendant in capital cases	An extension of a proposed amendment to CR 12.2(DOJ) at 10/97 meeting.	10/97 Adv Cmte voted to proceed with the drafting of an amendment. **PENDING FURTHER ACTION**
[CR 32(d)(2) — Forfeiture proceedings and procedures reflect proposed new Rule 32.2 governing criminal forfeitures	Roger Pauley, DOJ, 10/93	4/94 — Considered 6/94 — Approved by ST Cmte for public comment 9/94 — Published for public comment 4/95 — Revised and approved 6/95 — Approved by ST Cmte 9/95 — Approved by Jud Conf 4/96 — Approved by Sup Ct 12/96 — Effective **COMPLETED** 4/97— Draft presented and approved for publication 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Withdrawn in light of rejection of R. 32.2 by Stg Comte **PENDING FURTHER ACTION**
[CR 32(e)] — Delete provision addressing probation and production of statements (later renumbered to CR32(c)(2))	DOJ	7/91 — Approved by ST Committee for publication 4/92 — Considered 6/92 — Approved by ST Committee 9/92 — Approved by Judicial Conference 4/93 — Approved by Supreme Court 12/93 — Effective **COMPLETED**
[CR 32.1] — Production of statements		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 32.1]— Technical correction of "magistrate" to "magistrate judge."	Rabiej (2/6/98)	2/98—Letter sent advising chair & reporter **4/98 — Approved, but deferred until style project completed** **PENDING FURTHER ACTION**
[CR 32.1]—pending victims rights/allocution litigation	Pending litigation 1997/98.	10/97—Adv Cmte expressed view that it was not opposed to addressing the legislation and decided to keep the subcommittee in place to monitor/respond to the legislation. **PENDING FURTHER ACTION**
[CR 32.2] — Create forfeiture procedures	John C. Keeney, DOJ, 3/96 (96-CR-D)	10/96 — Draft presented and considered 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Rejected by Stg Comte **PENDING FURTHER ACTION**
[CR 33] — Time for filing motion for new trial on ground of newly discovered evidence	John C. Keeney, DOJ 9/95	10/95 — Considered 4/96 — Draft presented and approved 6/96 — Approved for publication by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court **PENDING FURTHER ACTION**
[CR 35(b)] — Recognize combined pre-sentencing and post-sentencing assistance	Judge T. S. Ellis, III 7/95	10/95 — Draft presented and considered 4/96 — Forwarded to ST Cmte 6/96 — Approved for publication by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court **PENDING FURTHER ACTION**
[CR 35(b)] — Recognize assistance in any offense	S.3, Sen Hatch 1/97	1/97 — Introduced as § 602 and 821 of the Omnibus Crime Prevention Act of 1997 6/97 — Stotler letter to Chairman Hatch **PENDING FURTHER ACTION**
[CR 35(c)] — Correction of sentence, timing	Jensen, 1994 9th Cir. decision	10/94 — Considered 4/95 — No action pending restylization of CR Rules **PENDING FURTHER ACTION**
[CR 38(e)] — Conforming amendment to CR 32.2		4/97— Draft presented and approved for publication 6/97 — Approved by ST Cmte for publication 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Withdrawn in light of rejection of R. 32.2 by Stg Comte **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 40] — Commitment to another district (warrant may be produced by facsimile)		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 40] —Treat FAX copies of documents as certified	Mag Judge Wade Hampton 2/93	10/93 — Rejected **COMPLETED**
[CR 40(a)] — Technical amendment conforming with change to CR5	Criminal Rules Cmte 4/94	4/94 — Considered, conforming change no publication necessary 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CR 40(a)] —Proximity of nearest judge for removal proceedings	Mag Judge Robert B. Collings 3/94	10/94 — Considered and deferred further discussion until 4/95 10/96 — Considered and rejected **COMPLETED**
[CR 40(d)] — Conditional release of probationer; magistrate judge sets terms of release of probationer or supervised release	Magistrate Judge Robert B. Collings 11/92	10/92 — Forwarded to ST Cmte for publication 4/93 — Discussed 6/93 — Approved by ST Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 12/94 — Effective **COMPLETED**
[CR 41] — Search and seizure warrant issued on information sent by facsimile		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 41] — Warrant issued by authority within the district	J.C. Whitaker 3/93	10/93 — Failed for lack of a motion **COMPLETED**
[CR 41(c)(2)(D)] — recording of oral search warrant	J. Dowd 2/98	4/98 — Tabled until study reveals need for change **DEFERRED INDEFINITELY**

Proposal	Source, Date, and Doc #	Status
[CR 43(b)] — Arraignment of detainees by video teleconferencing; sentence absent defendant	DOJ 4/92	10/92 — Subcommittee appointed 4/93 — Considered 6/93 — Approved for publication by ST Cmte 9/93 — Published for public comment 4/94 — Deleted video teleconferencing provision & forwarded to ST Cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CR 43(c)(4)] — Defendant need not be present to reduce or change a sentence	John Keeney, DOJ 1/96	4/96 — Considered 6/96 — Approved for publication by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court **PENDING FURTHER ACTION**
[CR 43(c)(5) — Defendant to waive personal arraignment on subsequent, superseding indictments and enter plea of not guilty in writing	Judge Joseph G. Scoville, 10/16/97 (97-CR-I)	10/97 — Referred to reporter and chair 4/98 — Approved for publication, but deferred until completion of style project **PENDING FURTHER ACTION**
[CR 43]—defendant to waive presence at arraignment	Mario Cano 97---	10/97—Adv Cmte voted to consider amendment(and related amendment to CR 10) at next meeting **PENDING FURTHER ACTION**
[CR 46] — Production of statements in release from custody proceedings		6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 46] — Release of persons after arrest for violation of probation or supervised release	Magistrate Judge Robert Collings 3/94	10/94 — Defer consideration of amendment until rule might be amended or restylized **PENDING FURTHER ACTION**
[CR 46] — Requirements in AP 9(a) that court state reasons for releasing or detaining defendant in a CR case	11/95 Stotler letter	4/96 — Discussed and no action taken **COMPLETED**
[CR 46 (e)] — Forfeiture of bond	H.R. 2134	4/98 — Opposed amendment **COMPLETED**
[CR 46(i)] — Typographical error in rule in cross-citation	Jensen	7/91 — Approved for publication by ST Cmte 4/94 — Considered 9/94 — No action taken by Jud Conf because Congress corrected error **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 47] — Require parties to confer or attempt to confer before any motion is filed	Local Rules Project	10/95 — Subcommittee appointed 4/96 — Rejected by subcommittee **COMPLETED**
[CR 49] — Double-sided paper	Environmental Defense Fund 12/91	4/92 — Chair informed EDF that matter was being considered by other committees in Jud Conf **COMPLETED**
[CR 49(c)] — Fax noticing to produce substantial cost savings while increasing efficiency and productivity	Michael E. Kunz, Clerk of Court 9/10/97 (97-CR-G)	9/97 — Mailed to reporter and chair 4/98 — Referred to Technology Subcmte **PENDING FURTHER ACTION**
[CR49(c)] — Facsimile service of notice to counsel	William S. Brownell, District Clerks Advisory Group 10/20/97 (CR-J)	11/97 — Referred to reporter and chair **PENDING FURTHER ACTION**
[CR 49(e)] —Delete provision re filing notice of dangerous offender status — conforming amendment	Prof. David Schlueter 4/94	4/94 — Considered 6/94 — ST Cmte approved without publication 9/94 — Jud Conf approved 4/95 — Sup Ct approved 12/95 — Effective **COMPLETED**
[CR53] — Cameras in the courtroom		7/93 — Approved by ST Cmte 10/93 — Published 4/94 — Considered and approved 6/94 — Approved by ST Cmte 9/94 — Rejected by Jud Conf 10/94 — Guidelines discussed by cmte **COMPLETED**
[CR54] — Delete Canal Zone	Roger Pauley, minutes 4/97 mtg	4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98 — Approved and forwarded to Stg Cmte 6/98 —Approved by Stg Comte **PENDING FURTHER ACTION**
[CR 57] — Local rules technical and conforming amendments & local rule renumbering	ST meeting 1/92	4/92 — Forwarded to ST Cmte for public comment 6/93 — Approved for publication by ST Cmte 9/93 — Published for public comment 4/94 — Forwarded to ST Cmte 12/95 — Effective **COMPLETED**
[CR 57] — Uniform effective date for local rules	Stg Comte meeting 12/97	4/98 — Considered an deferred for further study **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 58] — Clarify whether forfeiture of collateral amounts to a conviction	Magistrate Judge David G. Lowe 1/95	4/95 — No action **COMPLETED**
[CR 58 (b)(2)] — Consent in magistrate judge trials	Judge Philip Pro 10/24/96 (96- CR-B)	1/97 — Reported out by CR Rules Committee and approved by ST Cmte for transmission to Jud Conf without publication; consistent with Federal Courts Improvement Act 4/97 — Approved by Sup Ct **COMPLETED**
[CR 59] — Authorize Judicial Conference to correct technical errors with no need for Supreme Court & Congressional action	Report from ST Subcommittee on Style	4/92 — Considered and sent to ST Cmte 6/93 — Approved for publication by ST Cmte 10/93 — Published for public comment 4/94 — Approved as published and forwarded to ST Cmte 6/94 — Rejected by ST Cmte **COMPLETED**
[Megatrials] — Address issue	ABA	11/91 — Agenda 1/92 — ST Cmte, no action taken **COMPLETED**
[Rule 8. Rules Governing §2255] — Production of statements at evidentiary hearing		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[Rules Governing Habeas Corpus Proceedings]— miscellaneous changes to Rule 8 & Rule 4 for §2255 & §2254 proceedings	CV Cmte	10/97—Adv Cmte appointed subcom to study issues 4/98 — Considered and further study **PENDING FURTHER ACTION**
[U.S. Attorneys admitted to practice in Federal courts]	DOJ 11/92	4/93 — Considered **PENDING FURTHER ACTION**
[Restyling CR Rules]		10/95 — Considered 4/96 — On hold pending consideration of restyled AP Rules published for public comment 4/98 — Advised that Style Subc intends to complete first draft by the end of the year **PENDING FURTHER ACTION**

Item III A & B

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Rules Approved by Standing Committee and Forwarded to Judicial Conference**

DATE: **September 15, 1998**

At its June 1998 meeting, the Standing Committee approved the proposed amendments to the following rules:

Rule 6 (Presence of Interpreters; Return of Indictment): The Committee accepted the Advisory Committee's recommendation to limit the presence of interpreters for hearing or speech impaired grand jurors.

Rule 11 (Pleas): Although, the Standing Committee agreed with the Advisory Committee's proposed amendments, there was some dissent about the issue of including appeal waivers in plea agreements. That particular change to Rule 11 has been identified as one which created substantial controversy in the Report to the Judicial Conference.

Rule 24(c) (Alternate Jurors): The Committee agreed with the proposed change concerning the ability to retain alternate jurors after deliberations have begun. But it specifically amended the rule to require that if an alternate is substituted after deliberations have begun, that the judge must instruct them to begin their deliberations anew.

Rule 54 (Technical Change re Canal Zone court): The Committee approved the amendment.

The Standing Committee rejected proposed new Rule 32.2, Criminal Forfeitures. The key objection focused on the fact that the new rule would have abrogated the jury's role in determining the forfeiture issue, particularly the question of nexus. Several members questioned whether the proposed rule would limit the ability of the defendant to present evidence at the preliminary hearing conducted after the verdict was announced. As a result of the rejection of Rule 32.2, the conforming amendments to Rules 7, 31, 32, and 38 were withdrawn.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

WILL L. GARWOOD
APPELLATE RULES

ADRIAN G. DUPLANTIER
BANKRUPTCY RULES

PAUL V. NIEMEYER
CIVIL RULES

W. EUGENE DAVIS
CRIMINAL RULES

FERN M. SMITH
EVIDENCE RULES

TO: **Hon. Alicemarie H. Stotler, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Hon. W. Eugene Davis, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT: **Report of the Advisory Committee on Criminal Rules**

DATE: **May 15, 1998**

I. Introduction

The Advisory Committee on the Rules of Criminal Procedure met on April 27 and 28, 1998 in Washington, D.C. and took action on a number of proposed amendments. The draft Minutes of that meeting are included at Attachment B. This report addresses matters discussed by the Committee at that meeting. First, the Committee considered public comments on proposed amendments to the following Rules:

- Rule 6. Grand Jury (Presence of Interpreters; Return of Indictment).
- Rule 7. The Indictment and the Information (Conforming Amendment).
- Rule 11. Pleas (Acceptance of Pleas and Agreements, etc.).
- Rule 24(c). Alternate Jurors (Retention During Deliberations).
- Rule 31. Verdict (Conforming Amendment).
- Rule 32. Sentence and Judgment (Conforming Amendment).
- Rule 32.2. Forfeiture Procedures (New Rule).
- Rule 38. Stay of Execution (Conforming Amendment).
- Rule 54. Application and Exception (Conforming Amendment).

As noted in the following discussion, the Advisory Committee proposes that these amendments be approved by the Committee and forwarded to the Judicial Conference.

Second, the Committee has approved amendments to Rules 5(c) which addresses the authority of a magistrate judge to grant a continuance of a preliminary hearing over the objection of a defendant and Rule 24(b) which would equalize the number of peremptory challenges in felony cases at 10 for each side. The Committee recommends, however, that those two rules not be published for public comment at this point.

Third, the Committee is considering proposed amendments to the following rules:

- Rule 10. Arraignment & Rule 43, Presence of Defendant.
- Rule 12.2. Notice of Insanity Defense or Expert Testimony of
- Defendant's Mental Condition .
- Rule 26. Taking of Testimony.
- Rule 32. Sentence and Judgment.
- Rule 32.1. Revocation or Modification of Probation or Supervised
- Release.
- Rule 43. Presence of Defendant.
- Rule 49. Service and Filing of Papers.
- Rules Governing Habeas Corpus Proceedings; Report of Subcommittee.

Finally, the Advisory Committee has several information items to bring to the attention of the Standing Committee.

II. Action Items--Recommendations to Forward Amendments to the Judicial Conference

A. Summary and Recommendations

At its June 1997 meeting, the Standing Committee approved the publication of proposed amendments to nine rules for public comment from the bench and bar. In response, the Advisory Committee received written comments from 24 persons or organizations commenting on all or some of the Committee's proposed amendments to the rules. In addition, the Committee heard the testimony of four witnesses on the proposed amendments to Rules 11 and 32.2.

The Committee has considered those comments and recommends that all of the proposed amendments be forwarded to the Judicial Conference for approval and transmittal to the Supreme Court. The following discussion briefly summarizes the proposed amendments.

1. ACTION ITEM--Rule 6. Grand Jury.

The Committee has proposed two amendments to Rule 6. The first, in Rule 6(d) would make provision for interpreters in grand jury deliberations; under the current rule, no persons other than the jurors themselves may be present. As originally drafted by the Advisory Committee, the provision for interpreters would have been extended only to interpreters for deaf persons serving on a grand jury. The Standing Committee, however, believed that the limitation as to the kind of interpreter permitted to be present during grand jury deliberations should be removed in order to provide an opportunity for the widest range of public comment on all the issues raised by the presence of an interpreter during those deliberations. Thus, the published amendment extended to any interpreter who may be necessary to assist a grand juror. While some of those commenting on this proposed amendment believed it would be appropriate to include all interpreters, several commentators correctly noted that the amendment as written would be inconsistent with 28 U.S.C. § 1865(b) which requires that all petit and grand jurors must speak English.

The second amendment would change Rule 6(f) regarding the return of an indictment. Under current practice the entire grand jury is required to return the indictment in open court. The proposed change would permit the grand jury foreperson to return the indictment in open court--on behalf of the grand jury. Of the eleven commentators, only two opposed this change on the general view that it distances the grand jury from the court.

Upon further consideration of the amendments to Rule 6(d), the Committee decided to limit the presence of interpreters to those assisting hearing or speech impaired grand jurors.

Recommendation--The Committee recommends that the amendments to Rule 6, as modified following publication, be approved and forwarded to the Judicial Conference.

2. ACTION ITEM--Rule 7. The Indictment and the Information

The amendment to Rule 7(c)(2), which addresses one aspect of criminal forfeiture, is a conforming amendment reflecting proposed new Rule 32.2. That rule provides comprehensive coverage of forfeiture procedures. The Committee received no comments on the proposed amendment to the rule.

Recommendation--The Committee recommends that the amendment to Rule 7 be approved and forwarded to the Judicial Conference.

3. ACTION ITEM--Rule 11. Pleas.

The proposed amendments to Rule 11 reflect the Committee's discussion over the last year concerning the interplay between the sentencing guidelines and plea agreements and the ability of a defendant to waive any attacks on his or her sentence. Specifically, Rule 11(a) has been changed slightly to conform the definition of organizational defendants. Rule 11(c) would be amended to require the trial court to determine if the defendant understands any provision in the plea agreement waiving the right to appeal or to collaterally attack the sentence. A majority of the commentators, and one witness who testified before the Committee, opposed the change. Their general opposition rests on the argument that the Rule should not in any way reflect the Committee's support of such waivers until the Supreme Court has ruled on the question of whether such waivers are valid. The Committee believed that it was appropriate to recognize what is apparently already taking place in a number of jurisdictions and formally require trial judges in those jurisdictions to question the defendant about whether his or her waiver was made knowingly, voluntarily, and intelligently. The Committee did add a disclaimer to the Committee Note, as suggested by at least one commentator.

The proposed change in Rule 11(e)(1) is intended to distinguish clearly between (e)(1)(B) plea agreements--which are not binding on the court--and (e)(1)(C) agreements--which are binding. Other language has been added to those subdivisions to make it clear that a plea agreement may include an agreement as to a sentencing range, sentencing guideline, sentencing factor, or policy statement. The proposed language includes suggested changes by the Subcommittee on Style. The majority of the commentators supported this clarification.

Recommendation--The Committee recommends that the amendments to Rule 11 be approved as published and forwarded to the Judicial Conference.

4. ACTION ITEM--Rule 24(c). Alternate Jurors.

The proposed amendment to Rule 24(c) would permit the trial court to retain alternate jurors--who during the trial have not been selected as substitutes for regular jurors--during the deliberations in case any other regular juror becomes incapacitated and can no longer take part. Although Rule 23 makes provision for returning a verdict with 11 jurors, the Committee believed that the judge should have the discretion in a particular case to retain the alternates, a practice not provided for under the current rule. Most of those commenting on the proposed amendment, supported it. The NADCL and the ABA opposed the change; the former believes that there is no provision for the court to make any substitutions of jurors after deliberations begin. The ABA opposes the amendment because it believes that it will create an unnecessary risk that jurors will decide the case on something less than a thorough evaluation of the evidence. On the other hand, the Magistrate Judges Association supports the change. After considering the comments, the Committee decided to forward the rule with no changes to the published version.

Recommendation--The Committee recommends that the amendment to Rule 24(c) be approved and forwarded to the Judicial Conference.

5. ACTION ITEM--Rule 31. Verdict.

The proposed amendment to Rule 31 deletes subdivision (e) which related to the requirement that the jury return a special verdict regarding criminal forfeiture. The amendment conforms the rule to proposed new Rule 32.2 which provides comprehensive guidance on criminal forfeitures. The Committee received no comments on this proposed change.

Recommendation--The Committee recommends that the amendment to Rule 31 be approved and forwarded to the Judicial Conference.

6. ACTION ITEM--Rule 32. Sentence and Judgment.

The proposed amendment to Rule 32(d), which deals with criminal forfeiture, conforms that provision to proposed new Rule 32.2 which provides

comprehensive guidance on forfeiture procedures. The Committee received no comments on this proposed amendment.

Recommendation--The Committee recommends that the amendment to Rule 32 be approved and forwarded to the Judicial Conference.

7. ACTION ITEM--Rule 32.2. Forfeiture Procedures.

The Committee proposes adoption of a new rule dedicated solely to the question of forfeiture proceedings. Over the last several years the Committee has discussed the jury's role in criminal forfeiture. Under existing rules provisions, when a verdict of guilty is returned on any substantive count on which the government alleges that property may be forfeited, the jury is asked to decide questions of ownership or property interests vis a vis the defendant(s). However, in *Libretti v. United States*, 116 S.Ct. 356 (1995), the Supreme Court indicated that criminal forfeiture constitutes an aspect of the sentence imposed in the case and that the defendant has no constitutional right to have a jury decide any part of the sentence. Accordingly, the Department of Justice recommended adoption of a rule which would leave the issue of criminal forfeiture to the court. In reviewing the various existing rules provisions dealing with criminal forfeiture, the Committee finally settled on proposing one new rule. The adoption of this new rule would require amendments to Rules 7(c)(2), 31(e), 32(d)(2), *supra*, and an amendment to Rule 38(e), *infra*.

The Committee received only six written comments and most of those supported the change. The NADCL adamantly opposes the proposed rule, and provided two witnesses who testified before the Committee. Their key point is that the new rule abrogates the critical right to a jury trial. Under current Rule 31(e), a jury is required to return a special verdict which determines the extent of the defendant's interest in property to be forfeited; and the rules of evidence apply at that proceeding. Under the new rule, the jury's role would be eliminated and the court would initially decide whether the defendant has an interest in the property. In a later proceeding the court would resolve any third party claims to the property subject to forfeiture. A witness for the Department of Justice pointed out that after the Supreme Court's decision is *Libretti*, supra, forfeiture proceedings are a part of sentencing, a matter to be decided by the trial judge.

After reviewing the comments, the Committee recognized that it can be burdensome to the jury which has just returned a verdict following a long trial involving difficult deliberations, to be informed that their task is not yet finished and that they must next decide whether certain property may be forfeited. The

Committee learned that probably as a result, most defendants waive the right to have the jury decide the issue.

After discussion and consideration of the comments and testimony, the Committee made several clarifying changes to the rule regarding (1) the obligation of the trial judge to determine the extent of the defendant's interest in the property to be forfeited, (2) the fact that the ancillary proceeding is not a part of sentencing, and (3) the procedures to be used if the government wishes to use "substitute" property as provided by statute, and procedures to be used if property which was originally part of the order of forfeiture is subsequently discovered.

Recommendation--The Committee recommends that the amendment to Rule 32.2 be approved as amended and forwarded to the Judicial Conference.

8. ACTION ITEM--Rule 38. Stay of Execution.

The amendment to Rule 38 (e) is a technical, conforming, amendment resulting from proposed new Rule 32.2 which provides comprehensive guidance on criminal forfeitures. The Committee received no comments on the proposed change.

Recommendation--The Committee recommends that the amendment to Rule 38 be approved as published and forwarded to the Judicial Conference.

9. ACTION ITEM--Rule 54. Application and Exception.

The proposed amendment to Rule 54 is a minor change reflecting the fact that the Canal Zone court no longer exists. The Committee received only two comments on the amendment; both supported the change.

Recommendation--The Committee recommends that the amendment to Rule 54 be approved as published and forwarded to the Judicial Conference.

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

FINAL CONSENT CALENDAR

September 15-16, 1998

The following recommendations are hereby presented for approval by acclamation.

F-1 Executive Committee
Judge Wm. Terrell Hodges, Chair

1. For discussion.

2. Approve a resolution in recognition of the substantial contributions made by Judicial Conference committee chairs whose terms of service will end in 1998 . . . . . pp. 2-3

3. Approve the document entitled *The Judicial Conference of the United States and its Committees* (Appendix F of the report) . . . . . Addendum

F-2 Committee on the Administrative Office
Chief Judge Edward B. Davis, Chair

For information.

F-3 Committee on Automation and Technology
Judge Edward W. Nottingham, Chair

For information.

NOTICE
No recommendation presented herein represents the policy of the Judicial Conference unless approved by the Conference itself.

F-18 Committee on Rules of Practice and Procedure
Judge Alicemarie H. Stotler, Chair

1. Approve the proposed amendments to Bankruptcy Rules 1017, 1019, 2002, 2003, 3020, 3021, 4001, 4004, 4007, 6004, 6006, 7001, 7004, 7062, 9006, and 9014 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 2-6

F-18 Rules of Practice and Procedure (continued):

2. With regard to National Bankruptcy Commission Recommendation 1.1.4 (concerning systems administration of consumer bankruptcies), express thanks for the endorsement of the 1997 amendments to Rule 9011, and follow the procedures set forth in the Rules Enabling Act, 28 U.S.C. §§ 2071-2077, for considering further amendments and recommending them to the Supreme Court ..... pp. 6-7

3. With regard to Commission Recommendation 2.3.2 (concerning consent of former partners), urge Congress, if it enacts legislation, to defer to the provisions of the Rules Enabling Act for any procedural rules that may be required to implement changes in the Bankruptcy Code ..... pp. 7-8

4. With regard to Commission Recommendation 2.4.9 (concerning employee participation in bankruptcy cases), inform Congress that the schedules that must be filed by a debtor (Official Form 6) already require disclosure of employee-related obligations and that action on the Commission's recommendation is unnecessary ..... p. 9

5. With regard to Commission Recommendation 2.4.10 (concerning enhancing the efficacy of examiners and limiting the grounds for appointment of examiners in chapter 11 cases):

   a. restate support for limiting the circumstances under which a trustee or trustee's own firm can be retained as a professional by the trustee but take no position on this recommendation to permit examiners to retain professionals under the same standards that govern the retention of other professionals, because such a change in substantive bankruptcy law concerns a matter of public policy that is best addressed by Congress; and

   b. with respect to the recommendation to consider an amendment to Rule 2004, note that the recommendation is addressed directly to the Advisory Committee on Bankruptcy Rules, which has considered the matter and determined, for the time being, simply to monitor any case law that develops and, accordingly, urge Congress to defer to the provisions of the Rules Enabling Act, 28 U.S.C. §§ 2071-2077 ..... p. 10

6. With respect to Commission Recommendation 2.5.2 (concerning flexible rules for disclosure statements and plans), express support for authorizing the bankruptcy courts to exercise greater flexibility in managing small business cases under chapter 11, but urge Congress, if it enacts legislation, to defer to the provisions of the Rules Enabling Act, 28 U.S.C. §§ 2071-2077, for any procedural rules or official forms that may be required to implement changes in the Bankruptcy Code ..... pp. 11-12

F-18 Rules of Practice and Procedure (continued):

7. With respect to Commission Recommendation 2.5.3 (concerning reporting requirements for small business debtors), take no position on the merits of the recommendation, but urge Congress, if it enacts legislation on the subject of small business cases under chapter 11 of the Bankruptcy Code, to defer to the provisions of the Rules Enabling Act, 28 U.S.C. §§ 2071-2077, for any procedural rules or official forms that may be required to implement changes in the Bankruptcy Code ..... pp. 13-15

8. With regard to Commission Recommendation 4.2.3 (concerning taxation and the Bankruptcy Code), express general support for the principle of facilitating adequate and effective notice in bankruptcy cases to governmental units and note that proposed amendments to the Federal Rules of Bankruptcy Procedure that would provide better notice to all federal and state governmental units have been published for comment ..... pp. 15-16

9. Approve the proposed amendments to Civil Rule 6(b) and Form 2 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law ..... p. 18

10. Approve the proposed amendments to Criminal Rules 6, 11, 24, and 54 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law. ..... pp. 22-25

All of the foregoing recommendations which require the expenditure of funds are approved by the Conference subject to the availability of funds, and subject to whatever priorities the Conference might establish for the use of available resources.

105th Congress, 2d Session - - - - - - - - - - - - House Document 105-267

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

COMMUNICATION

FROM

THE CHIEF JUSTICE, THE SUPREME COURT OF THE UNITED STATES

TRANSMITTING

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE THAT HAVE BEEN ADOPTED BY THE COURT, PURSUANT TO 28 U.S.C. 2074

MAY 5, 1998.—Referred to the Committee on the Judiciary and ordered to be printed

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U.S. GOVERNMENT PRINTING OFFICE

48-832 WASHINGTON : 1998

SUPREME COURT OF THE UNITED STATES

April 24, 1998

ORDERED:

1. That the Federal Rules of Criminal Procedure for the United States District Courts be, and they hereby are, amended by including therein amendments to Criminal Rules 5.1, 26.2, 31, 33, 35, and 43.

[See infra., pp. ___ ___ ___.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 1998, and shall govern all proceedings in criminal cases thereafter commenced and, insofar as just and practicable, all proceedings in criminal cases then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

Item III C 1

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Dave Schlueter, Reporter

RE: Proposed Amendments to Rules 10 & 43; Waiver of Appearance

DATE: September 15, 1998

At its last meeting in April 1998, the Committee considered an amendment to Rules 10 and 43 that would have permitted the defendant to waive personal appearance at his or her arraignment. The issue had been raised initially at the Committee's October 1997 meeting in Monterey, California and resulted in a draft that would have required the defendant to execute a written waiver of appearance.

During the discussion on that draft, the question was raised whether similar waivers might apply where the accused was prepared to enter a no contest plea or a plea to a superseding indictment. Judge Miller and Mr. Martin were asked to consider the issue.

Attached is a memo from Judge Miller and Mr. Martin suggesting an amendment to the April 1998 draft of the proposed rule. Their language would require the defense counsel to sign the written waiver and would permit the defendant to waive appearance if he or she is pleading guilty to an indictment or misdemeanor information. The attached materials contain the memo and draft which appeared in the April 1998 agenda book.

In discussing this issue, it might be helpful to recognize the technical distinction between arraignment and taking the defendant's plea. Rule 10 addresses only the issue of arraignment—which technically ends with the defendant being called upon to enter a plea. The entry of the plea itself, is covered in Rule 11. Rule 43 requires that the accused be present at "the arraignment, at the taking of the plea..." Although neither Rules 10 or 11 contain an explicit reference to the requirement that the defendant be present, both rules implicitly recognize that requirement.

Although in practice the arraignment and plea are usually conducted as a unitary proceeding, in theory, a defendant might wish to waive appearance at the arraignment, but not to the entry of pleas. Thus, it might be advisable to recognize the distinction and address the issue of personal appearance at both the arraignment and the entry of a not guilty plea. That might be accomplished by adding a specific provision to Rule 11 which mirrors the proposed language in Rule 11, as well.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
SUITE 173
WALTER E. HOFFMAN UNITED STATES COURTHOUSE
600 GRANBY STREET
NORFOLK, VIRGINIA 23510-1915
(757) 222-7007

CHAMBERS OF
TOMMY E. MILLER
UNITED STATES MAGISTRATE JUDGE

FACSIMILE NO.
(757) 222-7027

MEMORANDUM

TO: THE HONORABLE W. EUGENE DAVIS
CHAIR, ADVISORY COMMITTEE ON CRIMINAL RULES
PROFESSOR DAVID A. SCHLUETER
REPORTER, ADVISORY COMMITTEE ON CRIMINAL RULES

FROM: TOMMY E. MILLER
HENRY A. MARTIN

RE: PROPOSED AMENDMENTS TO RULES 10 AND 43

DATE: SEPTEMBER 3, 1998

At Judge Davis' request, we have reviewed the proposed language for changes to Rules 10 and 43 as prepared by Professor Schlueter for the April 1998 meeting [Binder Tab III-C-2] and the proposal of Judge Scoville that a defendant should be permitted to waive appearance at an arraignment on a superseding indictment [Binder Tab III-C-9].

In our opinion the language proposed by Professor Schlueter needs only one modification. We suggest the following language at Rule 10(c)(i):

> (i) The defendant has waived such appearance in a written waiver signed by the defendant and counsel which affirms that the defendant has received and understands the indictment or misdemeanor information and states that the defendant's plea is not guilty to the charges, and

We believe that this additional language adequately addresses the following concerns we had with the written waiver of arraignment:

1. The written waiver assures that the requirements of subsections (a) and (b) of Rule 10 are met,

2. This waiver, which applies to all arraignments, addresses Judge Scoville's request that a waiver be permitted for superseding indictments,

3. Such a waiver should be permitted only when the defendant is entering a not guilty plea. We believe that a defendant should not be permitted to waive arraignment if he plans to stand mute [Rule 11(a)(1], or seeks to enter a conditional plea [Rule 11(a)(2)], a nolo contendere plea [Rule 11(b)], or a guilty plea [Rule 11(c)]. Each of these pleas requires the court to take some affirmative action in order to accept the plea. The court's action for these pleas should take place in the presence of the defendant.

4. The waiver may not be used in cases where the defendant is charged with a criminal information in a felony case since the defendant is required by Rule 7(b) to waive indictment in open court.

Attached to this memo is a waiver form now used in the Middle District of Tennessee. Also attached are the materials contained at Tabs III-C-2 and III-C-9 in the April 1998 binder.

(CANNOT BE USED WHEN INFORMATION CHARGES A FELONY)

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. _____
	)	
	)	

WAIVER OF PERSONAL APPEARANCE AT ARRAIGNMENT AND ENTRY OF PLEA OF NOT GUILTY

I am _____, the defendant in this case, and along with my undersigned attorney, I hereby acknowledge the following, and petition the Court to enter a plea of not guilty--

1) I have received a copy of the Indictment or Information in this case. I understand the nature and substance of the charge or charges, the maximum penalties applicable in the event I am convicted, and my constitutional rights. My attorney has advised me of these rights and the penalties provided if I am convicted.

2) I understand I have the right to appear personally with my attorney before a judicial officer for arraignment in open court on the charge, or charges, within ten (10) days of (a) the filing of the Indictment or Information and making public thereof; (b) the date I was arrested or served with a summons; or (c) the date I was ordered held to answer and appeared before a judicial officer of the court in which this charge, or charges, are pending, whichever date last occurs. I further understand that, absent the present waiver, I will be arraigned in open court and must appear as directed.

I have conferred with my attorney and fully understand all of the above. I hereby waive personal appearance at arraignment and the reading of the Indictment or Information; by this petition, I tender a plea of not guilty. I understand that entry by the Court of this plea will conclude the arraignment in this case for all purposes, including the Speedy Trial Act, 18 U.S.C. §3161, and §12(d) of Part II of the Speedy Trial Plan for this District.

Furthermore, I agree that if this petition is posted, the time between the date of the signing of this paper and the date it is stamped as filed by the Clerk of the United States District Court is excludable from the time limits of the Speedy Trial Act. 18 U.S.C. §§3161, et seq.

I respectfully submit this petition to enter a plea of not guilty in my absence.

_____ _____
Date of signatures Defendant

_____
Attorney for Defendant

ORDER

APPROVED by the Court. A plea of "Not Guilty" is entered for Defendant effective _____.

_____ _____
District Judge/Magistrate Judge

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Proposed Amendment to Rules 10 (Arraignment) & 43 (Presence of Defendant).**

DATE: **March 25, 1998**

At its October 1997 meeting, the Committee voted to proceed with consideration of draft amendments to Rules 10 and 43 which would permit a defendant to waive a personal appearance at an arraignment.

Attached are drafts of proposed amendments to the those two rules, along with draft Committee Notes. During the discussion at the October meeting, there was some sense that it would be appropriate to require the waiver of appearance to be in writing, and with the approval of the court. Those qualifying provisons have been included in the draft for purposes of further discussion.

Rule 10. Arraignment

(a) Arraignment, which shall be conducted in open court, ~~and shall~~ consists of:

(i) reading the indictment or information to the defendant or stating to the defendant the substance of the charge; and

(ii) calling on the defendant to plead to the indictment or information ~~thereto~~.

(b) The defendant shall be given a copy of the indictment or information before being called upon to enter a plea ~~plead~~.

(c) A defendant need not be present for the arraignment if :

(i) the defendant has waived such appearance in writing; and

(ii) the court accepts the waiver.

COMMITTEE NOTE

Read together, Rules 10 and 43 require the defendant to be present in court for the arraignment. *See, e.g., Valenzuela-Gonzales v. United States*, 915 F.2d 1276, 1280 (9th Cir. 1990)(Rules 10 and 43 are broader in protection than the Constitution). The amendment to Rule 10, in addition to several stylistic changes, creates an exception to that rule and provides that the court may permit arraignments when the defendant has waived the right to be present in writing and the court consents to that waiver. A conforming amendment has also been made to Rule 43.

In amending the rule, and Rule 43, the Committee was very much aware of the argument that permitting a defendant to be absent from the arraignment could be viewed as an erosion of an important element of the judicial process. First, it may be important for a defendant to see, and experience first-hand the formal impact of the reading of the charge. Second, it may be necessary for the court to personally see and speak with the defendant at the arraignment, especially where there is a real question whether the defendant really understands the gravity of the proceedings. And third, there may be difficulties in providing the defendant with effective and confidential assistance of counsel if counsel, but not the defendant, appears at the arraignment.

The Committee nonetheless believed that in appropriate circumstances the court, and the defendant, should have the option of conducting the arraignment in the absence of the defendant. The question of when it would be appropriate for a defendant to waive his or her appearance is not spelled out in the rule. That is left to the defendant and the court in each case.

A critical element to the amendment is that no matter how convenient or cost effective a defendant's waiver might be, the defendant's right be present in court stands

unless he or she waives that right. As with other rules including an element of waiver, whether a defendant voluntarily waived the right to be present in court during an arraignment will be measured by the same standards. An effective means of meeting that requirement in Rule 10 is to require that any waiver of the right be in writing. And if the trial court has reason to believe that in a particular case the defendant should not be permitted to waive the right, the court may reject the waiver and require that the defendant actually appear in court. That might be particularly appropriate where the court wishes to discuss substantive or procedural matters in conjunction with the arraignment and the court believes that the defendant's presence is important in resolving those matters.

Criminal Rules Committee
Proposed Amendment: Rule 43
March 1998

Rule 43. Presence of the Defendant

* * * * *

(c). PRESENCE NOT REQUIRED. A defendant need not be present:

(1) when represented by counsel and the defendant is an organization, as defined in 18 U.S.C. § 18;

(2) when the offense is punishable by fine or by imprisonment for not more than one year or both, and the court, with the written consent of the defendant, permits arraignment, plea, trial, and imposition of sentence in the defendant's absence;

(3) when the proceeding involves only a conference or hearing upon a question of law; ~~or~~

(4) when the proceeding involves a [reduction or] correction of sentence under Rule [~~35~~ 35(b) or (c) or 18 U.S.C. § 3582(c)]; or

(5) when, as provided in Rule 10, the defendant has waived the right to be present at the arraignment.

COMMITTEE NOTE

The amendment to Rule 43(c) reflects the concurrent change to Rule 10 which permits a defendant to waive his or her presence at the arraignment.

New matter is underlined and matter to be deleted is lined through. Matter in brackets reflects proposed changes currently pending before the Supreme Court

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

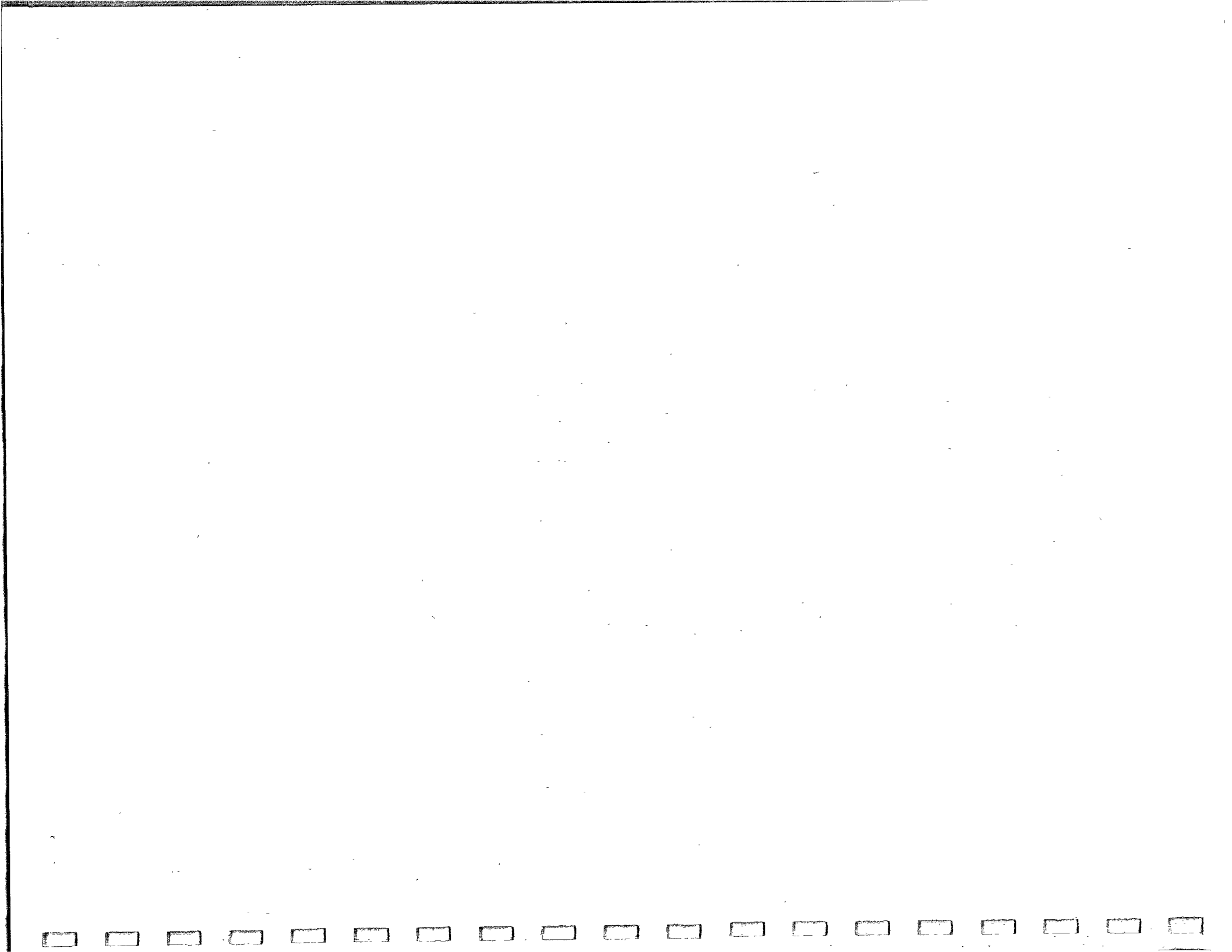
RE: **Proposal to Permit Defendant to Waive Appearance at Arraignment on Superseding Indictments and Pleas**

DATE: **March 28, 1998**

The attached letter from Magistrate Judge Scoville proposes that Rule 43 be amended to permit a defendant to waive his or her appearance at an arraignment on a superseding indictment and also enter a plea of not guilty or stand mute, without appearing in open court.

That portion of the proposal addressing the waiver of appearance at an arraignment (whether superseding or otherwise) is already addressed in proposed amendments to Rules 10 and 43 (*See* Agenda for April 1997 meeting). The question of whether a defendant can waive personal appearance when called upon to enter a plea is not addressed in those amendments.

If the Committee is inclined to consider an amendment permitting a defendant to waive appearance at the entry of a not guilty plea or when refusing to enter a plea (for any case or only in those cases where there has been a superseding indictment), then some additional consideration should be given to whether an amendment should be made to Rule 11 as well.



UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
110 MICHIGAN N. W.
GRAND RAPIDS, MICHIGAN 49503

CHAMBERS OF
JOSEPH G. SCOVILLE
UNITED STATES MAGISTRATE

(616) 456-2309
(FTS) 372-2309

97-CR-I

October 16, 1997

Mr. Peter G. McCabe
Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Washington, D.C. 20544

Re: Proposed Amendment to Federal Rules of Criminal Procedure

Dear Mr. McCabe:

I am writing to you in your capacity as Secretary of the Standing Committee on Rules of Practice and Procedure. I have enclosed what I believe to be a modest proposal for amendment to Criminal Rule 43. The proposed amendment would allow a defendant who has previously appeared in person for arraignment to waive personal arraignment on subsequent, superseding indictments and enter a plea of not guilty in writing.

The genesis of this proposal came a few years ago, when our court was asked to identify methods of saving taxpayer money in criminal cases. Several judges concluded that the practice of rearraigning defendants on superseding indictments, many of which are merely technical in nature, creates unnecessary expense. Personal appearance for arraignment on a superseding indictment often requires transportation costs from far away detention facilities and payment of CJA panel attorneys for what amounts to a formality. In some cases, the probation department has been required to pay for transportation for out-of-state defendants released on bond to return to the district only for this purpose.

The model for the proposal comes from the Michigan Court Rules, which allow a defendant to waive personal presence at any arraignment, as a matter of right. The enclosed proposal does not go that far, as it allows the court to direct a personal appearance in any particular case. I have circulated this proposal to the United States Attorney's Office, the Federal Defenders of both the Eastern and Western Districts of Michigan, and the Committee on the United States Courts of the State Bar of Michigan. I received minor editorial comments, which have been incorporated into the enclosed proposal. None of those attorneys reviewing the proposal expressed any objection to the concepts embodied therein.

If this proposal is in proper form, I would appreciate your bringing it to the attention of the Advisory Committee on the Federal Rules of Criminal Procedure for its consideration.

Thank you for your assistance in this matter.

Very truly yours,

Joseph G. Scoville
U. S. Magistrate Judge

mml

enclosure

Fed. R. Crim. P. 43

* * * *

(c) **Presence Not Required.** A defendant need not be present in the following situations:

* * * *

(5) Unless the court directs otherwise, a defendant who is represented by a lawyer and has personally appeared for arraignment on an indictment may enter a plea of not guilty or stand mute to a superseding indictment by filing, at or before the time set for the arraignment, a written statement signed by the defendant and the defendant's lawyer acknowledging that the defendant has received a copy of the superseding indictment, has read or had it read or explained, understands the substance of the charge and potential penalties, waives arraignment in open court, and pleads not guilty to the charge or stands mute.

Rationale

The filing of superseding indictments has become common. The taxpayers are put to unnecessary expense by the present requirement that a defendant appear personally for arraignment on superseding indictments, which is a formality in the vast majority of cases. The proposed amendment would allow a represented defendant to waive appearance in response to a superseding indictment, unless the court or counsel see a reason for personal appearance. The amendment is patterned after Rule 6.113 of the Michigan Court Rules, which allows the entry of not-guilty pleas in this fashion in all felony cases as a matter of right.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

December 11, 1997

Honorable Joseph G. Scoville
United States District Court
110 Michigan N.W.
Grand Rapids, Michigan 49503

Dear Judge Scoville:

Thank you for your suggestion to amend Criminal Rule 43 to allow a defendant to waive the right to be present at a subsequent, superseding arraignment. The Advisory Committee on Criminal Rules is considering an amendment that would allow a represented defendant to waive the right to be present at any arraignment, including the initial arraignment, which would encompass your suggestion. A copy of your letter has been sent to the chair and reporter of the advisory committee for their review in the event that a more limited alternative is considered along the lines suggested in your proposal.

I have enclosed excerpts of the minutes and the relevant materials considered by the advisory committee at its October 13-14, 1997 meeting. I will advise you of any actions taken by the advisory committee with regard to Criminal Rule 43.

The committee meets next on April 27-28, 1998. We welcome your suggestion and appreciate your interest in the rulemaking process.

Sincerely,

Peter G. McCabe
Secretary

Enclosure

cc: Honorable Alicemarie H. Stotler
Honorable W. Eugene Davis
Professor David A. Schlueter
Professor Daniel R. Coquillette

Item III C 2

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Dave Schlueter, Reporter

RE: Proposed Amendments to Rule 12.2

DATE: September 15, 1998

Overview of Issue

For the past two meetings, the Committee has considered an amendment to Rule 12.2 that would first, require a defendant to give notice of an intent to introduce expert testimony in a capital case sentencing proceeding. Second, the proposed amendment would authorize the trial court to order a defendant, who had provided such notice, to undergo a compelled mental examination. Third, the proposal would place some limits on the ability of the government to see the results of the examination before the penalty phase had begun.

At the last meeting in April 1998, the Committee was generally in agreement with the requirement that the defendant be required to give notice of an intent to introduce expert testimony on his mental condition. It also seemed in agreement that the proposed rule regarding the ability of the court to order a psychiatric examination was sound. In my cover memo (attached), I raised several policy questions for the members' consideration regarding disclosure of the results of the examination. During the discussion on the proposed changes, several members of the Committee raised questions, however, about the core issue of self-incrimination vis a vis any resulting mental examinations and disclosure of the results. I was asked to do some additional research on the issue of self-incrimination.

Application of Fifth Amendment to Court-Ordered Psychiatric Examinations

The law seems clear: A defendant has a Fifth Amendment right against self-incrimination to refuse to answer questions at a court-ordered psychiatric examination if he does not intend to place his mental condition in issue in the case. *Estelle v. Smith*, 451 U.S. 454 (1981). On the other hand, if a defendant introduces evidence of his mental condition, the government is permitted to use the results of that examination in rebuttal. *Buchanan v. Kentucky*, 483 U.S. 402 (1987); *Estelle*, *supra*, at 461-69. Several lower courts have treated the issue as one of implied waiver of the privilege against self-incrimination. *See, e.g., Schneider v. Lynaugh*, 835 F.2d 570, 576 (5th Cir. 1988). That is, a defendant who puts his or her mental condition in issue may not claim the Fifth Amendment to bar the state from responding in kind.

A related question then is whether *notice* of an intent to submit such evidence is sufficient to waive any Fifth Amendment privilege. The Fifth Circuit recently addressed that point in *United States v. Hall*, ____ F.3d ____ (5th Cir. 1998) (attached) where the trial court conditioned the defendant's presentation of psychiatric mitigation testimony at his capital sentencing proceeding on submission to a government psychiatric examination. The Court of Appeals ruled that a defendant could be required to submit to a government-conducted examination as a condition to introducing expert psychiatric testimony—without violating his privilege against self-incrimination. The court noted that the defense was correct in arguing that merely giving notice of an intent to submit psychiatric testimony did not constitute waiver of the privilege. But the court made it clear that after he had introduced such evidence, the trial court would not have violated his privilege by permitting the government to admit psychiatric testimony in rebuttal.

The court also rejected the alternative defense argument that the trial court could not order a government psychiatric examination unless it also ordered that the results be sealed until the penalty phase of the trial. The defense had argued that unless the results were sealed, there would be no guarantee that the government had not made improper use of those results before the defendant actually placed his mental condition in issue. The court noted that some district courts had ordered the results sealed. *See, e.g., United States v. Beckford*, 962 F. Supp. 748, 761 (E.D. Va 1997). Observing that although sealing the results would be beneficial to the defendant and would likely advance judicial economy, the court nonetheless concluded that such steps were not constitutionally mandated. The court added that if the defense believes that the government has used otherwise protected information prematurely, it may raise the issue at trial and put the government to the burden of proving the absence of any taint from such use.

Finally, the court noted that Rule 12.2(c) currently provides safeguards by excluding the results of the mental examination on an insanity defense until the defendant has introduced testimony. That provision, said the court, makes no provision for denying the government access to the sanity report until after the defendant actually places his or her sanity in issue in the case. And that provision, the court continued, has been upheld as comporting with the Fifth Amendment. *See, e.g., United States v. Lewis*, 53 F.3d 29, 35 n. 9 (4th Cir. 1995).

In sum, the caselaw appears to support several general propositions that impact on the proposed changes to Rule 12.2. First, the court may constitutionally condition a defendant's ability to present evidence of his or her mental condition at sentencing on submission to a court-ordered government psychiatric examination without violating the Fifth Amendment. Second, the court is not required to wait until the defendant introduces such evidence before ordering the examination. Third, the government is not permitted to make any use of the results of that examination until the defendant has actually introduced evidence of his or her mental condition. Fourth, according to *Hall*, the court is not

constitutionally required to seal the results of the court-ordered examination until the penalty phase, although it might be desirable to do so.

Proposed Changes to Rule 12.2 Considered at April 1998 Meeting

As originally presented by the Department of Justice in its draft changes to Rule 12.2(c)(2) (regarding capital sentencing), the court would normally not permit disclosure of the results of the compelled mental examination until the defendant had been found guilty of at least one capital crimes and confirmed his intent to present evidence on his mental condition during the sentencing phase. That draft permitted earlier disclosure to a government attorney on certain conditions: the attorney was not prosecuting the case and disclosure would not tend to incriminate the defendant on the issue of guilt. (Attached)

I prepared an alternative draft to the disclosure provision that would have placed additional requirements on early disclosure to the government and also provided for disclosure to the defendant as well. (Attached).

Remaining Policy Decisions Regarding
Disclosure of Results of Examination

Although the caselaw seems to support disclosure of the court-order examination before the defendant is actually convicted of a capital crime, the Committee may wish to address first, the question of whether any specific time limit or condition should be noted in the Rule, as was proposed at the last meeting, and noted *supra.* Second, and related to that question, is the issue of whether the trial court should be required to "seal" the results before that time and whether any provision should be made for earlier release to the government and/or the defendant. Although, the Fifth Circuit has held that sealing the results is not constitutionally required, there may be prudent reasons for doing so.

At this point I have not attempted to redraft the language considered by the Committee at its April meeting.

UNITED STATES of America, Plaintiff-Appellee,
v.
Orlando Cordia HALL, also known as Lan, Defendant-Appellant.

No. 96-10178.

United States Court of Appeals,
Fifth Circuit.

Aug. 21, 1998.

Christopher Allan Curtis, Asst. U.S. Atty., Fort Worth, TX, Delonia Anita Watson, Dallas, TX, for Plaintiff-Appellee.

Marcia Adele Widder, Philadelphia, PA, Michael Logan Ware, Fort Worth, TX, Neal Walker, New Orleans, LA, for Defendant-Appellant.

David W. DeBruin, Thomas J. Perrelli, Elizabeth Appel Blue, Jenner & Block, Washington, DC, for American Orthopsychiatric Ass'n and American Ass'n on Mental Retardation, Amicus Curiae.

Appeal from the United States District Court for the Northern District of Texas.

Before KING, SMITH and STEWART, Circuit Judges.

KING, Circuit Judge:

*1 Defendant-Appellant Orlando Cordia Hall challenges his conviction and sentence for kidnapping resulting in death, conspiring to kidnap, traveling in interstate commerce to promote possession of marijuana with intent to distribute, and using and carrying a firearm during a crime of violence. For the reasons set forth below, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Orlando Cordia Hall, along with Bruce Webster and Marvin Holloway, ran a marijuana trafficking enterprise in Pine Bluff, Arkansas. They purchased marijuana in varying amounts in the Dallas/Fort Worth area with the assistance of Steven Beckley, who lived in Irving, Texas. The marijuana was transported, typically by Beckley, to Arkansas and stored in Holloway's house.

On September 21, 1994, Holloway drove Hall from Pine Bluff to the airport in Little Rock, Arkansas, and Hall took a flight to Dallas, Texas to engage in a drug transaction. Beckley and Hall's brother, Demetrius Hall (D.Hall), picked Hall up at the airport. Later that day, Hall and Beckley met two local drug dealers, Stanfield Vitalis and Neil Rene (N. Rene), at a car wash and gave them $4700 for the purchase of marijuana. Later that day, Beckley and D. Hall returned to the car wash to pick up the marijuana, but Vitalis and N. Rene never appeared. Later, when Hall got in touch with Vitalis and N. Rene by telephone, they claimed that they had been robbed of the $4700. Using the telephone number that Beckley had used to contact Vitalis and N. Rene, Hall procured an address at the Polo Run Apartments in Arlington, Texas from a friend who worked for the telephone company. Hall, D. Hall, and Beckley began conducting surveillance at the address and saw Vitalis and N. Rene exit an apartment and approach the same car that they had driven to the car wash, which they claimed was stolen from them along with Hall's $4700. Hall therefore deduced that Vitalis and N. Rene had lied to him about being robbed.

On September 24, 1994, Hall contacted Holloway and had him drive Webster to the Little Rock Airport. From there, Webster flew to Dallas. That evening, Hall, D. Hall, Beckley, and Webster returned to the Polo Run Apartments in a Cadillac Eldorado owned by Cassandra Ross, Hall's sister. Hall and Webster were each armed with handguns, D. Hall carried a small souvenir baseball bat, and Beckley had duct tape and a jug of gasoline. The four men approached the apartment that they had previously seen Vitalis and N. Rene leave.

Webster and D. Hall went to the front door of the apartment and knocked. The occupant of the apartment, Lisa Rene, N. Rene's sixteen-

year-old sister, refused to let them in and called her sister and 911. After Webster unsuccessfully attempted to kick in the door, he and D. Hall went around to a sliding glass door on the patio and saw that Lisa Rene was on the telephone. D. Hall shattered the glass door with his baseball bat, Webster entered the apartment, tackled Lisa Rene, and dragged her to the car. Hall and Beckley had returned to the car when they heard the sound of breaking glass. Webster forced Lisa Rene onto the floorboard of the car, and the group drove to Ross's apartment in Irving, Texas. Once there, they exited the Cadillac and forced Lisa Rene into the backseat of Beckley's car. Hall got in the backseat as well. Beckley got in the driver's seat, and Webster got in the front passenger seat. The group then drove off again. During the drive, Hall raped Lisa Rene and forced her to perform oral sex on him. The group later returned to Ross's apartment.

*2 From there, Beckley, D. Hall, and Webster drove Lisa Rene to Pine Bluff. Hall remained in Irving and flew back to Arkansas the next day. Once Beckley, D. Hall, and Webster reached Pine Bluff, they obtained money from Holloway to get a motel room. In the motel room, they tied Lisa Rene to a chair and raped her repeatedly.

Hall and Holloway arrived at the motel room on Sunday morning, September 25, 1994. They went into the bathroom with Lisa Rene for approximately fifteen to twenty minutes. When Hall and Holloway came out of the bathroom, Hall told Beckley, "She know too much." Hall, Holloway, and Webster then left the motel.

Later that afternoon, Hall and Webster went to Byrd Lake Park and dug a grave. That same evening, Hall, Webster, and Beckley took Lisa Rene to Byrd Lake Park, but could not find the grave site in the dark. They then returned to the motel room. In the early morning of Monday, September 26, 1994, Beckley and D. Hall moved Lisa Rene to another motel because they believed that the security guard at the first motel was growing suspicious.

Later the same morning, Webster, Hall, and Beckley again drove Lisa Rene to Byrd Lake Park. Lisa Rene's eyes were covered by a mask. Hall and Webster led the way to the grave site, with Beckley guiding Lisa Rene by the shoulders. At the grave site, Hall turned Lisa Rene's back toward the grave and placed a sheet over her head. He then hit her in the head with a shovel. Lisa Rene screamed and started running. Beckley grabbed her, and they both fell down. Beckley then hit Lisa Rene in the head twice with the shovel and handed it to Hall. Webster and Hall then began taking turns hitting her with the shovel. Webster then gagged Lisa Rene and dragged her into the grave. He covered her with gasoline and shoveled dirt back into the grave. Hall, Beckley, and Webster then returned to the motel and picked up D. Hall.

On September 29, 1994, an arrest warrant issued out of the City of Arlington for Hall, D. Hall, and Beckley for Lisa Rene's kidnapping. D. Hall, Beckley, and Webster were subsequently arrested. On September 30, 1994, Hall surrendered to Pine Bluff authorities in the presence of his attorney. On the advice of counsel, he did not give a statement at the time of his arrest, but indicated that he would talk with law enforcement agents after he was transported to Texas. On October 5, 1994, following his transfer to the Arlington County jail, Hall gave a written statement to FBI and Arlington County officials in which he substantially implicated himself in the kidnapping and murder.

On October 26, 1994, the United States District Court for the Northern District of Texas issued a criminal complaint charging Hall, D. Hall, Webster, and Beckley with kidnapping in violation of 18 U.S.C. § 1201(a)(1). On November 4, 1994, a six-count superseding indictment was returned, charging Hall, D. Hall, Webster, Beckley, and Holloway with kidnapping in which a death occurred in violation of 18 U.S.C. § 1201(a)(1) (count 1), conspiracy to commit kidnapping in violation of 18 U.S.C. § 1201(c) (count 2), traveling in interstate commerce with intent to promote the possession of marijuana with

intent to distribute in violation of 18 U.S.C. § 1952 (count 3), using a telephone to promote the unlawful activity of extortion in violation of 18 U.S.C. § 1952 (count 4), traveling in interstate commerce with intent to promote extortion in violation of 18 U.S.C. § 1952 (count 5), and using and carrying a firearm during a crime of violence in violation of 18 U.S.C. § 924(c) (count 6). On February 23, 1995, the government filed its notice of intent to seek the death penalty against Hall pursuant to the Federal Death Penalty Act of 1994 (FDPA), 18 U.S.C. §§ 3591-3598. On April 6, 1995, the district court granted Hall's motion to sever his trial from that of his codefendants, and trial commenced on October 2, 1995.

***3** The jury returned a verdict of guilty as to counts 1, 2, 3, and 6. After the penalty phase of the trial, the jury returned a recommendation that a sentence of death be imposed. The district court sentenced Hall to death on count 1, life imprisonment on count 2, sixty months imprisonment on count 3 to run concurrently with the life sentence imposed on count 2, and sixty months imprisonment on count 6 to run consecutively to the sentences imposed on counts 2 and 3. Hall filed a timely notice of appeal.

II. DISCUSSION

Hall appeals his judgment of conviction and sentence on the following grounds:

1. The district court's failure to allow Hall to allocute before the jury violated his right to due process, violated Rule 32 of the Federal Rules of Civil Procedure, and was an abuse of discretion under the evidentiary standards governing the penalty phase of a capital trial under the FDPA.
2. The district court violated Hall's Fifth and Eighth Amendment rights by conditioning the admission of psychiatric testimony in mitigation of punishment upon Hall's submission to a government psychiatric examination prior to conviction without restricting the government's access to the results of the examination until after the guilt phase of trial.
3. The district court abused its discretion by admitting certain materials and testimony into evidence because they were unfairly prejudicial.
4. The admission of evidence regarding unadjudicated offenses during the penalty phase and a lack of a jury instruction requiring the jury to apply some burden of proof to this evidence rendered the death sentence unreliable.
5. The admission of nontestimonial victim impact statements during the penalty phase violated Hall's Sixth Amendment right of confrontation, due process, and the FDPA's evidentiary standards.
6. The district court's rejection of defense challenges for cause to impaired and biased venirepersons denied Hall due process, an impartial jury, and his statutory right to free exercise of peremptory challenges.
7. The jury's failure to consider the circumstances surrounding Hall's upbringing as a mitigating factor was clearly erroneous and requires vacation of his death sentence.
8. Several of the aggravating factors submitted to the jury were unconstitutionally vague, overbroad, and duplicative.
9. The district court's denial of Hall's motions for continuance denied Hall his rights to due process and effective assistance of counsel under the Fifth and Sixth Amendments.
10. The district court erred in denying Hall's request to poll the jury regarding a news report and debate that aired during penalty-phase deliberations.
11. The district court erred in denying Hall's motion to suppress his oral and written statements as violative of his Fifth and Sixth Amendment rights as well as applicable federal statutes and rules.

We address each of these issues in turn.

A. Allocution

Hall first contends that the district court's denial of his request to make an unsworn statement of remorse to the jury during the penalty phase of his trial constitutes reversible error. [FN1] In this regard, Hall advances a number of arguments. First, he contends that Rule 32(c)(3)(C) of the Federal Rules of Criminal Procedure afforded him a right to allocute before the jury. Second, he

claims that, even if Rule 32(c)(3)(C) does not specifically create a right to allocute before the jury, such a right was recognized at common law, and the FDPA does not clearly abrogate this right. Third, he contends that he possesses a constitutional right to allocute. Fourth, he claims that, even if no constitutional right to allocute exists per se, the district court's refusal to allow him to allocute in this case nonetheless violated his due process-based right to procedural parity because the district court unfairly allowed the government to present victim impact statements that were not subject to cross-examination. Fifth, he argues that the district court's refusal to allow him to make an unsworn statement of remorse before the jury constituted an abuse of discretion under the FDPA's evidentiary standards. We address each of these arguments in turn.

1. Statutory Right of Allocution

*4 Hall contends that Rule 32(c)(3)(C) of the Federal Rules of Criminal Procedure afforded him the right to make an unsworn statement of remorse before the jury. Rule 32(c)(3)(C) provides that, "[b]efore imposing sentence, the court must ... address the defendant personally and determine whether the defendant wishes to make a statement and to present any information in mitigation of the sentence." Fed R.Crim. P. 32(c)(3)(C).

In support of his contention that Rule 32(c)(3)(C) creates a right to make an unsworn statement before the jury in capital cases, Hall relies upon the following language from 18 U.S.C. § 3593(c), which establishes the procedures for sentencing hearings in capital cases:

> Notwithstanding rule 32(c) of the Federal Rules of Criminal Procedure, when a defendant is found guilty or pleads guilty to an offense under section 3591, no presentence report shall be prepared. At the sentencing hearing, information may be presented as to any matter relevant to the sentence....

18 U.S.C. § 3593(c). Hall argues that, because the statute expressly states that the portion of Rule 32 requiring the preparation of a presentence report is inapplicable in capital cases and makes no similar reference to any other portion of Rule 32, the doctrine of expressio unius exclusio alterius indicates that Congress did not intend for the FDPA to displace other provisions of Rule 32, including the right to allocute created by subsection (c)(3)(C). [FN2]

We need not decide whether § 3593 was intended to displace Rule 32(c)(3)(C) because we conclude that, regardless of whether it was required to do so, the district court complied with the plain language of Rule 32(c)(3)(C) by inquiring of Hall whether he wished to make a statement before it announced his sentence. The text of the rule provides no basis for concluding that the defendant has a right to make a statement to the jury prior to the jury's arriving at its sentencing recommendation. Compliance with the strict language of the rule is achieved when, as was the case here, the district court allows the defendant to make a statement to the court after the jury returns its recommendation but before the district court imposes sentence. [FN3]

Hall responds that this interpretation of Rule 32(c)(3)(C) would render allocution an empty gesture because the district court has no discretion to disregard the jury's recommendation. However, other circumstances exist in which allocution is equally devoid of practical impact. This is the case when the statutory mandatory minimum sentence for a particular offense exceeds the maximum sentence under the otherwise applicable U.S. Sentencing Guidelines range. In that circumstance, "the court is required to impose the statutory minimum sentence." Santana v. United States, 98 F.3d 752, 756 (3d Cir.1996); see also U.S. SENTENCING GUIDELINES MANUAL § 5G1.1(b) ("Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutory minimum sentence shall be the guideline sentence."). [FN4]

*5 Furthermore, § 3593(c) counsels against construing Rule 32(c)(3)(C) as establishing an unconditional right for the defendant to make

an unsworn statement of remorse to the jury. Section 3593(c) sets forth with great specificity the type of information that may be submitted to the jury during the penalty phase of a capital trial and the circumstances under which it may be presented. [FN5] In this regard, the statute provides as follows:

> At the sentencing hearing, information may be presented as to any matter relevant to the sentence, including any mitigating or aggravating factor permitted or required to be considered under section 3592. Information presented may include the trial transcript and exhibits if the hearing is held before a jury or judge not present during the trial, or at the trial judge's discretion. The defendant may present any information relevant to a mitigating factor. The government may present any information relevant to an aggravating factor for which notice has been provided.... Information is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury.

18 U.S.C. § 3593(c) (emphasis). Construing Rule 32(c)(3)(C) as granting a defendant the unconditional right to make an unsworn statement of remorse to the jury would contravene § 3593's mandate that the district court exercise discretion in determining whether to exclude any information offered by the parties on the basis that its probative value "is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." Id. Section 3593(c) does not contemplate exempting any type of information offered at a sentencing hearing from the district court's gatekeeping function, and we decline to interpret Rule 32(c)(3)(C) to have this effect when the plain language of the rule does not dictate such an interpretation.

Furthermore, both Hall and the government concede that § 3593 authorized Hall to make a sworn statement of remorse that would have been subject to cross-examination. [FN6] Construing Rule 32(c)(3)(C) as creating a per se right to make an unsworn statement of remorse to the jury that is not subject to crossexamination would in no sense increase the accuracy and reliability of the capital-sentencing process. When the district court receives a statement in allocution, it recognizes the legal effect of the fact that the statements are not sworn and the attendant potential effect of this fact upon the credibility of the defendant's statements; the same cannot be said for a jury. Cf. State v. Williams, 688 So.2d 1277, 1284 (La.Ct.App.1997) ("The right of allocution has normally been reserved to a defendant addressing the sentencing judge."); Commonwealth v. Abu-Jamal, 521 Pa. 188, 555 A.2d 846, 858 (Pa.1989) ("We find no reason in law or logic why the defendant's presentation of evidence in support of his claim that life imprisonment is the appropriate sentence should be shielded from testing for truthfulness and reliability that is accomplished by cross-examination."). We therefore conclude that the district court did not violate Rule 32(c)(3)(C) by denying Hall's request to make an unsworn statement of remorse before the jury.

2. Common-Law Right of Allocution

*6 Hall next contends that, even if Rule 32(c)(3)(C) does not expressly provide him with a per se right to make an unsworn statement of remorse before the jury, he possesses a common-law right to do so. He further argues that we should not construe § 3593 as abrogating this common-law right because "[i]t is a well-established principle of statutory construction that '[t]he common law ... ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose.' " Norfolk Redev. and Housing Auth. v. Chesapeake & Potomac Tel. Co., 464 U.S. 30, 35, 104 S.Ct. 304, 78 L.Ed.2d 29 (1983) (quoting Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603, 623, 3 L.Ed. 453 (1813) (second set of brackets and ellipses in original)). We conclude, however, that no such common-law right exists.

At common law, a felony defendant had a right to have the court formally inquire "

'what he had to say why judgment should not be given against him.' " Paul W. Barrett, Allocution, 9 MO. L.REV. 121 (1944) (quoting Rex & Regina v. Geary, 2 Salk. 630 (K.B.1689-1712)); see also State v. Green, 336 N.C. 142, 443 S.E.2d 14, 42 (N.C.1994). The right of allocution developed in a time in which the common-law judge had no discretion as to the punishment for felonies; as such, the point of the question to the defendant was not to elicit mitigating information. See Barrett, supra, at 120-21. Rather, the question was designed to afford the defendant a formal opportunity to present certain strictly-defined common law grounds requiring the avoidance or delay of sentencing, including a claim that the defendant was not the person convicted, had the benefit of clergy, was insane, or was pregnant. See id.; 1 JOSEPH CHITTY, THE CRIMINAL LAW 698, 761-62 (1841); 3 CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 525, at 82 (2d ed. 1982) ("The common law for many centuries has recognized the right of a defendant to 'allocution,' a formal statement by the defendant of any legal reason why he could not be sentenced.").

Since the mid-nineteenth century, however, modern developments in criminal procedure, including the advent of sentencing discretion, the right of the accused to counsel, and the right of the accused to testify on his own behalf, have led to varied treatment of the right of allocution. See Barrett, supra, at 126-43. Some jurisdictions have concluded that the common-law right of allocution encompasses the right of the defendant to make unsworn statements to the jury that are not subject to cross-examination. See, e.g., Harris v. State, 306 Md. 344, 509 A.2d 120, 127 (Md.1986) ("We conclude that, under the common law applicable to capital sentencing proceedings at the time [the defendant] was sentenced, a defendant who timely asserts his right to allocute [before the jury], and provides an acceptable proffer, must be afforded a fair opportunity to exercise this right."); Homick v. State, 108 Nev. 127, 825 P.2d 600, 604 (Nev.1992) ("We conclude that capital defendants in the State of Nevada enjoy the common law right of allocution [before the jury]."); State v. Zola, 112 N.J. 384, 548 A.2d 1022, 1046 (N.J.1988) (recognizing under the court's supervisory power the right of a capital defendant to make an unsworn plea for mercy to the jury); State v. Lord, 117 Wash.2d 829, 822 P.2d 177, 216 (Wash.1991) (indicating that the defendant had a right to make an unsworn plea for mercy before the jury that was not subject to cross-examination). However, other jurisdictions have held that no such common-law right exists. See, e.g., People v. Robbins, 45 Cal.3d 867, 248 Cal.Rptr. 172, 755 P.2d 355, 369 (Cal.1988) ("Given [that a capital defendant possesses the right to testify and offer other mitigating evidence], we fail to see the need, much less a constitutional requirement, for a corresponding 'right to address the sentencer without being subject to cross-examination' in capital cases."); People v. Kokoraleis, 132 Ill.2d 235, 138 Ill.Dec. 233, 547 N.E.2d 202, 224 (Ill.1989) (declining to exercise its supervisory power to recognize a rule "allowing defendants in capital sentencing hearings ... to make a brief, unsworn plea for leniency without being subject to cross-examination."); State v. Whitfield, 837 S.W.2d 503, 514 (Mo.1992) (en banc) ("Despite defendant's claim to the contrary, the right of allocution in Missouri does not extend to addressing the jury."); State v. Perkins, 345 N.C. 254, 481 S.E.2d 25, 41 (N.C.) ("[W]e have held that a defendant does not have a constitutional, statutory, or common law right to make unsworn statements of fact to the jury at the conclusion of a capital sentencing proceeding."), cert. denied, --- U.S. ----, 118 S.Ct. 111, 139 L.Ed.2d 64 (1997); Duckett v. State, 919 P.2d 7, 22 (Okla.Crim.App.1995) ("[W]e conclude that there is no statutory, common-law or constitutional right of a defendant to make a plea for mercy or otherwise address his sentencing jury, in addition to closing argument by counsel." (footnote omitted)); State v. Stephenson, 878 S.W.2d 530, 551 (Tenn.1994) (holding that no common-law right of allocution exists in Tennessee because the right is nothing more than an empty formality in light of the criminal defendant's right to counsel).

*7 Suffice it to say, Hall stands on shaky

ground when he asserts that a general common-law right exists entitling a capital defendant to address the sentencing jury unsworn and not subject to cross-examination. Moreover, even if such a common-law right existed, its continued recognition in federal capital cases would be inconsistent with the procedural framework for capital sentencing hearings established by the FDPA. As noted earlier, § 3593(c) vests the district court with a gatekeeping role in determining what information--both mitigating and aggravating--reaches the jury. It may exclude information "if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." 18 U.S.C. § 3593(c). The Pennsylvania Supreme Court interpreted that state's capital sentencing scheme, which vests the trial court with similar authority, to abrogate any commmon-law right of the defendant to make unsworn statements to the jury on the following grounds:

> Whatever force the common law of allocution has with respect to other criminal cases, the General Assembly has abrogated that law and replaced it with statutory law devised specifically for first degree murder cases. The legislature has provided that a sentencing hearing is required at which evidence may be presented to the jury, or the judge as the case may be. The court is given discretion to determine what evidence will be received as relevant and admissible on the question of the sentence to be imposed. Following the presentation of evidence, counsel are permitted to argue to the sentencing body for or against the death sentence.
>
> It is apparent from the structure provided that this evidentiary hearing is intended to serve as part of the "truth-determining process" to enable the sentencer to discern and apply the facts bearing on the determination of the appropriate sentence. Implicit in the fact that the statute assigns to the defendant the burden of proving mitigating circumstances by a preponderance of evidence is the understanding that the jury is to asses[s] the evidence for credibility. It must be left open for the Commonwealth to challenge the veracity of facts asserted and the credibility of the person asserting those facts, whether that person is a witness or the defendant. We find no reason in law or logic why the defendant's presentation of evidence in support of his claim that life imprisonment is the appropriate sentence should be shielded from the testing for truthfulness and reliability that is accomplished by cross-examination.

Abu-Jamal, 555 A.2d at 857-58. We find this analysis persuasive in construing the FDPA. We therefore conclude that Hall possessed no federal common-law right to allocute before the jury.

3. Allocution as an Independent Constitutional Right

Hall next asserts that he possesses a constitutional right to allocute before the jury. The Supreme Court has never squarely addressed the issue of whether a defendant who affirmatively requests the opportunity to allocute, either before the court or the jury, is denied due process by the trial court's refusal to grant the request. In Hill v. United States, 368 U.S. 424, 82 S.Ct. 468, 7 L.Ed.2d 417 (1962), the Court held that a district court's failure to expressly ask a defendant represented by counsel whether he wished to make a statement before imposition of sentence was not an error of constitutional dimension and therefore provided no basis for a § 2255 collateral attack upon the defendant's sentence. See id. at 428. The court expressly declined to consider whether the district court's denial of an affirmative request by a defendant to make a statement prior to the imposition of sentence would rise to the level of constitutional error. See id. at 429; see also McGautha v. California, 402 U.S. 183, 219 n. 22, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971) (noting that whether a trial court's denial of a defendant's request to plead for mercy rises to the level of a constitutional violation remains an open question), vacated in part on other grounds, Crampton v. Ohio, 408 U.S. 941, 92 S.Ct. 2873, 33 L.Ed.2d 765 (1972).

*8 We conclude that a criminal defendant in a capital case does not possess a constitutional right to make an unsworn statement of remorse before the jury that is not subject to

cross-examination. In Green v. United States, 365 U.S. 301, 81 S.Ct. 653, 5 L.Ed.2d 670 (1961), Justice Frankfurter observed that the ultimate value of allocution as a procedural right in the context of modern criminal procedure rests in the fact that "[t]he most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." Id. at 304. Neither the government nor Hall contends that Hall would not have been permitted to testify at the sentencing hearing and thereby in his own words introduce "any information relevant to a mitigating factor." 18 U.S.C. § 3593(c). We simply cannot conclude that fundamental fairness required that Hall be allowed to make such a statement without being sworn or subject to cross-examination. [FN7] This conclusion is bolstered by the varied conclusions that the states have reached, discussed supra, as to whether a criminal defendant has a right to make an unsworn statement of remorse or plea for mercy before a sentencing jury. Cf. Medina v. California, 505 U.S. 437, 446, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992) ("Historical practice is probative of whether a procedural rule can be characterized as fundamental.").

4. Denial of Procedural Parity

Hall next contends that, even if the Constitution does not vest criminal defendants with an independent, per se right to make an unsworn statement in allocution before the jury, the district court's denial of his request to make such a statement was nonetheless unconstitutional because the district court allowed the government to introduce similarly nontestimonial victim impact statements. Hall contends that such disparate treatment constitutes an unconstitutional disruption of "the balance of forces between the accused and his accuser." Wardius v. Oregon, 412 U.S. 470, 474, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973). We disagree.

The constitutionally required balance between prosecution and defense is "a balance between the total advantages enjoyed by each side rather than an insistence on symmetry at every stage in the process." Tyson v. Trigg, 50 F.3d 436, 441 (7th Cir.1995). In this case, we conclude that no significant imbalance existed in the total advantages afforded Hall and the government at sentencing. First, contrary to Hall's contention, the district court actually allowed him to present evidence of a type similar to the victim impact statements. Specifically, the district court allowed Hall to introduce hearsay evidence of his own remorse in the form of his sister's testimony of his statements of remorse to her when she visited him in prison. The government was not allowed to cross-examine Hall as to the contents of these statements.

*9 Second, Agnes Rene, Lisa Rene's mother and the author of one of the three victim impact statements introduced at sentencing, testified during the sentencing hearing regarding the impact of the loss of her daughter. Hall declined to cross-examine her. This provides a strong indication that Hall did not consider cross-examination of the makers of the victim impact statements to be vital--or, for that matter, even beneficial--to his defense.

Third, the district court's refusal to allow Hall to make an unsworn statement that was not subject to cross-examination constituted at best a marginal procedural disadvantage. Had Hall taken the stand and offered limited testimony in substance equivalent to his proffered statement in allocution, he would have waived his Fifth Amendment privilege against self-incrimination only as to matters reasonably related to the contents of that statement. See Brown v. United States, 356 U.S. 148, 156, 78 S.Ct. 622, 2 L.Ed.2d 589 (1958) (holding that a criminal defendant "could not take the stand to testify in her own behalf and also claim the right to be free from cross-examination on matters raised by her own testimony on direct examination " (emphasis added)); United States v. Hernandez, 646 F.2d 970, 979 (5th Cir. Unit B June 1981) (noting that, in cross-examining a criminal defendant who chooses to testify, "[t]he government's questions must be reasonably related to the subjects covered by the defendant's direct testimony." (internal quotation marks omitted)).

A great deal of the type of information that the government would have likely sought to admit to impeach Hall's testimony or directly refute his claims of remorse and acceptance of responsibility was admitted as direct evidence of aggravating factors during the sentencing hearing, particularly the nonstatutory factor that "Hall constitutes a future danger to the lives and safety of other persons." Specifically, the government offered evidence of Hall's prior convictions and unadjudicated offenses. Additionally, the government introduced the testimony of Larry Nichols, one of Hall's fellow inmates at the correctional facility where Hall was incarcerated prior to trial. Nichols testified that Hall joked and bragged about repeatedly raping Lisa Rene. He also testified that Hall told him that, given the opportunity, he would kill Steven Beckley because, were it not for Beckley's assistance, the government would have had no case against him. Additionally, Nichols testified that Hall informed him of his plans to attempt to escape from the correctional facility in which they were incarcerated by taking his lawyer hostage using a "shank," a homemade knife. Hall has pointed to no information that would have been rendered relevant by virtue of his offering testimony similar in substance to his proffered statement in allocution which the government did not present as direct support of the aggravating factors the existence of which it sought to prove during the sentencing hearing. Thus, we conclude that the district court's decision to admit victim impact statements offered by the government but to exclude Hall's request to make an unsworn statement in allocution to the jury did not unconstitutionally skew the balance of procedural advantage in the government's favor.

5. Violation of § 3593's Evidentiary Standards

***10** Hall next argues that the district court abused its discretion in declining to allow him to make an unsworn statement of remorse and plea for mercy before the jury. Section 3593(c) provides that information need not be admissible under the Federal Rules of Evidence in order to be admissible at a hearing conducted pursuant to the statute. However, the statute provides that the district court may exclude information "if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." 18 U.S.C. § 3593(c). The district court has "considerable discretion in controlling the presentation of the 'information' to the jury in both content and form." United States v. McVeigh, 944 F.Supp. 1478, 1487 (D.Colo.1996).

Assuming that an unsworn statement such as the one Hall proffered is theoretically admissible during an FDPA sentencing hearing, [FN8] we conclude that the district court did not abuse its discretion in declining to admit it. The district court could properly conclude that the danger that Hall's unsworn, uncross-examinable testimony would mislead the jury outweighed the probative value of the information conveyed in the testimony, particularly given the fact that such information was readily available in a superior form: Hall's sworn testimony, which would have been subject to testing for truthfulness and accuracy through cross-examination by the government.

B. Conditioning the Presentation of Psychiatric Evidence on Submission to a Psychiatric Examination

Hall next contends that the district court erred in conditioning his right to present psychiatric evidence in mitigation of punishment upon his submission to a government psychiatric examination prior to trial. Hall first argues that the district court could not properly compel him to undergo a government psychiatric examination as a condition upon his being allowed to introduce psychiatric evidence at sentencing because doing so unconstitutionally forced him to choose between exercising his Fifth Amendment privilege against self-incrimination and his Eighth Amendment right to present evidence in mitigation of punishment. We disagree.

This court has long recognized that "a defendant who puts his mental state at issue with psychological evidence may not then use

the Fifth Amendment to bar the state from rebutting in kind." Schneider v. Lynaugh, 835 F.2d 570, 575 (5th Cir.1988). This rule rests upon the premise that "[i]t is unfair and improper to allow a defendant to introduce favorable psychological testimony and then prevent the prosecution from resorting to the most effective and in most instances the only means of rebuttal: other psychological testimony." Id. at 576.

Hall correctly notes that he did not waive his Fifth Amendment privilege against self-incrimination merely by giving notice of his intention to submit expert psychiatric testimony at the sentencing hearing. See Brown v. Butler, 876 F.2d 427, 430 (5th Cir.1989) (holding that the state could not introduce expert testimony based upon a previous psychological examination of the defendant where the defendant announced an intention to offer expert psychological evidence but never actually did so). However, had he actually offered such evidence, the district court would not have violated Hall's privilege against self-incrimination by admitting psychiatric testimony subsequently offered by the government. Hall's claim that the district court could not condition his right to introduce expert psychiatric evidence based upon out-of-court examination of Hall upon his submission to a government psychiatric examination therefore lacks merit. In the same sense that Hall could not himself testify at the sentencing hearing regarding his remorse or acceptance of responsibility and then refuse cross-examination on this issue, he could not offer expert psychiatric testimony based upon his own statements to a psychiatrist and then deny the government the opportunity to do so as well in rebuttal. See Estelle v. Smith, 451 U.S. 454, 461-69, 472, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) (holding that the admission of statements made by the defendant during a pretrial psychiatric examination violated his Fifth Amendment privilege against compelled self-incrimination because he was not advised before the examination that he had a right to remain silent and that any statement that he made could be used against him at a capital-sentencing hearing, but noting that "a different situation arises where a defendant intends to introduce psychiatric evidence at the penalty phase"); Vanderbilt v. Collins, 994 F.2d 189, 196 (5th Cir.1993) ("If a defendant requests a [psychiatric] examination on the issue of future dangerousness or presents psychiatric evidence at trial, the defendant may be deemed to have waived the fifth amendment privilege."). [FN9]

*11 Hall, along with the American Orthopsychiatric Association and the American Association on Mental Retardation as amici curiae, argues in the alternative that, in order to adequately safeguard his Fifth Amendment privilege against self-incrimination, the district court could not order a government psychiatric examination unless it sealed the results of the examination until the penalty phase of trial. Otherwise, he argues, he could have no guarantee that the government would not utilize the results of the examination or the fruits thereof as evidence in the guilt phase of his trial. This argument lacks merit.

The Supreme Court has held that, when a defendant claims that the government has sought to introduce the fruits of a coerced confession, the defendant "must go forward with specific evidence demonstrating taint," upon which the government "has the ultimate burden of persuasion to show that its evidence is untainted." Alderman v. United States, 394 U.S. 165, 183, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969); see also Nardone v. United States, 308 U.S. 338, 341, 60 S.Ct. 266, 84 L.Ed. 307 (1939) ("[T]he trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin."); United States v. Cherry, 759 F.2d 1196, 1207 (5th Cir.1985) ("It is firmly established that, once the defendant goes forward with specific evidence demonstrating taint, the government has the final burden of persuasion to show that the evidence is untainted."); 5 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 11.2(b), at 45 (3d ed.1996).

We are convinced that this evidentiary framework provides all of the protection against the introduction of the fruits of the government psychiatric examination prior to Hall's introduction of psychiatric evidence that the Constitution requires. Had Hall undergone the government psychiatric examination and believed that the government was improperly seeking to introduce evidence that it derived from the examination, he could have precluded the introduction of such evidence by offering some evidence of taint. The district court would have been required to exclude the evidence unless the government could carry its burden of persuading the court that the evidence was not tainted.

The only specific safeguard that Hall requested in his motion opposing the government's request for a psychiatric examination and oral argument on this motion was the sealing of the results of the examination until the penalty phase of his trial. Hall has cited several cases in which district courts have imposed such a safeguard. See United States v. Beckford, 962 F.Supp. 748, 761 (E.D.Va.1997); United States v. Haworth, 942 F.Supp. 1406, 1408-09 (D.N.M.1996); United States v. Vest, 905 F.Supp. 651, 654 (W.D.Mo.1995). While we acknowledge that such a rule is doubtless beneficial to defendants and that it likely advances interests of judicial economy by avoiding litigation over whether particular pieces of evidence that the government seeks to admit prior to the defendant's offering psychiatric evidence were derived from the government psychiatric examination, we nonetheless conclude that such a rule is not constitutionally mandated.

***12** Our conclusion in this regard is bolstered by Rule 12.2(c) of the Federal Rules of Criminal Procedure, which provides that, when a defendant intends to rely upon an insanity defense during the guilt phase of his trial, the district court may order a mental examination upon motion by the government. See Fed.R.Crim.P. 12.2(c). In order to safeguard the defendant's privilege against self-incrimination, the rule provides as follows:

> No statement made by the defendant in the course of any examination provided for by this rule, whether the examination be with or without the consent of the defendant, no testimony by the expert based upon such statement, and no other fruits of the statement shall be admitted in evidence against the defendant in any criminal proceeding except on an issue respecting mental condition on which the defendant has introduced testimony.

Id. Noticeably absent from the rule is any requirement that the government be denied access to the results of the examination until after the defendant actually introduces testimony regarding his mental condition. Rather, the rule merely precludes the government from introducing as evidence the results of the examination or their fruits until after the defendant actually places his sanity in issue. Yet the rule has consistently been held to comport with the Fifth Amendment. See, e.g., United States v. Lewis, 53 F.3d 29, 35 n. 9 (4th Cir.1995); United States v. Stockwell, 743 F.2d 123, 127 (2d Cir.1984) ("[W]hile we do not wish to encourage the practice of requiring defendants to submit to a psychiatric examination in the prosecutor's presence (either in person or through the use of a tape recording), such a procedure cannot be said to constitute a per se violation of Rule 12.2(c) and the defendant's Fifth Amendment rights."). Given that the government presents its case-in-chief during the guilt phase prior to the defendant, we perceive no functional distinction between the risk that the government will improperly utilize the fruits of a psychiatric examination undertaken pursuant to Rule 12.2 during its case-in-chief (and thus prior to the defendant's offering psychiatric evidence of insanity) and the risk that the government in this case would improperly utilize the fruits of the court-ordered psychiatric examination prior to Hall's introduction of psychiatric evidence during the penalty phase. [FN10] We therefore reject Hall's contention that the district court violated his Fifth Amendment privilege against self-incrimination by ordering him to undergo a psychiatric examination as a condition upon his offering psychiatric

evidence during the sentencing hearing or by declining to order the results of the examination sealed until the sentencing hearing. [FN11]

C. Admission of Unduly Prejudicial Evidence

Hall next claims that the district court abused its discretion by admitting certain evidence which he claims was irrelevant and highly prejudicial. Specifically, he complains of the district court's admission of (1) graphic photographs of Lisa Rene's body; (2) a videotape depicting a walk through Byrd Lake Park to the grave site, surveillance of the area where Lisa Rene's burned clothing was recovered, and an examination of the grave site during the exhumation of Lisa Rene's body; and (3) testimony by Hall's girlfriend in which she claimed to have been robbed at gunpoint while purchasing drugs for Hall. We review a district court's evidentiary rulings for an abuse of discretion. See United States v. Torres, 114 F.3d 520, 525-26 (5th Cir.), cert. denied, 118 S.Ct. 316 (1997).

1. Photographs

*13 Hall claims that the district court abused its discretion by admitting photographs of Lisa Rene's body in the grave and after its removal during the guilt phase of his trial. Hall first argues that the photographs were rendered legally irrelevant by the fact that he offered to stipulate to the identity of the victim and her cause of death. Additionally, Hall complains that the photographs were particularly gruesome because they depicted Lisa Rene's body in a state of decomposition. He also argues that the photographs were cumulative of detailed testimony of a medical examiner regarding the condition of Lisa Rene's body. As such, he argues that the district court's admission of the photographs violated Rule 403 of the Federal Rules of Evidence because any probative value the photographs might have possessed was "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed.R.Evid. 403.

We note as an initial matter that the photographs were relevant to Lisa Rene's identity and the cause of her death, and Hall's offer to stipulate to these facts did not render them irrelevant. The advisory committee notes to Rule 401 of the Federal Rules of Evidence, which establishes the definition of legal relevance, speak directly to this issue:

> The fact to which the evidence is directed need not be in dispute. While situations will arise which call for the exclusion of evidence offered to prove a point conceded by the opponent, the ruling should be made on the basis of such considerations as waste of time and undue prejudice (see Rule 403), rather than under any general requirement that evidence is admissible only if directed to matters in dispute.

Fed.R.Evid. 401 advisory committee notes. The reason that a criminal defendant cannot typically avoid the introduction of other evidence of a particular element of the offense by stipulation is that the government must be given the opportunity "to present to the jury a picture of the events relied upon. To substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight." Old Chief v. United States, 519 U.S. 172, 117 S.Ct. 644, 653, 136 L.Ed.2d 574 (1997) (internal quotation marks omitted). Our sole inquiry, then, is whether admission of the photographs violated Rule 403. See id. at 650 ("If ... relevant evidence is inadmissible in the presence of other evidence related to it, its exclusion must rest not on the ground that the other evidence has rendered it 'irrelevant,' but on its character as unfairly prejudicial, cumulative or the like, its relevance notwithstanding."). We conclude that admission of the photographs did not violate Rule 403.

In United States v. McRae, 593 F.2d 700 (5th Cir.1979), this court addressed a Rule 403 challenge to the district court's admission in a murder trial of numerous photographs of the victim and the death scene which the district court had described as "gross, distasteful and disturbing." See id. at 707. One of these photographs was "a view of [the victim's] corpse, clothed in her bloody garments, bent

local officers.

Alvarez-Sanchez, 511 U.S. at 359. The record reveals no such improper collaboration in this case. As the district court concluded, "[t]here is little, if any, evidence to suggest that [Hall] was being held by the state solely to permit in-custody interrogation by federal officials without compliance with Rule 5 or § 3501(c)." Indeed, Agent Floyd testified, and the district court found, that, at the time Hall made his custodial statement, Floyd was not even aware of the issuance of a federal warrant or complaint against Hall for flight from prosecution. We see no reason to disturb the district court's factual conclusion that the record in this case reflects the existence of nothing more than "routine cooperation between local and federal authorities," which is "wholly unobjectionable." AlvarezSanchez, 511 U.S. at 360. We therefore reject Hall's contention that § 3501(c) rendered his confession inadmissible as substantive evidence against him.

L. Additional Review Under § 3595(a)

*45 In addition to imposing a duty upon the court of appeals to "address all substantive and procedural issues raised on the appeal of a sentence of death," the FDPA also imposes a duty upon this court to "consider whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor and whether the evidence supports the special finding of a[ ] [statutory] aggravating factor." 18 U.S.C. § 3595(c)(1). We have found nothing in the record indicating that the jury's recommendation of a death sentence was motivated in any degree by passion, prejudice, or any other arbitrary factor. Further, as noted in Part II.H.3, supra, in connection with our harmlesserror analysis of the district court's submission of the nonstatutory aggravating factor of the effect of the offense on Lisa Rene's family, the record contains ample evidence from which the jury could conclude beyond a reasonable doubt that the death occurred during the commission of a kidnapping, the aggravating factor set forth in § 3952(c)(1), and that Hall killed Lisa Rene in an especially heinous, cruel, or depraved manner, the aggravating factor set forth in § 3592(c)(6). [FN20]

III. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's judgment of conviction and sentence.

FN1. Hall's proffered statement in allocution was as follows:
I want to apologize to my family and ask them to forgive me, and I hope somehow they can forgive me. I want to apologize to Lisa Rene's family and ask them to forgive me, even though I know that there is no possible way they can forgive me and I understand that. I want to ask God to forgive me, however, I question in my own mind whether even God can forgive me.

FN2. In order to avoid confusion, it should be noted that the FDPA was enacted in an omnibus crime control act that also included another act which amended Rule 32. See Violent Crime Control and Law Enforcement Act of 1994, Pub.L. No. 103-322, tits. VI, XXIII, secs. 60002(a), 230101(b), 108 Stat. 1796, 1959-68, 2078. The Rule 32 amendment moved allocution from subsection (a) to subsection (c) of Rule 32 and moved the requirement of preparing a presentence report from subsection (c) to subsection (b). It therefore appears that the phrase "[n]otwithstanding rule 32(c) of the Federal Rules of Criminal Procedure" in § 3593(c) refers to subsection (c) of the prior version of Rule 32 and subsection (b) of the current version of the rule.

FN3. While the record does not contain a transcript of the hearing at which the district court imposed sentence, the government represented at oral argument that, at this hearing, the district court asked Hall if he wished to make a statement before the imposition of sentence. In any event, even if this did not occur, Hall does not complain about it on appeal.

FN4. This is true unless the government files a motion authorizing the court "to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." 18 U.S.C. § 3553(e).

FN5. Hall concedes that his "proffered allocution constituted information relevant to the mitigating factors of remorse and acceptance of responsibility."

FN6. As indicated in Part II.A.5, infra, in connection with Hall's argument that the district court abused its discretion in declining to allow him to make an unsworn statement to the jury, we express no opinion as to whether the district court could properly exercise its discretion to allow a defendant to make such a statement.

FN7. Hall directs our attention to United States v. Moree, 928 F.2d 654, 656 (5th Cir.1991), in which we in passing described a criminal defendant's right to allocute under the subsection of Rule 32 that now occupies subsection (c)(3)(C) as "constitutional [in] dimension." Id. at 656. However, as noted earlier, we have not construed Rule 32(c)(3)(C) as affording a defendant a right to make a statement before the jury; rather, the rule merely requires the court to allow the defendant to make a statement at some point before it actually imposes sentence. As such, no conflict exists between Moree 's statement that the right to allocute afforded by Rule 32(c)(3)(C) is of constitutional dimension and our conclusion here that a criminal defendant possesses no constitutional right to make an unsworn statement of remorse before the jury that is not subject to cross-examination.

FN8. It is at least arguable that the district court may have discretion to admit an unsworn statement of remorse by the defendant because the general requirement that witnesses in criminal cases be sworn stems from Rule 603 of the Federal Rules of Evidence. See Fed.R.Evid. 603 ("Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.").

FN9. By incorporating some of the pleadings that he filed at the district court level in his brief, Hall also attempts to reurge his argument asserted in the district court that the district court lacked statutory authority to order him to submit to a psychiatric examination. Because Hall has not adequately briefed this issue, we decline to address it. See Yohey v. Collins, 985 F.2d 222 (5th Cir.1993) (declining to consider arguments in other pleadings that the appellant attempted to incorporate by reference in a brief already in excess of the 50-page limit).

FN10. It is also worth noting that, had the district court granted Hall's request to seal the results of the examination until after the guilt phase, it would not have eliminated the risk that the government would have, either inadvertently or intentionally, introduced the results of the examination or their fruits prior to Hall's waiver of his privilege against self-incrimination by placing his mental state at issue. Section 3593(c) provides that, during the sentencing hearing, "[t]he government shall open the argument." 18 U.S.C. § 3593(c). To the extent that, pursuant to Hall's request, the government would have had access to the results of the psychiatric examination after the guilt phase but prior to the sentencing hearing, a risk would exist that the government would improperly utilize the results or their fruits during its initial presentation of information to the jury on sentencing.

FN11. We express no opinion on whether reversal would have been warranted if Hall had requested lesser safeguards, such as an order that the government utilize neither the results of the psychiatric examination nor their fruits prior to his presentation of psychiatric evidence during the sentencing hearing and the district court had ordered the examination without imposing such safeguards.

FN12. Hall has not specified what quantum of evidence, e.g., substantial evidence, preponderance of the evidence, clear and convincing evidence, beyond a reasonable doubt, he considers appropriate.

FN13. Moreover, it is significant that in Williams the Court addressed a due process challenge under the Fourteenth Amendment. The Court did not hold that the Sixth Amendment right to confrontation applied to the states via the Fourteenth Amendment's due process clause until over fifteen years after Williams was decided. See Pointer v. Texas, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). It is thus quite questionable whether Williams is controlling with respect to the determination of whether the Sixth Amendment right to confrontation extends to capital sentencing hearings.

FN14. In reaching this conclusion, we necessarily reject Hall's contention that his sentence must be vacated on the ground that the district court violated

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Proposed Amendment to Rule 12.2**

DATE: **March 26, 1998**

At its October 1997 meeting, the Committee agreed to consider amendments to Rule 12.2, which would accomplish two results. First, a defendant who intends to introduce expert testimony on the issue of mental condition at a capital sentencing proceeding would be required to give notice of an intent to do so. And second, the rule would make it clear that the trial court would have the authority to order a mental examination of a defendant who had given such notice. I was directed to draft appropriate language to effect those changes.

Subsequently, the Department of Justice submitted suggested language to include in Rule 12.2 (Attached). But the suggested draft also included suggested procedures for releasing the results of the examination to an attorney for the government before a guilty verdict on a capital crime had been returned. Although the Committee did not explicitly address that issue in conjunction with its discussion on Rule 12.2, the Minutes of the October meeting reflect that there was some limited discussion regarding release of the report in conjunction with a possible amendment to Rule 32 and that it was understood that any reports would be sealed. Nonetheless it seems reasonable to consider whether any procedure short of sealing the results of the examination might be appropriate.

The attached draft includes the suggestions forwarded by the Department along with some style and format changes. I have also included some alternative language, which might better address the issue of disclosure of the results of the examination--assuming that the Committee decides to permit some form of early disclosure. The issue of disclosure raises several sub-issues:

First, what dangers, if any, might be presented by releasing the results of the examination before the defendant has actually been convicted for at least one capital crime?

Second, assuming that early disclosure is permitted, what standards should be used, if any, in deciding whether to release the results?

Third, assuming early disclosure is permitted, should both sides be permitted to request such?

Fourth, if the court is to consider the issue of whether the results of the examination will not tend to incriminate the defendant on the question of guilt or innocence, *see* Rule 12.2(c)(i), should the defendant be permitted to contest that averment. If so, wouldn't that require disclosure to the defendant beforehand?

The attached Committee Note is a draft, which assumes that some provision will be made for early disclosure to both the defendant and the government. Depending on the language finally selected by the Committee, that section of the Note will have to be rewritten.

I have also attached copies of the Department's original letter and copies of the pertinent statutes. This matter is on the agenda for the April meeting in Washington.

Rule 12.2. Notice of Insanity Defense or Expert Testimony ~~of~~ on Defendant's Mental Condition

* * * * *

(b) EXPERT TESTIMONY OF DEFENDANT'S MENTAL CONDITION. If a defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing upon (1) the issue of guilt or (2) whether in a capital case, a sentence of capital punishment should be imposed, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(c) MENTAL EXAMINATION OF DEFENDANT.

(1) *Authority to Order Examination; Procedures.* If the defendant provides notice under subdivision (a) ~~In an appropriate case~~ the court ~~may~~ shall, upon motion of the attorney for the government, order the defendant to submit to an examination conducted pursuant to 18 U.S.C. ~~4241 or~~ 4242. If the defendant provides notice under subdivision (b) the court may, upon motion of the attorney for the government, order the defendant to submit to an examination conducted pursuant to procedures as ordered by the court.

(2) *Disclosure of Results of Examination.* The results of the examination conducted solely pursuant to notice under subdivision (b)(2) shall not be disclosed to any attorney for the government or the defendant unless and until the defendant is found guilty of one or more capital crimes and the defendant confirms his or her intent to offer mental condition evidence during sentencing proceedings. The results of such examination may be disclosed earlier to the attorney for the government if the court determines that:

(i) the attorney is not an attorney responsible for conducting the prosecution on the issue of guilt and the attorney requesting the results of the examination will not communicate the results, prior to the verdict, to an attorney who is so responsible, or

(ii) disclosure of the report will not tend to incriminate the defendant on the issue of guilt.

If such disclosure is made to an attorney for the government, disclosure shall also be made at the same time to the defendant.

(3) Disclosure of Statements by the Defendant No statement made by the defendant in the course of any examination provided for by this rule, whether the examination be with or without the consent of the defendant, no testimony by the expert based upon such statement, and no other fruits of the statement shall be admitted in evidence against the defendant in any criminal proceeding except on an issue respecting mental condition on which the defendant has introduced

testimony.

ALTERNATIVE LANGUAGE for Subdivision (c)(2)

(2) *Disclosure of Results of Examination.* The results of the examination conducted solely pursuant to notice under subdivision (b)(2) shall not be disclosed to any attorney for the government or the defendant unless and until the defendant is found guilty of one or more capital crimes and the defendant confirms his or her intent to offer mental condition evidence during sentencing proceedings.

(i) The results of the examination may be disclosed earlier to the attorney for the government, upon good cause shown, and the court determines that the attorney is not the attorney responsible for conducting the prosecution on the issue of guilt and the attorney requesting the results of the examination will not communicate them to that attorney prior to the verdict, or disclosure of the report will not tend to incriminate the defendant on the issue of guilt.

(ii) The results of the examination may be disclosed earlier to the defendant upon good cause shown.

(iii) If early disclosure is made to either an attorney for the government or the defendant, similar disclosure shall be made to the other party.

* * * *

COMMITTEE NOTE

The changes to Rule 12.2 are designed to address three issues. First, the amendment clarifies that Rule 12.2(c) authorizes a trial court to order a mental examination for a defendant who has indicated an intention to raise the defense of insanity. The second amendment relates to a requirement that the defendant provide notice of an intent to present evidence of his or her mental condition during a capital sentencing proceeding. And finally, the amendments address the ability of the trial court to order a mental examination for a defendant who has given notice of an intent to present evidence of his or her mental condition during sentencing and when the results of that examination may be disclosed.

Subdivision (b). Under current subdivision (b), a defendant who intends to offer expert testimony on the issue of his or her mental condition on the question of guilt must provide pretrial notice of that intent. The amendment extends that notice requirement to a defendant who intends to offer expert testimony on his or her mental condition during a capital sentencing proceeding. As several courts have recognized, the better practice is to require pretrial notice of that intent so that any mental examinations can be conducted without unnecessarily delaying capital sentencing proceedings. *See, e.g., United States v. Beckford*, 962 F. Supp. 748, 754-764 (E.D. Va. 1997); *United States v. Haworth*, 942 F. Supp. 1406, 1409 (D.N.M. 1996). The amendment adopts that view.

Subdivision (c). The change to subdivision (c) clarifies the authority of the court to order mental examinations for a defendant. As currently written, the trial court has the authority to order a mental examination of a defendant who has indicated under subdivision (a) that he or she intends to raise the defense of insanity. Indeed, the corresponding statute, 18 U.S.C. § 4242 indicates that the court must order an examination if the defendant has provided notice of an intent to raise that defense and the government moves for the examination. The amendment conforms subdivision (c) to that statute. And any examination conducted on the issue of the insanity defense would thus be conducted in accordance with the procedures set out in the statutory provision.

While the authority of a trial court to order a mental examination on a defendant who has registered an intent to raise the insanity defense seems clear, the authority to order an examination on a defendant who intends only to present expert testimony on his or her mental condition is not so clear. Some courts have concluded that a court may order such an examination. *See, e.g., United States v. Stackpole*, 811 F.2d 689, 697 (1st Cir. 1987); *United States v. Buchbinder*, 796 F.2d 910, 915 (1st Cir. 1986); and *United States v. Halbert*, 712 F.2d 388 (9th Cir. 1983). In *United States v. Davis*, 93 F.3d 1286 (6th Cir. 1996), however, the court in a detailed analysis of the issue concluded that the district court lacked the authority to order a mental examination on a defendant who had provided notice of an intent to offer evidence, inter alia, on a defense of diminished

capacity. The court noted first, that the defendant could not be ordered to undergo commitment and examination under 18 U.S.C. 4242, because that provision relates to situations where the defendant intends to rely on the defense of insanity. The court also rejected the argument that examination could be ordered under Rule 12.2(c) because this was, in the words of the rule "an appropriate case." The court concluded, however, that the trial court had the inherent authority to order such an examination.

The amendment is intended to make it clear that the authority of a court to order a mental examination under Rule 12.2(c) explicitly extends to those cases where the defendant has provided notice, under Rule 12.2(b), of an intent to present expert testimony on his or her mental condition, either on the merits or at sentencing.

The amendment to Rule 12.2(c) is not intended to limit or otherwise change the authority, which a court might have, either by statute or under its inherent authority, to order other mental examinations.

The amendment also addresses the question of what procedures should be used for a court-ordered examination. As currently stated in the Rule, if the examination is being ordered in connection with the defendant's stated intent to present an insanity defense, the procedures are dictated by 18 U.S.C. § 4242. On the other hand, if the examination is being ordered in conjunction with a stated intent to present expert testimony on the defendant's mental condition (not amounting to a defense of insanity) either at the guilt or sentencing phases, no specific statutory counterpart is available. Accordingly, the court is given the discretion to specify the procedures to be used. In doing so, the court may certainly be informed by other provisions, which address hearings on a defendant's mental condition. *See, e.g.*, 18 U.S.C. 4241, et. seq.

The final changes to Rule 12.2 address the question of when the results of an examination ordered under the rule, may, or must, be disclosed. The courts, which have addressed the issue generally, recognize that use of a defendant's statements made during a court-ordered examination may compromise the defendant's right against self-incrimination. *See, e.g., Estelle v. Smith*, 451 U.S. 454 (1981) (defendant's privilege against self-incrimination violated where he was not advised of right to remain silent during court-ordered examination and prosecution introduced statements during capital sentencing hearing). But subsequent cases have indicated that where the defendant has decided to introduce expert testimony on his or her mental condition, the courts have found a waiver of the privilege. That view is reflected in Rule 12.2(c) which indicates that the statements of the defendant may be used against the defendant only after the defendant has introduced testimony on his or her mental condition. What the current rule does not address is the issue of when, and to what extent, the prosecution may see the results of the examination, which may include the defendant's statements, where evidence of the defendant's mental condition is being presented solely at a capital sentencing proceeding.

The proposed change adopts the procedure used by some courts to seal or otherwise insulate the results of the examination until it is clear that the defendant will introduce expert testimony about his or her mental condition at a capital sentencing hearing, i.e., after a verdict of guilty on one or more capital crimes. *See, e.g., United States v. Beckford*, 962 F. Supp. 748 (E.D.Va. 1997). While the Committee did not believe that sealing the results was required, it nonetheless recognized that normally the results should not be used to the prejudice of the defendant on the issue of guilt or innocence. At the same time, the Committee believed that there might be instances where there may be sound reasons for releasing the results before the verdict. Under the amendment, either the government or the defendant may request early release of the results of the examination. Both must show good cause for the early release. But in the case of a government request for such release, the court must also conclude that disclosure of the results will not be used by an attorney handling the merits portion of the trial or after reviewing the results the court concludes that releasing the information to such an attorney will not tend to incriminate the defendant. If the government obtains the results of the examination, then similar disclosure must be made to the defendant.

CHAPTER 313—OFFENDERS WITH MENTAL DISEASE OR DEFECT

§ 4241. Determination of mental competency to stand trial

(a) **Motion to determine competency of defendant.**—At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

(b) **Psychiatric or psychological examination and report.**—Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(c) **Hearing.**—The hearing shall be conducted pursuant to the provisions of section 4247(d).

(d) **Determination and disposition.**—If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility—

(1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed; and

(2) for an additional reasonable period of time until—

(A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the trial to proceed; or

(B) the pending charges against him are disposed of according to law; whichever is earlier.

If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the trial to proceed, the defendant is subject to the provisions of section 4246.

(e) **Discharge.**—When the director of the facility in which a defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the Government. The court shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine the competency of the defendant. If, after the hearing, the court finds by a preponderance of the evidence that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, the court shall order his immediate discharge from the facility in which he is hospitalized and shall set the date for trial. Upon discharge, the defendant is subject to the provisions of chapter 207.

(f) Admissibility of finding of competency.—A finding by the court that the defendant is mentally competent to stand trial shall not prejudice the defendant in raising the issue of his insanity as a defense to the offense charged, and shall not be admissible as evidence in a trial for the offense charged.

(As amended Oct. 12, 1984, Pub.L. 98-473, Title II, § 403(a), 98 Stat. 2057.)

§ 4242. Determination of the existence of insanity at the time of the offense

(a) Motion for pretrial psychiatric or psychological examination.—Upon the filing of a notice, as provided in Rule 12.2 of the Federal Rules of Criminal Procedure, that the defendant intends to rely on the defense of insanity, the court, upon motion of the attorney for the Government, shall order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(b) Special verdict.—If the issue of insanity is raised by notice as provided in Rule 12.2 of the Federal Rules of Criminal Procedure on motion of the defendant or of the attorney for the Government, or on the court's own motion, the jury shall be instructed to find, or, in the event of a nonjury trial, the court shall find the defendant—

(1) guilty;

(2) not guilty; or

(3) not guilty only by reason of insanity.

(As amended Oct. 12, 1984, Pub.L. 98-473, Title II, § 403(a), 98 Stat. 2059.)

§ 4243. Hospitalization of a person found not guilty only by reason of insanity

(a) Determination of present mental condition of acquitted person.—If a person is found not guilty only by reason of insanity at the time of the offense charged, he shall be committed to a suitable facility until such time as he is eligible for release pursuant to subsection (e).

(b) Psychiatric or psychological examination and report.—Prior to the date of the hearing, pursuant to subsection (c), the court shall order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(c) Hearing.—A hearing shall be conducted pursuant to the provisions of section 4247(d) and shall take place not later than forty days following the special verdict.

(d) Burden of proof.—In a hearing pursuant to subsection (c) of this section, a person found not guilty only by reason of insanity of an offense involving bodily injury to, or serious damage to the property of, another person, or involving a substantial risk of such injury or damage, has the burden of proving by clear and convincing evidence that his release would not create a substantial risk of bodily injury to another person or serious damage of property of another due to a present mental disease or defect. With respect to any other offense, the person has the burden of such proof by a preponderance of the evidence.

(e) Determination and disposition.—If, after the hearing, the court fails to find by the standard specified in subsection (d) of this section that the person's release would not create a substantial risk of bodily injury to another person or serious damage of property of another due to a present mental disease or defect, the court shall commit the person to the custody of the Attorney General. The Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment. The Attorney General shall make all reasonable efforts to cause such a State to assume such responsibility. If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall hospitalize the person for treatment in a suitable facility until—

(1) such a State will assume such responsibility; or

(2) the person's mental condition is such that his release, or his conditional release under a prescribed regimen of medical, psychiatric, or psychological care

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART III--PRISONS AND PRISONERS
CHAPTER 313--OFFENDERS WITH MENTAL DISEASE OR DEFECT

§ 4247. General provisions for chapter

(a) Definitions.--As used in this chapter--
(1) "rehabilitation program" includes--
(A) basic educational training that will assist the individual in understanding the society to which he will return and that will assist him in understanding the magnitude of his offense and its impact on society;
(B) vocational training that will assist the individual in contributing to, and in participating in, the society to which he will return;
TEXT (a) (1) (C)
(C) drug, alcohol, and other treatment programs that will assist the individual in overcoming his psychological or physical dependence; and
(D) organized physical sports and recreation programs; and
(2) "suitable facility" means a facility that is suitable to provide care or treatment given the nature of the offense and the characteristics of the defendant.
(b) Psychiatric or psychological examination.--A psychiatric or psychological examination ordered pursuant to this chapter shall be conducted by a licensed or certified psychiatrist or psychologist, or, if the court finds it appropriate, by more than one such examiner. Each examiner shall be designated by the court, except that if the examination is ordered under section 4245 or 4246, upon the request of the defendant an additional examiner may be selected by the defendant. For the purposes of an examination pursuant to an order under section 4241, 4244, or 4245, the court may commit the person to be examined for a reasonable period, but not to exceed thirty days, and under section 4242, 4243, or 4246, for a reasonable period, but not to exceed forty- five days, to the custody of the Attorney General for placement in a suitable facility. Unless impracticable, the psychiatric or psychological examination shall be conducted in the suitable facility closest to the court. The director of the facility may apply for a reasonable extension, but not to exceed fifteen days under section 4241, 4244, or 4245, and not to exceed thirty days under section 4242, 4243, or 4246, upon a showing of good cause that the additional time is necessary to observe and evaluate the defendant.
(c) Psychiatric or psychological reports.--A psychiatric or psychological report ordered pursuant to this chapter shall be prepared by the examiner

designated to conduct the psychiatric or psychological examination, shall be filed with the court with copies provided to the counsel for the person examin and to the attorney for the Government, and shall include--

(1) the person's history and present symptoms;

(2) a description of the psychiatric, psychological, and medical tests that were employed and their results;

(3) the examiner's findings; and

(4) the examiner's opinions as to diagnosis, prognosis, and--

(A) if the examination is ordered under section 4241, whether the person is suffering from a mental disease or defect rendering him mentally incompetent tc the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense;

(B) if the examination is ordered under section 4242, whether the person was insane at the time of the offense charged;

(C) if the examination is ordered under section 4243 or 4246, whether the person is suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another;

(D) if the examination is ordered under section 4244 or 4245, whether the person is suffering from a mental disease or defect as a result of which he is in need of custody for care or treatment in a suitable facility; or

(E) if the examination is ordered as a part of a presentence investigation, any recommendation the examiner may have as to how the mental condition of the defendant should affect the sentence.

(d) Hearing.--At a hearing ordered pursuant to this chapter the person whose mental condition is the subject of the hearing shall be represented by counsel and, if he is financially unable to obtain adequate representation, counsel shall be appointed for him pursuant to section 3006A. The person shall be afforded an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing.

(e) Periodic report and information requirements.--(1) The director of the facility in which a person is hospitalized pursuant to--

(A) section 4241 shall prepare semiannual reports; or

(B) section 4243, 4244, 4245, or 4246 shall prepare annual reports concerning the mental condition of the person and containing recommendations concerning the need for his continued hospitalization. The reports shall be submitted to the court that ordered the person's commitment to the facility and copies of the reports shall be submitted to such other persons as the court may direct. A copy of each such report concerning a person hospitalized after the beginning of a prosecution of that person for violation of section 871, 879, or 1751 of this title shall be submitted to the Director of the United States Secret Service. Except with the prior approval of the court, the Secret Service shall not use or disclose the information in these copies for any purpose other than carrying out protective duties under section 3056(a) of this title.

(2) The director of the facility in which a person is hospitalized pursuant to section 4241, 4243, 4244, 4245, or 4246 shall inform such person of any rehabilitation programs that are available for persons hospitalized in that facility.

(f) Videotape record.--Upon written request of defense counsel, the court may order a videotape record made of the defendant's testimony or interview upon which the periodic report is based pursuant to subsection (e). Such videotape record shall be submitted to the court along with the periodic report.

(g) Habeas corpus unimpaired.--Nothing contained in section 4243 or 4246 precludes a person who is committed under either of such sections from establishing by writ of habeas corpus the illegality of his detention.

(h) Discharge.--Regardless of whether the director of the facility in which a person is hospitalized has filed a certificate pursuant to the provisions of subsection (e) of section 4241, 4244, 4245, or 4246, or subsection (f) of section 4243, counsel for the person or his legal guardian may, at any time during such person's hospitalization, file with the court that ordered the commitment a motion for a hearing to determine whether the person should be discharged from such facility, but no such motion may be filed within one hundred and eighty days of a court determination that the person should continu to be hospitalized. A copy of the motion shall be sent to the director of the facility in which the person is hospitalized and to the attorney for the Government.

(i) Authority and responsibility of the Attorney General.--The Attorney General--

(A) may contract with a State, a political subdivision, a locality, or a private agency for the confinement, hospitalization, care, or treatment of, or the provision of services to, a person committed to his custody pursuant to thi chapter;

(B) may apply for the civil commitment, pursuant to State law, of a person committed to his custody pursuant to section 4243 or 4246;

(C) shall, before placing a person in a facility pursuant to the provisions of section 4241, 4243, 4244, 4245, or 4246, consider the suitability of the facility's rehabilitation programs in meeting the needs of the person; and

(D) shall consult with the Secretary of the Department of Health and Human Services in the general implementation of the provisions of this chapter and in the establishment of standards for facilities used in the implementation of this chapter.

(j) This chapter does not apply to a prosecution under an Act of Congress applicable exclusively to the District of Columbia or the Uniform Code of Military Justice.

(B) by adding at the end the following new subsection:
"(h) DEFINITION.--As used in this chapter the term "State" includes the District of Columbia.".

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(2) Section 4247(a) is amended--
(A) in paragraph (1)(D) by striking "and" after the semicolon;
(B) in paragraph (2) by striking the period and inserting "; and"; and
(C) by adding at the end the following new paragraph:
"(3) 'State' includes the District of Columbia.".
(3) Section 4247(j) of title 18, United States Code, is amended by striking "This chapter does" and inserting "Sections 4241, 4242, 4243, and 4244 do".

SEC. 11205. LIABILITY FOR AND LITIGATION AUTHORITY OF CORRECTIONS TRUSTEE.

(a) LIABILITY.--The District of Columbia shall defend any civil action or proceeding brought in any

U. S. Department of Justice

Criminal Division

Washington, D.C. 20530

December 8, 1997

Professor David A. Schlueter
St. Mary's University School of Law
One Camino Santa Maria
San Antonio, Texas 78228-8602

Dear Dave:

As you may recall, at the last meeting of the Advisory Committee on Criminal Rules, the Committee voted to approve in concept two amendments suggested by the Department of Justice. One was to clarify that Rule 12.2(c) permits the court to order a mental examination of a defendant who gives notice under Rule 12.2(b) of an intent to offer expert testimony on the defendant's mental condition bearing on the issue of guilt. The other was to require reasonable notice to the government when the defendant in a capital case intends to offer expert testimony on mental condition relevant to the issue of capital punishment and to allow the court to require the defendant to submit to a mental examination when such notice is given. The Committee deferred until its April meeting the consideration of amendatory language for these proposals.

We offer the following revisions for your consideration (proposed new matter underscored):

"(b) Expert Testimony of Defendant's Mental Condition. If a defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental condition bearing upon <u>(1)</u> the issue of guilt <u>or (2) whether, in a capital case, a sentence of capital punishment should be imposed</u>, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

"(c) Mental Examination of Defendant. In an appropriate case <u>pursuant to statutory authority or in which notice by the defendant has been given under subdivision (a) or (b),</u> the court may, upon motion of the attorney for the government, order the defendant to submit to an examination. <u>The examination shall be</u>

conducted pursuant to 18 U.S.C. 4241 et seq. or, in a case involving notice under subdivision (b), as otherwise ordered by the court. The results of an examination conducted solely pursuant to notice under subdivision (b)(2) shall not be disclosed to any attorney for the government unless and until the defendant is found guilty of one or more capital crimes and confirms his or her intent to offer mental condition evidence in mitigation at the sentencing phase, except that such results may be earlier disclosed to an attorney for the government if the court determines (1) such attorney is not, and will not communicate the results to, an attorney responsible for conducting the prosecution on the issue of guilt, or (2) such disclosure will not tend to incriminate the defendant on the issue of guilt. No statement made by the defendant in the course of any examination provided for by this rule, whether the examination be with or without the consent of the defendant, no testimony by the expert based upon such statement, and no other fruits of the statement shall be admitted in evidence against the defendant in any criminal proceeding except on an issue respecting mental condition on which the defendant has introduced testimony."

As to the first of our proposed amendments, it is effectuated by the explicit incorporation, in Rule 12.2(c), of cases in which notice is given under subdivision (b)(which relates to mental condition bearing upon guilt). As to the implementation of our second amendment, the language we propose is derived generally from the thoughtful opinions and orders in United States v. Beckford, 962 F. Supp. 748, 754-764 (E.D. Va. 1997), and United States v. Haworth, 942 F. Supp. 1406, 1409 (D.N.M. 1996). As the courts there determined, it is normally necessary to order that the defendant give notice pretrial of an intent to rely on expert mental condition testimony at the penalty phase in a capital case, and that any examinations take place pretrial as well, since if notice and examination were deferred until after the determination of guilt, a lengthy and undesirable continuance would be required. The defendant's rights were protected, however, in Beckford by the requirement that the results of a pretrial mental examination of the defendant by an independent expert be placed under seal and not divulged to the government until and unless the defendant was found guilty of a capital crime and reaffirmed his or her intent to offer mental evidence in mitigation at the penalty phase.

Under our proposal, the court could opt for the method used in Beckford -- i.e., sealing of the results -- or for a different solution that equally safeguarded the defendant's rights: to allow the results to be disclosed immediately to an attorney for the government, provided that attorney was not involved in conducting the prosecution on the guilt phase and was instructed not to reveal any of the information in the report to the members of the prosecution team until after verdict of guilty and a reaffirmation by the defendant of an intent to use mental evidence during the penalty phase (i.e., creating a "firewall").

Finally, the court could make an earlier disclosure of the results, even to a member of the prosecution team, if it determined that the results would not tend to incriminate the defendant on the issue of guilt. Earlier disclosure of the results, in appropriate situations, is beneficial to the efficient administration of justice and may be beneficial to the government and the defendant as well. If the results cast doubt on whether the death penalty is appropriate, early disclosure may afford the government a better opportunity, without seeking a continuance, to consider whether or not its insistence on the death penalty should be abandoned. And if the results are otherwise, early disclosure will better enable the government, without seeking a continuance, to prepare to meet the defendant's mental evidence in mitigation.

Your consideration of the above is appreciated. Please contact us if you have any suggestions about how the language can be improved, since by no means are we wedded to a particular formulation. We hope you had a good holiday and look forward to seeing you here in Washington in the spring.

Sincerely,

Mary Frances Harkenrider

Roger A. Pauley

Mary Frances Harkenrider
Roger A. Pauley

U. S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

JUL 15 1997

The Honorable D. Lowell Jensen
Judge of the United States District Court
Northern District of California
1301 Clay Street, 4th Floor
Oakland, CA 94612

Dear Judge Jensen:

I am writing to request that the Advisory Committee on Criminal Rules consider amending the Rules relating to mental examinations of defendants in two respects: (1) to clarify that Rule 12.2(c) permits a court to order, on motion of the government, a mental examination of a defendant who gives notice of an intent under Rule 12.2(b) to introduce expert testimony in support of a defense of mental condition bearing on the issue of guilt; and (2) to extend the Rules to permit a court to order a government-requested mental examination of a defendant when it appears that the defendant will offer expert testimony as to mental condition at sentencing.

On the first issue, the lower courts are now in conflict. Until recently, the courts had construed Rule 12.2(c) as including not only situations in which a defendant has given notice under Rule 12.2(a) of an intent to rely on expert evidence to prove a defense of insanity, but also those in which notice was given under Rule 12.2(b). However, the law is currently in some disarray as a result of United States v. Davis, 93 F.3d 1286 (6th Cir. 1996). There the court held that, because Rule 12.2(c) only authorizes the court to order a mental examination "pursuant to 18 U.S.C. 4241 or 4242," which relates to competency and sanity examinations, and not under 18 U.S.C. 4247, the general provision regarding psychiatric and psychological examinations, the Rule does not permit a court to order a mental examination in the situation addressed by Rule 12.2(b). The court indicated in dicta, however, that a trial court nevertheless had inherent authority to order a noncustodial examination in proper circumstances, which it declined to define. See also, following Davis, United States v. Akers, 945 F. Supp. 1442 (D. Colo. 1996).

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We believe it is patently unfair, and contrary to the truth-seeking function of a criminal trial, to permit only the defendant to be able to undergo a mental examination by an expert of his or her choice and to offer such evidence on the issue of guilt, without affording the government the opportunity for an independent (and if necessary custodial) examination of the defendant by its own expert. Such a result is contrary to Section 4.05(1) of the Model Penal Code, on which the drafters of Rule 12.2(c) expressly relied in the Advisory Committee Note.

The court in Davis was troubled by what it regarded as a serious constitutional question involving self-incrimination whether a defendant could be made to undergo a government-requested mental examination in light of Estelle v. Smith, 451 U.S. 454 (1981), where the court held that the government's use at the capital sentencing phase of a doctor's testimony arising from a court-ordered competency examination violated the defendant's Fifth Amendment privilege because he was not advised of his right to remain silent and that his statements could be used against him at sentencing. But as the Advisory Committee Note to Rule 12.2(c) observes, Estelle itself intimates that a defendant can be required to submit to a mental examination when his silence may deprive the government of the only effective means it has of controverting his proof on an issue that the defendant himself interjects. See 451 U.S. at 465. Moreover, the Estelle opinion emphasized that the defendant in that case "introduced no psychiatric evidence, nor had he indicated that he might do so." 451 U.S. at 466.

Subsequent decisions, both of the Supreme Court and of the courts of appeals, have uniformly construed Estelle narrowly and have found a waiver of Fifth Amendment self-incrimination rights when the defendant has opted to introduce expert testimony at trial as to mental condition. E.g., Powell v. Texas, 492 U.S. 680, 683-4 (1989); Buchanan v. Kentucky, 483 U.S. 402, 421-4 (1987); Presnell v. Zant, 959 F.2d 1524, 1533 (11th Cir. 1992); Williams v. Lynaugh, 809 F.2d 1063, 1068 (5th Cir.), cert. denied, 481 U.S. 1008 (1987); Vardas v. Estelle, 715 F.2d 206, 209 (5th Cir. 1983), cert. denied, 465 U.S. 1104 (1984); United States v. Madrid, 673 F.2d 1114, 1119-21 (10th Cir. 1982). See also United States v. Vest, 905 F. Supp. 651, 653 (W.D. Mo. 1995)(finding waiver of Estelle at the capital penalty phase when a "defendant elects, with the advice of counsel, to put his mental status into issue"); United States v. Haworth, 942 F. Supp. 1406 (D.N.M. 1996)(same).

Rule 12.2(c), of course, only allows the introduction and use against the defendant of any statements made by the defendant during a mental examination when the defendant has introduced testimony on an issue respecting mental condition. The Rule thus embodies the triggering or waiver principle first hinted at in Estelle v. Smith and relied on in subsequent similar situations

by the cases cited above. In sum, we do not share the Davis court's belief that the constitutional issue is a serious or difficult one, and we urge that the Rule be amended to clarify the power of a trial court to do justice "in an appropriate case" by granting the government's request for an independent, and if necessary custodial, mental examination of the defendant, when the defendant gives notice of an intent to rely on expert testimony of his or her mental condition on the issue of guilt.

One relatively simple way to accomplish this, suggested by the Davis opinion itself, would be to amend the first sentence of Rule 12.2(c) to reference not only 18 U.S.C. 4241 and 4242 but also 18 U.S.C. 4247. The pertinent sentence would then read: "In an appropriate case the court may, upon motion of the attorney for the government, order the defendant to submit to an examination pursuant to 18 U.S.C. 4241, 4242, or 4247."

A second way that we think the Rules should be amended to permit a court-ordered mental examination of a defendant involves sentencing proceedings. The Rules nowhere authorize a court-ordered mental examination of the defendant relating to sentencing. This is a gap that should be remedied.

For example, defendants in capital proceedings, in a significant percentage of federal cases, have sought mental examinations with a view toward offering expert evidence relating to mental disease or condition in mitigation at the sentencing phase. See, e.g., United States v. Vest, supra; United States v. Haworth, supra; see also, setting forth as mitigating factors, 18 U.S.C. 3592(a)(1)(impaired capacity), (a)(6)(severe mental or emotional disturbance). Likewise in noncapital sentencing proceedings, to which the sentencing guidelines apply, defendants may sometimes wish to offer expert evidence stemming from mental examinations in an effort to persuade the court to depart downward in unusual cases. See Guideline 5H1.3 (mental condition not "ordinarily" relevant); but compare Guideline 5K2.13 (diminished capacity relevant in some cases). In both instances, the government should be able to obtain a court-ordered mental examination by another expert, for the same kind of fairness reasons as undergird Rule 12.2(c).

Leaving aside the question whether defendants should be required, as in Rule 12.2(a) and (b), to give some form of timely notice of an intention to offer such expert testimony (both Vest and Haworth granted government motions to so require, apparently in the exercise of inherent authority),[1] if it appears that they

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[1] In order to clarify the law and prevent future litigation, we believe the Rules should also be amended to require adequate notice of an intention to offer expert testimony at the sentencing phase.

intend to do so, the trial judge should be able to order that the defendant undergo a mental examination by another expert. See Vest, supra, 905 F. Supp. at 653: "If a defendant elects to present mitigation testimony addressing his mental status, then ... [u]nless the government is allowed to conduct its own mental health examination, it may be deprived 'of the only effective means it has of controverting ... proof on an issue that [defendant has chosen to] interject into the case.'", quoting from Estelle. In sum, in order to promote fairness and avoid future litigation, the Rules should be amended to permit court-ordered mental examinations of defendants when appropriate in sentencing proceedings, both capital and noncapital.

Your and the Committee's consideration of these matters is appreciated.

Sincerely,

(signed) John C. Keeney

John C. Keeney
Acting Assistant Attorney General

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Proposed Amendment to Rule 26; Taking of Testimony from Remote Location**

DATE: **September 15, 1998**

In 1997, Judge Stotler suggested to the Criminal Rules Committee that it consider an amendment to Rule 26 that would mirror an amendment to Civil Rule 43. Amended Rule 43 permits reception of testimony transmitted from a remote location. A subcommittee (Judge Carnes, Chair, Mr. Josefsberg, and Mr. Pauley) reported to the Committee in October 1997; the Committee approved the concept of an amendment to Rule 26 and asked me to draft appropriate language.

At the Committee's last meeting, April 1998, I presented a draft amendment to Rule 26 (attached). The draft contained alternative language that would focus on the question of whether the Committee believed that some preference should or should not be stated for deposition testimony. During the discussion, members of the Committee raised questions about whether the court could only permit such transmission under, in the words of the draft, "compelling circumstances,' and what that term meant. Following additional discussion which raised the issue of right to confrontation, I was asked to so some additional research on the question.

It seems clear now that a court may permit reception of testimony in a criminal case by means of closed circuit television without per se violating the defendant's confrontation rights. In *Maryland v. Craig*, 110 S.Ct. 3157 (1990) (attached), the Supreme Court held that a state statute which permitted a judge to receive a child abuse victim's testimony by one-way closed circuit television did not violate the defendant's constitutional right to confront the witness. Noting that the Constitution does not guarantee a defendant the absolute right to face-to-face confrontation, the Court applied a sort of balancing test: On the one hand the government's compelling interest in protecting the well-being of a child victim and on the other hand the defendant's right to face his accuser in court. The Court also noted that the procedure used in the case preserved other aspects of the right to confrontation, e.g., cross-examination. To that extent, the procedure was just as protective, if not more so, than the rule against hearsay. The Court indicated that such transmission may be used only where there is a "case-specific finding of necessity." 110 S.Ct. at 3170. But the Court declined to "establish, as a matter of federal constitutional law, any such categorical evidentiary prerequisites for use of the one-way television procedure." *Id* at 3171.

Attached are two recent cases which seem to address directly the issue before the Committee. In *United States v. Gigante*, 971 F.Supp. 755 (E.D.N.Y. 1997), Judge Weinstein held that permitting the prosecution to present testimony of one its witnesses through closed-circuit television did not violate the defendant's right to confrontation. The opinion includes a copy of his order. In *United States v. Nippon Paper Industries Co.*, ___ F.Supp.2d ____ (D.C. Mass 1998), Judge Gertner permitted the government to present a tape of testimony given by a witness located in Japan. The defendant had consented to the procedure because he preferred that over presentation of the witness' videotaped deposition. That decision includes a good comparison of using videotaped depositions and televised testimony (either live or taped).

Both decisions address the question of whether confrontation rights are implicated and the need for maintaining some control over the potential for "virtual" testimony from outside the protections of the courtroom. Interestingly, the decision in *Gigante* cites the changes to Civil Rule 43.

Several points emerge from these cases. First, although I have not located any other cases directly on point, these two seem to be on solid constitutional ground, as noted by the cases cited in each of the decisions.

Second, the cases seem to express no preference for deposition testimony over live, remote, testimony. In fact in *Gigante*, the court concluded that: "Receiving contemporaneous testimony via closed circuit television affords greater protection of [this defendant's confrontation rights than would a deposition." 971 F.Supp. at 759.

Third, the courts were concerned about imposing safeguards for insuring the reliability of the transmission and guarding against the possibility of third persons (out of the view of the judge and jury) affecting the witness' testimony. For example, in *Gigante*, the judge appointed the court's clerk as a special master to monitor the procedure from the undisclosed location.

I have taken the liberty of drafting yet another version of the proposed amendment to Rule 26. This draft, which roughly follows the alternate language suggested in my March 1998 memo (attached), takes into account several style changes suggested at the last meeting. It expresses no preference for deposition testimony but limits use of transmitted testimony to those cases where taking the testimony is required by "compelling circumstances." Those words, which appear in amended Civil Rule 43, generally track the view of the Supreme Court in *Craig* and are intended to provide a check on routinely using the remote transmission as a means merely to accommodate a witness or a party. The Advisory Committee Note to Rule 43 (included in the *Gigante* decision at page 757) gives an example of what those circumstances might be.

Please note that the draft does not distinguish between one-way and two-way transmission. If one-way transmission may be considered constitutional, then two-way would arguably provide greater protection for the criminal defendant by more closely approximating the preference for face-to-face confrontation note in *Craig*. Also, please note that the draft does not explicitly mention the possibility that a defendant waiving the right to in-court testimony. As noted in *Gigante*, a defendant might actually prefer contemporaneous remote transmission of testimony, and waive whatever confrontation rights he might otherwise have.

At this point, I have not suggested any additional changes in the Committee Note. Depending on the Committee's action on the proposed changes, I will make any necessary changes in the Committee Note for consideration at the Spring 1999 meeting.

Rule 26. Taking of Testimony

(a) IN GENERAL. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court.

(b) TESTIMONY TRANSMITTED FROM DIFFERENT LOCATION. The court may authorize the video presentation of testimony in open court from a different location if:

(i) the requesting party establishes compelling circumstances for such transmission; and

(ii) appropriate safeguards are established for presenting that testimony.

charges against Marianna was a response to defense counsel's argument that her signature[s] on certain other documents were nothing more than a "quick scrawl," essentially implying that she did not understand what she was signing. The Court doubts that a signature comparison using exhibits inadmissible against Marianna was of any consequence where there were other documents bearing her signature which were also readily accessible. In the Court's view, such a statement, made in a rebuttal summation, does not rise to such a level as to warrant a reversal of her convictions.

[12] Marianna also assails the Government's summation by contending that the prosecution "argued an improper theory of ... involvement in the alleged conspiracy." Marianna Somerstein Mem. of Law at 21. In summation, the Government asserted that by ordering fewer union waiters she deprived the Funds of contributions that would have been owed had additional union employees been hired. According to the defendant, such a scheme unlawfully widened the scope of the indictment because it depicted an effort to defraud the union, rather than the Funds. While ordering less union waitstaff might lessen contributions, it would constitute neither mail fraud nor the filing of false statements.

Although the Court appreciates the facial appeal of this argument, it does not constitute a ground to set aside the verdict. Ordering fewer union waiters would not operate directly to defraud the HEREIU Benefit Funds. However, this argument by the prosecutor does not constitute an improper enlargement of the indictment or an improper theory of involvement in the alleged conspiracy.

Finally, the Somersteins also move in the alternative for a new trial. Such a motion is guided by a lower standard, which permits the Court to exercise its discretion "in the interests of justice" when reviewing the adequacy of the evidence. *See Tibbs*, 457 U.S. at 38, 102 S.Ct. at 2216. Nevertheless, the Court declines to order a new trial. Based on the evidence adduced at trial, some of which has been set forth above in detail by the Court, in the Court's view, a reasonable jury could have concluded that the Government proved its case as to all counts against both defendants, beyond a reasonable doubt. As a result, an exercise of discretion to overrule the jury's verdict is unwarranted. Accordingly, the defendants' motion for a new trial pursuant to Fed.R.Crim.P. 33 is denied.

III. *Conclusion*

Having reviewed the parties' submissions and heard oral argument, and for the reasons set forth above, it is hereby

ORDERED, that the motions of the defendants Stuart Somerstein and Marianna Somerstein for a judgment of acquittal pursuant to Fed.R.Crim.P. 29, or, in the alternative, for a new trial, pursuant to Fed.R.Crim.P. 33, are denied.

SO ORDERED.

UNITED STATES of America

v.

Vincent GIGANTE, Defendant.

No. CR 93-368(JBW).

United States District Court,
E.D. New York.

July 21, 1997.

In prosecution for violation of Racketeer Influenced and Corrupt Organizations Act (RICO), federal government requested to present at trial testimony of physically-ill government informant witness by closed-circuit television. The District Court, Weinstein, Senior District Judge, held as a matter of first impression that permitting government to have witness' testimony taken at trial through closed-circuit television would not violate defendant's constitutional right to

confrontation and would satisfy requirements of Federal Rules of Criminal Procedure.

Ordered accordingly.

1. Witnesses ⇐228

A federal district court in criminal prosecution had inherent power to order form of testimony by television prior to amendment of civil procedural rule governing taking of testimony so as to allow for provision of testimony at trial by television. Fed.Rules Civ.Proc.Rule 43, 28 U.S.C.A.

2. Criminal Law ⇐633(1)

Federal district court conducting criminal case is permitted to draw from and mirror practice that is sanctioned by Federal Rules of Civil Procedure when Federal Rules of Criminal Procedure do not speak specifically to matter. Fed.Rules Cr.Proc.Rule 57, 18 U.S.C.A.; Fed.Rules Civ.Proc.Rule 1, 28 U.S.C.A.

3. Criminal Law ⇐662.65

Permitting federal government to have testimony of physically-ill government informant witness, who was in federal witness protection program, taken at trial through closed-circuit television would not violate defendant's constitutional right to confrontation and would satisfy requirements of Federal Rules of Criminal Procedure; closed-circuit system permitted witness and defendant to see and hear each other, while jury, court, and counsel would simultaneously see witness and defendant, and deposition of witness was not appropriate due to requirement to disclose witness' address and whereabouts and due to defendant's own poor health precluding him from traveling to deposition. U.S.C.A. Const.Amend. 6; Fed.Rules Cr. Proc.Rules 2, 15(b), 57, 18 U.S.C.A.; Fed. Rules Civ.Proc.Rule 43, 28 U.S.C.A.

Zachary W. Carter, United States Attorney, Eastern District of New York, Brooklyn, NY by Andrew Weissmann, George A. Stamboulidis, Daniel S. Dorsky, for U.S.

Culleton, Marinaccio, & Foglia, White Plains, NY by James J. Culleton, Michael A. Marinaccio, Philip Foglia; Steven R. Kartagener, New York City, for Defendant.

MEMORANDUM AND ORDER

WEINSTEIN, Senior District Judge.

This case raises an issue of apparent first impression in the federal courts. A chief witness in this RICO case is too ill to testify in court. He is in the Federal Witness Protection Program, at some distance from this state so that the jury cannot be convened in his presence. It might jeopardize the safety of the witness were the defendant's full counsel staff to be present at the witness' deposition since that would reveal the witness' location and put him in serious danger from criminals against whom he has testified and provided information. Given defendant's claimed serious physical disabilities, it is conceded that he will not attend any deposition at a place convenient to the witness.

A full hearing was conducted to determine whether it is practicable for the witness to appear in person at trial. Medical reports and testimony for the government and defendant fully supported the government's contention, by clear and convincing proof, that the witness could not appear in court.

The government seeks to have the witness' testimony taken through closed circuit television. The defendant contends that this would violate his constitutional right to confrontation. The closed circuit system permits the witness to view and hear counsel and defendant, while simultaneously allowing counsel, defendant, judge and jury to view and to hear the witness. The defendant's objection is overruled.

The optimal way of conducting a trial under American practice is for the witness in person in court to face the defendant and the trier, and to be subject to immediate cross-examination in their presence. *See e.g., Maryland v. Craig*, 497 U.S. 836, 849, 110 S.Ct. 3157, 3165, 111 L.Ed.2d 666 (1990) (historic preference for in-person encounters between accused persons and their accusers). American criminal procedure, however, is pragmatic. It recognizes that this ideal condition can not be made available in every instance if there is to be an effective search for the

truth in an atmosphere protecting the defendant's needs for fairness and due process and the public's right to protection against crime. *See, e.g., Craig,* 497 U.S. 836, 850, 110 S.Ct. 3157, 3166, 111 L.Ed.2d 666 (1990) (sanctioning the use of closed circuit television to transmit testimony of a witness when "necessary to further an important public policy" and where "the reliability of the testimony is otherwise assured").

Modification of the face-to-face in-person confrontation rule is exemplified by the extensive hearsay exceptions permitting the trier to rely upon the statements made outside of court. *See, e.g.,* Fed.R.Evid. 803, 804; *White v. Illinois,* 502 U.S. 346, 356 n. 8, 112 S.Ct. 736, 742, 116 L.Ed.2d 848 (1992) (exceptions to hearsay rule recognized in Federal Rules of Evidence bear sufficient reliability to satisfy requirements of Confrontation Clause); *Lee v. Illinois,* 476 U.S. 530, 543, 106 S.Ct. 2056, 2063, 90 L.Ed.2d 514 (1986) (even when hearsay does not fall within a hearsay exception, "it may nonetheless meet Confrontation Clause reliability standards"); *United States v. Sasso,* 59 F.3d 341, 348–49 (2d Cir.1995) (incriminating hearsay statements against a defendant); *United States v. Matthews,* 20 F.3d 538, 544–545 (2d Cir.1994) (when a declarant is unavailable and his prior out-of-court statements are sufficiently reliable, admission at trial of his hearsay declarations is constitutionally permissible). Depositions of out-of-court witnesses are permitted in criminal cases. *See* Fed.R.Crim.P.15 (depositions when due to exceptional circumstances are in the interest of justice); *United States v. Donaldson,* 978 F.2d 381, 392–93 (7th Cir.1992) (permitting the government to present deposition testimony of witness who recently gave birth and had other medical complications causing her to be hospitalized the day before she was to testify at trial). Such depositions are allowed even where they are taken pursuant to continental practice where the examination is conducted by the magistrate rather than by the attorneys. *See United States v. Salim,* 664 F.Supp. 682 (E.D.N.Y.1987), *aff'd,* 855 F.2d 944 (2d Cir.1988).

Recognizing this history, the Supreme Court, effective December 1, 1996, amended Rule 43 of the Federal Rules of Civil Procedure to provide explicitly for televised presentation of testimony as follows (strike-outs indicate prior language eliminated and underlining material added):

> In ~~all~~ every trials, the testimony of witnesses shall be taken ~~orally~~ in open court, unless ~~otherwise provided by an Act of Congress or by~~ a federal law, these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court provide otherwise. The court may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location.

In the advisory committee notes to these amendments to Federal Rule of Civil Procedure 43, the appropriateness in special circumstances of testimony being transmitted from a location other than the courtroom was recognized:

> Contemporaneous transmission of testimony from a different location is permitted only on showing of good cause in compelling circumstances. The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition. Transmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial.
>
> The most persuasive showings of good cause and compelling circumstances are likely to arise when a witness is unable to attend trial for unexpected reasons, such as accident or illness, but remains able to testify from a different place. Contemporaneous transmission may be better than an attempt to reschedule the trial, particularly if there is a risk that other—and perhaps more important—witnesses might not be able to be available at a later time.

No attempt is made to specify the means of transmission that may be used. Audio transmission without video images may be sufficient in some circumstances, particularly as to less important testimony. Video transmission ordinarily should be preferred when the cost is reasonable in relation to the matters in dispute, the means of the parties, and the circumstances that justify transmission. Transmission that merely produces that equivalent of a written statement ordinarily should not be used.

Safeguards must be adopted that ensure accurate identification of the witness and that protect against influence by persons present with the witness. Accurate transmission likewise must be assured.

Other safeguards should be employed to ensure that advance notice is given to all parties of foreseeable circumstances that may lead the proponent to offer testimony by transmission. Advance notice is important to protect the opportunity to argue for attendance of the witness at trial. Advance notice also ensures an opportunity to depose the witness, and perhaps by video record, as a means of supplementing transmitted testimony.

[1, 2] The analogous Federal Rule of Criminal Procedure was not amended in the same way. *Compare* Fed.R.Crim.P. 26 and Fed.R.Civ.P. 43. That circumstance does not preclude the use of contemporaneous televised examinations of witnesses in federal criminal cases. Prior to the 1996 amendment to civil Rule 43, a court's need to seek the truth, to efficiently conduct a trial, and to ensure that persons with important information relating to the case be heard, permitted a court to interpret the Federal Criminal Rules in ways that justice mandates. *See generally,* Fed.R.Crim.P. 2. Under its inherent power it could have ordered the form of testimony by television required in the instant case. *Cf., United States v. Hasting,* 461 U.S. 499, 505–06, 103 S.Ct. 1974, 1978, 76 L.Ed.2d 96 (1983) ("federal courts may, within limits, formulate procedural rules not specifically required by the Constitution or Congress"). Since the Rules of Criminal Procedure do not speak specifically to this matter, a court conducting a criminal case is permitted to draw from and mirror a practice that is sanctioned by the Federal Rules of Civil Procedure. Fed.R.Crim.P. 57 ("a judge may regulate practice in any manner consistent with federal law, these rules, and local rules of the district" where there is no controlling law on an issue).

Amended civil Rule 43 expresses power that existed under prior law. It cannot be construed as a limitation on the previous inherent power of the courts in criminal cases that continues under the Federal Rules of Criminal Procedure. Rule 2 of the Federal Rules of Criminal Procedure requires district courts to construct the Rules to provide "fairness in administration and the elimination of unjustifiable expense and delay" in criminal proceedings. Television procedures for providing testimony in exceptional cases is essential if the policy expressed in criminal Rule 2 is to vindicated. *Cf. Harrell v. State,* 689 So.2d 400 (Fla.Dist.Ct.App.1997) ("satellite testimony enhances the efficiency of our legal system" in case where Argentinian residents testified as witnesses in a Florida criminal trial).

Prior to amendment of the civil Rule federal trial courts have repeatedly, in civil cases, taken testimony by telephone and closed circuit television. The jury has never had any difficulty in evaluating such testimony. The court of appeals for the Second Circuit permits oral argument by television with counsel and the court separated geographically. There is increasing use in courts across the country of appearances by closed circuit television at arraignments to avoid the necessity of police and those arrested traveling to be before a magistrate. *See, e.g., id.* at 404 (audiovisual technologies are currently utilized in Florida during presentments and arraignments in criminal cases).

[3] In this case the government has been able to make the threshold showing entitling it to a deposition. *See Donaldson,* 978 F.2d 381, 392–93 (7th Cir.1992). Nevertheless, deposing the witness is not appropriate. First, the deposition rule requires the requesting party to notify all parties of its intention to depose the witness, to provide them with the name and address of the witness, and to

disclose the location of the deposition site. Fed.R.Crim.P. 15(b). Disseminating the address of the witness in this case or his whereabouts would be dangerous. Second, a defendant generally has the right to be present with his attorneys at a deposition. Fed. R.Crim.P. 15(b). Defendant concedes that his own purported poor health precludes his traveling to the deposition and he prefers televised presentation of live testimony to a deposition. Receiving contemporaneous testimony via closed circuit televising affords greater protection of his confrontation rights than would a deposition.

It is desirable that the defendant be permitted, if he wishes, to face the witness directly so that each sees the other and the jury sees both while the testimony is being given. The televising arrangements made by the government provide this full confrontation since the witness sees and hears the defendant while the defendant sees and hears the witness. The jury, court, and counsel simultaneously see both. In short, the arrangements proposed by the government in this case satisfy fully the requirements of the Constitution and the Federal Rules of Criminal Procedure.

The process will be memorialized by a sealed video tape recording for purposes of any appeal. The video tape may not be released to the media. *See* Fed.R.Crim.P.53 (broadcasting from courtroom in criminal trial not permitted); *cf., Hamilton v. Accu-Tek*, 942 F.Supp. 136 (E.D.N.Y.1996) (broadcasting in civil case permitted). Any reading back of testimony requested by the jury during its deliberations will be from the court reporter's transcript; use of the video tape recording for this purpose might result in evaluating this testimony differently from other testimony taken in open court.

Nicholas Turner is appointed Special Master to accompany one attorney representative of the defendant and one of the government to the place where the witness will appear. None of them will reveal this place to anyone. The government will furnish transportation. Other terms of the accompanying order follow the court's oral instructions.

So ordered.

ORDER

UPON AN APPLICATION BY THE GOVERNMENT, to present at this trial the testimony of Government witness Peter Savino by closed-circuit television, due to his physical illness, and upon having conducted an evidentiary hearing related to that issue on July 16, 1997, and upon having found that the Government has sustained its burden of proof in establishing the propriety of such a procedure, and the defendant having declined a Rule 15 deposition;

IT IS HEREBY ORDERED, that Savino shall be permitted to testify by closed-circuit television from an undisclosed location known also to the Government, to Philip F. Foglia, Esq., to the Special Master, and to the United States Marshal Service, with the jury being advised that this procedure has been made necessary by Savino's physical infirmity; and

IT IS FURTHER ORDERED, that the examining attorneys, preferring to conduct their examinations from the courtroom within which this criminal case is now being tried, will do so; and

IT IS FURTHER ORDERED, that Savino's testimony shall be preserved by the official court reporter and by videotape, with the court reporter's stenographic transcript to be used for any requested readback by the jury during its deliberations, and the written transcript and videotape will be available for appellate review; and

IT IS FURTHER ORDERED, that the videotape recording of Savino's testimony shall be maintained by this Court under seal; and

IT IS FURTHER ORDERED, that this Court's clerk, Nicholas R. Turner, is hereby appointed Special Master, with a direction to attend the witness's testimony at the undisclosed location for the purpose of assuring the integrity of the procedure; and

IT IS FURTHER ORDERED, that one Assistant United States Attorney and one of defendant's counsel, Philip F. Foglia, Esq., shall be permitted to be present at the site from which Savino will be testifying for the purpose of assuring that the procedures employed are in accordance with the requirements of this Court and the defendant's right

to confrontation, due process, and a fair trial; and that both counsel shall travel at the expense of the Government, which shall also provide for food and housing; and

IT IS FURTHER ORDERED, that Mr. Foglia shall not reveal at any time whatsoever the location from which Savino will testify, unless required to make disclosure by an order of this Court; and

IT IS FURTHER ORDERED, that Mr. Foglia is permitted to telephone the Court or the Marshal's Service at any time so that messages can be transmitted to or from his family or others; and

IT IS FURTHER ORDERED, that the Marshal's Service is directed, if possible, and if consistent with the needs of the Federal Witness Protection Program, to make available a patched telephone line so that Mr. Foglia may speak with his wife and children; and

IT IS FURTHER ORDERED, that it will be a violation of this Court's Order for anyone, other than the persons designated, to attempt to ascertain the location of the site from which Savino will testify; and

IT IS FURTHER ORDERED, that the role of the Government attorney and defense counsel is solely to observe the proceedings as they occur, and to make known any objections to the Special Master, who is empowered to take whatever lawful steps are necessary to lawfully expedite these proceedings.

James F. REIDY, Plaintiff,

v.

Marvin T. RUNYON, Postmaster General, United States Postal Service, Defendant.

No. CV 95-0578 (ADS).

United States District Court, E.D. New York.

July 30, 1997.

Postal employee brought action against Postal Service alleging disability discrimination in violation of Rehabilitation Act. Postal Service moved for summary judgment. The District Court, Spatt, J., held that: (1) genuine issue of material fact existed as to whether postal employee knowingly and voluntarily waived his statutory rights under Rehabilitation Act when settling his grievances, precluding summary judgment; (2) genuine issue of material fact existed as to whether incidents of disability discrimination occurring outside limitations period were part of a continuous course of discrimination so as to warrant application of continuous violation doctrine; (3) genuine issue of material fact existed as to whether postal employee who suffered cervical sprain and who was restricted in his ability to lift, bend and twist was "disabled"; and (4) employee's recovery of workers' compensation benefits under Federal Employees' Compensation Act (FECA) did not preclude any recovery under Rehabilitation Act.

Motion denied.

1. Civil Rights ⇐240(2)

Claims brought pursuant to Rehabilitation Act are subject to same burden-shifting analysis as other federal employment discrimination cases. Rehabilitation Act of 1973, § 2 et seq., 29 U.S.C.A. § 701 et seq.

2. Compromise and Settlement ⇐8(1)

In making a determination of whether employee voluntarily waived employment discrimination claims by virtue of settlement, trial court must determine at outset that employee's consent to settlement was voluntary and knowing.

3. Civil Rights ⇐155

Waiver of federal remedial rights under employment discrimination laws will not be lightly inferred.

4. Compromise and Settlement ⇐16(1)

Once an individual executes a valid agreement settling employment discrimination claims, he cannot subsequently seek both

UNITED STATES of America,
v.
NIPPON PAPER INDUSTRIES CO., LTD., formerly JUJO PAPER CO., LTD.
Defendant.

No. CRIM. 95-10388-NG.

United States District Court,
D. Massachusetts.

July 28, 1998.

Richard G. Parker, Crystal L. Nix, Ian Simmons, O'Melveny & Myers, Washington, DC, William H. Kettlewell, Dwyer & Collora, Boston, Jeffrey W. Kilduff, O'Melveny & Meyers, Washington, DC, Alan M. Cohen, O'Melveney & Myers LLP, New York, NY, for Nippon Paper Industries Co., Ltd, Defendants.

Lisa M. Phelan, U.S. Department of Justice, Washington, DC, for U.S. Attorneys.

ORDER

GERTNER, D.J.

I. INTRODUCTION

*1 This case involves an issue at the intersection of the Constitution's Confrontation Clause on the one hand, and advanced courtroom technology, on the other. In this criminal antitrust action, the Government sought to take the testimony of a critical witness in Japan through either a videotaped deposition pursuant to Fed.R.Crim.P. 15 or through the use of simultaneous video teleconferencing--two different techniques for recording testimony with different implications. The witness, Mr. Shigeru Hinoki ("Hinoki"), refused to come to the United States to testify; although he was a cooperating witness, [FN1] the Government lacked the means to compel his presence in the courtroom. See United States v. Filippi, 918 F.2d 244, 247 (1st Cir.1990)("The government has no power to compel the presence of a foreign national residing outside the United States.")

In response, the defendant objected to the Government's motion for permission to take testimony by video deposition pursuant to Rule 15, but agreed to video teleconferencing, presumably since some of the defendant's own potential witnesses were located in Japan and could be questioned effectively using the same technology.

On May 4, 1998, I granted the Government's Motion for Permission to Take Testimony by Video Teleconference. I did not, however, permit simultaneous transmission of Mr. Hinoki's testimony in front of the jury. For the reasons described below, I allowed the video teleconferencing of the witness from the U.S. embassy in Tokyo between the hours of 6:00--9:30 p.m. EST, but the proceedings were taped, edited and replayed before the jury during normal court hours.

II. PROCEDURAL POSTURE

The defendant, Nippon Paper Industries, Co. ("NPI") was charged with being part of a conspiracy of Japanese manufacturers to fix prices for thermal fax paper exported to the United States. After four weeks of trial, and seven days of deliberations, the jury was unable to reach a verdict. Since the issues raised by this case are likely to recur--whether in a subsequent trial of the defendant or another case involving similar questions--I have spelled out my reasons in this decision.

III. BACKGROUND

A videotaped deposition involves an off site deposition of a witness, recorded via videotape and transcribed by a court reporter. The deposition is attended by counsel for both sides who raise objections and examine the witness. The tape can be edited, and, if the Court rules that the witness' testimony is admissible, all or some of the videotape is played before the jury during trial.

Video teleconferencing offers many of the same advantages of a videotaped deposition--the jury connects a face to words, absorbs the context of questions and answers, and gains a purchase on his or her testimony that is

absent without the immediacy of their image--but with additional characteristics. It enables an off-site witness to testify "live" during a trial, to be examined in real time by the lawyers, with the trial judge presiding, in front of the jury.

*2 The Government was content with a videotaped deposition, video teleconferencing or some combination of the two. NPI was amenable only to simultaneous video teleconferencing. A videotaped deposition, it contended, would deprive NPI of a meaningful opportunity to confront Hinoki in violation of the Sixth Amendment. The defendant argued that Hinoki had given equivocal answers to the Government in prior interviews. NPI was concerned that without judicial oversight, the prosecution would be able to employ repetition and leading questions to shape the witness' testimony outside the presence of the jury. And since the deposition was pretrial, the Government could test out one approach and if unavailing, try another at trial.

As an alternative, NPI proposed video teleconferencing of both parties' witnesses as a means of simulating "live" testimony while avoiding some of the transglobal travel associated with bringing Japanese witnesses to a trial in Boston. The video teleconference would occur after the trial had begun, with trial judge oversight and in front of the jury. See Defendant's Response to Motion of United States to Take Testimony by Video Teleconference or by Video Deposition Pursuant to Fed.R.Crim.P. 15.

IV. ANALYSIS

1. Confrontation Rights and the Formality of the Courtroom

I begin my analysis with the context in which the Government made its request. The defendant, a Japanese corporation, is charged in a U.S. federal court with a criminal antitrust violation. As such, it is entitled to the same rights of confrontation as any U.S. defendant.

The Confrontation Clause is an essential part of the criminal trial's truth seeking function. It assures the right of the accused, "in all criminal prosecutions ... to be confronted with the witnesses against him." An important premise of the criminal justice system is that the truth is more likely to emerge with face to face communication between accused and accuser, played out before the fact-finder, [FN2] in this case, the jury. [FN3] Equally important is the formality that attaches to the ceremony, the robed judge, the witness' oath, the public's scrutiny, the creation of an appellate record formed in a moment experienced simultaneously by all parties.

That right of confrontation and those formalities were especially important in this case. NPI was alleged to have been a co-conspirator in a foreign-based conspiracy designed to fix prices for thermal fax paper sold in the United States. While in any price fixing case the difference between agreeing to set prices and setting prices independently may be a matter of nuance and emphasis, in this case subtle distinctions were complicated by cultural and language differences. Many of the witnesses, including Mr. Hinoki, were native Japanese speakers and required interpreters. Most of the documents relied on by the parties were in Japanese. Both the written record as well as the spoken word were challenged by translators for the defense and for the prosecution. [FN4]

*3 To a degree, the presence of a translator already compromised the defendant's confrontation rights. While the jury heard the witness speaking in Japanese, immediately followed by the English translation, it was likely to miss the witness' intonations, his tone of voice, or the emphasis he placed on words in a sentence. [FN5]

At the same time, the government acknowledged that, in order to prosecute this case, some modification of a traditional trial setting--beyond translators--was essential. While American criminal law could reach Japan, see United States v. Nippon Paper Industries, Co. Ltd.,109 F.3d 1 (1st. Cir.1997), American process could not. The question became, "to what extent would confrontation

rights be compromised because of the exigencies of an international antitrust litigation?"

2. Videotaped Deposition.

The case law and the rules allow the Court to compromise confrontation rights in very specific circumstances. Fed.R.Crim.P. 15 provides that a deposition of a prospective witness may be taken under "exceptional circumstances" subject to certain requirements. [FN6] It may be admitted under the former testimony exception, Fed.R.Evid. 804(b)(1) if it approximates trial conditions to a significant degree. In United States v. McKeeve, 131 F.3d 1 (1st Cir.1997), for example, the First Circuit sanctioned the admission of a deposition of an otherwise unavailable foreign witness, where the U.S. Government had attempted to secure face-to-face confrontation with the deponent in a foreign country (Britain) but where the British authorities refused to comply, where the prosecution provided requisite telephonic links between the defendant's prison cell and the court in which the deposition was taken during the deposition, and where the deposition otherwise complied with confrontation standards, including the administration of an oath, unlimited direct and cross-examination, the ability to lodge objections, oversight by a judicial officer, the compilation of a transcript by a trained solicitor, and linguistic compatibility.

But while videotaped depositions have been admitted, they are plainly the exception and not the rule, notwithstanding the pressures. Clearly videotaped depositions are easier, more convenient. Few witnesses want to testify before a jury, under the pressure of a trial. Counsel often prefer to hear the testimony during a pre-trial dry run, rather than expose their witnesses' weaknesses before a jury. Indeed, excuses can always be found to avoid a court appearance. However, should these events occur with any regularity, trial by deposition would substitute for trial by confrontation, precisely what the Confrontation Clause was designed to avoid. Stoner v. Sowders, 997 F.2d 209 (6th Cir.1994).

This is especially true where the Government chooses, as here, to prosecute a foreign defendant for violations of American law. It should be anticipated that requests to use the technology to make up for face-to-face confrontation in an American court of law are likely to multiply. But, notwithstanding the increasingly global economy, and the utility of the new technology in litigating far flung claims, there are sound reasons for limiting its use.

*4 In the instant case, the deposition the government proposed would not take place before a judicial officer in Japan; there were serious questions concerning the witness' reliability; and major concerns about translation. [FN7]

The fact that the Government requires the assistance of videotaped depositions in order to prosecute international cases is not sufficient to make it constitutional. In this, as in other criminal cases, the demands of efficiency and even necessity, do not create automatic exceptions to Constitutional requirements. Whatever the need, we do not have the option to substitute videotaped depositions for live testimony on a regular basis. The Sixth Amendment stands firmly in the way. While some argue that videotaping is just like the real thing, "just like" is not, in most situations, good enough. The fact that we have the technology to take depositions in this fashion does not mean that we should. As one court noted:

> In the most important affairs of life, people approach each other in person, and television is no substitute for direct personal contact. Video tape is still a picture, not a life, and it does not come within the rule of the confrontation clause which insists on real life where possible, not simply a close approximation. Stoner, 997 F.2d at 213.

Put in more modern parlance, I, though an avid supporter of the "Courtroom of the Future," with a courtroom equipped with every manner and means of high tech accoutrements, believe that we should be

cautious about the technology lest we begin to practice "virtual justice."

3. Video Teleconferencing

With the defendant's concurrence, the Government proposed conducting the video teleconference in front of the Court and jury, during the trial, subject to cross examination by the parties. That procedure would provide a judicial officer and obviate one of the concerns associated with standard depositions; as the very judge hearing the case, I would preside over the testimony as it was elicited. The problem of unfairly shaping trial testimony in advance would be minimized since the testimony would be taken mid-trial, after the Government had already committed to a theory of the case. Real time testimony would provide the Court with the simultaneity of a live witness.

Nevertheless, notwithstanding the advantages of video teleconferencing, especially as compared with videotaped depositions, had serious concerns. The testimony of the witness would still be mediated via videoscreen. Studies have suggested that television and videoscreens necessarily present antiseptic, watered down versions of reality. [FN8] Much of the interaction of the courtroom is missed. [FN9]

Despite the acceptance of closed captioned testimony in certain, particularized cases, [FN10] these issues might have counseled rejecting video teleconferencing had the defendant not effectively waived its objections. NPI, after all, agreed with video teleconferencing of witnesses. Thus, the ultimate propriety of video teleconferencing did not need to be resolved.

*5 One problem remained. The defendant insisted that the jury be present during the video teleconference with the witness, the Court and counsel. "Real time" video teleconferencing presented extraordinary logistical problems: The witness was in Tokyo, Japan, which is 13 hours ahead of Boston time. Moreover, the Government represented that the witness was infirm and would not be able to appear for his testimony in the middle of the night; the earliest he could appear was at 7:30 a.m. or 6:30 p.m. Boston time.

I declined to ask the jurors to stay into the evening, or to require that they travel to and from the courthouse at night. Since the defendant had already waived the principle components of its Confrontation Clause rights by agreeing to the appearance of witnesses through a videoscreen, I held that he had also waived the right to confront the accuser in "real time." Under the circumstances, that one additional component--having that encounter occur in front of the jury--was not constitutionally compelled. If exceptional circumstances justified the admission of a videotaped deposition in McKeeve, an inferior technology, then it surely justified the admission of the taped video teleconferencing in this case. The resulting procedure was a constitutional hybrid, borrowing from the precedent associated with Rule 15 videotaped depositions, marrying it to the advantages of video teleconferencing.

I therefore ORDERED that the testimony of Mr. Hinoki be taken in the evening between 6:30 and 9:30 p.m., that counsel be present to cross examine, that the Court rule on all objections as if the testimony were being conducted before the jury and that the conference be taped and edited for later transmission to the jury. The Government's Motion for Permission to Take Testimony by Video Teleconference or By Video Deposition Pursuant to Fed.R.Crim.P. 15 [document # 135] is ALLOWED.

SO ORDERED.

FN1. Mr. Hinoki's company, Honshu Paper Co., now Oji Paper Co., entered into a plea agreement with the Government on April 2, 1996. See Memorandum of United States in Support of Its Motion for permission to Take Testimony by Video Teleconference or By Video Deposition Pursuant to Fed.R.Crim.P. 15, Att. B. That agreement required Mr. Hinoki to "cooperate fully with the United States in the conduct of any grand jury or other federal criminal investigation involving alleged antitrust violations in the thermal paper industry, and in any

criminal litigation or other related criminal proceeding arising or resulting therefrom. This cooperation shall include, but is not limited to ... obtaining the agreement and continuing cooperation of Mr. Hinoki ... to testify in any criminal litigation... " Notwithstanding these representations, Mr. Hinoki declined to come to the United States for reasons related to his poor health.

FN2. See Dutton v. Evans, 400 U.S. 74, 89, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970).

FN3. Scholars have debated the origins and breadth of the Confrontation Clause. In White v. Illinois, 502 U.S. 346, 359, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992), the United States argued as amicus curiae that the purpose of the Confrontation Clause was to prevent trial by ex parte affidavits. Justice Thomas, concurring, agreed with the Government citing to 16th Century English practice. In 16th century England, magistrates interrogated witnesses without affording the defendant a right to be present or to engage in cross examination. Predictably, the trial devolved into the mere reading of depositions or confessions; the defendant did not "confront" his accusers in any setting. White, 502 U.S. at 361 (Thomas, J., concurring). In Mattox v. United States, 156 U.S. 237, 242, 15 S.Ct. 337, 39 L.Ed. 409 (1895), one of the early Confrontation Clause decisions, the Supreme Court noted that "[t]he primary object of the [Confrontation Clause] was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of personal examination and cross examination of the witness ...") Id. In Mattox, the Court acknowledged that another purpose of the clause is to guarantee that the accused has an opportunity, not only to test the recollection of the witness in an out of court setting, but also to compel him to stand face-to-face with the jury so that they may look at him, and evaluate his demeanor. Id. at 242-43. This broader purpose was endorsed by the Supreme Court in White, and Maryland v. Craig, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990). Thus, the Confrontation Clause ensures (1) that the witness will give the testimony under oath, impressing upon the witness the seriousness of the matter and protecting against a lie by the possibility of penalty of perjury, (2) that the witness will be subject to cross-examination, and (3) that the jury will have the chance to observe the demeanor of the witness, which aids the jury in assessing credibility. See Maryland v. Craig, supra at 851 (1990), citing California v. Green, 399 U.S. 149, 158, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970).
Other commentators suggest that the purpose of the clause was to constitutionalize criminal procedure as it then existed in the states, namely as an adversary system with defense cross examination at its core. See Randolph N. Jonakit, The Origins of the Confrontation Clause: An Alternative History, 27 Rutgers L.J. 77 (1995).

FN4. For example, the Government claimed that the word "Sando" in certain documents (allegedly memorializing meetings between Japanese manufacturers to fix prices for the U.S. market) should be translated as "agreement." The defense countered that "Sando" could be interpreted to mean "concurrence," a noun which would allow the jury to find that multiple manufacturers had made independent pricing decisions and had merely acquiesced in their competitors' approach.

FN5. This point was emphasized during the Government's heated examination of Mr. Hinoki in which the prosecution's sharp language and tone were tempered by the time it took to translate questions, the cadence of the interpreter and the complexities associated with translating rhetorical questions into a language that is structured differently than English.

FN6. The rule provides:
(a) When taken. Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged, be produced at the same time and place ....

* * *

(d) How taken. Subject to such additional conditions as the court shall provide, a deposition shall be taken and filed in the manner provided in civil actions except as otherwise provided in these rules, provided that
(1) in no event shall a deposition be taken of a party defendant without that defendant's consent, and

(2) the scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself.

FN7. After the mistrial, the jury made it quite clear that they had a difficult time understanding Mr. Hinoki with the combination of Japanese translation and videoscreen.

FN8. See Gerbner et al., 1994; Lichter, Lichter, and Rothman, 1994, cited in Schrum and Wyer Jr., The Effects of Television Consumption on Social Perceptions: The Use of Priming Procedures to Investigate Psychological Processes, 24 J. of Consumer Res. 447 (1998).

FN9. In a telling scene in the move "Twelve Angry Men," the jurors were discussing the testimony of an old man who claimed to have heard a fight in the apartment above him, and then a loud noise, like a body hitting the floor. He reported that he ran to his apartment door just in time to see the defendant running down the stairs. One of the jurors, himself an elderly man, reminded the others about the way the elderly witness had walked to the stand before testifying; dragging one of his feet, he walked in a labored fashion, his gait slowed by some disability. It was an observation that would have been missed if the only aspect of the witness that the jurors saw was his face.

FN10. See, e.g., Maryland v. Craig, 497 U.S. 836, 850, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990)(sanctioning the use of closed circuit television to transmit testimony of child witness in sex abuse case when "necessary to further an important public policy" and where "the reliability of the testimony is otherwise assured"); U.S. v. Gigante, 971 F.Supp. 755 (E.D.N.Y.1997)(permitting physically ill government informant witness to testify at RICO trial by closed circuit television).

END OF DOCUMENT

Item III C3

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Proposed Amendment to Rule 26; Taking Testimony from Remote Location**

DATE: **March 28, 1998**

After hearing a report from a subcommittee (Judge Carnes, chair, Mr. Josefsberg, and Mr. Pauley), the Committee at its October 1997 meeting approved in concept an amendment to Rule 26 which permit the court to authorize the presentation of testimony by contemporaneous transmission from a different location. A draft of an amendment to accomplish that and an accompanying Committee Note are attached.

The draft generally follows the suggested language included in the subcommittee's report. In its report, the subcommittee raised the issue of whether the Rule or Note should indicate a preference for deposition testimony over contemporaneous transmission of testimony. A preference for depositions is stated in a Committee Note accompanying an amendment to Civil Rule 43(a) which uses almost identical language to that proposed here—with the exception of reference to "unavailability."

Two options are presented here. In the first, a preference for depositions is implied by requiring a finding of compelling circumstances and good cause shown. That is the language used in the civil rule.

The second option expresses no preference and treats deposition testimony and contemporaneous transmission on equal footing. That is reflected in the draft which does not include any requirement of compelling circumstances, etc. and is consistent with Crim. R. 15 which permits the introduction of a deposition if a witness is unavailable.

In both versions, the transmission involved is video, not audio.

Rule 26. Taking of Testimony

(a) IN GENERAL. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court.

(b) TRANSMISSION OF TESTIMONY FROM DIFFERENT LOCATION. The court may authorize contemporaneous video presentation of testimony in open court from a different location if:

(i) the requesting party compelling circumstances for such transmission;

(ii) appropriate safeguards are established; and

(iii) the witness is unavailable within the meaning of Rule 804(a) of the Federal Rules of Evidence.

ALTERNATE LANGUAGE for Subdivision (b) (No preference for Depositions)

(b) TRANSMISSION OF TESTIMONY FROM DIFFERENT LOCATION. The court may authorize the video presentation of testimony in open court from a different location if:

(i) appropriate safeguards are established; and

(ii) the witness is unavailable within the meaning of Rule 804(a) of the Federal Rules of Evidence.

COMMITTEE NOTE

The amendment to Rule 26 is intended to permit a court to receive the video transmission of an absent witness if certain conditions are met. As currently written, Rule 26 indicates that normally only testimony given in open court will be considered, unless otherwise provided by the rules, an Act of Congress, or any other rule authorized by the Supreme Court. One of those exceptions is located in Rule 15, which provides that a party may present the deposition testimony of an "unavailable" witness. The amendment extends the logic underlying that exception to contemporaneous video testimony of an unavailable witness. The amendment generally parallels a similar provision in Federal Rule of Civil Procedure 43.

The Committee believed that permitting use of video transmission of testimony only in those instances where deposition testimony could be used is a prudent and measured step. A party against whom a deposition may be introduced at trial will normally have no basis for objecting if contemporaneous testimony is used instead. Indeed, the use of such transmitted testimony is in most regards the closest thing to having the witness actually in the court room. For example, the participants in the court room can see for themselves the demeanor of the witness and hear any pauses in the testimony, matters which are not normally available in non-video deposition testimony. Although deposition testimony is normally taken with all counsel and parties present with the witness, those are not absolute requirements. *See, e.g., United States v. Salim*, 855 F.2d 944, 947-48 (2d Cir. 1988) (conviction affirmed where deposition testimony used although defendant and her counsel were not permitted in same room with witness, witness' lawyer answered some questions, lawyers were not permitted to question witness directly, and portions of proceedings were not transcribed verbatim.

[Alternative 1--preference for deposition testimony *Nonetheless, the Committee believed that some preference should be given to deposition testimony over contemporaneous transmission. First, normally the lawyers are present and can have the opportunity before and after a deposition to observe the witness. Second, a defendant's confrontation rights, although not absolute, are more likely to be protected if physical face-to-face confrontation is provided for. The preference is preserved by requiring that before contemporaneous transmission may be received the requesting party must convince the trial court that compelling circumstances exist. For example, a witness whose deposition was not taken is unexpectedly unavailable to testify.]*

[Alternative 2--no preference for deposition testimony *Thus, although the rule does not express a preference for deposition testimony, the Committee recognized that there is a need for the trial court to impose appropriate, as required, to insure that the accuracy and quality of the transmission, the ability of any jurors to hear and view the testimony, and the ability of the judge, counsel, and the witness to hear and understand each other during questioning.]*

Where the prosecution is presenting the contemporaneous transmission of a government witness, there may be a question or objection on grounds that the defendant's confrontation rights are being infringed. The Committee believes that including the requirement of "unavailability" as that term is defined in Federal Rule of Evidence, which permits use of certain deposition testimony, should normally insure that those rights are not infringed.

In deciding whether to permit contemporaneous transmission of the testimony of a government witness, the Supreme Court's decision in *Maryland v. Craig*, 497 U.S. 836 (1990) is instructive. In that case, the prosecution presented the testimony of a child sexual assault victim from another room by way of one-way closed circuit television. The Court outlined four elements which underlie Confrontation Clause issues: (1) physical presence; (2) the oath; (3) cross-examination; and (4) the opportunity for the trier-of-fact to observe the witness' demeanor. *Id.* at 847. The Court rejected the notion that a defendant's Confrontation Clause rights could be protected only if all four elements were present. In this case, the trial court had explicitly concluded that the procedure was necessary to protect the child witness, i.e., the witness was psychologically unavailable to testify in open court. The Court noted that any harm to the defendant resulting from the transmitted testimony was minor because the defendant received most of the protections contemplated by the Confrontation Clause, i.e., the witness was under oath, counsel could cross-examine the absent witness, and the jury could observe the demeanor of the witness.

While the amendment is not limited to instances such as those encountered in *Craig*, it is limited to situations where the witness is unavailable for any of the reasons set out in Federal Rule of Evidence 804(a). Whether under the particular circumstances proposed transmission will satisfy some, or all, of the four protective factors identified by the Supreme Court in *Craig*, is a decision left to the trial court.

cumstances surrounding the making of the statements acknowledged by the Court as suggesting that the statements are reliable, give rise to a legitimate argument that admission of the statements did not violate the Confrontation Clause. Because the Idaho Supreme Court did not consider these factors, I would vacate its judgment reversing respondent's[835] conviction and remand for it to consider in the first instance whether the child's statements bore "particularized guarantees of trustworthiness" under the analysis set forth in this separate opinion.

For these reasons, I respectfully dissent.

497 U.S. 836, 111 L.Ed.2d 666

[836]MARYLAND, Petitioner

v.

Sandra Ann CRAIG.

No. 89–478.

Argued April 18, 1990.

Decided June 27, 1990.

Defendant was convicted in the Maryland Circuit Court, Howard County, Raymond J. Kane, Jr., J., of sexual offenses and assault and battery arising from her operation of preschool and abuse of preschool students, and defendant appealed. The Court of Special Appeals, affirmed, 76 Md.App. 250, 544 A.2d 784,. Defendant petitioned for writ of certiorari. The Court of Appeals, 316 Md. 551, 560 A.2d 1120, reversed and remanded. Certiorari was granted. The Supreme Court, Justice O'Connor, held that: (1) confrontation clause did not categorically prohibit child witness in child abuse case from testifying against defendant at trial, outside defendant's physical presence, by one-way closed circuit television; (2) finding of necessity for use of one-way closed circuit television procedure had to be made on case specific basis; but (3) observation of child's behavior in defendant's presence and exploration of less restrictive alternatives to use of one-way closed circuit television procedure were not categorical prerequisites to use of one-way television procedure as a matter of federal constitutional law.

Vacated and remanded.

Justice Scalia filed a dissenting opinion, in which Justices Brennan, Marshall and Stevens joined.

Opinion on remand, 322 Md. 418, 588 A.2d 328.

1. Criminal Law ⇐662.1

The central concern of the confrontation clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact. U.S.C.A. Const.Amend. 6.

2. Criminal Law ⇐662.1

A face-to-face confrontation enhances the accuracy of fact-finding by reducing the risk that a witness will wrongfully implicate an innocent person. U.S.C.A. Const.Amend. 6.

3. Criminal Law ⇐662.8

In narrow circumstances, the confrontation clause permits the admission of hearsay statements against a defendant despite the defendant's inability to confront the declarant at trial. U.S.C.A. Const.Amend. 6.

4. Criminal Law ⇐662.1

Face-to-face confrontation with witnesses is not an indispensable element of the Sixth Amendment's guarantee of the right to confront one's accusers. U.S.C.A. Const. Amend. 6.

5. Criminal Law ⇐662.1, 662.65
Witnesses ⇐228

Child assault victim's testimony at trial of child abuse defendant through use of one-way closed circuit television procedure autho-

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rized by Maryland child witness protection statute did not impinge upon the truth seeking nor symbolic purposes of the confrontation clause; procedure required that child witness be competent to testify and testify under oath, defendant retained full opportunity for contemporaneous cross-examination, and judge, jury and defendant were able to view witness' demeanor and body by video monitor. Md.Code, Courts and Judicial Proceedings, § 9–102, U.S.C.A. Const.Amend. 6.

6. **Criminal Law** ⇐662.1, 662.65
Witnesses ⇐228

If the State makes an adequate showing of necessity, the State's interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure permitting a child witness in abuse case to testify at trial in the absence of face-to-face confrontation with the defendant. U.S.C.A. Const.Amends. 6, 14.

7. **Criminal Law** ⇐662.1, 662.65
Witnesses ⇐228

Determination of whether use of procedure permitting a child witness to testify in a child abuse case without face-to-face confrontation with the defendant is justified by the State's interest in protecting witness from the trauma of testifying must be made on a case specific basis; trial court must determine whether use of one-way closed circuit television procedure is necessary to protect welfare of particular child witness, must find that child witness would be traumatized by the presence of the defendant, not by the courtroom generally, and must find that the emotional distress suffered by child witness in presence of defendant is more than mere nervousness, excitement or reluctance to testify. Md.Code, Courts and Judicial Proceedings, §§ 9–102, 9–102(a)(1)(ii); U.S.C.A. Const.Amend. 6.

8. **Criminal Law** ⇐662.1, 662.65
Witnesses ⇐228

Testimony of child witnesses in child abuse case by one-way closed circuit television would be admissible under the confrontation clause to the extent that a proper finding was made that use of procedure was necessary to protect child witness from trauma; witnesses were under oath, were subject to full cross-examination and could be observed by judge, jury and defendant as they testified. Md.Code, Courts and Judicial Proceedings, § 9–102; U.S.C.A. Const.Amend. 6.

9. **Criminal Law** ⇐662.1, 662.65
Witnesses ⇐228

Observation of child abuse victims' behavior in defendant's presence and consideration of less restrictive alternatives to one-way closed circuit television procedure, although possibly strengthening grounds for use of protective measures, were not categorically prerequisites to use of television testimony procedure as a matter of federal constitutional law. Md.Code, Courts and Judicial Proceedings, § 9–102; U.S.C.A. Const. Amends. 6, 14.

Syllabus *

Respondent Craig was tried in a Maryland court on several charges related to her alleged sexual abuse of a 6–year–old child. Before the trial began, the State sought to invoke a state statutory procedure permitting a judge to receive, by one-way closed circuit television, the testimony of an alleged child abuse victim upon determining that the child's courtroom testimony would result in the child suffering serious emotional distress, such that he or she could not reasonably communicate. If the procedure is invoked, the child, prosecutor, and defense counsel withdraw to another room, where the child is examined and cross-examined; the judge, jury, and defendant remain in the courtroom, where the testimony is displayed. Although

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

the child cannot see the defendant, the defendant remains in electronic communication with counsel, and objections may be made and ruled on as if the witness were in the courtroom. The court rejected Craig's objection that the procedure's use violates the Confrontation Clause of the Sixth Amendment, ruling that Craig retained the essence of the right to confrontation. Based on expert testimony, the court also found that the alleged victim and other allegedly abused children who were witnesses would suffer serious emotional distress if they were required to testify in the courtroom, such that each would be unable to communicate. Finding that the children were competent to testify, the court permitted testimony under the procedure, and Craig was convicted. The State Court of Special Appeals affirmed, but the State Court of Appeals reversed. Although it rejected Craig's argument that the Clause requires in all cases a face-to-face courtroom encounter between the accused and accusers, it found that the State's showing was insufficient to reach the high threshold required by *Coy v. Iowa*, 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 before the procedure could be invoked. The court held that the procedure usually cannot be invoked unless the child initially is questioned in the defendant's presence and that, before using the one-way television procedure, the trial court must determine whether a child would suffer severe emotional distress if he or she were to testify by two-way television.

Held:

1. The Confrontation Clause does not guarantee criminal defendants an *absolute* right to a face-to-face meeting with the witnesses against them at trial. The Clause's central purpose, to ensure the reliability of the evidence against a defendant by subjecting it to rigorous testing in an adversary proceeding before the trier of fact, is served by the combined effects of the elements of confrontation: physical presence, oath, cross-examination, and observation of demeanor by the trier of fact. Although face-to-face confrontation forms the core of the Clause's values, it is not an indispensable element of the confrontation right. If it were, the Clause would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme, *Ohio v. Roberts*, 448 U.S. 56, 63, 100 S.Ct. 2531, 2537, 65 L.Ed.2d 597. Accordingly, the Clause must be interpreted in a manner sensitive to its purpose and to the necessities of trial and the adversary process. See, *e.g.*, *Kirby v. United States*, 174 U.S. 47, 19 S.Ct. 574, 43 L.Ed. 890. Nonetheless, the right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the testimony's reliability is otherwise assured. *Coy, supra*, at 1021. Pp. 3162–3166.

2. Maryland's interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of its special procedure, provided that the State makes an adequate showing of necessity in an individual case. Pp. 3166–3170.

(a) While Maryland's procedure prevents the child from seeing the defendant, it preserves the other elements of confrontation and, thus, adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony. These assurances are far greater than those required for the admission of hearsay statements. Thus, the use of the one-way closed circuit television procedure, where it is necessary to further an important state interest, does not impinge upon the Confrontation Clause's truth-seeking or symbolic purposes. Pp. 3166–3167.

(b) A State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court. The fact that most States have enacted simi-

lar statutes attests to widespread belief in such a public policy's importance, and this Court has previously recognized that States have a compelling interest in protecting minor victims of sex crimes from further trauma and embarrassment, see, *e.g.*, *Globe Newspaper Co. v. Superior Court of Norfolk County*, 457 U.S. 596, 607, 102 S.Ct. 2613, 2620, 73 L.Ed.2d 248. The Maryland Legislature's considered judgment regarding the importance of its interest will not be second-guessed, given the State's traditional and transcendent interest in protecting the welfare of children and the growing body of academic literature [838] documenting the psychological trauma suffered by child abuse victims who must testify in court. Pp. 3167–3169.

(c) The requisite necessity finding must be case specific. The trial court must hear evidence and determine whether the procedure's use is necessary to protect the particular child witness' welfare; find that the child would be traumatized, not by the courtroom generally, but by the defendant's presence; and find that the emotional distress suffered by the child in the defendant's presence is more than *de minimis*. Without determining the minimum showing of emotional trauma required for the use of a special procedure, the Maryland statute, which requires a determination that the child will suffer serious emotional distress such that the child cannot reasonably communicate, clearly suffices to meet constitutional standards. Pp. 3169–3170.

(d) Since there is no dispute that, here, the children testified under oath, were subject to full cross-examination, and were able to be observed by the judge, jury, and defendant as they testified, admitting their testimony is consonant with the Confrontation Clause, provided that a proper necessity finding has been made. P. 3170.

3. The Court of Appeals erred to the extent that it may have rested its conclusion that the trial court did not make the requisite necessity finding on the lower court's failure to observe the children's behavior in the defendant's presence and its failure to explore less restrictive alternatives to the one-way television procedure. While such evidentiary requirements could strengthen the grounds for the use of protective measures, only a case-specific necessity finding is required. This Court will not establish, as a matter of federal constitutional law, such categorical evidentiary prerequisites for the use of the one-way procedure. Pp. 3170–3171.

316 Md. 551, 560 A.2d 1120 (1989). Vacated and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and WHITE, BLACKMUN, and KENNEDY, JJ., joined. SCALIA, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post*, p. 3171.

J. Joseph Curran, Jr., Baltimore, Md., for petitioner.

[839] William H. Murphy, Jr., Baltimore, Md., for respondent.

[840] Justice O'CONNOR delivered the opinion of the Court.

This case requires us to decide whether the Confrontation Clause of the Sixth Amendment categorically prohibits a child witness in a child abuse case from testifying against a defendant at trial, outside the defendant's physical presence, by one-way closed circuit television.

I

In October 1986, a Howard County grand jury charged respondent, Sandra Ann Craig, with child abuse, first and second degree sexual offenses, perverted sexual practice, assault, and battery. The named victim in each count was a 6-year-old girl who, from August 1984 to June 1986, had attended a kindergarten and prekindergarten center owned and operated by Craig.

In March 1987, before the case went to trial, the State sought to invoke a Maryland

statutory procedure that permits a judge to receive, by one-way closed circuit television, the testimony of a child witness who is alleged to be a victim of child abuse.[1] To invoke the procedure, the [841] trial judge must first "determin[e] that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate." Md.Cts. & Jud.Proc.Code Ann. § 9–102(a)(1)(ii) (1989). Once the procedure is invoked, the child witness, prosecutor, and defense counsel withdraw to a separate room; the judge, jury, and defendant remain in the courtroom. The child witness is then examined and cross-examined in the separate room, while a video monitor records and displays the witness' testimony to those in the courtroom. During this time the witness cannot see the defendant. [842] The defendant remains in electronic communication with defense counsel, and objections may be made and ruled on as if the witness were testifying in the courtroom.

In support of its motion invoking the one-way closed circuit television procedure, the State presented expert testimony that the named victim as well as a number of other children who were alleged to have been sexually abused by Craig, would suffer "serious emotional distress such that [they could not] reasonably communicate," § 9–102(a)(1)(ii), if required to testify in the courtroom. App. 7–59. The Maryland Court of Appeals characterized the evidence as follows:

> "The expert testimony in each case suggested that each child would have some or considerable difficulty in testifying in Craig's presence. For example, as to one child, the expert said that what 'would cause him the most anxiety would be to testify in front of Mrs. Craig. . . .' The child 'wouldn't be able to communicate effectively.' As to another, an expert said she 'would probably stop talking and she would withdraw and curl up.' With respect to two others, the testimony was that one would 'become highly agitated, that he may refuse to talk or if he did talk, that he would choose his subject regardless of the questions' while the other would 'become extremely timid and unwilling to talk.'" 316 Md. 551, 568–569, 560 A.2d 1120, 1128–1129 (1989).

Craig objected to the use of the procedure on Confrontation Clause grounds, but the trial

1. Maryland Cts. & Jud.Proc.Code Ann. § 9–102 of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland (1989) provides in full:

"(a)(1) In a case of abuse of a child as defined in § 5–701 of the Family Law Article or Article 27, § 35A of the Code, a court may order that the testimony of a child victim be taken outside the courtroom and shown in the courtroom by means of a closed circuit television if:

"(i) The testimony is taken during the proceeding; and

"(ii) The judge determines that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.

"(2) Only the prosecuting attorney, the attorney for the defendant, and the judge may question the child.

"(3) The operators of the closed circuit television shall make every effort to be unobtrusive.

"(b)(1) Only the following persons may be in the room with the child when the child testifies by closed circuit television:

"(i) The prosecuting attorney;

"(ii) The attorney for the defendant;

"(iii) The operators of the closed circuit television equipment; and

"(iv) Unless the defendant objects, any person whose presence, in the opinion of the court, contributes to the well-being of the child, including a person who has dealt with the child in a therapeutic setting concerning the abuse.

"(2) During the child's testimony by closed circuit television, the judge and the defendant shall be in the courtroom.

"(3) The judge and the defendant shall be allowed to communicate with the persons in the room where the child is testifying by any appropriate electronic method.

"(c) The provisions of this section do not apply if the defendant is an attorney pro se.

"(d) This section may not be interpreted to preclude, for purposes of identification of a defendant, the presence of both the victim and the defendant in the courtroom at the same time."

For a detailed description of the § 9–102 procedure, see *Wildermuth v. State*, 310 Md. 496, 503–504, 530 A.2d 275, 278–279 (1987).

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court rejected that contention, concluding that although the statute "take[s] away the right of the defendant to be face to face with his or her accuser," the defendant retains the "essence of the right of confrontation," including the right to observe, cross-examine, and have the jury view the demeanor of the witness. App. 65–66. The trial court further found that, "based upon the evidence presented ... the testimony of each of these children in a courtroom will result in each child suffering serious emotional distress ... such that each of these children cannot reasonably 843 communicate." *Id.*, at 66. The trial court then found the named victim and three other children competent to testify and accordingly permitted them to testify against Craig via the one-way closed circuit television procedure. The jury convicted Craig on all counts, and the Maryland Court of Special Appeals affirmed the convictions, 76 Md.App. 250, 544 A.2d 784 (1988).

The Court of Appeals of Maryland reversed and remanded for a new trial. 316 Md. 551, 560 A.2d 1120 (1989). The Court of Appeals rejected Craig's argument that the Confrontation Clause requires in all cases a face-to-face courtroom encounter between the accused and his accusers, *id.*, at 556–562, 560 A.2d, at 1122–1125, but concluded:

> "[U]nder § 9–102(a)(1)(ii), the operative 'serious emotional distress' which renders a child victim unable to 'reasonably communicate' must be determined to arise, at least primarily, from face-to-face confrontation with the defendant. Thus, we construe the phrase 'in the courtroom' as meaning, for sixth amendment and [state constitution] confrontation purposes, 'in the courtroom in the presence of the defendant.' Unless prevention of 'eyeball-to-eyeball' confrontation is necessary to obtain the trial testimony of the child, the defendant cannot be denied that right." *Id.*, at 566, 560 A.2d, at 1127.

Reviewing the trial court's finding and the evidence presented in support of the § 9–102 procedure, the Court of Appeals held that, "as [it] read *Coy* [v. *Iowa*, 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988)], the showing made by the State was insufficient to reach the high threshold required by that case before § 9–102 may be invoked." *Id.*, 316 Md., at 554–555, 560 A.2d, at 1121 (footnote omitted).

We granted certiorari to resolve the important Confrontation Clause issues raised by this case. 493 U.S. 1041, 110 S.Ct. 834, 107 L.Ed.2d 830 (1990).

844 II

The Confrontation Clause of the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him."

We observed in *Coy v. Iowa* that "the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." 487 U.S., at 1016, 108 S.Ct., at 2801 (citing *Kentucky v. Stincer*, 482 U.S. 730, 748, 749–750, 107 S.Ct. 2658, 2669, 2669, 2670, 96 L.Ed.2d 631 (1987) (MARSHALL, J., dissenting)); see also *Pennsylvania v. Ritchie*, 480 U.S. 39, 51, 107 S.Ct. 989, 998, 94 L.Ed.2d 40 (1987) (plurality opinion); *California v. Green*, 399 U.S. 149, 157, 90 S.Ct. 1930, 1934, 26 L.Ed.2d 489 (1970); *Snyder v. Massachusetts*, 291 U.S. 97, 106, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934); *Dowdell v. United States*, 221 U.S. 325, 330, 31 S.Ct. 590, 592, 55 L.Ed. 753 (1911); *Kirby v. United States*, 174 U.S. 47, 55, 19 S.Ct. 574, 577, 43 L.Ed. 890 (1899); *Mattox v. United States*, 156 U.S. 237, 244, 15 S.Ct. 337, 340, 39 L.Ed. 409 (1895). This interpretation derives not only from the literal text of the Clause, but also from our understanding of its historical roots. See *Coy*, *supra*, 487 U.S., at 1015–1016, 108 S.Ct., at 2800; *Mattox*, *supra*, 156 U.S., at 242, 15 S.Ct. at 339 (Confrontation Clause intended to prevent conviction by affidavit); *Green*, *supra*, 399 U.S., at 156, 90 S.Ct., at 1934

(same); cf. 3 J. Story, Commentaries on the Constitution § 1785, p. 662 (1833).

We have never held, however, that the Confrontation Clause guarantees criminal defendants the *absolute* right to a face-to-face meeting with witnesses against them at trial. Indeed, in *Coy v. Iowa*, we expressly "le[ft] for another day ... the question whether any exceptions exist" to the "irreducible literal meaning of the Clause: 'a right to *meet face to face* all those who appear and give evidence *at trial.*'" 487 U.S., at 1021, 108 S.Ct., at 2803 (quoting *Green, supra*, 399 U.S., at 175, 90 S.Ct., at 1943 (Harlan, J., concurring)). The procedure challenged in *Coy* involved the placement of a screen that prevented two child witnesses in a child abuse case from seeing the defendant as they testified against him at trial. See 487 U.S., at 1014–1015, 108 S.Ct., at 2799–2800. In holding that the use of this procedure violated the defendant's right to confront witnesses against him, we suggested that 1845any exception to the right "would surely be allowed only when necessary to further an important public policy"—*i.e.*, only upon a showing of something more than the generalized, "legislatively imposed presumption of trauma" underlying the statute at issue in that case. *Id.*, at 1021, 108 S.Ct., at 2803; see also *id.*, at 1025, 108 S.Ct., at 2805 (O'Connor, J., concurring). We concluded that "[s]ince there ha[d] been no individualized findings that these particular witnesses needed special protection, the judgment [in the case before us] could not be sustained by any conceivable exception." *Id.*, at 1021, 108 S.Ct., at 2803. Because the trial court in this case made individualized findings that each of the child witnesses needed special protection, this case requires us to decide the question reserved in *Coy*.

[1] The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a crimir.l defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact. The word "confront," after all, also means a clashing of forces or ideas, thus carrying with it the notion of adversariness. As we noted in our earliest case interpreting the Clause:

> "The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox, supra*, 156 U.S., at 242–243, 15 S.Ct., at 339–340.

As this description indicates, the right guaranteed by the Confrontation Clause includes not only a "personal examination," 156 U.S., at 242, 15 S.Ct., at 339, but also "(1) insures that the witness will give his statements under oath—thus impressing him with 1846the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'; [and] (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility." *Green, supra*, 399 U.S., at 158, 90 S.Ct., at 1935 (footnote omitted).

The combined effect of these elements of confrontation—physical presence, oath, cross-examination, and observation of demeanor by the trier of fact—serves the purposes of the Confrontation Clause by ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo–American criminal proceedings. See *Stincer, supra*, 482 U.S., at 739, 107 S.Ct., at 2664 ("[T]he right to confrontation is a func-

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tional one for the purpose of promoting reliability in a criminal trial"); *Dutton v. Evans*, 400 U.S. 74, 89, 91 S.Ct. 210, 219, 27 L.Ed.2d 213 (1970) (plurality opinion) ("[T]he mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the [testimony]' "); *Lee v. Illinois*, 476 U.S. 530, 540, 106 S.Ct. 2056, 2061, 90 L.Ed.2d 514 (1986) (confrontation guarantee serves "symbolic goals" and "promotes reliability"); see also *Faretta v. California*, 422 U.S. 806, 818, 95 S.Ct. 2525, 2532, 45 L.Ed.2d 562 (1975) (Sixth Amendment "constitutionalizes the right in an adversary criminal trial to make a defense as we know it"); *Strickland v. Washington*, 466 U.S. 668, 684–685, 104 S.Ct. 2052, 2062–2063, 80 L.Ed.2d 674 (1984).

[2] We have recognized, for example, that face-to-face confrontation enhances the accuracy of factfinding by reducing the risk that a witness will wrongfully implicate an innocent person. See *Coy, supra*, 487 U.S., at 1019–1020, 108 S.Ct., at 2802 ("It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.' . . . That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult"); *Ohio v. Roberts*, 448 U.S. 56, 63, n. 6, 100 S.Ct. 2531, 2537 n. 6, 65 L.Ed.2d 597 (1980); see also 3 W. Blackstone, Commentaries *373–*374. We have also noted the strong symbolic purpose served by requiring adverse witnesses at trial to testify in the accused's presence. See *Coy*, 487 U.S., at 1017, 108 S.Ct., at 2801 ("[T]here is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution' ") (quoting *Pointer v. Texas*, 380 U.S. 400, 404, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965)).

Although face-to-face confrontation forms "the core of the values furthered by the Confrontation Clause," *Green*, 399 U.S., at 157, 90 S.Ct., at 1934, we have nevertheless recognized that it is not the *sine qua non* of the confrontation right. See *Delaware v. Fensterer*, 474 U.S. 15, 22, 106 S.Ct. 292, 295, 88 L.Ed.2d 15 (1985) (*per curiam*) ("[T]he Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose [testimonial] infirmities [such as forgetfulness, confusion, or evasion] through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony"); *Roberts, supra*, 448 U.S., at 69, 100 S.Ct., at 2540 (oath, cross-examination, and demeanor provide "all that the Sixth Amendment demands: 'substantial compliance with the purposes behind the confrontation requirement' ") (quoting *Green, supra*, 399 U.S., at 166, 90 S.Ct., at 1939); see also *Stincer*, 482 U.S. at 739–744, 107 S.Ct., at 2664–2667 (confrontation right not violated by exclusion of defendant from competency hearing of child witnesses, where defendant had opportunity for full and effective cross-examination at trial); *Davis v. Alaska*, 415 U.S. 308, 315–316, 94 S.Ct. 1105, 1109–1110, 39 L.Ed.2d 347 (1974); *Douglas v. Alabama*, 380 U.S. 415, 418, 85 S.Ct. 1074, 1076, 13 L.Ed.2d 934 (1965); *Pointer, supra*, 380 U.S., at 406–407, 85 S.Ct., at 1069; 5 J. Wigmore, Evidence § 1395, p. 150 (J. Chadbourn rev. 1974).

[3] For this reason, we have never insisted on an actual face-to-face encounter at trial in *every* instance in which testimony is admitted against a defendant. Instead, we have repeatedly held that the Clause permits, where necessary, the admission of certain hearsay statements against a defendant despite the defendant's inability to confront the declarant at trial. See, *e.g.*, *Mattox*, 156 U.S., at 243, 15 S.Ct., at 339 ("[T]here could be nothing more directly contrary to the letter of the provision in question than the admission of dying declarations");

Pointer, supra, 380 U.S., at 407, 85 S.Ct., at 1069 (noting exceptions to the confrontation right for dying declarations and "other analogous situations"). In *Mattox*, for example, we held that the testimony of a Government witness at a former trial against the defendant, where the witness was fully cross-examined but had died after the first trial, was admissible in evidence against the defendant at his second trial. See 156 U.S., at 240–244, 15 S.Ct., at 338–340. We explained:

> "There is doubtless reason for saying that ... if notes of [the witness'] testimony are permitted to be read, [the defendant] is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection. But general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused." *Id.*, at 243, 15 S.Ct., at 339–340.

We have accordingly stated that a literal reading of the Confrontation Clause would "abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme." *Roberts*, 448 U.S., at 63, 100 S.Ct., at 2537. Thus, in certain narrow circumstances, "competing interests, if 'closely examined,' may warrant dispensing with confrontation at trial." *Id.*, at 64, 100 S.Ct., at 2538 (quoting *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S.Ct. 1038, 1045, 35 L.Ed.2d 297 (1973), and citing *Mattox, supra*). We have recently held, [849] for example, that hearsay statements of nontestifying co-conspirators may be admitted against a defendant despite the lack of any face-to-face encounter with the accused. See *Bourjaily v. United States*, 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987); *United States v. Inadi*, 475 U.S. 387, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986). Given our hearsay cases, the word "confronted," as used in the Confrontation Clause, cannot simply mean face-to-face confrontation, for the Clause would then, contrary to our cases, prohibit the admission of any accusatory hearsay statement made by an absent declarant—a declarant who is undoubtedly as much a "witness against" a defendant as one who actually testifies at trial.

[4] In sum, our precedents establish that "the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial," *Roberts, supra*, 448 U.S., at 63, 100 S.Ct., at 2537 (emphasis added; footnote omitted), a preference that "must occasionally give way to considerations of public policy and the necessities of the case," *Mattox, supra*, 156 U.S., at 243, 15 S.Ct., at 339–340. "[W]e have attempted to harmonize the goal of the Clause—placing limits on the kind of evidence that may be received against a defendant—with a societal interest in accurate factfinding, which may require consideration of out-of-court statements." *Bourjaily, supra*, 483 U.S., at 182, 107 S.Ct., at 2782. We have accordingly interpreted the Confrontation Clause in a manner sensitive to its purposes and sensitive to the necessities of trial and the adversary process. See, *e.g.*, *Kirby*, 174 U.S., at 61, 19 S.Ct., at 578 ("It is scarcely necessary to say that to the rule that an accused is entitled to be confronted with witnesses against him the admission of dying declarations is an exception which arises from the necessity of the case"); *Chambers, supra*, 410 U.S., at 295, 93 S.Ct., at 1045 ("Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process"). Thus, though we reaffirm the importance of face-to-face confrontation with wit-

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nesses appearing at trial, we cannot say that such confrontation is an indispensable element of the Sixth Amendment's guarantee
|850 of the right to confront one's accusers. Indeed, one commentator has noted that "[i]t is all but universally assumed that there are circumstances that excuse compliance with the right of confrontation." Graham, The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One, 8 Crim.L.Bull. 99, 107–108 (1972).

This interpretation of the Confrontation Clause is consistent with our cases holding that other Sixth Amendment rights must also be interpreted in the context of the necessities of trial and the adversary process. See, *e.g., Illinois v. Allen*, 397 U.S. 337, 342–343, 90 S.Ct. 1057, 1060, 25 L.Ed.2d 353 (1970) (right to be present at trial not violated where trial judge removed defendant for disruptive behavior); *Ritchie*, 480 U.S., at 51–54, 107 S.Ct., at 998–1000 (plurality opinion) (right to cross-examination not violated where State denied defendant access to investigative files); *Taylor v. Illinois*, 484 U.S. 400, 410–416, 108 S.Ct. 646, 653–657, 98 L.Ed.2d 798 (1988) (right to compulsory process not violated where trial judge precluded testimony of a surprise defense witness); *Perry v. Leeke*, 488 U.S. 272, 280–285, 109 S.Ct. 594, 599–602, 102 L.Ed.2d 624 (1989) (right to effective assistance of counsel not violated where trial judge prevented testifying defendant from conferring with counsel during a short break in testimony). We see no reason to treat the face-to-face component of the confrontation right any differently, and indeed we think it would be anomalous to do so.

That the face-to-face confrontation requirement is not absolute does not, of course, mean that it may easily be dispensed with. As we suggested in *Coy*, our precedents confirm that a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured. See 487 U.S., at 1021, 108 S.Ct., at 2803 (citing *Roberts, supra*, 448 U.S. at 64, 100 S.Ct., at 2538; *Chambers, supra*, 410 U.S. at 295, 93 S.Ct., at 1045); *Coy, supra*, 487 U.S., at 1025, 108 S.Ct., at 2805 (O'Connor, J., concurring).

|851 III

[5] Maryland's statutory procedure, when invoked, prevents a child witness from seeing the defendant as he or she testifies against the defendant at trial. We find it significant, however, that Maryland's procedure preserves all of the other elements of the confrontation right: The child witness must be competent to testify and must testify under oath; the defendant retains full opportunity for contemporaneous cross-examination; and the judge, jury, and defendant are able to view (albeit by video monitor) the demeanor (and body) of the witness as he or she testifies. Although we are mindful of the many subtle effects face-to-face confrontation may have on an adversary criminal proceeding, the presence of these other elements of confrontation—oath, cross-examination, and observation of the witness' demeanor—adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony. These safeguards of reliability and adversariness render the use of such a procedure a far cry from the undisputed prohibition of the Confrontation Clause: trial by *ex parte* affidavit or inquisition, see *Mattox*, 156 U.S., at 242, 15 S.Ct., at 389; see also *Green*, 399 U.S., at 179, 90 S.Ct., at 1946 (Harlan, J., concurring) ("[T]he Confrontation Clause was meant to constitutionalize a barrier against flagrant abuses, trials by anonymous accusers, and absentee witnesses"). Rather, we think these elements of effective confrontation not only permit a defendant to "confound and undo the false accuser, or reveal the child coached by a malevolent adult," *Coy, supra*, 487 U.S., at 1020, 108 S.Ct., at

2802, but may well aid a defendant in eliciting favorable testimony from the child witness. Indeed, to the extent the child witness' testimony may be said to be technically given out of court (though we do not so hold), these assurances of reliability and adversariness are far greater than those required for admission of hearsay testimony under the Confrontation Clause. See *Roberts*, 448 |852 U.S., at 66, 100 S.Ct., at 2539. We are therefore confident that use of the one-way closed circuit television procedure, where necessary to further an important state interest, does not impinge upon the truth-seeking or symbolic purposes of the Confrontation Clause.

The critical inquiry in this case, therefore, is whether use of the procedure is necessary to further an important state interest. The State contends that it has a substantial interest in protecting children who are allegedly victims of child abuse from the trauma of testifying against the alleged perpetrator and that its statutory procedure for receiving testimony from such witnesses is necessary to further that interest.

We have of course recognized that a State's interest in "the protection of minor victims of sex crimes from further trauma and embarrassment" is a "compelling" one. *Globe Newspaper Co. v. Superior Court of Norfolk County*, 457 U.S. 596, 607, 102 S.Ct. 2613, 2620, 73 L.Ed.2d 248 (1982); see also *New York v. Ferber*, 458 U.S. 747, 756–757, 102 S.Ct. 3348, 3354, 73 L.Ed.2d 1113 (1982); *FCC v. Pacifica Foundation*, 438 U.S. 726, 749–750, 98 S.Ct. 3026, 3040–3041, 57 L.Ed.2d 1073 (1978); *Ginsberg v. New York*, 390 U.S. 629, 640, 88 S.Ct. 1274, 1281, 20 L.Ed.2d 195 (1968); *Prince v. Massachusetts*, 321 U.S. 158, 168, 64 S.Ct. 438, 443, 88 L.Ed. 645 (1944). "[W]e have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights." *Ferber*, *supra*, 458 U.S., at 757, 102 S.Ct., at 3354. In *Globe Newspaper*, for example, we held that a State's interest in the physical and psychological well-being of a minor victim was sufficiently weighty to justify depriving the press and public of their constitutional right to attend criminal trials, where the trial court makes a case-specific finding that closure of the trial is necessary to protect the welfare of the minor. See 457 U.S., at 608–609, 102 S.Ct., at 2620–21. This Term, in *Osborne v. Ohio*, 495 U.S. 103, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990), we upheld a state statute that proscribed the possession and viewing of child pornography, reaffirming that "'[i]t is evident beyond the need for elaboration that a State's interest in "safeguarding the physical and |853 psychological well-being of a minor" is "compelling."'" *Id.*, at 109, 110 S.Ct. at 1696 (quoting *Ferber*, *supra*, 458 U.S., at 756–757, 102 S.Ct., at 3354–55).

[6] We likewise conclude today that a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court. That a significant majority of States have enacted statutes to protect child witnesses from the trauma of giving testimony in child abuse cases attests to the widespread belief in the importance of such a public policy. See *Coy*, 487 U.S., at 1022–1023, 108 S.Ct., at 2803–2804 (O'Connor, J., concurring) ("Many States have determined that a child victim may suffer trauma from exposure to the harsh atmosphere of the typical courtroom and have undertaken to shield the child through a variety of ameliorative measures"). Thirty-seven States, for example, permit the use of videotaped testimony of sexually abused children;[2] 24 States have authorized the use of

2. See Ala.Code § 15–25–2 (Supp.1989); Ariz.Rev.Stat.Ann. §§ 13–4251 and 4253(B), (C) (1989); Ark.Code Ann. § 16–44–203 (1987); Cal.Penal Code Ann. § 1346 (West Supp.1990); Colo.Rev.Stat. §§ 18–3–413 and 18–6–401.3 (1986); Conn.Gen.Stat. § 54–86g (1989); Del. Code Ann., Tit. 11, § 3511 (1987); Fla.Stat. § 92.53 (1989); Haw.Rev.Stat., ch. 626, Rule

one-way |854 closed circuit television testimony in child abuse cases;[3] and 8 States authorize the use of a two-way system in which the child witness is permitted to see the courtroom and the defendant on a video monitor and in which the jury and judge are permitted to view the child during the testimony.[4]

The statute at issue in this case, for example, was specifically intended "to safeguard the physical and psychological well-being of child victims by avoiding, or at least minimizing, the emotional trauma produced by testifying." *Wildermuth v. State*, 310 Md. 496, 518, 530 A.2d 275, 286 (1987). The *Wildermuth* court noted:

> "In Maryland, the Governor's Task Force on Child Abuse in its *Interim Report* (Nov.1984) documented the existence of the [child abuse] problem in our State. *Interim Report* at 1. It brought the picture up to date in its *Final Report* (Dec. 1985). In the first six months of 1985, investigations of child abuse were 12 percent more numerous than during the same period of 1984. In 1979, 4,615 cases of child abuse were investigated; in 1984, |855 8,321. *Final Report* at iii. In its *Interim Report* at 2, the Commission proposed legislation that, with some changes, became § 9–102. The proposal was 'aimed at alleviating the trauma to a child victim in the courtroom atmosphere by allowing the child's testimony to be obtained outside of the courtroom.' *Id.*, at 2. This would both protect the child and enhance the public interest by encouraging effective prosecution of the alleged abuser." *Id.*, at 517, 530 A.2d, at 285.

Given the State's traditional and "'transcendent interest in protecting the welfare of children,'" *Ginsberg*, 390 U.S., at 640, 88 S.Ct., at 1281 (citation omitted), and buttressed by the growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court, see Brief for American Psychological Association as *Amicus Curiae* 7–13; G. Goodman et al., Emotional Effects of Criminal Court Testimony on Child Sexual

Evid. 616 (1985); Ill.Rev.Stat., ch. 38, ¶ 106A–2 (1989); Ind.Code §§ 35–37–4–8(c), (d), (f), (g) (1988); Iowa Code § 910A.14 (1987); Kan.Stat. Ann. § 38–1558 (1986); Ky.Rev.Stat.Ann. § 421.–350(4) (Baldwin Supp.1989); Mass.Gen.Laws § 278:16D (Supp.1990); Mich.Comp.Laws Ann. § 600.2163a(5) (Supp.1990); Minn.Stat. § 595.–02(4) (1988); Miss.Code Ann. § 13–1–407 (Supp. 1989); Mo.Rev.Stat. §§ 491.675–491.690 (1986); Mont.Code Ann. §§ 46–15–401 to 46–15–403 (1989); Neb.Rev.Stat. § 29–1926 (1989); Nev. Rev.Stat. § 174.227 (1989); N.H.Rev.Stat.Ann. § 517:13–a (Supp.1989); N.M.Stat.Ann. § 30–9–17 (1984); Ohio Rev.Code Ann. §§ 2907.41(A), (B), (D), (E) (1987); Okla.Stat., Tit. 22, § 753(C) (Supp.1988); Ore.Rev.Stat. § 40.460(24) (1989); 42 Pa.Cons.Stat. §§ 5982, 5984 (1988); R.I.Gen. Laws § 11–37–13.2 (Supp.1989); S.C.Code Ann. § 16–3–1530(G) (1985); S.D.Codified Laws § 23A–12–9 (1988); Tenn.Code Ann. §§ 24–7–116(d), (e), (f) (Supp.1989); Tex.Code Crim.Proc. Ann., Art. 38.071, § 4 (Vernon Supp.1990); Utah Rule Crim.Proc. 15.5 (1990); Vt.Rule Evid. 807(d) (Supp.1989); Wis.Stat. §§ 967.04(7) to (10) (1987–1988); Wyo.Stat. § 7–11–408 (1987).

3. See Ala.Code § 15–25–3 (Supp.1989); Alaska Stat.Ann. § 12.45.046 (Supp.1989); Ariz.Rev. Stat.Ann. § 13–4253 (1989); Conn.Gen.Stat. § 54–86g (1989); Fla.Stat. § 92.54 (1989); Ga. Code Ann. § 17–8–55 (Supp.1989); Ill.Rev.Stat., ch. 38, ¶ 106A–3 (1987); Ind.Code § 35–37–4–8 (1988); Iowa Code § 910A.14 (Supp.1990); Kan. Stat.Ann. § 38–1558 (1986); Ky.Rev.Stat.Ann. §§ 421–350(1), (3) (Baldwin Supp.1989); La. Rev.Stat.Ann. § 15:283 (West Supp.1990); Md. Cts. & Jud.Proc.Code Ann. § 9–102 (1989); Mass.Gen.Laws § 278:16D (Supp.1990); Minn. Stat. § 595.02(4) (1988); Miss.Code Ann. § 13–1–405 (Supp.1989); N.J.Stat.Ann. § 2A:84A–32.4 (Supp.1989); Okla.Stat., Tit. 22, § 753(B) (West Supp.1988); Ore.Rev.Stat. § 40.460(24) (1989); 42 Pa.Cons.Stat. §§ 5982, 5985 (1988); R.I.Gen. Laws § 11–37–13.2 (Supp.1989); Tex.Code Crim.Proc.Ann., Art. 38.071, § 3 (Vernon Supp. 1990); Utah Rule Crim.Proc. 15.5 (1990); Vt. Rule Evid. 807(d) (Supp.1989).

4. See Cal.Penal Code Ann. § 1347 (West Supp. 1990); Haw.Rev.Stat., ch. 626, Rule Evid. 616 (1985); Idaho Code § 19–3024A (Supp.1989); Minn.Stat. § 595.02(4)(c)(2) (1988); N.Y.Crim. Proc.Law §§ 65.00 to 65.30 (McKinney Supp. 1990); Ohio Rev.Code Ann. §§ 2907.41(C), (E) (1987); Va.Code Ann. § 18.2–67.9 (1988); Vt. Rule Evid. 807(e) (Supp.1989).

Assault Victims, Final Report to the National Institute of Justice (presented as conference paper at annual convention of American Psychological Assn., Aug.1989), we will not second-guess the considered judgment of the Maryland Legislature regarding the importance of its interest in protecting child abuse victims from the emotional trauma of testifying. Accordingly, we hold that, if the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant.

[7] The requisite finding of necessity must of course be a case-specific one: The trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. See *Globe Newspaper Co.*, 457 U.S., at 608–609, 102 S.Ct., at 2621 (compelling interest in protecting [856] child victims does not justify a *mandatory* trial closure rule); *Coy*, 487 U.S., at 1021, 108 S.Ct., at 2803; *id.*, at 1025, 108 S.Ct., at 2805 (O'Connor, J., concurring); see also *Hochheiser v. Superior Court*, 161 Cal.App.3d 777, 793, 208 Cal.Rptr. 273, 283 (1984). The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. See, *e.g.*, *State v. Wilhite*, 160 Ariz. 228, 772 P.2d 582 (1989); *State v. Bonello*, 210 Conn. 51, 554 A.2d 277 (1989); *State v. Davidson*, 764 S.W.2d 731 (Mo.App.1989); *Commonwealth v. Ludwig*, 366 Pa.Super. 361, 531 A.2d 459 (1987). Denial of face-to-face confrontation is not needed to further the state interest in protecting the child witness from trauma unless it is the presence of the defendant that causes the trauma. In other words, if the state interest were merely the interest in protecting child witnesses from courtroom trauma generally, denial of face-to-face confrontation would be unnecessary because the child could be permitted to testify in less intimidating surroundings, albeit with the defendant present. Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*, *i.e.*, more than "mere nervousness or excitement or some reluctance to testify," *Wildermuth*, *supra*, 310 Md., at 524, 530 A.2d, at 289; see also *State v. Mannion*, 19 Utah 505, 511–512, 57 P. 542, 543–544 (1899). We need not decide the minimum showing of emotional trauma required for use of the special procedure, however, because the Maryland statute, which requires a determination that the child witness will suffer "serious emotional distress such that the child cannot reasonably communicate," § 9–102(a)(1)(ii), clearly suffices to meet constitutional standards.

To be sure, face-to-face confrontation may be said to cause trauma for the very purpose of eliciting truth, cf. *Coy*, *supra*, 487 U.S., at 1019–1020, 108 S.Ct., at 2802–03, but we think that the use of Maryland's special procedure, where necessary to further the important state interest in preventing trauma to child witnesses in child [857] abuse cases, adequately ensures the accuracy of the testimony and preserves the adversary nature of the trial. See *supra*, at 3166–3167. Indeed, where face-to-face confrontation causes significant emotional distress in a child witness, there is evidence that such confrontation would in fact *disserve* the Confrontation Clause's truth-seeking goal. See, *e.g.*, *Coy*, *supra*, 487 U.S., at 1032, 108 S.Ct., at 2809 (BLACKMUN, J., dissenting) (face-to-face confrontation "may so overwhelm the child as to prevent the possibility of effective testimony, thereby undermining the truth-finding function of the trial itself"); Brief for American Psychological Association as *Amicus Curiae* 18–24; *State v. Sheppard*, 197 N.J.Super. 411, 416, 484 A.2d 1330, 1332 (1984); Goodman & Helgeson, Child Sexual Assault: Children's Memory and the Law, 40

U. Miami L.Rev. 181, 203–204 (1985); Note, Videotaping Children's Testimony: An Empirical View, 85 Mich.L.Rev. 809, 813–820 (1987).

[8] In sum, we conclude that where necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate, the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation. Because there is no dispute that the child witnesses in this case testified under oath, were subject to full cross-examination, and were able to be observed by the judge, jury, and defendant as they testified, we conclude that, to the extent that a proper finding of necessity has been made, the admission of such testimony would be consonant with the Confrontation Clause.

IV

[9] The Maryland Court of Appeals held, as we do today, that although face-to-face confrontation is not an absolute constitutional requirement, it may be abridged only where there [858] is a " 'case-specific finding of necessity.' " 316 Md., at 564, 560 A.2d, at 1126 (quoting *Coy, supra*, 487 U.S., at 1025, 108 S.Ct., at 2805 (O'Connor, J., concurring)). Given this latter requirement, the Court of Appeals reasoned that "[t]he question of whether a child is unavailable to testify . . . should not be asked in terms of inability to testify in the ordinary courtroom setting, but in the much narrower terms of the witness's inability to testify in the presence of the accused." 316 Md., at 564, 560 A.2d, at 1126 (footnote omitted). "[T]he determinative inquiry required to preclude face-to-face confrontation is the effect of the presence of the defendant on the witness or the witness's testimony." *Id.*, at 565, 560 A.2d, at 1127. The Court of Appeals accordingly concluded that, as a prerequisite to use of the § 9–102 procedure, the Confrontation Clause requires the trial court to make a specific finding that testimony by the child in the courtroom *in the presence of the defendant* would result in the child suffering serious emotional distress such that the child could not reasonably communicate. *Id.*, at 566, 560 A.2d, at 1127. This conclusion, of course, is consistent with our holding today.

In addition, however, the Court of Appeals interpreted our decision in *Coy* to impose two subsidiary requirements. First, the court held that "§ 9–102 ordinarily cannot be invoked unless the child witness initially is questioned (either in or outside the courtroom) in the defendant's presence." *Id.*, at 566, 560 A.2d, at 1127; see also *Wildermuth*, 310 Md., at 523–524, 530 A.2d, at 289 (personal observation by the judge should be the rule rather than the exception). Second, the court asserted that, before using the one-way television procedure, a trial judge must determine whether a child would suffer "severe emotional distress" if he or she were to testify by *two*-way closed circuit television. 316 Md., at 567, 560 A.2d, at 1128.

Reviewing the evidence presented to the trial court in support of the finding required under § 9–102(a)(1)(ii), the Court of Appeals determined that "the finding of necessity required [859] to limit the defendant's right of confrontation through invocation of § 9–102 . . . was not made here." *Id.*, at 570–571, 560 A.2d, at 1129. The Court of Appeals noted that the trial judge "had the benefit only of expert testimony on the ability of the children to communicate; he did not question any of the children himself, nor did he observe any child's behavior on the witness stand before making his ruling. He did not explore any alternatives to the use of one-way closed-circuit television." *Id.*, at 568, 560 A.2d, at 1128 (footnote omitted). The Court of Appeals also observed that "the testimony in this case was not sharply focused on the effect of the defendant's pres-

ence on the child witnesses." *Id.*, at 569, 560 A.2d, at 1129. Thus, the Court of Appeals concluded:

> "Unable to supplement the expert testimony by responses to questions put by him, or by his own observations of the children's behavior in Craig's presence, the judge made his § 9–102 finding in terms of what the experts had said. He ruled that 'the testimony of each of these children *in a courtroom* will [result] in each child suffering serious emotional distress ... such that each of these children cannot reasonably communicate.' He failed to find—indeed, on the evidence before him, *could not have found*—that this result would be the product of testimony in a courtroom in the defendant's presence or outside the courtroom but in the defendant's televised presence. That, however, is the finding of necessity required to limit the defendant's right of confrontation through invocation of § 9–102. Since that finding was not made here, and since the procedures we deem requisite to the valid use of § 9–102 were not followed, the judgment of the Court of Special Appeals must be reversed and the case remanded for a new trial." *Id.*, at 570–571, 560 A.2d, at 1129 (emphasis added).

The Court of Appeals appears to have rested its conclusion at least in part on the trial court's failure to observe the children's behavior in the defendant's presence and its failure to |860 explore less restrictive alternatives to the use of the one-way closed circuit television procedure. See *id.*, at 568–571, 560 A.2d, at 1128–1129. Although we think such evidentiary requirements could strengthen the grounds for use of protective measures, we decline to establish, as a matter of federal constitutional law, any such categorical evidentiary prerequisites for the use of the one-way television procedure. The trial court in this case, for example, could well have found, on the basis of the expert testimony before it, that testimony by the child witnesses in the courtroom in the defendant's presence "will result in [each] child suffering serious emotional distress such that the child cannot reasonably communicate," § 9–102(a)(1)(ii). See *id.*, at 568–569, 560 A.2d, at 1128–1129; see also App. 22–25, 39, 41, 43, 44–45, 54–57. So long as a trial court makes such a case-specific finding of necessity, the Confrontation Clause does not prohibit a State from using a one-way closed circuit television procedure for the receipt of testimony by a child witness in a child abuse case. Because the Court of Appeals held that the trial court had not made the requisite finding of necessity under its interpretation of "the high threshold required by [*Coy*] before § 9–102 may be invoked," 316 Md., at 554–555, 560 A.2d, at 1121 (footnote omitted), we cannot be certain whether the Court of Appeals would reach the same conclusion in light of the legal standard we establish today. We therefore vacate the judgment of the Court of Appeals of Maryland and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice SCALIA, with whom Justice BRENNAN, Justice MARSHALL, and Justice STEVENS join, dissenting.

Seldom has this Court failed so conspicuously to sustain a categorical guarantee of the Constitution against the tide of prevailing current opinion. The Sixth Amendment provides, with unmistakable clarity, that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted |861 with the witnesses against him." The purpose of enshrining this protection in the Constitution was to assure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant's right to face his or her accusers in court. The Court, however, says:

> "We ... conclude today that a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face

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his or her accusers in court. That a significant majority of States have enacted statutes to protect child witnesses from the trauma of giving testimony in child abuse cases attests to the widespread belief in the importance of such a public policy." *Ante*, at 3167.

Because of this subordination of explicit constitutional text to currently favored public policy, the following scene can be played out in an American courtroom for the first time in two centuries: A father whose young daughter has been given over to the exclusive custody of his estranged wife, or a mother whose young son has been taken into custody by the State's child welfare department, is sentenced to prison for sexual abuse on the basis of testimony by a child the parent has not seen or spoken to for many months; and the guilty verdict is rendered without giving the parent so much as the opportunity to sit in the presence of the child, and to ask, personally or through counsel, "it is really not true, is it, that I—your father (or mother) whom you see before you—did these terrible things?" Perhaps that is a procedure today's society desires; perhaps (though I doubt it) it is even a fair procedure; but it is assuredly not a procedure permitted by the Constitution.

Because the text of the Sixth Amendment is clear, and because the Constitution is meant to protect against, rather than conform to, current "widespread belief," I respectfully dissent.

[862] I

According to the Court, "we cannot say that [face-to-face] confrontation [with witnesses appearing at trial] is an indispensable element of the Sixth Amendment's guarantee of the right to confront one's accusers." *Ante*, at 3166. That is rather like saying "we cannot say that being tried before a jury is an indispensable element of the Sixth Amendment's guarantee of the right to jury trial." The Court makes the impossible plausible by recharacterizing the Confrontation Clause, so that confrontation (redesignated "face-to-face confrontation") becomes only one of many "elements of confrontation." *Ante*, at 3163–3164. The reasoning is as follows: The Confrontation Clause guarantees not only what it explicitly provides for—"face-to-face" confrontation—but also implied and collateral rights such as cross-examination, oath, and observation of demeanor (TRUE); the purpose of this entire cluster of rights is to ensure the reliability of evidence (TRUE); the Maryland procedure preserves the implied and collateral rights (TRUE), which adequately ensure the reliability of evidence (perhaps TRUE); therefore the Confrontation Clause is not violated by denying what it explicitly provides for—"face-to-face" confrontation (unquestionably FALSE). This reasoning abstracts from the right to its purposes, and then eliminates the right. It is wrong because the Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to *assure* reliable evidence, undeniably among which was "face-to-face" confrontation. Whatever else it may mean in addition, the defendant's constitutional right "to be confronted with the witnesses against him" means, always and everywhere, at least what it explicitly says: the " 'right to meet face to face all those who appear and give evidence at trial.' " *Coy v. Iowa*, 487 U.S. 1012, 1016, 108 S.Ct. 2798, 2800, 101 L.Ed.2d 857 (1988), quoting *California v. Green*, 399 U.S. 149, 175, 90 S.Ct. 1930, 1943–44, 26 L.Ed.2d 489 (1970) (Harlan, J., concurring).

[863] The Court supports its antitextual conclusion by cobbling together scraps of dicta from various cases that have no bearing here. It will suffice to discuss one of them, since they are all of a kind. Quoting *Ohio v. Roberts*, 448 U.S. 56, 63, 100 S.Ct. 2531, 2537, 65 L.Ed.2d 597 (1980), the Court says that "[i]n sum, our precedents establish that 'the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial,' " *ante*, at 3165. (emphasis added by the Court). But *Roberts*, and all the other "precedents" the Court enlists to prove the implausible,

dealt with the *implications* of the Confrontation Clause, and not its literal, unavoidable text. When *Roberts* said that the Clause merely "reflects a preference for face-to-face confrontation at trial," what it had in mind as the nonpreferred alternative was not (as the Court implies) the appearance of a witness at trial without confronting the defendant. That has been, until today, not merely "nonpreferred" but utterly unheard-of. What *Roberts* had in mind was the receipt of *other-than-first-hand testimony* from witnesses at trial—that is, witnesses' recounting of hearsay statements by absent parties who, *since they did not appear at trial*, did not have to endure face-to-face confrontation. Rejecting that, I agree, was merely giving effect to an evident constitutional preference; there are, after all, many exceptions to the Confrontation Clause's hearsay rule. But that the defendant should be confronted by the witnesses who appear at trial is not a preference "reflected" by the Confrontation Clause; it is a constitutional right unqualifiedly guaranteed.

The Court claims that its interpretation of the Confrontation Clause "is consistent with our cases holding that other Sixth Amendment rights must also be interpreted in the context of the necessities of trial and the adversary process." *Ante*, at 3166. I disagree. It is true enough that the "necessities of trial and the adversary process" limit the *manner* in which Sixth Amendment rights may be exercised, and limit the *scope* of Sixth Amendment guarantees to the extent that scope is textually indeterminate. Thus (to |864 describe the cases the Court cites): The right to confront is not the right to confront in a manner that disrupts the trial. *Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). The right "to have compulsory process for obtaining witnesses" is not the right to call witnesses in a manner that violates fair and orderly procedures. *Taylor v. Illinois*, 484 U.S. 400, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988). The scope of the right "to have the assistance of counsel" does not include consultation with counsel at all times during the trial. *Perry v. Leeke*, 488 U.S. 272, 109 S.Ct. 594, 102 L.Ed.2d 624 (1989). The scope of the right to cross-examine does not include access to the State's investigative files. *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987). But we are not talking here about denying expansive scope to a Sixth Amendment provision whose scope for the purpose at issue is textually unclear; "to confront" plainly means to encounter face-to-face, whatever else it may mean in addition. And we are not talking about the manner of arranging that face-to-face encounter, but about whether it shall occur at all. The "necessities of trial and the adversary process" are irrelevant here, since they cannot alter the constitutional text.

II

Much of the Court's opinion consists of applying to this case the mode of analysis we have used in the admission of hearsay evidence. The Sixth Amendment does not literally contain a prohibition upon such evidence, since it guarantees the defendant only the right to confront "the witnesses against him." As applied in the Sixth Amendment's context of a prosecution, the noun "witness"—in 1791 as today—could mean either (a) one "who knows or sees any thing; one personally present" or (b) "one who gives testimony" or who "testifies," *i.e.*, "[i]n *judicial proceedings*, [one who] make[s] a solemn declaration under oath, for the purpose of establishing or making proof of some fact to a court." 2 N. Webster, An American Dictionary of the English Language (1828) (emphasis added). See also J. Buchanan, Linguae Britannicae Vera Pronunciatio (1757). The former meaning (one "who |865 knows or sees") would cover hearsay evidence, but is excluded in the Sixth Amendment by the words following the noun: "witnesses *against him*." The phrase obviously refers to those who give testimony against the defendant at trial. We have nonetheless found implicit in the Confronta-

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tion Clause some limitation upon hearsay evidence, since otherwise the government could subvert the confrontation right by putting on witnesses who know nothing except what an absent declarant said. And in determining the scope of that implicit limitation, we have focused upon whether the reliability of the hearsay statements (which are not *expressly* excluded by the Confrontation Clause) "is otherwise assured." *Ante*, at 3166. The same test cannot be applied, however, to permit what is explicitly forbidden by the constitutional text; there is simply no room for interpretation with regard to "the irreducible literal meaning of the Clause." *Coy, supra*, 487 U.S., at 1020–1021, 108 S.Ct., at 2803.

Some of the Court's analysis seems to suggest that the children's testimony here was itself hearsay of the sort permissible under our Confrontation Clause cases. See *ante*, at 3166–3167. That cannot be. Our Confrontation Clause conditions for the admission of hearsay have long included a "general requirement of unavailability" of the declarant. *Idaho v. Wright*, 497 U.S. 805, 815, 110 S.Ct. 3139, 3146, 111 L.Ed.2d 638. "In the usual case ..., the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." *Ohio v. Roberts*, 448 U.S., at 65, 100 S.Ct., at 2538. We have permitted a few exceptions to this general rule—*e.g.*, for co-conspirators' statements, whose effect cannot be replicated by live testimony because they "derive [their] significance from the circumstances in which [they were] made," *United States v. Inadi*, 475 U.S. 387, 395, 106 S.Ct. 1121, 1126, 89 L.Ed.2d 390 (1986). "Live" closed-circuit television testimony, however—if it can be called hearsay at all—is surely an example of hearsay as "a weaker substitute for live testimony," *id.*, at 394, 106 S.Ct., at 1126, which can be employed only when the genuine article is unavailable. "When |866 two versions of the same evidence are available, longstanding principles of the law of hearsay, applicable as well to Confrontation Clause analysis, favor the better evidence." *Ibid.* See also *Roberts, supra* (requiring unavailability as precondition for admission of prior testimony); *Barber v. Page*, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968) (same).

The Court's test today requires unavailability only in the sense that the child is unable to testify in the presence of the defendant.[1] That cannot possibly be the relevant sense. If unconfronted testimony is admissible hearsay when the witness is unable to confront the defendant, then presumably there are other categories of admissible hearsay consisting of unsworn testimony when the witness is unable to risk perjury, uncross-examined testimony when the witness is unable to undergo hostile questioning, etc. *California v. Green*, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970), is not precedent for such a silly system. That case held that the Confrontation Clause does not bar admission of prior testimony when the declarant is sworn as a witness but refuses to answer. But in *Green*, as in most cases of refusal, we could not know *why* the declarant refused to testify. Here, by contrast, we know that it is precisely because the child is unwilling to testify in the presence of the defendant. That unwillingness cannot be a valid excuse under the Confrontation Clause, whose very object is to place the witness under the sometimes hostile glare of the defendant. "That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult." *Coy*, 487 |867 U.S., at 1020, 108 S.Ct., at 2802. To say

1. I presume that when the Court says "trauma would impair the child's ability to communicate," *ante*, at 3170, it means that trauma would make it impossible for the child to communicate. That is the requirement of the Maryland law at issue here: "serious emotional distress such th the child cannot reasonably communicate." Md. Cts. & Jud.Proc.Code Ann. § 9–102(a)(1)(ii) (1989). Any implication beyond that would in any event be dictum.

that a defendant loses his right to confront a witness when that would cause the witness not to testify is rather like saying that the defendant loses his right to counsel when counsel would save him, or his right to subpoena witnesses when they would exculpate him, or his right not to give testimony against himself when that would prove him guilty.

III

The Court characterizes the State's interest which "outweigh[s]" the explicit text of the Constitution as an "interest in the physical and psychological well-being of child abuse victims," *ante*, at 3167, an "interest in protecting" such victims "from the emotional trauma of testifying," *ante*, at 3169. That is not so. A child who meets the Maryland statute's requirement of suffering such "serious emotional distress" from confrontation that he "cannot reasonably communicate" would seem entirely safe. Why would a prosecutor want to call a witness who cannot reasonably communicate? And if he did, it would be the State's own fault. Protection of the child's interest—as far as the Confrontation Clause is concerned [2]—is entirely within Maryland's control. The State's interest here is in fact no more and no less than what the State's interest always is when it seeks to get a class of evidence admitted in criminal proceedings: more convictions of guilty defendants. That is not an unworthy interest, but it should not be dressed up as a humanitarian one.

And the interest on the other side is also what it usually is when the State seeks to get a new class of evidence admitted: fewer convictions of innocent defendants—specifically, in the 1868present context, innocent defendants accused of particularly heinous crimes. The "special" reasons that exist for suspending one of the usual guarantees of reliability in the case of children's testimony are perhaps matched by "special" reasons for being particularly insistent upon it in the case of children's testimony. Some studies show that children are substantially more vulnerable to suggestion than adults, and often unable to separate recollected fantasy (or suggestion) from reality. See Lindsay & Johnson, Reality Monitoring and Suggestibility: Children's Ability to Discriminate Among Memories From Different Sources, in Children's Eyewitness Memory 92 (S. Ceci, M. Toglia, & D. Ross eds. 1987); Feher, The Alleged Molestation Victim, The Rules of Evidence, and the Constitution: Should Children Really Be Seen and Not Heard?, 14 Am.J.Crim.L. 227, 230–233 (1987); Christiansen, The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews, 62 Wash.L.Rev. 705, 708–711 (1987). The injustice their erroneous testimony can produce is evidenced by the tragic Scott County investigations of 1983–1984, which disrupted the lives of many (as far as we know) innocent people in the small town of Jordan, Minnesota. At one stage those investigations were pursuing allegations by at least eight children of multiple murders, but the prosecutions actually initiated charged only sexual abuse. Specifically, 24 adults were charged with molesting 37 children. In the course of the investigations, 25 children were placed in foster homes. Of the 24 indicted defendants, one pleaded guilty, two were acquitted at trial, and the charges against the remaining 21 were voluntarily dismissed. See Feher, *supra*, at 239–240. There is no doubt that some sexual abuse took place in Jordan; but there is no reason to believe it was as widespread as charged. A report by the Minnesota attorney general's office, based on inquiries conducted by the Minnesota Bureau of Criminal Apprehension and the Federal Bureau of Investigation,

2. A different situation would be presented if the defendant sought to call the child. In that event, the State's refusal to compel the child to appear, or its insistence upon a procedure such as that set forth in the Maryland statute as a condition of its compelling him to do so, would call into question—initially, at least, and perhaps exclusively—the scope of the defendant's Sixth Amendment right "to have compulsory process for obtaining witnesses in his favor."

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concluded that there was an "absence of credible testimony and [a] lack of [869]significant corroboration" to support reinstitution of sex-abuse charges, and "no credible evidence of murders." H. Humphrey, Report on Scott County Investigation 8, 7 (1985). The report describes an investigation full of well-intentioned techniques employed by the prosecution team, police, child protection workers, and foster parents, that distorted and in some cases even coerced the children's recollection. Children were interrogated repeatedly, in some cases as many as 50 times, *id.*, at 9; answers were suggested by telling the children what other witnesses had said, *id.*, at 11; and children (even some who did not at first complain of abuse) were separated from their parents for months, *id.*, at 9. The report describes the consequences as follows:

> "As children continued to be interviewed the list of accused citizens grew. In a number of cases, it was only after weeks or months of questioning that children would 'admit' their parents abused them.
>
> . . . . .
>
> "In some instances, over a period of time, the allegations of sexual abuse turned to stories of mutilations, and eventually homicide." *Id.*, at 10–11.

The value of the confrontation right in guarding against a child's distorted or coerced recollections is dramatically evident with respect to one of the misguided investigative techniques the report cited: some children were told by their foster parents that reunion with their real parents would be hastened by "admission" of their parents' abuse. *Id.*, at 9. Is it difficult to imagine how unconvincing such a testimonial admission might be to a jury that witnessed the child's delight at seeing his parents in the courtroom? Or how devastating it might be if, pursuant to a psychiatric evaluation that "trauma would impair the child's ability to communicate" in front of his parents, the child were permitted to tell his story to the jury on closed-circuit television?

In the last analysis, however, this debate is not an appropriate one. I have no need to defend the value of confrontation,[870] because the Court has no authority to question it. It is not within our charge to speculate that, "where face-to-face confrontation causes significant emotional distress in a child witness," confrontation might "in fact *disserve* the Confrontation Clause's truth-seeking goal." *Ante*, at 3169. If so, that is a defect in the Constitution—which should be amended by the procedures provided for such an eventuality, but cannot be corrected by judicial pronouncement that it is archaic, contrary to "widespread belief," and thus null and void. For good or bad, the Sixth Amendment requires confrontation, and we are not at liberty to ignore it. To quote the document one last time (for it plainly says all that need be said): "In *all* criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him" (emphasis added).

* * *

The Court today has applied "interest-balancing" analysis where the text of the Constitution simply does not permit it. We are not free to conduct a cost-benefit analysis of clear and explicit constitutional guarantees, and then to adjust their meaning to comport with our findings. The Court has convincingly proved that the Maryland procedure serves a valid interest, and gives the defendant virtually everything the Confrontation Clause guarantees (everything, that is, except confrontation). I am persuaded, therefore, that the Maryland procedure is virtually constitutional. Since it is not, however, actually constitutional I would affirm the judgment of the Maryland Court of Appeals reversing the judgment of conviction.

Item IIIC4

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Dave Schlueter, Reporter

RE: Proposed Amendments to Rule 30

DATE: September 16, 1998

I. Overview of Issue

As a result of a review of local rules several years ago, and at the suggestion of Judge Stotler (Chair, Standing Committee), the Committee proposed a change to Rule 30 to permit the judge to request the parties to submit their requested instructions at some time earlier than the close of the evidence. The amendment was published for comment in 1997 and the Committee received six written comments which generally favored the proposal. At its April 1998 meeting, the Committee was informed that the Civil Rules Committee was considering an amendment to Civil Rule 51. That amendment would attempt to clarify the requirements for preserving error regarding the court's instructions. That memo is attached. (It is not clear at this point whether the Civil Rules Committee will discuss the Professor Cooper's suggested changes at its upcoming meeting).

During the Committee's discussion in April, several members expressed the view that instruction errors seem problematic and that an amendment might be appropriate. I was asked to explore the possibility of including language in Rule 30 that would clarify what steps counsel must take to preserve error.

II. An Overview of the Law

The law governing preservation of error vis-a-vis instructions errors, as reflected in Rule 30, is usually simply stated: In order to preserve error counsel must timely object to the instructions, either as an objection to an instruction to be given or as to a requested instruction not given. *See* Devitt, et al, FEDERAL JURY PRACTICE AND INSTRUCTIONS, § 7.03 (West 1992) (citing cases). Assuming that counsel fails to do so, Rule 52 and the caselaw clearly permit an appellate court to grant relief under the doctrine of "plain error." Although the general rule seems to be simply stated, caselaw application has apparently not always been consistent because of issues concerning whether counsel's actions amounted to a specific "objection." For example, some cases have indicated that counsel's request for an instruction may be a sufficient means of preserving error if the trial judge fails to give the instruction as requested. *See, e.g., United States v. Lassiter*, 819 F.2d 84 (5th Cir. 1987); *Sherrod v. Berry*, 827 F.2d 195 (7th Cir. 1987) (applying Rule 51). But Rule 30 itself seems clear in its requirement that a specific objection must be timely made in order to preserve error—both as to instructions given and as to

instructions not given. Thus, to be on the safe side, if the trial judge fails to give a timely requested instruction, counsel should specifically object to its omission from the charge. For the most part, the courts seem to treat instructions errors in civil and criminal cases in a similar fashion.

III. Issue Before the Committee

The question before the Committee is whether to include any new or additional language in Rule 30 which would address some of the concerns under discussion in the civil context.

In addressing that issue several points should be considered. First, as they now stand, Rules 30 and 51 are identical. And in the recent history of rule-making, there has been an effort to use the same language in all of the Rules, Civil, Criminal, and Appellate, unless there was a good reason for varying the text.

Second, the major issue sought to be addressed in Civil Rule 51 focuses on addressing the issue of plain error, which is not otherwise mentioned in the Civil Rules. In the Criminal Rules, Rule 52 explicitly recognizes that doctrine for appeals of criminal cases. Thus, there is probably not a need to reflect that issue in Rule 30.

Third, the proposed language suggested by Professor Cooper to the Civil Rules Committee would certainly make it clearer in the Rule itself, what steps counsel must take to preserve error. Whether there is better language to accomplish the same result is another matter. That would be true even if no explicit reference was made in Rule 52 to the subject of plain error.

Fourth, this Rule will be considered for restyling in the near future, which might result in reorganization of the rule itself.

Fifth, immediate change to this Rule is not critical.

IV. Recommendation

I recommend that the Committee discuss Rule 30 with a view toward instructing me on whether to coordinate any proposed changes with the Reporter for the Civil Rules Committee. If that is the view of the Committee, I would propose to work out a draft for the Committee's consideration at a future meeting, after working with Professor Cooper and possible similar language for both Rules 30 and 51, or reasons for not using similar language.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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CRIMINAL RULES

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EVIDENCE RULES

MEMORANDUM

March 16, 1998

To: Judge W. Eugene Davis
Professor David A. Schlueter

From: Judge Alicemarie H. Stotler (by jhr)

Re: Overlapping Information from Civil Rules

In reviewing the agenda book for the upcoming Civil Rules meeting, I noted that they are considering an amendment to Civil Rule 51 similar to the amendment to Criminal Rule 30 published for comment last fall. Beyond the question of the timing of the submission of jury instructions, however, Professor Cooper identifies several other issues that may need to be addressed if the rule is amended. In light of the similarities between the two rules, I am enclosing a copy of Professor Cooper's memo on the subject for the consideration of your committee.

Also, John Rabiej may have already forwarded to you the correspondence between Professors Cooper and Capra on the subject of Civil Rule 44. If not, I have enclosed it now for your information. As you can see, Criminal Rule 27 may be implicated.

I look forward to seeing you both next month in Washington.

enclosures

cc (all w/o enc.):
Judge Paul V. Niemeyer
Professor Edward H. Cooper
Professor Daniel J. Capra
Mr. John K. Rabiej

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Rule 51: Requests Before Trial and More

In the wake of its review of local rules, the Ninth Circuit Judicial Council has recommended that Civil Rule 51 be amended "to authorize local rules requiring the filing of civil jury instructions before trial." This recommendation raises at least three distinct questions. The most obvious is whether it is good policy to require that requests for instructions be filed before trial in some cases or in all cases. If pretrial request deadlines are desirable, it must be decided whether this matter should be confided to local rules or instead should be approached in a national rule. On the face of it, there is no apparent reason to relegate this matter to local option. It is difficult to imagine variations in local circumstances that make this policy more desirable in some parts of the country but less desirable in other parts. No more will be said about this question. The third and least obvious question is whether a general change in the Rule 51 request deadline should be the only change proposed for Rule 51. Rule 51 notoriously "does not say what it means, and does not mean what it says." If some part of the request-objection-review question is to be addressed, perhaps the rule should be approached as an integrated whole.

This Memorandum is designed only to introduce the topic. There is little reason to anticipate time for sufficient deliberation at the March, 1998 Advisory Committee meeting. Two questions are posed: Should Rule 51 be approached at all? If some Rule 51 changes are to be studied, should the full range of possibly desirable changes be considered?

Pretrial Instruction Requests

The first sentence of Rule 51 now reads:

> At the close of the evidence or at such earlier time during trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests.

This sentence seems to limit the court's authority to directing that requests filed before the close of the evidence be filed "during trial," not before trial. It is difficult to find anything in the generalities of Rule 16 that can be read as an implicit license to direct earlier requests. Local rules that require pretrial requests are at great risk of being held invalid as inconsistent with Rule 51.

Three principal advantages seem to underlie the interest in pretrial jury requests. Pretrial requests will help the court if it wishes to provide preliminary instructions at the beginning of the trial. All parties will have a better idea of the instructions likely to be given, and can shape trial presentations accordingly; this advantage would be enhanced if the court were required to make at least preliminary rulings on the requests before trial. The court will have more time to consider the requests, particularly if it is not required to make final rulings before trial. There may

be incidental advantages as well. The competing requests may focus the dispute in ways that support renewed consideration of motions to dismiss or for summary judgment. The better focus may instead suggest that potentially dispositive issues be tried first, cf. Rules 16(c)(14) and 50(a), or be designated for separate trial. Advantages of this sort are most likely to be realized if the instruction requests are made part of the pretrial conference procedure.

The potential disadvantages of pretrial instruction requests arise from inability to predict just what the evidence will reveal. In smaller part, the problem is that wishful parties may request instructions on issues that will not be supported by trial evidence. In larger part, the problem is that even wishful parties may not anticipate all of the issues that will be supported by trial evidence. It will not do to prohibit requests as untimely when there was good reason to fail to anticipate the evidence that supports the request.

The simplest way to accommodate these conflicting concerns would be to strike the limiting language from Rule 51:

> At the close of the evidence or at such earlier time ~~during the trial~~ as the court reasonably directs, any party may file written requests * * *.

The Committee Note could point to the reasons that may justify a direction that requests be filed before trial, particularly in complex cases. The reasons for caution also should be pointed out. One of the cautions might be a reflection on the meaning of Rule 51's fourth sentence: "No party may assign as error the giving or the failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict * * *." This sentence does not mean that it is enough to make a request for the first time, couched as an "objection," before the jury retires. The objection works only if there was a duty to request, and there is a duty to request only if a timely request is made.

The reason for considering Rule 51 in more general terms is suggested by the cautionary observation that might be written to explain the difference between a request and an objection. It is easy for the uninitiated to misread Rule 51. It can be revised to convey its messages more clearly.

General Rule 51 Revision

Rule 51 can be read easily only by those who already know what it means. A party who wants an issue covered by instructions must do both of two things: make a timely request, and then separately object to failure to give the request as made. The cases that explain the need to renew the request by way of objection suggest that repetition is needed in part to ensure that the court has not simply forgotten the request or its intention to give the instruction, and in part to show the court that it has failed in its attempt to give the substance of a requested instruction in better form. An attempt to address an omitted issue by submissions

to the court after the request deadline fails because it is not an "objection" but an untimely request. Many circuits, moreover, recognize a "plain," "clear," or "fundamental" error doctrine that allows reversal despite failure to comply with Rule 51. This doctrine is explicit in the general "plain errors" provision of Criminal Rule 52; the contrast between this general provision and Rule 51 has led some circuits to reject the plain error doctrine for civil jury instructions.

Although unlikely, it also is possible that the formal requirements of Rule 51 may discourage the timid from making untimely requests that would be granted if made. Requests framed as objections may well be given, despite the risk that tardy requests will seduce the court into error, confuse the jury, or at least unduly emphasize one issue.

Present Rule 51 is set out as a prelude to a revised draft, adding only numbers to indicate the points at which distinct thoughts emerge in the text:

> [1: Requests] At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. [2: Instructions] The court, at its election, may instruct the jury before or after argument, or both. [3: Objections] No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

The following draft Rule 51 is only an approximation that suggests many of the issues that might be addressed by a comprehensive attempt to adopt a rule that better guides parties and courts:

Rule 51. Instructions to Jury: Objection

(a) **Requests.** A party may file written requests that the court instruct the jury on the law as set forth in the requests at the close of the evidence or at an earlier reasonable time directed by the court. The court must inform the parties of its proposed action on the requests before jury arguments. The court may, in its discretion, permit an untimely request [to be] made at any time before the jury retires to consider its verdict.

(b) **Objections.** A party may object to an instruction or the failure to give an instruction before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity must be given to make the objection out of the jury's hearing.

(c) **Instructions.** The court may instruct the jury at any time after trial begins. Final instructions must be given to the jury before or after argument, or both.

(d) **Forfeiture; plain error**

(1) A party may not assign as error a mistake in an instruction actually made unless the party made a proper objection under subdivision (b).

(2) A party may not assign as error a failure to give an instruction unless the party made a proper request under subdivision (a), and – unless the court made it clear that the request had been considered and rejected – also made a proper objection under subdivision (b).

(3) A court may set aside a jury verdict for error in the instructions that has not been preserved as required by paragraphs (1) or (2), taking account of the obviousness of the error, the importance of the error, the costs of correcting the error, and the importance of the action to nonparties.

Committee Note

Rule 51 is revised to capture many of the interpretations that have emerged in practice. The revisions in text will make uniform the conclusions reached by a majority of decisions on each point.

Requests. Subdivision (a) governs requests. Apart from the plain error doctrine recognized in subdivision (d)(3), a court is not obliged to instruct the jury on issues raised by the evidence unless a party requests an instruction. The revised rule recognizes the court's authority to direct that requests be submitted before trial. Particularly in complex cases, pretrial requests can help the parties prepare for trial. In addition, pretrial requests may focus the case in ways that invite reconsideration of motions to dismiss or for summary judgment. Trial also may be shaped by severing some matters for separate trial, or by directing that trial begin with issues that may warrant disposition by judgment as a matter of law; see Rules 16(c)(14) and 50(a). The rule permits the court to further support these purposes by informing the parties of its action on their requests before trial. It seems likely that the deadline for pretrial requests will often be connected to a final pretrial conference.

The risk in directing a pretrial request deadline is that unanticipated trial evidence may raise new issues or reshape issues the parties thought they had understood. The need for a pretrial request deadline may not be great in an action that involves well-settled law that is familiar to the court. Courts should avoid a routine practice of directing pretrial requests.

Untimely requests are often accepted, at times by acting on an objection to the failure to give an instruction on an issue that was not framed by a timely request. The revised rule expressly recognizes the court's discretion to act on an untimely request. The most important consideration in exercising discretion is the importance of the issue to the case – the closer the issue lies to the "plain error" that would be recognized under subdivision (d)(3), the better the reason to give an instruction. The cogency of the reason for failing to make a timely request also should be considered – the earlier the request deadline, the more likely it is that good reason will appear for failing to recognize an important issue. Courts also must remain wary, however, of the risks posed by tardy requests. Hurried action in the closing minutes of trial may invite error. A jury may be confused by a tardy instruction made after the main body of instructions, and in any event may be misled to focus undue attention on the issues isolated and emphasized by a tardy instruction.

Objections. No change is intended in the requirements for making objections.

Instructions. Subdivision (c) expressly authorizes preliminary instructions at the beginning of the trial, a device that may be a helpful aid to the jury. In cases of unusual length or complexity, interim instructions also may be made during the course of trial.

Forfeiture and plain error. Many cases hold that a proper request for a jury instruction is not alone enough to preserve the right to appeal failure to give the instruction. The request must be renewed by objection. An objection, on the other hand, is sufficient only as to matters actually stated in the instructions. Even if framed as an objection, a request to include matter omitted from the instructions is just that, a request, and is untimely after the close of the evidence. This doctrine is appropriate when the court may not have sufficiently focused on the request, or may believe that the request has been granted in substance although in different words. This doctrine may also prove a trap for the unwary who fail to add an objection after the court has made it clear that the request has been considered and rejected on the merits. The authority to act on an untimely request despite a failure to object is established in subdivision (a). Subdivision (d)(2) establishes authority to review the failure to grant a timely request, despite a failure to add an objection, when the court has made clear its consideration and rejection of the request.

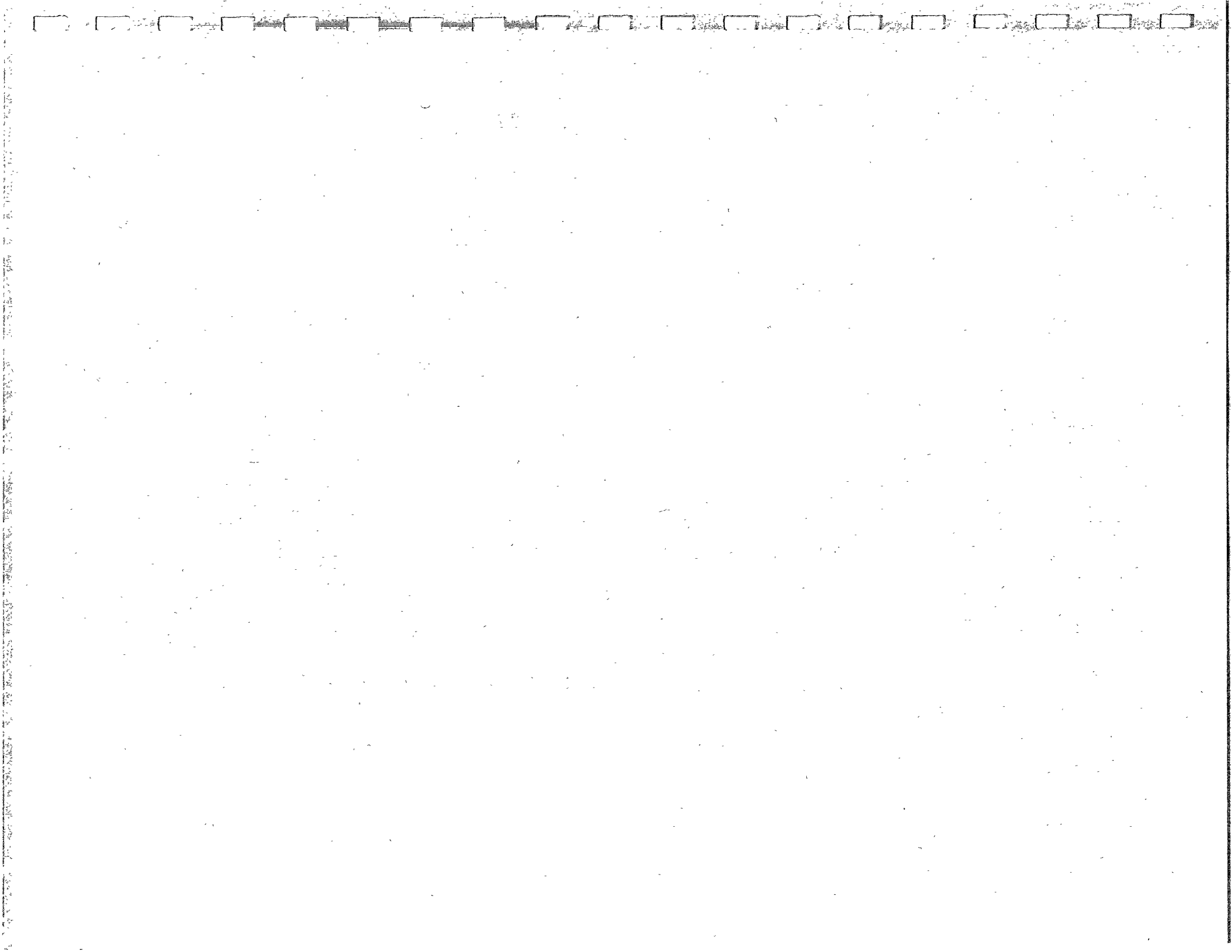
Many circuits have recognized the power to review errors not preserved under Rule 51 in exceptional cases. The foundation of these decisions is that a district court owes a duty to the parties, to the law, and to the jury to give correct instructions on the fundamental elements of an action. This duty is shaped by at least the four factors enumerated in subdivision (d)(3).

The obviousness of the error reduces the need to rely on the parties to help the court with the law, and also bears on society's obligation to provide a reasonably learned judge. Obviousness turns not only on how well the law is settled, but also on how familiar the particular area of law should be to most judges. Clearly settled but exotic law often does not generate obvious error.

The importance of the error must be measured by the role the issue plays in the specific case; what is fundamental to one case may be peripheral in another. Importance is independent of obviousness. The most obvious example involves law that was clearly settled at the time of the instructions, only to be overruled by the time of appeal.

The costs of correcting an error are affected by a variety of factors. If a complete new trial must be had for other reasons, ordinarily an instruction error at the first trial can be corrected for the second trial without significant cost. A Rule 49 verdict may enable correction without further proceedings.

In a case that seems close to the fundamental error line, account also may be taken of the impact a verdict may have on nonparties. Common examples are provided by actions that attack government actions or private discrimination.



MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor David A. Schlueter, Reporter

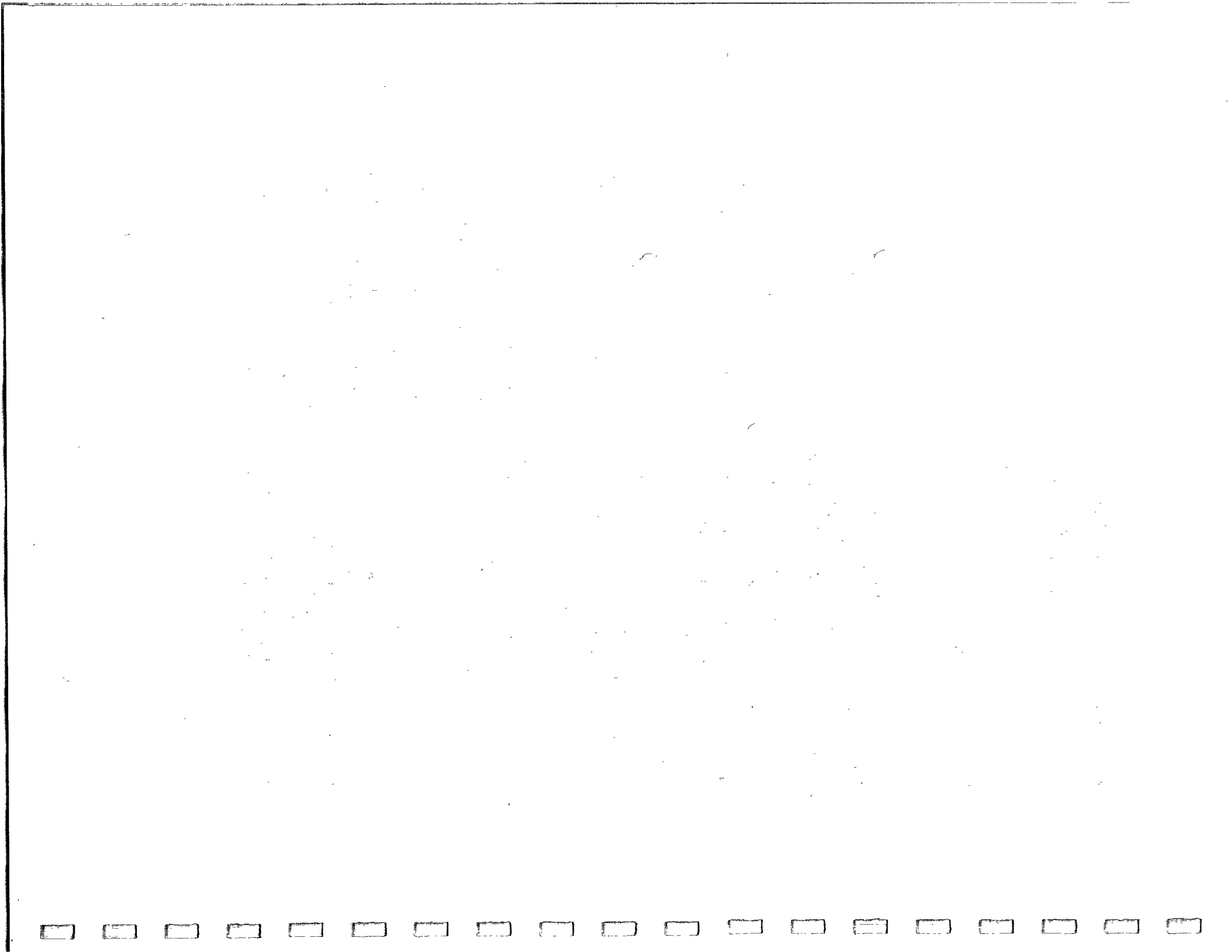
RE: Proposed Amendments to Rule 30

DATE: March 24, 1998

The Committee received only six comments on the proposed change to Rule 30, which would permit the trial court to require the parties to file their requests for instructions before the trial starts. Under the current rule that practice is not permitted. The majority of those commenting support the change. A summary of the comments received is attached, along with a copy of the published rule.

The NADCL opposes the change, largely because in a criminal case the defendant could be required to reveal the theory of his or her case before the trial actually starts, which would give the government another unfair advantage. It proposes that the rule be redrafted to state that a criminal defendant may not be required to submit its proposed instructions until after the government has rested, and that in any event, the defense should have the absolute right to submit additional requests after both sides have rested. The current rule, however, already permits to some extent what the NADCL fears. Under the present rule, a trial judge in a criminal case could require the prosecution and defense to file their requested instructions as soon as the trial commences, *e.g.* in the middle of the government's case.

Also attached is a copy of correspondence from Judge Stotler who notes that in addition to the timing issues addressed in the proposed amendment, there may be other issues--identified by the Civil Rules Committee in its consideration of similar amendments to Civil Rule 51--which may arise with regard to Rule 30. Those materials raise some of the issues discussed at earlier meetings on the proposed amendment to Rule 31, i.e., some of the advantages and disadvantages of requiring pretrial submission of issues. Of course, the point raised by the NADCL concerning the defendant in a criminal case do not arise as such in the civil setting where pretrial discovery and pleadings practice has probably given both sides a good idea what the case will be about. In complex criminal cases,. where such notice is not normally required there may be even a greater benefit for the court to see what the government and defense will be arguing and thus better inform the trial court what the evidence is likely to show. The other issues raised the materials seem to focus on preservation of error issues vis a vis requests and objections to instructions—an issue not addressed at all in the currently proposed amendments to Rule 30.



Rule 30. Instructions

Any party may request in writing that the court instruct the jury on the law as specified in the request. The request may be made ~~At~~ at the close of the evidence, or at ~~during the trial~~ such ~~any~~ earlier time that ~~as~~ the court reasonably directs. ~~, any party may file written requests that the court instruct the jury on the law as set forth in the requests.~~ At the same time, a copy of the request shall be furnished to all other parties. ~~copies of such requests shall be furnished to all parties.~~ Before closing arguments, the ~~The~~ court shall inform counsel of its proposed action on the requests ~~upon the requests prior to their arguments to the jury~~. The court may instruct the jury before or after the arguments are completed, or at both times. No party may appeal from ~~assign as error~~ any portion of the charge or from anything omitted, ~~omission therefrom~~ unless that party objects ~~thereto~~ before the jury retires to consider its verdict and states, ~~stating~~ distinctly the matter to which objection is made ~~that party objects~~ and the grounds for ~~of~~ the objection. An opportunity must ~~Opportunity shall~~ be given to object ~~make the objection~~ out of the jury's hearing ~~of the jury~~ and, on request ~~of any party~~, out of the jury's presence ~~of the jury~~.

COMMITTEE NOTE

The amendment addresses the timing of requests for instructions. As currently written, the trial court may not direct the parties to file such requests before trial without violating Rules 30 and 57. While the amendment falls short of requiring all requests to be made before trial in all cases, the amendment now permits a court to do so in a particular case or as a matter of local practice under local rules promulgated under Rule 57.

Item III C 5

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor David A. Schlueter, Reporter**

RE: **Rule 32; Report of Subcommittee on Proposal to Adopt Rule Governing Release of Probation, Pretrial and Presentence Records and Reports**

DATE: **September 15, 1998**

In July 1998, Judge Davis appointed a subcommittee (Judge Brooks, chair, Chief Justice Wathen, Mr. Pauley, Ms. Harkenrider, and Mr. Martin) to study a proposal from the Criminal Law Committee regarding the adoption of a local rule to deal with the issue of release of presentence and related reports. The report of that subcommittee is attached. Also attached are materials from the General Counsel's office and the Criminal Law Committee.

This matter will be on the agenda for the October meeting in Maine.

MEMORANDUM

TO: **Judge W. Eugene Davis**

FROM: **Judge D. Brooks Smith**

RE: **Subcommittee on Confidentiality of Pretrial Services**

DATE: **September 11, 1998**

In July, you asked that I chair a subcommittee to consider whether the Criminal Rules Committee should publish a rule governing the disclosure of probation, pretrial and presentence records and reports. You also named Chief Justice Wathen, Roger Pauley, Mary Harkenrider and Henry Martin to serve on the subcommittee.

Apparently, this issue was first raised with the Criminal Law Committee by the Associate General Counsel of the Administrative Office because of the frequent requests made to pretrial services and probation officers for production of pretrial services, presentence and supervision information -- information generally regarded as confidential. According to the Associate General Counsel,

> [t]he Office of General Counsel receives several requests a week dealing with these requests and is glad to provide assistance, but the lack of an established procedure causes confusion and results in a great deal of unnecessary effort on the part of the probation officer, the United States Attorney's Office, which is often asked to assist the probation office, and, ultimately, the court.[1]

The Associate General Counsel has drafted a proposed uniform local rule to submit to district courts for adoption. This prompted you and our committee to consider whether a national rule would be more appropriate. Accordingly, our subcommittee was asked to consider whether the full committee should consider adopting a national rule governing disclosure of presentence reports and related records, and to draft a proposed rule if we concluded that the subject warranted further consideration.

Our subcommittee conducted a telephone conference on August 24. The consensus of our membership was that there is not presently a need for a national rule.

During our discussion, most of us questioned how a national rule could be fashioned to adequately address the variety of ways these requests are raised with district courts. Roger Pauley

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[1] Memorandum of David N. Adair, Jr., Associate General Counsel, dated June 17, 1998.

stated that the Department of Justice does not have a position on this issue, and that he is "not persuaded a national rule is needed." Mary Harkenrider similarly noted that she was "unclear that we're ready for [a national rule]."

Chief Justice Wathen emphasized that the real decision is a discretionary call by the district judge and that the procedure should be left "the way it is." Henry Martin likewise stated his belief that a rule is unnecessary.

The subcommittee suggested that I contact Judge Kazen, chair of the Criminal Law Committee, to solicit his views on the need for rule-making. I did so on September 4, and during our conversation, Judge Kazen made clear his "skepticism" concerning the need for a national rule governing disclosure.

Our subcommittee conducted no legal research on this issue beyond what was provided for us in the memoranda from the Associate General Counsel. It should also be pointed out that Roger Pauley had received, as of the date of our telephone conference, very few replies from U. S. Attorneys and others in response to his own inquiry on this subject.

If you wish for us to conduct a broader inquiry into the experience of district judges, prosecutors, defense counsel and probation officers with issues of disclosure concerning probation, pretrial and presentence records, we will be pleased to do so. As of this date, however, our consensus recommendation is that no further action need be taken on this issue by the full committee.

cc: Honorable Daniel E. Wathen
Roger A. Pauley, Esquire
Mary Frances Harkenrider, Esquire
Henry A. Martin, Esquire
Professor David A. Schlueter

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

July 1, 1998

MEMORANDUM TO JUDGE W. EUGENE DAVIS AND PROFESSOR DAVID A. SCHLUETER

SUBJECT: Disclosure of Presentence Report

For your information, I am sending to you materials from David Adair of the AO's General Counsel office on the disclosure of presentence investigation reports. David provides staff assistance to the Committee on Criminal Law and was tasked by that committee to prepare a model local rule governing the disclosure of probation, pretrial, and presentence records and reports. The Criminal Law Committee later decided to defer further consideration of the issue until the Advisory Committee on Criminal Rules evaluated the advisability of recommending a national rule.

Dave had completed extensive research into this issue before the committee decided to defer further consideration pending the advisory committee's consideration. His attached memorandum is comprehensive, and it will be helpful in our review of this issue.

John K. Rabiej

Attachments

cc: Peter G. McCabe, Secretary (with attach.)
David N. Adair, Esquire (without attach.)

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
Memorandum

DATE: June 17, 1998

FROM: David N. Adair, Jr., Associate General Counsel

SUBJECT: Confidentiality of Pretrial Services, Presentence, and Supervision Information

TO: John Rabiej, Chief, Rules Committee Support Office

I understand that the Advisory Committee on the Federal Rules of Criminal Procedure is interested in considering a rule on the confidentiality of pretrial services, presentence and probation and supervised release information. As you know, I had done some work on a model local rule on the issue for the Judicial Conference Committee on Criminal Law. Ultimately, because of the interest of the Advisory Committee, the materials I prepared were not submitted to the Criminal Law Committee. I am sending some of these materials to you in case they may be helpful to the Advisory Committee.

It is the view of this office that, in general, presentence investigation reports and information gathered in the course of probation or supervised release supervision are generally regarded as confidential unless disclosure is required by statute, rule, or administrative guidelines, or is specifically authorized by the court. (Pretrial services information is also specifically protected from disclosure by regulations promulgated by the Director of the Administrative Office under the authority of 18 U.S.C. § 3153(c).) I have attached a more thorough discussion of the law on this issue.

Nonetheless, requests for such documents and information either by subpoena or informal request are a common occurrence. These requests come from both state and federal courts, but mostly from state courts, and they come in connection with both criminal and civil proceedings. The Office of General Counsel receives several requests a week dealing with these requests and is glad to provide assistance, but the lack of an established procedure causes confusion and results in a great deal of unnecessary effort on the part of the probation officer, the United States Attorney's office, which is often asked to assist the probation office, and, ultimately, the court.

The existence of an established and recognized procedure would make the entire exercise more predictable and efficient. The existence of a number of local rules on the subject indicates interest in such a procedure. About half of the district courts have promulgated local rules or orders that deal with the confidentiality of these records, and about one-third have promulgated procedures that govern the disclosure of these records. I have

prepared a table of those local rules, which I attach. The fact that the majority of these rules were enacted relatively recently suggests that the interest is current and, perhaps, increasing.

Two rules, that I drafted as model local rules, are attached. The first is a short form model rule and an explanation of the rule's provisions. Though there are advantages in brevity, the short form leaves a number of issues unresolved that presumably would have to be resolved on a case by case basis. The second is a more comprehensive model rule, together with an explanation of its provisions.

I hope you find these materials of assistance. Please advise if you have any questions or comments. Of course, I would be happy to talk with David Schluetter if he has any questions.

4 Attachments

CONFIDENTIALITY OF PRESENTENCE, PROBATION AND SUPERVISED RELEASE INFORMATION

It is the position of the Office of the General Counsel of the Administrative Office that presentence, probation or supervised release information is confidential and may be disclosed only (1) if authorization to disclose such information has been granted by the respective sentencing court at its discretion, (2) if a court determines that a compelling need for disclosure has been demonstrated, or (3) if there exists explicit authority to disclose such information.

With regard to presentence reports, F. R. Crim. P. 32(c) provides for the disclosure of the presentence report to the defendant, the defendant's counsel, and the attorney for the Government. The rule does not specifically proscribe other disclosure, but a number of courts have determined that the purpose and function of the presentence report requires that it be confidential. The case law clearly establishes that concern for confidentiality permeates Rule 32 and its history and that, therefore, presentence information constitutes confidential court records, not public records.

> In order to be of greatest assistance to the court, the report should be as complete as possible, containing "[a]ll objective information which is significant to the decision-making process." To this end, the report is designed to
>
> > describe . . . the defendant's character and personality, evaluate . . . his or her problems and needs, help . . . the reader understand the world in which the defendant lives, reveal . . . the nature of his or her relationships with people, and disclose those factors that underlie the defendant's specific offense and conduct in general.
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> [Administrative Office of the United States Courts, The Presentence Investigation Report 1 (Publication 105, 1978)].
>
> . . .
>
> In order to ensure the availability of as much information as possible to assist in sentencing, the courts have generally determined that presentencing reports should be held confidential.

United States v. Charmer Industries, Inc., 711 F.2d 1164, 1170 (2d Cir. 1983).

In addition, the presentence report contains a great deal of information from a variety of sources. Pursuant to statute, "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. § 3661. The restrictions of the rules of evidence may not apply to such information. See F. R. Evid. 1101(d)(3). The disclosure of such information to third parties unaware of the nature of the information could lead to misunderstanding that could unfairly prejudice the subject of the report or others contributing to it.

Accordingly, all courts that have considered the issue have held that presentence reports are discloseable to third parties only with the consent of the sentencing court, upon demonstration of a compelling need, or pursuant to a statute or rule. See United States v. Charmer Industries, Inc., supra; United States v. Trevino, 89 F.3d 187 (4th Cir. 1996); United States v. Moore, 949 F.2d 68 (2d Cir. 1991); United States v. Martinello, 556 F.2d 1215, 1216 (5th Cir. 1977) (per curiam); United States v. Dingle, 546 F.2d 1378, 1380-81 (10th Cir. 1976); United States v. Canniff, 521 F.2d 565, 573 (2d Cir. 1975), cert. den., 423 U.S. 1059 (1976); United States v. Walker, 491 F.2d 236, 238 (9th Cir.), cert. den., 415 U.S. 990 (1974); United States v. Faucett, __ F. Supp. __, 1998 WL 15655 (S.D.W.Va. 1998); United States v. Daniels, 319 F. Supp. 1061, 1063-64 (E.D. Ky. 1970); Hancock Brothers, Inc. v. Jones, 293 F. Supp. 1229, 1233 (N.D. Cal. 1968); United States v. Greathouse, 188 F. Supp. 765, 766 (M.D. Ala. 1960); United States v. Durham, 181 F. Supp. 503 (D.D.C. 1960).

The confidentiality of information collected or received by probation officers in the course of supervising individuals under probation or supervised release is not so clearly established. Nonetheless, the reasons for confidentiality of this kind of information are as compelling as those for confidentiality of presentence information. In order to obtain complete information to assure that supervisees are complying with the conditions imposed by the court, in order to monitor supervisees' activities to determine if modification of conditions should be recommended to the court, and in order to better assist in the rehabilitation of supervisees, probation officers and, ultimately, the court, need the most complete information possible. This is only possible if the supervisees and other sources of information are assured of some measure of confidentiality with respect to their communications to probation officers. Although there are few reported cases directly on point, courts that have considered the issue have uniformly determined that access to these records by third parties should be limited by confidentiality concerns similar to those that apply to presentence reports. See e.g., United States v. Oberle, __ F.3d __, 1998 WL 78015 (10th Cir. 1998); United States v. $2,500 in United States Currency, 689 F.2d 10, 16 (2d Cir. 1982); In re Subpoena and Order Directing Probation Officer to Produce Records, 737 F. Supp. 30 (W.D.N.C. 1990); In the Matter of an Application for Disclosure of the Records of Probation Investigation and Supervision, 699 F. Supp. 463 (S.D.N.Y. 1988).

This principle of confidentiality and instructions to probation officers regarding the maintenance of confidentiality are clearly set out in the Probation Manual, Guide to Judiciary Policies and Procedures, Vol. X, Chapt. II(E)(4) (presentence information) and Chapt. IV(D) (supervision information); Administrative Office of the United States Courts, The Presentence Investigation Report 2-3, 17-18 (Publication 105, 1984); and Administrative Office of the United States Courts, Presentence Investigation Reports Under the Sentencing Reform Act of 1984 11-13 (Publication 107, 1988).

Probation officers have been granted discretion to disclose presentence, probation, and supervised release information in certain limited circumstances. The disclosure of the presentence report to the defendant, counsel for the defendant and the attorney for the Government pursuant to F. R. Crim. P. 32(c)(3) and 18 U.S.C. § 3552(d), of course, is one such circumstance. In addition, probation officers may disclose such information when necessary to warn a third party of a reasonably foreseeable risk presented by a probationer or supervised releasee under an officer's supervision. Guide to Judiciary Policies and Procedures, Vol. X, (Probation Manual) Chapt. IV(D)(3).

Finally, under certain circumstances, probation officers may disclose limited information to other law enforcement agencies when such disclosure is necessary to enable the agency to assist the probation officer in monitoring the conduct of the supervisee. For example, in order to determine if a white collar offender is engaged in sophisticated income tax fraud, the supervising officer may be required to consult with the Internal Revenue Service. Such consultation might require that the officer share certain information that would otherwise be confidential. See Administrative Office of the United States Courts, The Supervision Process 36 (Publication 106, 1983). Investigatory disclosures of the information by probation officers made in furtherance of their official duties of investigating a probationer's background or conduct, or of keeping the sentencing court informed of possible probation violations, would not vitiate the privileged character of such information for every other purpose, just as a person's Fifth Amendment privilege is not waived if self-incriminating information is divulged in another proceeding for a different purpose. See Melson v. Sard, 402 F.2d 653, 655 (D.C. Cir. 1968) (self-incriminating statements by parolee made at a parole revocation hearing may not be used against him in a subsequent criminal trial).

In light of the above principles, the confidentiality of presentence information has been protected from disclosure by court process, and production of the presentence report may not be compelled except under the most extraordinary circumstances. For example, the report is not producible under the Jencks Act, the Brady v. Maryland rule, nor must it be disclosed by the court under the provisions of the Freedom of Information Act (FOIA). Trevino, supra., Moore, supra; United States v. Trevino, 556 F.2d 1265, reh. denied, 562 F.2d 1258 (5th Cir. 1977); Dingle, supra, 546 F.2d at 1380-81; Canniff, supra, 521 F.2d at 573. See also Cook v. Willingham, 400 F.2d 885, 885-86 (10th Cir. 1968) (presentence report not subject to Brady

or FOIA).* Likewise, probation officers' files and records collected in the course of preparing the presentence report are not subject to discovery by counsel. United States v. Sherlin, 67 F.3d 1208, 1217 (6th Cir. 1995); United States v. Jackson, 978 F.2d 903 (5th Cir. 1992), cert. denied, __ U.S. __, 113 S.Ct. 2429 (1993); United States v. Zavala, 839 F.2d 523 (9th Cir.), cert. denied, 488 U.S. 831 (1988); United States v. Walker, 491 F.2d 236 (9th Cir. 1974); United States v. Ward, 609 F. Supp. 169 (N.D. Ohio 1993). See also Adair, "Looking at the Law," 86 Federal Probation (Sept. 1993)

The compelled disclosure of presentence information may be justified only under circumstances similar to those justifying disclosure of grand jury materials. See e.g. United States v. Charmer Industries, Inc., supra, 711 F.2d at 1174, and United States v. Boesky, 674 F. Supp. 1128 (S.D.N.Y. 1987). Courts have determined that three factors are relevant to a determination that such records be disclosed: (1) in a criminal trial, if the subpoenaed information is material and exculpatory (bearing on the defendant's innocence), it must be disclosed, cf. United States v. Figurski, 545 F.2d 389, 391-92 (4th Cir. 1976) (disclosure request by third party in a criminal prosecution denied as immaterial), Charmer Industries, Inc., supra, 711 F.2d at 1172-1176, and Hancock, supra, 293 F. Supp. at 1233 (disclosure requests by third parties in civil suits denied); (2) if the defendant desires an opportunity to refute derogatory material which might adversely affect his sentence, disclosure is mandatory, Hancock, supra, 293 F. Supp. at 1232 (disclosure at sentencing is now mandatory under F. R. Crim. P. 32(c)(3)(A); (3) if the Federal court concludes that disclosure of the subpoenaed information is necessary to "meet the ends of justice," confidentiality, at the court's discretion, may be lifted, see Figurski, supra, Hancock, supra. Consistent with the concept of "ends of justice," a court may exercise its discretion to release information in the possession of the probation officer which is favorable to the person about whom the information is maintained. Usually the consent of the individual should be obtained. See Hancock, supra, 293 F. Supp. at 1233. A caveat to the third consideration is that where the information may be available by another means, disclosure should be denied, since mere convenience would be served by release of the information. See Charmer Industries, Inc., 711 F.2d at 1179.

Given the confidentiality of presentence, probation, and supervised release information established by case law and policy, probation officers have limited discretion to disclose such information. The court, as the entity for whom the information is collected and as the employer of the officer, retains the authority to permit or deny release of that information. See

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*The Supreme Court has held that once the report has been lent to the United States Parole Commission or the United States Bureau of Prisons, it is an agency document under the provisions of the Freedom of Information Act. 5 U.S.C. §§ 551(1)(B) and 552(f). Julian v. United States Department of Justice, 486 U.S. 1 (1988). In that case, the FOIA request was made by the subject of the report. The Supreme Court did not indicate whether the report would be discloseable to third parties under the FOIA, but in my view it is likely that the "privacy" or "investigatory records" exemptions (5 U.S.C. § 552(b)(6) or (7)) of the FOIA would apply to such requests.

e.g., United States ex rel. Touhy v. Ragen, 340 U.S. 462, 467-68 (1951). Though the Judiciary has not adopted "Touhy" regulations which set out specific procedures governing the disclosure of information, the principle of Touhy nonetheless applies and the courts have held that a probation officer must be authorized by the court in order to release information from the presentence report or supervision files to the third parties. United States v. Charmer Industries, Inc., supra, 711 F.2d at 1176-1177. In United States v. Huckaby, 43 F.3d 135, (5th Cir. 1995), the court held that, although the presentence report should normally remain confidential after the sentencing hearing, the district court could release the presentence report to the public if the disclosure outweighed the purposes of confidentiality. Even then, however, the disclosure should be as limited as possible.

Generally, the court to which the information belongs, the sentencing court, should waive the information's confidentiality. Accordingly, a determination by a Federal court as to whether a probation officer should submit to legal process should be governed by the sentencing court's order where such an order has been issued. See Figurski, supra, 545 F.2d at 392.

If the person seeking disclosure alleges that the presentence report or probation officer files contain exculpatory or impeachment evidence that is material on the issue of defendant's innocence in a criminal trial, the court should examine material in camera to determine if it meets the tests for compelled disclosure noted above. The Fourth Circuit has recently established a sensible rule on the procedure and the grounds necessary for disclosure. The defendant must clearly specify the information contained in the report that the defendant expects will reveal exculpatory or impeachment evidence. Only if the defendant plainly articulates how the information contained in the report will be both material and favorable to the defense, must the court examine the report in camera to determine if there is such information. The court's determination is reviewable only for abuse of discretion. United States v. Trevino, supra.. See also, United States v. Moore, supra; United States v. Figurski, 545 at 391-392 (4th Cir. 1976); United States v. Anderson, 724 F.2d 596, 598-599 (7th Cir. 1984); United States v. DeVore, 839 F.2d 1330, 1332-1333 (8th Cir. 1988).

Often, a request or subpoena for probation or supervised release information comes from a state court. Where a submission to state legal process by the probation officer would violate the valid orders of his or her Federal superior, the Supremacy Clause bars the state from compelling such an appearance. If the sentencing court has reviewed the request or subpoena and decided that the information should not be disclosed, the Federal court's proscription of an officer from testifying or producing records relating to the subject of a presentence or probation report renders the state process an interference in the officer's official duties and an undue hardship.

The consensus regarding the confidentiality of the presentence report was challenged in United States v. Schluette, 842 F.2d 1574 (9th Cir. 1988). In that case, the Ninth Circuit permitted a newspaper to obtain a presentence report under circumstances in which the subject of that report was deceased. Shortly after Schluette was decided, however, the Seventh Circuit

refused to follow that case in connection with another request by a newspaper to obtain access to a presentence report. In United States v. Corbett, 879 F.2d 224 (7th Cir. 1989), the court relied upon the traditional analysis protecting the presentence report from disclosure except under circumstances similar to those that would require disclosure of grand jury materials.

> Only where a compelling, particularized need for disclosure is shown should the district court disclose the report; even then, however, the court should limit disclosure to those portions of the report which are directly relevant to the demonstrated need. Further, throughout this inquiry the court must be sensitive not only to the interests in confidentiality of the particular report, but also to the possible effects of disclosure in any particular case.

879 F.2d at 239. Accordingly, we believe that the Schluette decision is limited by its facts and, to the extent it has any impact, that impact should be limited to the Ninth Circuit.

Prepared by
David N. Adair, Jr.
Associate General Counsel
March 18, 1998

References on the Confidentiality of Probation and Pretrial Services Information

Court Regulations and Policies:

Guide to Judiciary Policies and Procedures, Vol. X (Probation Manual), Chapter II(E) - Presentence Information.

Guide to Judiciary Policies and Procedures, Vol. X (Probation Manual), Chapter IV(D) - Releasing File Information (Probation Supervision Information), pp. 31-40. Note: Includes Chapter IV(D)(1)(E), p. 34 - Requests by Subpoena.

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The Presentence Investigation Report (Publication 105, Administrative Office of the U.S. Courts, 1984), pp. 2-3, 17-18.

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Articles:

"FOIA Presentence Report Disclosure," David N. Adair, Jr., *Looking at the Law*, Federal Probation, September, 1988, pp. 77-81.

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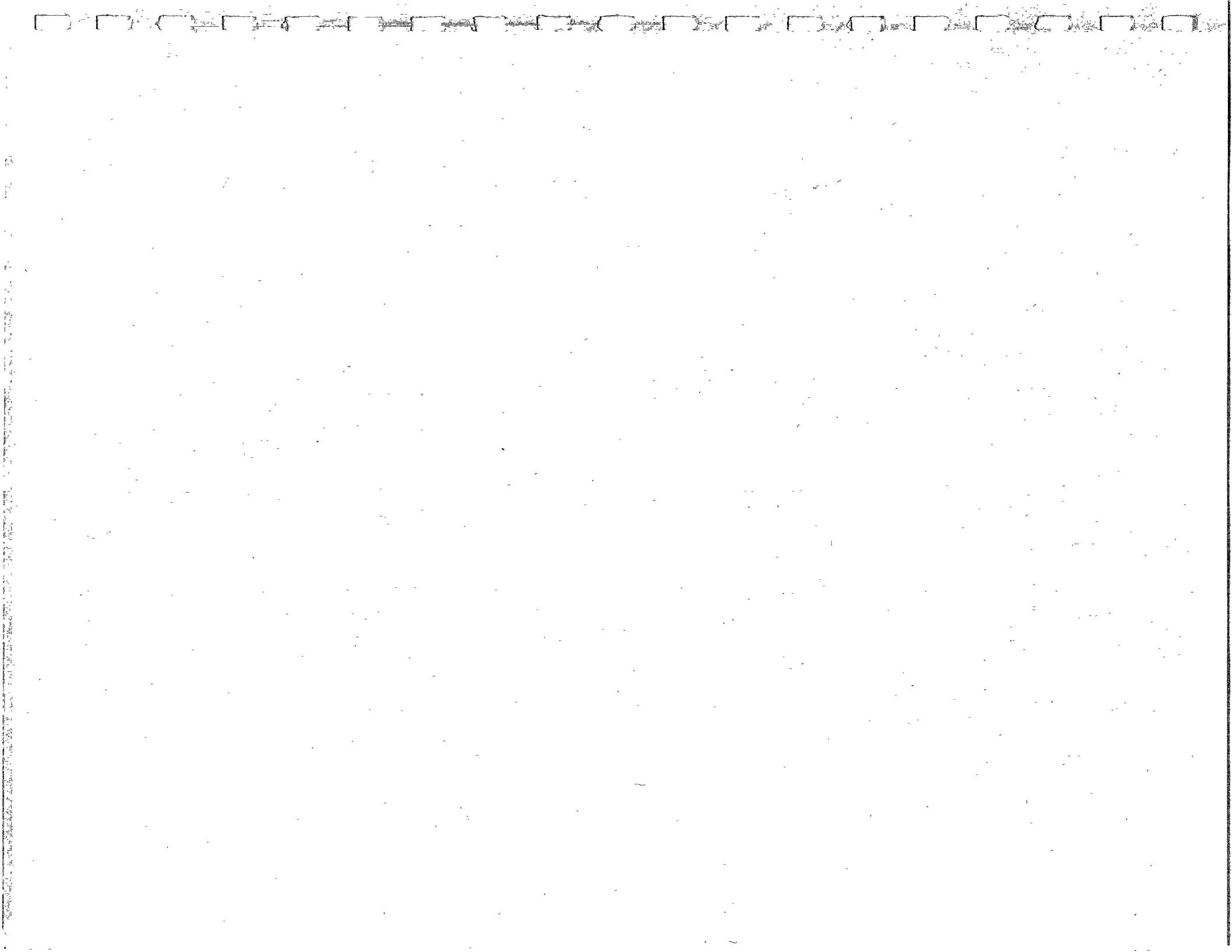
"The Confidentiality of Presentence Reports of Accomplice Witnesses When They are Requested as Brady Material or Jencks Statements," Catharine Goodwin, News and Views, June 3, 1996.

LOCAL RULES DEALING WITH CONFIDENTIALITY OF PRETRIAL SERVICES AND PROBATION RECORDS

DISTRICT	RULE	DATE	RECORDS COVERED	PROCEDURE FOR DISCLOSURE?
Ala., M.D.	Cr. Rule 32.1	1/1/98	PSR & Prob.	Yes
Alaska	Cr. Rule 3.4	5/4/93	PSR & Prob.	Yes
Arizona	Rule 4.8	1/12/95	PSR & Prob.	Yes
Cal., N.D.	Cr. Rule 32-7	9/1/96	PSR & Prob.	Yes
Cal., E.D.	Cr.R. 32-461	4/15/97	PSR & Prob.	Yes
Cal., C.D.	Cr. Rule 10	12/1/93	PSR & Prob.	No
Connecticut	Cr. Rule 9	6/1/95	PSR	No
Fla., N.D.	Rule 88.1	4/1/95	PSR & Prob.	Yes
Fla., M.D.	Rule 4.12	2/1/95	PSR	Yes
	Rule 4.19	3/1/91	PTS	Yes
Fla., S.D.	Rule 88.8	12/1/94	PSR	No
Ga., N.D.	Cr. Rule 32.1	4/15/97	PSR	No
Ga., M.D.	Cr. Rule 32	6/1/97	PSR & Prob.	Yes
Ga., S.D.	Cr. Rule 32.2	6/3/96	PSR & Prob.	Yes
Hawaii	Cr. Rule 360	2/15/95	PSR	No
Idaho	Cr. Rule 32.0	12/1/94	PSR & Prob.	Yes
Ill., N.D.	Cr. Rule 4.08	Unknown	PSR	Yes
	Cr. Rule 4.09	7/5/88	PSR & Prob.	Yes
Ill., C.D.	Cr. Rule 57.2	1/1/97	PSR & Prob.	Yes
Ill., S.D.	Rule 24	1/25/95	PSR & Prob.	Yes
Ind., S.D.	Cr. Rule 11.1	12/16/94	PSR & Prob.	Yes
Kansas	Cr. Rule 32.1	10/1/95	PSR & Prob.	Yes
Maine	Order	Unknown	PSR & Prob.	Yes

DISTRICT	RULE	DATE	RECORDS COVERED	PROCEDURE FOR DISCLOSURE?
Maryland	Rule 97-1	7/1/97	PSR & Prob.	Yes
Mich., W.D.	Rule 15	8/1/91	PSR & Prob.	Yes
Mo., E.D.	Rule 13.01	1/1/96	PTS, PSR & Prob.	Yes
New Jersey	Cr. Rule 32.1	4/1/97	PSR & Prob.	Yes
New Mexico	Cr. Rule 32.1	Unknown	PSR & Prob.	Yes
N.Y., N.D.	Cr. Rule 32.1	Unknown	PSR	No
N.C., N.D.	Cr. Rule 46	Unknown	PSR & Prob.	Yes
N. Dakota	Rule 32.1CR	1/23/95	PTS, PSR & Prob	Yes
Ohio, S.D.	Cr. Rule 103	10/1/91	PSR & Prob.	Yes
Okla., N.D.	Cr. Rule 32.2	1/1/95	PTS, PSR & Prob.	No
Okla., E.D.	Cr. Rule 32.2	10/1/96	PTS, PSR & Prob.	No
Rhode Island	Rule 40.1	Unknown	PSR	Yes
Tenn., W.D.	Cr. Rule 32.2	5/3/97	PSR & Prob.	Yes
Tenn., M.D.	PTS Rule IV	Unknown	PTS	No
Tex., W.D.	Rule CR-32	2/17/95	PSR	No
Utah	Cr. Rule 32-1	9/1/97	PSR & Prob.	No
Vermont	Cr. Rule 57.1	4/15/97	PSR & Prob.	Yes
	Cr. Rule 57-2	4/15/97	PTS	No
Va., W.D.	Order	7/1/79	PSR & Prob.	Yes
Wash., W.D.	Cr. Rule 32	7/1/97	PSR	No
WVa., W.D.	Cr. Rule 5.01	3/1/96	PTS, PSR & Prob.	Yes
WVa., S.D.	Cr. Rule 3.01	9/1/94	PSR & Prob.	Yes
Wis., E.D.	Rule 20	Unknown	PSR & Prob.	Yes
Wyoming	Cr. Rule 32.1	7/1/97	PSR	No



MODEL LOCAL RULE
DISCLOSURE OF PRETRIAL SERVICES, PRESENTENCE, AND PROBATION INFORMATION
(Short Form)

RULE ___. DISCLOSURE OF PRETRIAL SERVICES, PRESENTENCE, OR PROBATION RECORDS

No confidential records of this court maintained by the probation office, including presentence, and probation and supervised release supervision records, shall be sought except by written petition to this court establishing with particularity the need for specific information in the records. Whenever a probation officer is served with a subpoena or other judicial process seeking the production or disclosure of presentence or supervision records or information contained therein, the probation officer shall petition the court in writing for instructions with respect to responding to such process. In no event shall production or disclosure be made except pursuant to an order by a judge. The disclosure of pretrial services records shall be governed by the pretrial services confidentiality regulations promulgated under the provisions of 18 U.S.C. § 3153(c).

Explanation of Provision

This short form rule is similar to that adopted by the Eastern District of North Carolina. It assumes the confidentiality of presentence and supervision records and simply sets out the procedure by which these records may be disclosed. The reference to pretrial services information has been added, as well as a citation to the applicable regulations.

The advantage of this form is its simplicity. The confidentiality of the information covered is often not the issue when such information is sought. Rather, the confusion in situations in which the information is sought by subpoena or other judicial process concerns the appropriate action of the officer receiving the subpoena. This version of the rule resolves that issue. Because it is designed to be a short form rule, the draft does not include criteria for making the decision to disclose probation records.

MODEL LOCAL RULES
DISCLOSURE OF PRETRIAL SERVICES, PRESENTENCE, AND PROBATION INFORMATION
(Long Form)

RULE __ . DISCLOSURE OF PRETRIAL SERVICES RECORDS

(a) Pretrial Services Information. The pretrial services report and other information compiled in the course of providing pretrial services are confidential and may be disclosed only in accordance with the provisions of 18 U.S.C. § 3153(c) and the Regulations Governing Disclosure of Pretrial Services Information (regulations) promulgated thereunder.

(b) Subpoena of Pretrial Services Information. When a demand for disclosure of pretrial services information is made to a pretrial services (probation) officer, by subpoena or other judicial process, the officer shall, if authorized by the regulations, determine the disclosure of the information in accordance with those regulations. If the officer does not or is not authorized to disclose the information, the officer shall direct the demand for disclosure to the chief pretrial services (probation) officer or the judicial officer, as determined by the nature of the request and the party designated to make the disclosure decision under the regulations.

RULE __ . DISCLOSURE OF PRESENTENCE AND PROBATION RECORDS

(a) Presentence and Probation Records. The presentence report, any records prepared in the course of the presentence investigation, and probation or supervised release supervision records constitute confidential probation records and may be disclosed only as authorized by (1) statute, (2) federal rule, (3) guidelines of the Judicial Conference or Administrative Office of the United States Courts, or (4) express order of the court.

(b) Petition for Disclosure of Probation Records. Any request for disclosure of probation records that is not authorized by statute, federal rule, or regulation shall be submitted as a motion to the sentencing judge, or, if no longer sitting, to the chief judge. The motion shall state with particularity the need for specific information in the records. A copy of the motion will be provided to the chief probation officer.

(c) Subpoena of Probation Records. When a demand for disclosure of probation records is made to a probation officer, by subpoena or other judicial process, the officer shall petition the court in writing for instructions regarding the release of documentary records or production of testimony with respect to such confidential information. In either event, no disclosure shall be made except upon an order issued by this court.

(d) Determination of Disclosure.

(1) If a request for disclosure is submitted by a defendant in a criminal case and the defendant plainly articulates how information contained in probation records would be both favorable to

the defendant and material to the defendant's guilt or punishment, the court shall review the records in camera to determine if they should be disclosed.

(2) The court may order disclosure of all or part of requested probation records if required by law or if the court determines that there is a compelling need for disclosure. In making such determination, the court may consider the following: any promise of confidentiality made by the probation officer to the source of the information; the need to maintain the court's access to information by providing limited confidentiality to probation officers' sources of that information; the purpose for which the information is requested and how material the information is to that purpose; the privacy interests of those persons and entities that have provided information to the probation officer; and the availability of the information from other sources.

(3) If the court determines to authorize the production of documents or testimony regarding probation records, the authorization shall be limited to those matters directly relevant to the demonstrated need. The court's order shall identify the records that shall be produced and the scope of the testimony that is authorized.

(e) Continuing Confidentiality. Confidential probation records that are disclosed remain the property of the court and, except as otherwise authorized by law, must not be duplicated or disseminated to third parties without the permission of the court.

Explanation of Provisions

This rule is roughly based on the rule adopted in the District of Vermont. It deals separately with pretrial services information and presentence and supervision information, since the basis for protecting the confidentiality of these types of information is different. Pretrial services information is protected from disclosure by the provisions of 18 U.S.C. § 3153(c) and the Regulations Governing Disclosure of Pretrial Services Information of the Director of the Administrative Office of the United States Courts promulgated thereunder (regulations). Guide to Judiciary Policies and Procedures, Vol. XII, Chapt. III (Pretrial Services Manual). The pretrial services confidentiality regulations do not currently provide a procedure by which pretrial services or probation officers are to respond to requests for pretrial services information, but they include a decision making process for disclosure of such information.

The regulations permit limited disclosure of pretrial services information under certain circumstances and permit different parties to make the determination regarding disclosure. Confidentiality of pretrial services information is preserved primarily to promote a candid and truthful relationship between the defendant and the pretrial services officer in order to obtain the most complete and accurate information possible for the judicial officer. The regulations permit the pretrial services officer, the chief pretrial services or probation officer, or the judicial officer to make the disclosure determination depending on the nature of the disclosure.

For example, the pretrial services officer may provide pretrial services information to the probation officer as provided in 18 U.S.C. § 3153(c)(1)(C), the chief pretrial services or probation officer may disclose pretrial services information that may be necessary for the defendant to secure a benefit, and the judicial officer may disclose pretrial services information to a law enforcement agency investigating a violation of the conditions of release. The judicial officer also has authority to disclose pretrial services information for good cause if such disclosure is not specifically authorized by the regulations after considering certain factors. Even if disclosure is declined under the specific exceptions to confidentiality, therefore, the court may order disclosure. The judicial officer, therefore, always has the last word in a decision regarding disclosure.

Accordingly, the draft does not attempt to create a new procedure for dealing with requests for disclosure but acknowledges the existing decision-making process. When an officer receives a demand for disclosure under circumstances in which the officer is authorized to determine disclosure, and the officer does authorize disclosure, the matter is resolved. If the regulations provide that the decision must be made by the chief or the judicial officer, the officer simply forwards the demand to the appropriate party. If the officer or the chief has authority to determine disclosure and they do not authorize disclosure, they would forward the demand to the judicial officer for possible exercise of the good cause exception.

This is the process followed currently in many districts and it seems to work well. A local rule that acknowledges the practice, however, would be helpful in encouraging the acknowledgment of the regulations in making demands for disclosure. It would possibly discourage those demands that would not be consistent with the regulations and focus those demands that could be honored under the regulations.

Presentence reports, probation, and supervised release supervision information are made confidential by a combination of statutes, rules, policy and case law. Subsection (a) restates this principle, names the records and information that are confidential, and states the general rule regarding disclosure. Subsection (b) provides a procedure for requesting disclosure when such disclosure is not specifically authorized by a statute, such as 18 U.S.C. § 3552; federal rule, such as F.R.Crim.P. 32(b)(6); or guidelines, such as the Judicial Conference HIV/AIDS guidelines for probation and pretrial services officers or the third party risk guidelines contained in the Guide to Judiciary Policies and Procedures, Vol. X, Chapt. IV, Part D(3) (Probation Manual). The requirement that the petition be filed with the court instead of the probation officer simply recognizes that the court will ultimately make the decision regarding disclosure. The requirement that the petition state with particularity the need for the specific information is to discourage the kind of fishing expeditions through probation officer files that are sought with some regularity.

The requirement that a copy of the motion for disclosure be provided to the chief probation officer is intended to give the probation office notice that such a motion has been filed so that the office may provide the court with a recommendation, at least where the

disclosure is discretionary with the court. It is not designed to place the probation office in an adversarial position with respect to the party moving for disclosure.

Subsection (c) provides instructions to the officer if, instead of a petition as provided in subsection (b), disclosure is sought by subpoena or other judicial process. Despite the requirement that a petition be filed with the court, there will likely be breaches of this policy, particularly from parties to state court or administrative proceedings. Subsection (c), like many existing local rules, recognizes this reality and provides the officer with instructions in the event a subpoena or other judicial process is used to seek production.

Subsection (d) sets out the procedure for in camera review of probation records, the principal considerations for the determination of the disclosure of presentence and supervision information, and authority to limit the scope of oral testimony. While disclosure of probation information not required by statute or rule is generally discretionary with the court, there may be circumstances in which information that is exculpatory or favorable to the determination of the defendant's sentence should be disclosed to meet the ends of justice. See e.g. United States v. Figurski, 545 F.2d 389 (4th Cir. 1976). To preserve the presumption of confidentiality of probation records and to permit consideration of requests for disclosure of this kind of information, a number of courts have provided a procedure by which, upon an allegation that confidential records contain such information that is both favorable and material to a criminal defendant's guilt or sentence, the court reviews the requested material in camera to determine if the disclosure is justified. In order to prevent fishing expeditions, these courts have indicated that a defendant must make a particular showing before the court is obligated to review the records. One of the most recent and most clearly articulated standards for such a showing appears in United States v. Trevino, 89 F.3d 187, 190 (4th Cir. 1996). The Trevino standard is included in subsection (d)(1) of the draft, except that the requirement that the request for disclosure identify the particular information requested is not repeated since it is required of all requests under subsection (b).

The draft does not provide that disclosure is required when a defendant has made a showing that there is information that is material and favorable to the defendant. Though at least one court is considering incorporating such a requirement in its local rule, this substantive determination should probably not be governed by a local rule, but by the court faced with the question.

Subsection (d)(2) sets out the principal considerations the court should take into account in considering a request for disclosure. These considerations have been gleaned from the various decisions upholding the confidentiality of this information. They are flexible, but provide the court with a basis for decision. They also provide counsel seeking information with the standards by which disclosure will be considered so that petitions for disclosure may be more focused on the reasons why disclosure should be granted.

Subsection (d)(3) provides that the court may limit the records that may be produced and the scope of testimony to be given. The authority to limit disclosure is implicit in the

authority to authorize partial disclosure provided in subsection (d)(2). But this explicit authority is provided in some local rules and the authority to limit testimony is included in the administrative order in the District of Maine. It is reported to be very useful.

A number of local rules include provisions that place limitations on the redisclosure of confidential material that has been disclosed. Most of these deal with information disclosed to the Bureau of Prisons or the Parole Commission. They reflect the notion that presentence reports in particular are property of the court and do not become property of the agency to which they are disclosed. This notion may no longer be justified after Julian v. United States Department of Justice, 486 U.S. 1 (1988), in which the Supreme Court held that once the presentence report is provided to those agencies, it is an agency document subject to the provisions of the Freedom of Information Act. Accordingly, subsection (e) of the model rule does not deal with this issue. Instead it deals with the troublesome issue of redisclosure of records to other parties.

The issue of whether the court may continue to control the disclosure of court records once disclosed has not been resolved. F.R.Crim.P. 32 does not deal with the redisclosure of the presentence report once disclosed, and there is a question whether, under the Rules Enabling Act, 28 U.S.C. § 2071, which requires that local rules be consistent with the national rules, a local rule might restrict use of the presentence report once disclosed pursuant to Rule 32. In addition, 18 U.S.C. § 3552(d) requires that a copy of the presentence report be made available to the United States Attorney's office for use in the collection of financial penalties. Finally, there is some authority that a presentence report in the possession of the government might be subject to the provisions of the Jencks Act. See e.g., United States v. Trevino, 556 F.2d 1265, 1271 (5th Cir.) reh. denied, 562 F.2d 1258 (5th Cir. 1958). But see United States v. Dansker, 537 F.2d 40, 60-61 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977). The same may be true of exculpatory material covered by the holding in Brady v. Maryland, 373 U.S. 83 (1963).

On the other hand, in the absence of specific bars to prohibiting redisclosure, it is certainly arguable that the court should have continuing control over its confidential records. Recently, in United States v. Smith, __ F. Supp. __, 1998 WL 46818 (D.N.J. 1998), the court found that the internet publication, prior to sentencing, of a sentencing memorandum prepared by the United States attorney's office was in violation of Rule 32. Accordingly, subsection (e) is designed for those courts that wish to restrict redisclosure of confidential court records. The subsection includes an exemption from the prohibition in a situation in which redisclosure is required by operation of the Jencks Act, Brady v. Maryland, or other provision of law.

Agenda Item Tab C
Committee on Criminal Law
June 1998
Action Item

Confidentiality of Pretrial Services, Presentence, and Probation Information

Issue: Should the Committee defer consideration of a model local rule and refer the issue of disclosure of pretrial services, presentence, and supervision information to the Advisory Committee on the Federal Rules of Criminal Procedure for consideration as a national rule?

Discussion

Pretrial services information is specifically protected from disclosure by regulations promulgated by the Director of the Administrative Office under the authority of 18 U.S.C. § 3153(c). Presentence reports as well as presentence investigation information and information gathered in the course of probation or supervised release supervision are generally regarded as confidential unless disclosure is required by statute, rule, or administrative guidelines, or is specifically authorized by the court. Nonetheless, requests for such documents and information, either by subpoena or informal request, are a common occurrence. These requests come from both state and federal courts, but mostly from state courts, and they arise in connection with both criminal and civil proceedings. When these requests are made, probation and pretrial services officers, as well as judicial officers, are often uncertain how to respond to them.

At its last meeting, the Committee authorized the Office of the General Counsel, in consultation with the Federal Corrections and Supervision Division, to develop draft model local rules governing disclosure of pretrial services, presentence, and supervision information

for the Committee's consideration at its next meeting. In addition to procedures for disclosure, the draft model local rules or guidelines were to include criteria for the court to consider in determining whether information should be disclosed.

Since that meeting, however, the Advisory Committee on the Federal Rules of Criminal Procedure became aware of this Committee's interest in disclosure of these records and, at its April 27-28, 1998 meeting, took up as a preliminary matter the possibility of promulgating a national rule addressing such disclosure. Rule 32 of the Federal Rules of Criminal Procedure provides for disclosure of the presentence report to the parties during the sentencing process, but it is silent with respect to other disclosures of the presentence report and does not address at all disclosure of pretrial services information or supervision information.

Because the Advisory Committee has expressed interest in considering a national rule, it would be appropriate for this Committee to defer consideration of a model local rule. In order to assure prompt consideration by the Advisory Committee, it would also be appropriate for this Committee to request the Advisory Committee the question of whether a national rule regarding disclosure of pretrial services, presentence and supervision information would be appropriate and feasible.

Pending the determination of the Advisory Committee to consider a national rule on this issue or, if the Advisory Committee elects to proceed, completion of the Rules Enabling Act process, which can take two years from initial consideration by the Advisory Committee to the effective date of any resulting rule amendment, it might be helpful to provide courts with a reminder that certain probation and pretrial services records are confidential and offer them

references to the established principles regarding disclosure of those documents. Attachment 1 is a discussion of the issue that could be provided to district judges and chief probation and pretrial services officers.

Among the options the Committee may wish to consider are:

1. Defer consideration of a model local rule and request that the Advisory Committee on the Federal Rules of Criminal Procedure study whether the issue of disclosure of pretrial services, presentence, and supervision information merits consideration for inclusion in the Federal Rules of Criminal Procedure,
2. Authorize the Chair to distribute a letter to courts discussing the confidentiality and disclosure of pretrial services, presentence, and supervision information, and/or
3. Decline to take further action on disclosure.

AGENDA ITEM C
Attachment 1
Committee on Criminal Law
June 1998

CONFIDENTIALITY OF PRETRIAL SERVICES, PRESENTENCE, AND SUPERVISION RELEASE INFORMATION

Pretrial services and probation officers are often requested, by formal process or otherwise, to produce pretrial services, presentence, and supervision information. Though there are principles governing the disclosure of this material, the sources of these principles are not centralized and, except in those districts that have adopted local rules on the subject, there is no established procedure for determining the disclosability of this material pursuant to such a request.

As explained in more detail below, pretrial services information is confidential under the provisions of 18 U.S.C. § 3153(c) and may be disclosed only as provided under the provisions of that section and the Regulations Governing Disclosure of Pretrial Services Information of the Director of the Administrative Office of the United States Courts. Pretrial services officers may not disclose such information unless specifically permitted by the regulations, but the regulations authorize the court to disclose pretrial services information for good cause.

Presentence reports, information gathered in the course of the presentence investigation, and information gathered in the course of probation or supervised release supervision is made confidential by a combination of statutes, rules of procedure, regulations, case law, and local policy. In general, these authorities recognize the role of confidentiality in facilitating the collection of such information. Unless disclosure is specifically permitted by these authorities, the probation officer does not have discretion to disclose such information. The court, however, may authorize disclosure of this information, considering the need for confidentiality and the need for the information by the party requesting it. Accordingly, probation officers who receive requests for confidential information under circumstances in which they have no authority to disclose should forward the request to the court for instructions.

This memorandum seeks to provide additional information on this issue and guidance for judicial officers, pretrial services officers, and probation officers in reacting to requests for information.

Confidentiality and Disclosure of Pretrial Services Information

Pretrial services information is confidential and protected from disclosure by the provisions of 18 U.S.C. § 3153(c) and the Regulations Governing Disclosure of Pretrial Services Information of the Director of the Administrative Office of the United States Courts

promulgated thereunder (regulations).[1] The pretrial services confidentiality regulations do not currently provide a procedure by which officers are to respond to requests for pretrial services information, but they include a decision making process for disclosure of such information.

Confidentiality of pretrial services information is preserved primarily to promote a candid and truthful relationship between the defendant and the pretrial services officer in order to obtain the most complete and accurate information possible for the judicial officer. The regulations permit limited disclosure of pretrial services information under certain circumstances and permit different parties to make the determination regarding disclosure.

The regulations permit the pretrial services officer, the chief pretrial services or probation officer, or the judicial officer to make the disclosure determination, depending on the nature of the disclosure. For example, the pretrial services officer may provide pretrial services information to the probation officer as provided in 18 U.S.C. § 3153(c)(1)(C); the chief pretrial services or probation officer may disclose pretrial services information that may be necessary for the defendant to secure a benefit; and the judicial officer may disclose pretrial services information to a law enforcement agency investigating a violation of the conditions of release. Even if disclosure is not permitted under the specific exceptions to confidentiality, the judicial officer also has authority to disclose pretrial services information for good cause if such disclosure is not specifically authorized by the regulations after considering certain factors. The judicial officer, therefore, always has the last word in a decision regarding disclosure.

Accordingly, many districts have established a procedure whereby, when an officer receives a demand for disclosure under circumstances in which the officer is not authorized to disclose under the regulations, the officer simply forwards the demand to the chief or the judicial officer as appropriate under the regulations. If disclosure is not authorized by the officer or the chief, the judicial officer is provided the last opportunity to authorize disclosure under one of the specific regulations or under the "good cause" provision.

Confidentiality of Presentence Information

The presentence report is intended to provide the court with a wide range of information to assist in sentencing. To assure candor and the free flow of information, a number of decisions have determined that the report, as well as other information collected in the course of the presentence investigation, is not subject to routine disclosure.[2]

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[1] Guide to Judiciary Policies and Procedures, Vol. XII, Chapt. III (Pretrial Services Manual).

[2] Perhaps the best discussion of this issue is contained in United States v. Charmer Industries, Inc., 711 F.2d 1164, 1170 (2d Cir. 1983). In United States v. Julian, 486 U.S. 1, 12

Nonetheless, there seems to have been an increase in the number of requests for disclosure of this information outside the context of sentencing. This may be the result of amendments to title 18, United States Code, and the Federal Rules of Criminal Procedure, which have provided for greater access to the report by the parties during and after sentencing. A review of the evolution of disclosure of the presentence report, however, does not suggest that the status of the report as a confidential court document has fundamentally changed.

Disclosure of the presentence report is controlled by 18 U.S.C. § 3552(d) and F.R.Crim.P. 32(b), which require that the report be provided to the government, the defendant, and the defendant's counsel prior to sentencing. The disclosure requirements of Rule 32 have been repeatedly reviewed and amended. As presently formulated, the disclosure provisions strike a balance between the need for defendants to review and keep a copy of the report, and the court's need to keep some matters confidential.[3] Prior to 1966, there was no provision for disclosure of the report, and the Supreme Court held in Williams v. New York, 337 U.S. 241 (1949), that it was not a violation of due process to rely on a report without giving a defendant an opportunity to rebut it.[4]

In 1966, Rule 32 was amended to specifically permit disclosure of the report to the government, the defendant and the defendant's counsel, but not until 1974 was the rule amended to require such disclosure. Rule 32 was again amended in 1983 to provide that disclosure of the report be made sufficiently in advance of sentencing to ensure that the parties have adequate time to meaningfully review it, and that disclosure be made to both the defendant and his counsel. In 1989, the rule was amended to allow the government and the defense to retain a copy of the report, and in 1994, the rule was amended to provide for disclosure of the probation officer's recommendation unless the court, in a particular case or by local rule, provides otherwise. Whether or not constitutionally required, disclosure of the report is important to ensure accuracy and completeness of the report.[5]

(1988), the Supreme Court recognized that courts have typically not disclosed presentence reports without a showing of special need. For an interesting discussion of the confidentiality of the presentence report in a state case that heavily relies on federal precedents, see State v. Bacon, 702 A.2d 116 (Vt. 1997).

[3] See Notes of Advisory Committee on Rules to the 1989 Amendments.

[4] See also Williams v. Oklahoma, 358 U.S. 576 (1959).

[5] See Notes of the Advisory Committee on Rules to the 1974 and 1983 Amendments.

In spite of the repeated scrutiny of the disclosure provisions, and the recognition of the importance of disclosure for sentencing purposes, the general rule of the inherent confidentiality of presentence reports has not been changed.[6]

In addition, disclosure has not been extended beyond the report--to probation officers' notes and other background materials. The same principles that protect the confidentiality of the presentence report would seem to protect investigatory material collected, but not used, by the probation officer in the presentence report. Forcing disclosure of the raw investigatory data, such as prosecutors' reports that contain witnesses' and victims' addresses and the notes of discursive interviews with family members, would inhibit the officer's ability to perform this function. The availability of this data beyond the probation officer could likely lead to sources limiting or denying access to information.

This principle of confidentiality of presentence information and directions to probation officers to maintain confidentiality are set out in the Probation Manual, Guide to Judiciary Policies and Procedures, Vol. X, Chapt. IV(D); Administrative Office of the United States Courts, The Presentence Investigation Report 2-3, 17-18 (Publication 105, 1984); and Administrative Office of the United States Courts, Presentence Investigation Reports Under the Sentencing Reform Act of 1984 IV-13 (Publication 107, 1988).

Confidentiality of Supervision Information

The confidentiality of information collected or received by probation officers in the course of supervising individuals under probation or supervised release is not so clearly established, but some district courts have extended the principle of confidentiality to these materials as well.[7] The reasons for confidentiality of this kind of information are as compelling as those for confidentiality of presentence information. In order to obtain complete information to assure that persons under supervision are complying with the conditions imposed by the court; in order to monitor offenders' activities to determine if modification of conditions should be recommended to the court; and in order to better assist in the rehabilitation of offenders, probation officers and, ultimately, the court, need the most complete information possible. This is only possible if the offenders and other sources of information are assured of some measure of confidentiality with respect to their communications to probation officers.

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[6] See, e.g., United States v. Trevino, 89 F.3d 187 (4th Cir. 1996); United States v. Huckaby, 43 F.3d 135 (5th Cir. 1995); United States v. Moore, 949 F.2d 68 (2d Cir. 1991).

[7] See, e.g., United States v. Oberle, __ F.3d __, 1998 WL 78015 (10th Cir. 1998); In re Subpoena and Order Directing Probation Officer to Produce Records, 737 F. Supp. 30 (W.D.N.C. 1990); In the Matter of an Application for Disclosure of the Records of Probation Investigation and Supervision, 699 F. Supp. 463 (S.D.N.Y. 1988); United States v. $2,500 in United States Currency, 689 F.2d 10, 16 (2d Cir. 1982).

This principle of confidentiality of supervision information and instructions to probation officers to maintain confidentiality are set out in the Probation Manual, Guide to Judiciary Policies and Procedures, Vol. X, Chapt. IV(D) (supervision information).

Finally, a number of district courts have promulgated local rules or administrative orders that declare the confidentiality, not only of presentence reports, but of information gathered in the course of supervision.[8]

Disclosure of Presentence and Supervision Information

As discussed above, the currently available authority suggests that the presentence report, any records prepared in the course of the presentence investigation, and probation or supervised release supervision records are made confidential by a combination of statutes, rules, and case law. The following discussion provides background on the principles governing disclosure of these materials. In general, they should be disclosed only as authorized by (1) statute, (2) federal rule, (3) regulation, (4) guideline of the Judicial Conference or Administrative Office of the United States Courts, (5) case law, (6) local rule or policy, or (7) express order of the court.

Statutory Authority. With respect to statutory sources of authority for disclosure, 18 U.S.C. § 3552 generally provides for disclosure of the presentence report during sentencing. Disclosure is not required under the provisions of the Freedom of Information Act, 5 U.S.C. §§ 551(1)(B) and 552(f) (FOIA), since that Act does not apply to the courts. 5 U.S.C. §§ 551(1)(b), 552(e), and 552(a)(1).[9]

Federal Rules. The federal rules provide for disclosure of the presentence report under F.R.Crim.P. 32(b)(6). In connection with the revocation or modification of probation or supervised release, F.R.Crim.P. 32.1 requires that evidence against the offender be disclosed. But such evidence will generally be included in the Probation Form 12 for revocation or modification.

The Jencks Act provisions of Rule 26.2 are incorporated by reference in Rules 32 and 32.1, but there is authority that since the probation officer is not a government witness, the

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[8] See, e.g., Rule 32-7, N.D. Cal.; Rules 32-460 and 32-461, E.D. Cal.; Crim.R. 32.0, D. Idaho; Rule 4.09, N.D.Ill.; Rule 32.1, D. N.J.; D.U.Crim.R. 32.1, D. Utah.

[9] See Guide to Judiciary Policies and Procedures, Vol. X, Chapt. IV, Part D, page 26-27 (Probation Manual). However, the Supreme Court has held that once the report has been lent to the United States Parole Commission or the United States Bureau of Prisons, it is an agency document under the provisions of the FOIA. Julian v. United States Department of Justice, 486 U.S. 1 (1988).

officer's records are not Jencks Act material. Likewise, there is authority that presentence information is subject to disclosure under the principles of Brady v. Maryland, 373 U.S. 83 (1963).[10]

Federal Regulations. The only federal regulations that might impact on disclosure of confidential court information are at 42 C.F.R. Part 2, which severely limit disclosure of information collected in the course of drug treatment.[11]

Judiciary Guidelines. There are several sets of guidelines promulgated by the judiciary that relate to disclosure of presentence and supervision information. The Criminal Law and Probation Administration Committee's "guidelines for probation officers and pretrial services officers supervising clients who have been exposed to the Human Immunodeficiency Virus (HIV) or who have Acquired Immune Deficiency Syndrome (AIDS)," promulgated September 30, 1988, provide for confidentiality of that information and limited disclosure under defined circumstances.

The third party risk guidelines for probation officers contained in the Guide to Judiciary Policies and Procedures, Vol. X, Chapt. IV, Part D(3) (Probation Manual), provide for disclosure of otherwise confidential information to a person against whom a probation officer has determined there is a reasonably foreseeable risk of harm from an offender.

The Guide to Judiciary Policies and Procedures, Vol. X, Chapt. IV, Part D(1) (Probation Manual), provides limited guidance to probation officers concerning disclosure to law enforcement, correctional, and social services agencies. In general, disclosure of more than identifying information is discouraged without specific authorization of the court. In addition Publication 106, Administrative Office of the United States Courts, The Supervision Process 36 (1983), recognizes that, in order to collect presentence information and to effectively monitor compliance with the conditions of supervision, the probation officer has

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[10] See, e.g., United States v. Trevino, 556 F.2d 1265, reh. denied, 562 F.2d 1258 (5th Cir. 1977). United States v. Sherlin, 67 F.3d 1208, 1217 (6th Cir. 1995); United States v. Jackson, 978 F.2d 903 (5th Cir. 1992), cert. denied, __ U.S. __, 113 S.Ct. 2429 (1993). Some courts have indicated that when the presentence report contains a statement by a testifying witness in the trial of a co-defendant, the court should review the report in camera to determine if it contains Jencks statements by the testifying witness. See e.g. United States v. Dingle, 546 F.2d 378 (10th Cir. 1976). Some courts have also indicated that a particularized showing by a defendant that the report might contain Brady material obligates the court to review the report in camera for the existence of such material. See, e.g., United States v. Moore, 949 F.2d 68 (2d Cir. 1991).

[11] The regulations are summarized in the Guide to Judiciary Policies and Procedures, Vol. X, Chapt. X(I) (Probation Manual).

limited authority to communicate with other law enforcement agencies concerning the activities of defendants or persons under supervision. The publication provides no specific guidance on how much disclosure is permitted, but leaves to the officer's discretion the determination that a disclosure is necessary in furtherance of the official duties of investigating a probationer's background or conduct, or of keeping the sentencing court informed of possible probation violations.

Case law. There is also case law that has established specific circumstances that might justify disclosure. There may be circumstances in which information that is exculpatory or favorable to the determination of the defendant's sentence should be disclosed to meet the ends of justice.[12] To preserve the presumption of confidentiality of probation records and to permit consideration of requests for disclosure of this kind of information, a number of decisions have indicated a procedure by which, upon an allegation that confidential records contain such information that is both favorable and material to a criminal defendant's guilt or sentence, the court reviews the requested material in camera to determine if the disclosure is justified.

The defendant should make a particular showing before the court is obligated to review the records. One of the most recent and most clearly articulated standards for such a showing appears in United States v. Trevino, 89 F.3d 187, 190 (4th Cir. 1996). The defendant must clearly specify the information contained in the report or other document that the defendant expects will reveal exculpatory or impeachment evidence. Only if the defendant plainly articulates how that information will be both material and favorable to the defense must the court examine the report in camera to determine if there is such information. If so, only that information is disclosed. Accordingly, it is particularly important that the probation officer forward any request for information based on a claim that it is exculpatory or favorable to a defendant's sentence to the court for consideration.

Local Rules. A number of districts have promulgated local rules or administrative orders that provide for the disclosure of presentence and supervision information. Some of these generally provide that the probation officer should seek instructions from the court when requested to disclose such information.[13] Others are more detailed and provide a process for seeking disclosure.[14]

The practice of sharing presentence and probation information with state and local probation and law enforcement agencies varies from district to district. As indicated above, the Guide to Judiciary Policies and Procedures, Vol. X (Probation Manual), provides some

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[12] See, e.g., United States v. Figurski, 545 F.2d 389 (4th Cir. 1976).

[13] See, e.g., Rule 46.00, E.D. N.C.; Rule 40.1, D.R.I.

[14] See, e.g., Rule 4.8, D. Ariz.; Rule 32-7, N.D. Cal.; Rule 46.00; Rule 57-1, D. Vt.

guidance in this area, but some districts have promulgated local rules or policies that provide additional direction.[15]

Express Order of Court. Beyond disclosure that is authorized under the provisions noted above, the probation officer has no discretion to disclose confidential court information. The court has final discretion to permit or withhold disclosure of presentence or supervision information. The court, as the entity for which the information is collected and as the employer of the probation officer, retains the authority to permit or deny release of that information.[16]

Generally, the court to which the information belongs, the sentencing court or court with jurisdiction over supervision of the offender, should be the court that determines the information's disclosure. Accordingly, a determination as to whether a probation officer should submit to a disclosure request or subpoena should be governed by the sentencing or supervising court's order where such an order has been issued.

In considering its exercise of discretion, there are several considerations noted by courts that have discussed this issue. These considerations are any promise of confidentiality made by the probation officer to the source of the information; the need to maintain the court's access to information by providing limited confidentiality to probation officers' sources of that information; the purpose for which the information is requested and how material the information is to that purpose; the privacy interests of those persons and entities that have provided information to the probation officer; and the availability of the information from other sources.[17] Naturally, the court may determine to disclose only a part of the material requested, if, in the court's judgment, the party has not established a sufficient need to have all of the requested material.

Based on these authorities, many courts have determined that a probation officer who receives a request, either formal or by judicial process, for disclosure of court records, including presentence reports, presentence investigation information, and supervision information, or for testimony regarding those records, should simply approach the court for instructions as to how to proceed, unless the officer is required or authorized to disclose the information. This procedure is recommended to avoid confusion in handling these requests as well as unintended disclosure.

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[15] See, e.g., Rule 32.0, D. Idaho.

[16] United States v. Charmer Industries, Inc., supra, 711 F.2d at 1176-1177; United States v. Huckaby, 43 F.3d 135 (5th Cir. 1995).

[17] United States v. Trevino, 89 F.3d at 192-193; United States v. Charmer Industries, Inc., 711 F.2d at 1174-1178; United States v. Schlette, 842 F.2d 1574 (9th Cir. 1988).

Item III C 6

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor David A. Schlueter, Reporter**

RE: **Rule 32.2; Further Consideration of Proposed Rule**

DATE: **September 17, 1998**

In June, the Standing Committee meeting rejected the Committee's proposal to approve and forward new Rule 32.2 to the Judicial Conference. Several areas of concern emerged. First, there was concern about removing the role of the jury in the process, especially with regard to the decision regarding nexus between the defendant and the property. Second, at least one member voiced concern about whether a defendant would be permitted to present any evidence at the preliminary hearing on forfeiture. Finally, the Style Subcommittee noted that it had not had an opportunity to review portions of the proposed new rule that had been modified after the Advisory Committee meeting in April. Those style changes were made and presented to the full Committee and no member raised objections to those suggested style changes.

The issue before the Committee is whether to proceed with further modifications to Rule 32.2 and possible re-submission to the Standing Committee, either at its January 1999 meeting at some later time.

In theory, if the Committee decided to make only minor changes to the Rule, which would not require further publication, the revised Rule could be presented to the Standing Committee at its January meeting with a view to forwarding it to the Judicial Conference for its Spring 1999 meeting. However, given the Supreme Court's desire to have ample time to review proposed changes to rules, it seems doubtful that the Court would rush through its approval of the amendments in time to submit them to Congress by the end of May. The usual course of events, at least for the last number of years, is to have the Judicial Conference consider amendments at its Fall meeting and then submit them to the Court. That gives the Court a number of months to consider the amendments.

The attached materials, which address the question of further consideration of the Rule, are arranged in chronological order.

- Letter from Judge Davis to Rule 32.2 Subcommittee informing them of action of Standing Committee (July 10, 1998);

- Memo from Prof. Schlueter to Subcommittee informing them of suggested style changes to Rule 32.2 as presented to Standing Committee (July 16, 1998);

- Letter from Mr. Pauley to Judge Davis w/proposed revision of Rule 32.2 (July 29, 1998);

- Fax Transmittal from Mr. Pauley of side-by-side comparison of new version of Rule 32.2 with version submitted to Standing Committee (August 21, 1998);

- Memo from Prof. Schlueter to Subcommittee proposing minimal changes to Rule 32.2 version submitted to Standing Committee (August 24, 1998);

- Letter from Mr. Pauley to Subcommittee responding to Prof. Schlueter's proposed version of Rule 32.2 (August 26, 1998);

- Letter from Judge Dowd (Chair of Subcommittee) to members of Subcommittee regarding proposals and correspondence (August 26, 1998); and

- Letter from Prof. Stith to Subcommittee responding to Judge Dowd's letter (September 14, 1998).

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
556 JEFFERSON STREET
SUITE 300
LAFAYETTE, LOUISIANA 70501

W. EUGENE DAVIS
CIRCUIT JUDGE

July 10, 1998

Honorable David D. Dowd, Jr.
United States District Judge
510 Federal Building
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In re: Subcommittee on Rule 32.2, Fed. R. Crim. P.

Dear Friends:

I am sorry to report to you that the standing committee declined to approve our proposed Rule 32.2 for submission to the Judicial Conference. The vote was 7 to 4 against adoption.

It was my impression that most of the members of the standing committee who voted against adoption did so because they were opposed to taking away the defendant's right to jury trial. But there was a long discussion about the proposed rule and, as you know, it is full of details and many of the members were interested in other aspects of the proposed rule as well.

I have spoken with Mr. Pauley and he tells me that the Justice Department is interested in proposing a revised rule for our consideration at the October meeting. I ask that he submit the government's proposal to you as much in advance of that meeting as possible so that all of you will have a chance to be familiar with

the revisions and can lead our discussion of this item at the meeting.

The style committee made some stylistic changes to our proposed rule at the meeting and by copy of this letter to Dave Schlueter I ask that he furnish each of you with a copy of our Rule 32.2 as revised by the style committee.

Thanks for your help.

Sincerely,

W. Eugene Davis

cc: Professor David A. Schlueter
Mr. John Rabiej

MEMO TO: **Members, Rule 32.2 Subcommittee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Suggested Style Changes to Proposed Rule 32.2**

DATE: **July 16, 1998**

As Judge Davis informed you in his letter of July 10, 1998, the Standing Committee has rejected Rule 32.2. During the meeting in Santa Fe, Judge Davis and I met with the Standing Committee's Style Subcommittee (Judge James Parker, Mr. Bryan Garner, and Mr. Joseph Spaniol) to discuss their proposed style changes to the Rule. Their point was that we had changed the Rule following our April meeting without offering them an opportunity to review the changes. Without debating that point, we accepted their suggestions and copies were distributed to the Standing Committee. As I recall, there was no discussion of the style changes by the Committee. Instead, their attention was focused on the substance of the Rule, in particular the right to a jury trial on the issue of forfeiture.

I am enclosing a copy of their suggested changes. Most of the marks on the copy were made by the Style Subcommittee. The notations at line 11 are mine. During our discussions with that subcommittee, they wanted to change those words as well but we convinced them to leave that language in the proposed Rule.

~~and the rights of third parties. At sentencing, a final order of forfeiture shall be made part of the sentence and included in the judgment. The court may include in the final order such conditions as may be reasonably necessary to preserve the value of the property pending any appeal.~~

* * * * *

COMMITTEE NOTE

The rule is amended to reflect the creation of new rule 32.2 which now governs criminal forfeiture procedures.

Summary of Comments on Rule 32.

The Committee received no comments on the proposed conforming amendment to Rule 32(d).

GAP Report--Rule 32.

The Committee made no changes to the published draft.

32.2. Criminal Forfeiture

(a) *INDICTMENT OR INFORMATION.* No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or information alleges that a defendant has an interest in property that is subject to forfeiture in accordance with the applicable statute.

(b) *HEARING AND ORDER OF FORFEITURE.*

(1) As soon as practicable after entering a guilty verdict or accepting a plea of guilty or nolo contendere on any count in the

indictment or information for which criminal forfeiture is alleged, the court shall determine what property is subject to forfeiture because it is related to the offense. The determination may be based on evidence already in the record, including any written plea agreement, or on evidence adduced at a post trial hearing. If the property is subject to forfeiture, the court shall enter a preliminary order directing the forfeiture of whatever interest each defendant may have in the property, without determining what that interest is. Deciding the extent of each defendant's interest is deferred until any third party claiming an interest in the property has petitioned the court to consider the claim.

(2) If no third-party petition as provided in (b)(1) is timely filed, the court shall determine whether the property should be forfeited in whole or in part depending on the extent of the defendant's interest in the property. The determination may be made at any time before the order of forfeiture becomes final under subdivision (c), and may be based on evidence already in the record, including a written plea agreement, or evidence submitted by the government in a motion for entry of a final order of forfeiture. ~~The~~ defendant may not object to ~~the entry of the~~ final order of forfeiture on the ground that the property belongs, in whole or in part, to a

co-defendant or a third party. If the court determines that ~~the~~ defendant, or ~~any combination of~~ co-defendants, ~~were~~ are the only persons with a legal interest (or in the case of illegally obtained property, a possessory interest) in the property, the court shall enter a final order forfeiting the property in its entirety. If the court determines that ~~the~~ a defendant or ~~combination of~~ co-defendants had a legal interest (or in the case of illegally obtained property, a possessory interest) in only a portion of the property, the court shall enter a final order forfeiting the property to the extent of ~~the~~ ~~defendant's or defendants'~~ that interest.

(3) When the court enters a preliminary order of forfeiture, the Attorney General may seize the property subject to forfeiture; conduct any discovery ~~as~~ that the court considers proper in identifying, locating or disposing of the property; and commence proceedings consistent with any statutory requirements pertaining to third-party rights. At sentencing—or at any time before sentencing if the defendant consents—the order of forfeiture becomes final as to the defendant and shall be made a part of the sentence and included in the judgment. The court may include in the order of forfeiture whatever conditions are reasonably necessary to preserve the property's value pending any appeal.

(c) *ANCILLARY PROCEEDING.*

(1) If, as prescribed by statute, a third party files a petition asserting an interest in the forfeited property, the court shall conduct an ancillary proceeding.

(A) The court may consider a motion to dismiss the petition for lack of standing, for failure to state a claim upon which relief can be granted, or for any other ground. For purposes of the motion, the facts set forth in the petition are assumed to be true.

(B) If a Rule 32.2(c)(1)(A) motion to dismiss is ~~denied, or~~ not made, the court may permit the parties to conduct discovery in accordance with the Federal Rules of Civil Procedure to the extent that the court determines such discovery to be necessary or desirable ~~to resolve~~ in resolving factual issues before ~~conducting~~ an evidentiary hearing. After discovery ends, either party may ~~ask the court to dispose of the petition on a motion for summary judgment in the manner described in~~ move for summary judgement as provided in Rule 56 of the Federal Rules of Civil Procedure.

or is made and denied

(2) After the ancillary proceeding, the court shall enter a final order of forfeiture amending the preliminary order as necessary

to account for the disposition of any third-party petition.

(3) If multiple petitions are filed in the same case, an order dismissing or granting fewer than all of the petitions is not appealable until all petitions are resolved, unless the court determines that there is no just reason for delay and directs the entry of final judgment on one or more but fewer than all of the petitions.

(4) The ancillary proceeding is not considered a part of sentencing.

(d) *STAY OF FORFEITURE PENDING APPEAL.* If the defendant appeals from the conviction or order of forfeiture, the court may stay the order of forfeiture upon terms that the court finds appropriate to ensure that the property remains available in case the conviction or order of forfeiture is vacated. The stay will not delay the ancillary proceeding or the determination of a third party's rights or interests. If the defendant's appeal is still pending when the court ~~determines that~~ decides to amend the order of forfeiture ~~shall be amended~~ to recognize a third party's interest in the property, the court shall amend the order of forfeiture but shall refrain from directing the transfer of any property or interest to the third party until the defendant's appeal is final, unless the defendant consents in writing, or on the record, to the transfer of the property or interest to the third party.

(e) *SUBSEQUENTLY LOCATED PROPERTY; SUBSTITUTE PROPERTY.*

(1) ~~The court~~ on motion by the government, the court may at any time enter an order of forfeiture ~~or~~ amend an existing order of forfeiture to include property ~~which~~ that:

(i) A is subject to forfeiture under an existing order of forfeiture and was located and identified after that order of forfeiture was entered; or

(ii) B is substitute property ~~which~~ that qualifies for forfeiture under an applicable statute.

(2) If the government ~~makes the requisite showing~~ shows that the property is subject to forfeiture under ~~either~~ Rule 32.2 (e)(1)~~(i) or (e)(1)(ii)~~, the court shall:

(i) A enter an order forfeiting the property, or amend an existing preliminary or final order to include that property;

(ii) B if a third party files a petition with the court, conduct an ancillary proceeding under subdivision (c) ~~as to the property~~, and

(iii) C if no third party files a petition, enter an order forfeiting the property under subdivision (b)(2).

U.S. Department of Justice

Criminal Division

Washington, D.C. 20530

July 29, 1998

Honorable W. Eugene Davis
United States Circuit Judge
556 Jefferson Street, Suite 300
Lafayette, Louisiana 70501

Dear Judge Davis:

Enclosed please find a redraft of Rule 32.2 which the Department would request be considered by the Advisory Committee at the upcoming October meeting. As you will see, the redraft makes some significant changes in the proposal as presented to the Standing Committee, and accordingly might well require republication in the event of its approval by the Advisory Committee. Although disappointed by the Standing Committee's action disapproving the Rule, we do not believe that this setback should cause the Advisory Committee to abandon its attempt to craft a comprehensive new Rule governing criminal forfeiture procedures, which would fill an important need in the justice system. Nor do we believe that the Standing Committee's action was intended to signal that the Advisory Committee should abandon its efforts in this area.

One major change in the redraft responds to what we believe was the primary reason for the proposal's rejection by the Standing Committee, and would permit a defendant, in a case tried to a jury, to opt for a jury determination of the issue of the nexus between a specific asset sought to be forfeited and the offense. Our understanding is that the Standing Committee was not opposed to (and understood the reasons for) the elimination of the jury's role in determining whether a defendant had an interest in the property once the nexus question was resolved.

In addition to this change, on further reflection, we have made other changes in the proposal which we think are substantial improvements, including a differentiation between forfeitures involving specific assets and forfeitures involving a personal money judgment. Our new proposal is accompanied by an explanation, which can be readily transformed into a Committee Note.

As you may know, Mary Harkenrider will shortly be leaving the Department to return to Chicago with her family. I expect that Stef Cassella will accompany me to the Committee's meeting to help explain our new proposal.

I look forward to seeing you and the other Committee members in October.

Sincerely,

Roger A. Pauley

Roger A. Pauley

cc: Rule 32.2 Subcommittee Members

"**32.2. Criminal Forfeiture**

"(a) INDICTMENT OR INFORMATION. No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or information provides notice to the defendant that the government will seek the forfeiture of property in accordance with the applicable statute as part of the sentence.

"(b) HEARING AND ENTRY OF PRELIMINARY ORDER OF FORFEITURE. (1) As soon as practicable after entering a guilty verdict or accepting a plea of guilty or *nolo contendere* on any count in the indictment or information for which criminal forfeiture is authorized and notice has been provided, the court shall determine what property is subject to forfeiture. To the extent that the forfeiture relates to specific assets, the court must determine whether the government has established the requisite nexus between the property and the offense. To the extent the government seeks the entry of a personal money judgment against the defendant, the court must determine the amount of money that the defendant may be ordered to forfeit. In either case, the determination may be based on evidence already in the record, including any written plea agreement, or if the forfeiture is contested, on evidence or information adduced by the parties at a post-trial hearing.

"(2) If the court finds that property is subject to forfeiture, it shall enter a preliminary order of forfeiture as soon as practicable. The preliminary order shall set forth the amount of the money judgment, or in the case of specific assets, shall direct the forfeiture of the property without regard to whether any third party might have a superior interest in all or part of the property. Deciding whether any third party has such an interest is deferred until any third party claiming an interest in the property has petitioned the court to consider the claim, and the court conducts an ancillary proceeding pursuant to Rule 32.2(c).

"(3) When the court enters a preliminary order of forfeiture, the Attorney General (or his or her designee) may seize the property subject to forfeiture; conduct any discovery the court considers proper in identifying, locating or disposing of the property; and commence proceedings consistent with any statutory requirements pertaining to third-party rights. At sentencing - or at any time before sentencing if the defendant consents - the order of forfeiture becomes final as to the defendant and must be made a part of the sentence and included in the judgment. The court may include in the order of forfeiture whatever conditions are reasonably necessary to preserve the property's value pending any appeal.

"(4) In a case where a guilty verdict has been returned by a jury, and the government is seeking to forfeit specific assets, any defendant, or the government, may request that the determination of whether the government has established the requisite nexus between the property and the offense be made by the jury, pursuant to a special verdict, following the presentation, if necessary, of additional evidence.

"(c) ANCILLARY PROCEEDING; FINAL ORDER OF FORFEITURE. (1) If, as prescribed by statute, a third party files a petition asserting an interest in the forfeited property, the court shall conduct an ancillary proceeding, except that no ancillary proceeding is required to the extent that the forfeiture consists of a money judgment.

"(A) In the ancillary proceeding, the court may consider a motion to dismiss the petition for lack of standing, for failure to state a claim upon which relief can be granted, or for any other ground. For purposes of the motion, the facts set forth in the petition are assumed to be true.

"(B) If a Rule 32.2(c)(1)(A) motion to dismiss is denied, or not made, the court may permit the parties to conduct discovery in accordance with the Federal Rules of Civil Procedure to the extent that the court determines such discovery to be necessary or desirable to resolve

factual issues before conducting an evidentiary hearing. After discovery ends, either party may ask the court to dispose of the petition on a motion for summary judgment in the manner described in Rule 56 of the Federal Rules of Civil Procedure.

"(2) After the ancillary proceeding, the court shall enter a final order of forfeiture amending the preliminary order as necessary to account for the disposition of any third party petition. If no third party files a timely claim, no ancillary proceeding is required, and the preliminary order shall become the final order of forfeiture, provided that, except in cases involving the proceeds of a criminal offense or property traceable thereto, the court makes a finding that the defendant (or any combination of defendants) had a legal or possessory interest in the property. If the defendant used the property in the commission of the offense, that fact, together with the absence of any timely third party claim, shall be presumptive evidence that the defendant had a forfeitable interest in the property so used. The defendant may not object to the entry of the final order of forfeiture on the ground that the property belongs, in whole or in part, to a co-defendant or third party.

"(3) If multiple petitions are filed in the same case, an order dismissing or granting fewer than all of the petitions is not appealable until all petitions are resolved, unless the court determines that there is no just reason for delay and directs the entry of final judgment on one or more but fewer than all of the petitions.

(4) The ancillary proceeding is not considered part of the sentencing.

"(d) STAY OF FORFEITURE PENDING APPEAL. If the defendant appeals from the conviction or order of forfeiture, the court may stay the order of forfeiture upon terms that the court finds appropriate to ensure that the property remains available in case the conviction or order of forfeiture is vacated. The stay will not delay the ancillary proceeding or the

determination of a third party's rights or interests. If the defendant's appeal is still pending when the court determines that the order of forfeiture must be amended to recognize a third party's interest in the property, the court must amend the order of forfeiture but must refrain from directing the transfer of any property or interest to the third party until the defendant's appeal is final, unless the defendant consents in writing, or on the record, to the transfer of the property or interest to the third party.

"(e) SUBSEQUENTLY LOCATED PROPERTY; SUBSTITUTE PROPERTY. (1) The court, on motion by the government, may at any time enter an order of forfeiture - or amend an existing order of forfeiture - to include property that:

"(A) is subject to forfeiture under an existing order of forfeiture and was located and identified after that order of forfeiture was entered; or

"(B) is substitute property that qualifies for forfeiture under an applicable statute. Subdivision (b)(4) does not apply to property forfeited under this subdivision.

"(2) If the government makes the requisite showing that the property is subject to forfeiture under (e)(1), the court shall:

"(A) enter an order forfeiting the property, or amend an existing preliminary or final order to include that property, in accordance with subdivision (b); and

"(B) if a third party files a petition with the court, conduct an ancillary proceeding under subdivision (c) as to the property."

Summary of the July 1998 Revisions to Proposed Rule 32.2

1. Subsection (a) is revised to reflect the trend in the case law interpreting present Rule 7(c). Under the most recent cases, Rule 7(c) sets forth a requirement that the government give the defendant notice that it will be seeking forfeiture in accordance with the applicable statute; it does

not require a substantive allegation in which the property subject to forfeiture, or the defendant's interest in that property, must be described in detail. *See* United States v DeFries, 129 F.3d 1293 (D.C. Cir. 1997) (it is not necessary to specify in either the indictment or a bill of particulars that the government is seeking forfeiture of a particular asset, such as defendant's salary; to comply with Rule 7(c), the government need only put defendant on notice that it will seek to forfeit everything subject to forfeiture under the applicable statute, such as all property "acquired or maintained" as a result of a RICO violation).

2. Subsection (b)(1) is revised to recognize that there are different kinds of forfeiture judgments in criminal cases. *See* United States v. Voight, 89 F.3d 1050 (3d Cir. 1996) (government is entitled to a personal money judgment equal to the amount of money involved in the money laundering offense, as well as order forfeiting specific assets involved in, or traceable to, the offense; in addition, if the statutory requirements are met, the government may be entitled to forfeit substitute assets); United States v. Cleveland, 1997 WL 537707 (E.D. La. 1997) (government entitled to a money judgment equal to the amount of money defendant laundered in money laundering case). The finding the court required to make will depend on the nature of the forfeiture judgment.

To the extent that the government is seeking forfeiture of a particular asset, such as the money on deposit in a particular bank account that is alleged to be the proceeds of a criminal offense, or a parcel of land that is traceable to that offense, the court must find that the government has established the requisite nexus between the property and the offense. To the extent that the government is seeking a money judgment, such as a judgment for the amount of money derived from a drug trafficking offense or the amount involved in a money laundering offense where the actual property subject to forfeiture has not been found or is unavailable, the court must determine the amount of money that the defendant should be ordered to forfeit.

3. Subsection (b)(2) is revised to make clear that what is deferred to the ancillary proceeding is the determination of whether, and to what extent, a third party has a superior interest in the forfeited property. The language regarding what the court must do if no third party files a claim has been simplified and moved to subsection (c)(2).

4. Subsection (b)(3) is revised to make clear that the Attorney General may designate someone outside of the Department of Justice to seize forfeited property. This is necessary because in cases in which the lead investigative agency is in the Treasury Department, for example, the seizure of the forfeited property is typically handled by non-Justice agencies.

5. Subsection (b)(4) has been added to reflect the views of the Standing Committee on Rules of Practice and Procedure. The provision gives the defendant, in cases where a jury has returned a guilty verdict, the option of asking that the jury be retained to hear additional evidence regarding the forfeitability of the property. This provision only applies to cases where the government is seeking to forfeit a specific asset, and the only issue for the jury in such cases would be whether the government has established the requisite nexus between the property and the offense. For example, if the defendant disputes the government's allegation that a parcel of real property is traceable to the offense, the defendant would have the fight to request that the jury hear evidence

on that issue, and return a special verdict, in a bifurcated proceeding that would occur after the jury returns the guilty verdict. The government would have the same option of requesting a special jury verdict on this issue, as is the case under current law. *See* Rule 23(a) (trial by jury may be waived only with the consent of the government).

6. Subsection (c)(1) has been revised to make clear that no ancillary proceeding is required to the extent that the order of forfeiture consists of a money judgment. A money judgment is an *in personam* judgment against the defendant and not an order directed at specific assets in which any third party could have any interest.

7. Subsection (c)(2) provides for the entry of a final order of forfeiture at the conclusion of the ancillary proceeding. It also includes a simplified version of what appeared as subsection (b)(2) in the draft of the Rule that was rejected by the Standing Committee. Under this provision, if no one files a claim in the ancillary proceeding, the preliminary order would become the final order of forfeiture, but the court would first have to make an independent finding that at least one of the defendants had a legal or possessory interest in the property such that it was proper to order the forfeiture of the property in a criminal case.

This provision combines and preserves two established tenets of current law. One is that criminal forfeitures are *in personam* actions that are limited to the property interests of the defendant. (This distinguishes criminal forfeiture, which is imposed as part of the defendant's sentence, from civil forfeiture which may be pursued as an action against the property *in rem* without regard to who the owner may be.) The other tenet of current law is that if a third party has notice of the forfeiture but fails to file a timely claim, his or her interests are extinguished, and may not be recognized later when the court enters the final order of forfeiture. *See* Untied States v. Hentz, 1996 WL 355327 (E.D. Pa. 1996) (once third party fails to file a claim in the ancillary proceeding, government has clear title under 21 U.S.C. § 853(n)(7) and can market the property notwithstanding third party's name on the deed). In the rare event that a third party claims that he or she was not afforded adequate notice of a criminal forfeiture action, the person may file a motion under Rule 60(b) of the Federal Rules of Civil Procedure to reopen the ancillary proceeding. *See* United States v. Bouler, 927 F. Supp. 911 (W.D.N.C. 1996) (Rule 60(b) is the proper means by which a third party may move to reopen an ancillary proceeding).

To preserve the rule that third parties must assert their interests in the ancillary proceeding, the present draft drops the requirement in the previous version of subsection (b)(2) that required the court to determine the *extent* of each defendant's interest, even if no one filed a claim. determining the extent of the defendant's interest is necessary only if someone claims an interest in the property. Moreover, forcing the court to determine the extent of the defendant's interest, even if no one files a claim, would only encourage third parties - including spouses, creditors, lienholders, business partners and the like - to attempt to circumvent the ancillary proceeding (where they would bear the burden of proof) and importune the court to recognize their interests at sentencing, where the government would have the burden of establishing that the defendant was the owner of the property.

Finally, the Rule recognizes that there is no need for a finding regarding the defendant's interest in

the property if the property being forfeited is the proceeds of the crime, or property traceable thereto, and no one has filed a claim in the ancillary proceeding. Criminal defendants are jointly and severally liable for the forfeiture of the entire proceeds of any criminal offense. *See* United States v. Hurley, 63 F.3d 1 (1st Cir. 1995) (government can collect the proceeds only once, but subject to that cap, it can collect from any defendant so much of the proceeds as was foreseeable to that defendant); United States v. Cleveland, 1997 WL 602186 (E.D. La. Sept. 29, 1997) (same); United States v. McCarroll, 1996 WL 355371 at *9 (N.D. Ill. June 19, 1996) (following Hurley), aff'd sub nom. United States v. Jarrett, 133 F.3d 519 (7th Cir. 1998); United States v. DeFries, 909 F. Supp. 13, 19-20 (D.D.C. 1995) (defendants are jointly and severally liable even where government is able to determine precisely how much each defendant benefitted from the scheme), rev'd on other grounds, 129 F.3d 1293 (D.C. Cir. 1997). Therefore, the conviction of any of the defendants is sufficient to support the forfeiture of the entire proceeds of the offense, even if the defendants have divided the money among themselves.

8. Subdivision (e)(1) is augmented to make clear that the right to a bifurcated jury trial to determine whether the government has established the requisite nexus between the property and the offense does not apply to the forfeiture of substitute assets or to the addition of newly-discovered property to an existing order of forfeiture. It is well-established in the case law that the forfeiture of substitute assets is solely an issue for the court. *See* United States v. Hurley, 63 F.3d 1 (1st Cir. 1995) (court retains authority to order forfeiture of substitute assets after appeal is filed); United States v. Voight, 89 F.3d 1050 (3rd Cir. 1996) (following Hurley; court may amend order of forfeiture at any time to include substitute assets); United States v. Thompson, 837 F. Supp. 585 (S.D.N.Y. 1993) (court, not jury, orders forfeiture of substitute assets). As a practical matter, courts have also determined that they, not the jury, must determine the forfeitability of assets discovered long after the trial is over and the jury has been dismissed. *See* United States v. Saccoccia, 898 F. Supp. 53 (D.R.I. 1995) (government may conduct post-trial discovery to determine location and identity of forfeitable assets). In *Saccoccia*, the post-trial discovery culminated in the discovery of gold bars buried in the defendant's mother's backyard several years after the entry of an order directing the defendant to forfeit all property, up to $137 million, involved in his money laundering offense.

DEPARTMENT OF JUSTICE
CRIMINAL DIVISION
OFFICE OF POLICY & LEGISLATION
VOICE PHONE 202/514-3202
FAX NUMBER 202/514-4042

FAX COVER SHEET

DATE: August 21, 1998

TO: Honorable W. Eugene Davis
Professor David A. Schlueter CTS# _____

ORGANIZATION: _____

FAX # _____

VOICE # _____

FROM: Roger A. Pauley

PHONE NUMBER: 202/514 _____

RE: Rule 32.2

MESSAGE Attached is a side-by-side comparison of Rule 32.2 as recommended to but rejected by the Standing Committee, with the version of the Rule recently submitted by the Department. I have provided this document also to Judge Dowd, who I believe intends to distribute it to the other Subcommittee members.

NUMBER OF PAGES
INCLUDING COVER SHEET 8

Text of Rule 32.2 as Approved by the Advisory Committee on April 28, 1998

Rules 7(c)(2), 31(e), and 32(d)(2) are repealed and replaced by the following new Rule. Rule 38(e) is amended by striking "3554," and by striking "Criminal Forfeiture" in the heading:

32.2. Criminal Forfeiture

(a) INDICTMENT OR INFORMATION. No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or information **alleges that a defendant has an interest in property that is subject to forfeiture** in accordance with the applicable statute.

(b) HEARING AND ORDER OF FORFEITURE.

(1) As soon as practicable after entering a guilty verdict or accepting a plea of guilty or nolo contendere on any count in the indictment or information **for which criminal forfeiture is alleged,** the court shall determine what property is subject to forfeiture **because it is related to the offense.** The determination may be based on evidence already in the record, including any written plea agreement, or on evidence adduced at a post trial hearing.

Text of Revised Rule 32.2 Submitted by the Department of Justice in August, 1998

Rules 7(c)(2), 31(e), and 32(d)(2) are repealed and replaced by the following new Rule. Rule 38(e) is amended by striking "3554," and by striking "Criminal Forfeiture" in the heading:

32.2. Criminal Forfeiture

(a) INDICTMENT OR INFORMATION. No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or information **provides notice to the defendant that the government will seek the forfeiture of property** in accordance with the applicable statute as part of the sentence.

(b) HEARING AND ORDER OF FORFEITURE.

(1) As soon as practicable after entering a guilty verdict or accepting a plea of guilty or *nolo contendere* on any count in the indictment or information **for which criminal forfeiture is authorized and notice has been provided,** the court shall determine what property is subject to forfeiture. **To the extent that the forfeiture relates to specific assets, the court must determine whether the government has established the requisite nexus between the property and the offense. To the extent the government seeks the entry of a personal money judgment against the defendant, the court must determine the amount of money that the defendant may be ordered to forfeit.**

If the property is subject to forfeiture, the court shall enter a preliminary order directing the forfeiture of whatever interest each defendant may have in the property without determining what that interest is. Deciding the extent of each defendant's interest is deferred until any third party claiming an interest in the property has petitioned the court to consider the claim.

(Section (b)(2) relating to procedure when no third party files a claim has been moved to subdivision (c).)

(3) When the court enters a preliminary order of forfeiture, the Attorney General may seize the property subject to forfeiture; conduct any discovery as the court considers proper in identifying, locating or disposing of the property; and commence proceedings consistent with any statutory requirements pertaining to third-party rights. At sentencing-or at any time before sentencing if the defendant consents-the order of forfeiture becomes final

In either case, the determination may be based on evidence already in the record, including any written plea agreement, or if the forfeiture is contested, on evidence or information adduced by the parties at a post-trial hearing.

(2) If the court finds that property is subject to forfeiture, it shall enter a preliminary order of forfeiture as soon as practicable. The preliminary order shall set forth the amount of the money judgment, or in the case of specific assets, shall direct the forfeiture of the property without regard to whether any third party might have a superior interest in all or part of the property. Deciding whether any third party has such an interest is deferred until any third party claiming an interest in the property has petitioned the court to consider the claim, and the court conducts an ancillary proceeding pursuant to Rule 32.2(c).

(3) When the court enters a preliminary order of forfeiture, the Attorney General (or his or her designee) may seize the property subject to forfeiture; conduct any discovery the court considers proper in identifying, locating or disposing of the property; and commence proceedings consistent with any statutory requirements pertaining to third-party rights. At sentencing -- or at any time before sentencing if the defendant consents -- the

as to the defendant and shall be made a part of the sentence and included in the judgment. The court may include in the order of forfeiture whatever conditions are reasonably necessary to preserve the property's value pending any appeal.

(c) ANCILLARY PROCEEDING.

(1) If, as prescribed by statute, a third party files a petition asserting an interest in the forfeited property, the court shall conduct an ancillary proceeding.

(i) The court may consider a motion to dismiss the petition for lack of standing, for failure to state a claim upon which relief can be granted, or for any other ground. For purposes of the motion, the facts set forth in the petition are assumed to be true.

order of forfeiture becomes final as to the defendant and must be made a part of the sentence and included in the judgment. The court may include in the order of forfeiture whatever conditions are reasonably necessary to preserve the property's value pending any appeal.

(4) In a case where a guilty verdict has been returned by a jury, and the government is seeking to forfeit specific assets, any defendant, or the government, may request that the determination of whether the government has established the requisite nexus between the property and the offense be made by the jury, pursuant to a special verdict, following the presentation, if necessary, of additional evidence.

(c) ANCILLARY PROCEEDING.

(1) If, as prescribed by statute, a third party files a petition asserting an interest in the forfeited property, the court shall conduct an ancillary proceeding, **except that no ancillary proceeding is required to the extent that the forfeiture consists of a money judgment.**

(A) In the ancillary proceeding, the court may consider a motion to dismiss the petition for lack of standing, for failure to state a claim upon which relief can be granted, or for any other ground. For purposes of the motion, the facts set forth in the petition are assumed to be true.

(ii) If a Rule 32.2(c)(1) motion to dismiss is denied, or not made, the court may permit the parties to conduct discovery in accordance with the Federal Rules of Civil Procedure to the extent that the court determines such discovery to be necessary or desirable to resolve factual issues before conducting an evidentiary hearing. After discovery ends, either party may ask the court to dispose of the petition on a motion for summary judgment in the manner described in Rule 56 of the Federal Rules of Civil Procedure.

(2) After the ancillary proceeding, the court shall enter a final order of forfeiture amending the preliminary order as necessary to account for the disposition of any third-party petition.

(The following text formerly appeared in subdivision (b)(2)):

If no third party petition as provided in (b)(1) is timely filed, the court shall determine whether the property should be forfeited in whole or in part depending on the extent of the defendant's interest in the property. The determination may be made at any time before the order of forfeiture becomes final under subdivision (c), and may be based on evidence already in the record, including a written plea agreement, or evidence submitted by the government in a motion for the entry of a final order

(B) If a Rule 32.2(c)(1)(A) motion to dismiss is denied, or not made, the court may permit the parties to conduct discovery in accordance with the Federal Rules of Civil Procedure to the extent that the court determines such discovery to be necessary or desirable to resolve factual issues before conducting an evidentiary hearing. After discovery ends, either party may ask the court to dispose of the petition on a motion for summary judgment in the manner described in Rule 56 of the Federal Rules of Civil Procedure.

(2) After the ancillary proceeding, the court shall enter a final order of forfeiture amending the preliminary order as necessary to account for the disposition of any third party petition.

If no third party files a timely claim, no ancillary proceeding is required, and the preliminary order shall become the final order of forfeiture, provided that, except in cases involving the proceeds of a criminal offense or property traceable thereto, the court makes a finding that the defendant (or any combination of defendants) had a legal or possessory interest in the property. If the defendant used the property in the commission of the offense, that fact, together with the absence of any timely

of forfeiture. The defendant may not object to the entry of the final order of forfeiture on the ground that the property belongs, in whole, or in part, to a co-defendant or a third party. **If the court determines that the defendant, or any combination of co-defendants, were the only persons with a legal interest (or, in the case of illegally obtained property, a possessory interest) in the property, the court shall enter a final order forfeiting the property in its entirety. If the court determines that the defendant, or any combination of co-defendants, had a legal interest (or, in the case of illegally obtained property, a possessory interest) in only a portion of the property, the court shall enter a final order forfeiting the property to the extent of the defendant or defendants' interest.**

(3) If multiple petitions are filed in the same case, an order dismissing or granting fewer than all of the petitions is not appealable until all petitions are resolved, unless the court determines that there is no just reason for delay and directs the entry of final judgment on one or more but fewer than all of the petitions.

(4) The ancillary proceeding is not considered part of sentencing.

(d) STAY OF FORFEITURE PENDING APPEAL. If the defendant appeals from the conviction or order of forfeiture, the court may stay the order of forfeiture upon

third party claim, shall be presumptive evidence that the defendant had a forfeitable interest in the property so used. The defendant may not object to the entry of the final order of forfeiture on the ground that the property belongs, in whole or in part, to a co-defendant or third party.

(3) If multiple petitions are filed in the same case, an order dismissing or granting fewer than all of the petitions is not appealable until all petitions are resolved, unless the court determines that there is no just reason for delay and directs the entry of final judgment on one or more but fewer than all of the petitions.

(4) The ancillary proceeding is not considered part of the sentencing.

(d) STAY OF FORFEITURE PENDING APPEAL. If the defendant appeals from the conviction or order of forfeiture, the court may stay the order of forfeiture upon

terms that the court finds appropriate to ensure that the property remains available in case the conviction or order of forfeiture is vacated. The stay will not delay the ancillary proceeding or the determination of a third party's rights or interests. If the defendant's appeal is still pending when the court determines that the order of forfeiture shall be amended to recognize a third party's interest in the property, the court shall amend the order of forfeiture but shall refrain from directing the transfer of any property or interest to the third party until the defendant's appeal is final, unless the defendant consents in writing, or on the record, to the transfer of the property or interest to the third party.

(e) SUBSEQUENTLY LOCATED PROPERTY; SUBSTITUTE PROPERTY.

(1) The court, on motion of the government, may at any time enter and order of forfeiture -- or amend an existing order of forfeiture -- to include property which:

(i) is subject to forfeiture under an existing order of forfeiture and was located and identified after that order of forfeiture was entered; or

(ii) is substitute property which qualifies for forfeiture under an applicable statute property.

terms that the court finds appropriate to ensure that the property remains available in case the conviction or order of forfeiture is vacated. The stay will not delay the ancillary proceeding or the determination of a third party's rights or interests. If the defendant's appeal is still pending when the court determines that the order of forfeiture must be amended to recognize a third party's interest in the property, the court must amend the order of forfeiture but must refrain from directing the transfer of any property or interest to the third party until the defendant's appeal is final, unless the defendant consents in writing, or on the record, to the transfer of the property or interest to the third party.

(e) SUBSEQUENTLY LOCATED PROPERTY; SUBSTITUTE PROPERTY.

(1) The court, on motion by the government, may at any time enter an order of forfeiture -- or amend an existing order of forfeiture -- to include property that:

(A) is subject to forfeiture under an existing order of forfeiture and was located and identified after that order of forfeiture was entered; or

(B) is substitute property that qualifies for forfeiture under an applicable statute.

Subdivision (b)(4) does not apply to property forfeited under this subdivision.

(2) If the government makes the requisite showing that the property is subject to forfeiture under either (e)(1)(i) or (e)(1)(ii), the court shall:

(i) enter an order forfeiting the property, or amend an existing preliminary or final order to include that property;

(ii) if a third party files a petition with the court, conduct an ancillary proceeding under subdivision (c) as to the property; and

(iii) if no third party files a petition, enter an order forfeiting the property under subdivision (b)(2).

(2) If the government makes the requisite showing that the property is subject to forfeiture under (e)(1), the court shall:

(A) enter an order forfeiting the property, or amend an existing preliminary or final order to include that property, in accordance with subdivision (b); and

(B) if a third party files a petition with the court, conduct an ancillary proceeding under subdivision (c) as to the property.

MEMO TO: **Hon. W. Eugene Davis; Hon. David D. Dowd; Mr. Roger Pauley**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Rule 32.2**

DATE: **August 24, 1998**

The Department of Justice has circulated a redraft of Rule 32.2 which it plans to present to the Advisory Committee at its October meeting. I have reviewed that draft and I agree with Roger's comment in his July 29th cover letter that the draft makes significant changes in the proposal as presented to the Standing Committee. I am concerned that the new draft will in effect require the Advisory Committee to start over in first, understanding the changes and second, in deciding whether it agrees with those changes.

I recommend a more modest approach. My impression of the Standing Committee meeting, is that several members expressed concern about the fact that the rule would eliminate a right to have a jury decide the question of nexus. Still others questioned whether the defendant would ever be permitted to introduce evidence on the question of the extent his interest. After the Standing Committee voted to disapprove the rule, we asked for additional input on their objections—with the thought that it might be fixed. The responses were few and focused primarily on the jury issue.

If the jury issue is indeed the only real obstacle to the rule, then fixing that issue (and making other conforming changes) could make all the difference in whether the rule ever goes further than the Standing Committee. And it might be possible to take the rule directly back to the Standing Committee without additional publication.

I have taken the liberty of drafting a revised version of Rule 32.2. So that you can see my suggested changes, I have underlined the new material added since the Standing Committee meeting. And I have lined through language which should be deleted. The draft takes a minimalist approach: (1) the special verdict has been moved from Rule 31 to subparagraph (b), making it clear that the defendant may waive the right to have the jury decide whether a nexus exists; (2) language has been added at line 45 which addresses the ability of the defendant to present evidence on the extent of his interest in the property; (3) conforming changes.

This redraft includes the style changes made by the Style Subcommittee at the Standing Committee meeting.

I recommend that before the meeting, it would be useful to have some consensus as to whether (1) to proceed any further with Rule 32.2 and (2), if so, whether the Committee should make significant or less significant changes. To that end, it might be helpful for the Rule 32.2 subcommittee to hold some preliminary discussions on the issue.

32.2. Criminal Forfeiture

(a) *INDICTMENT OR INFORMATION.* No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or information alleges that a defendant has an interest in property that is subject to forfeiture in accordance with the applicable statute.

(b) SPECIAL VERDICT. If the indictment or information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to whether there is a nexus between that interest or property and the defendant. That determination may be based on evidence already in the record, including any written plea agreement, or on evidence adduced at a post-verdict hearing. In a case where a guilty verdict has been returned by a jury, the defendant may, with the consent of the government, waive the right to have the jury decide whether the required nexus exists.

(c) HEARING AND ORDER OF FORFEITURE.

(1) As soon as practicable after entering a special verdict in subdivision (b), the court shall enter a preliminary order directing the forfeiture of whatever interest each defendant may have in the property, without determining the extent of that interest. Deciding the extent of each

defendant's interest is deferred until any third party claiming an interest in the property has petitioned the court to consider the claim.

~~(c) *HEARING AND ORDER OF FORFEITURE.*~~

~~(1) As soon as practicable after entering a guilty verdict or accepting a plea of guilty or nolo contendere on any count in the indictment or information for which criminal forfeiture is alleged, the court shall determine what property is subject to forfeiture because it is related to the offense. The determination may be based on evidence already in the record, including any written plea agreement, or on evidence adduced at a post-trial hearing. If the property is subject to forfeiture, the court shall enter a preliminary order directing the forfeiture of whatever interest each defendant may have in the property, without determining what that interest is. Deciding the extent of each defendant's interest is deferred until any third party claiming an interest in the property has petitioned the court to consider the claim.~~

(2) If no third party petition as provided in ~~(b)(1)~~ (c)(1) is timely filed, the court shall determine whether the property should be forfeited in whole or in part depending on the extent of the defendant's interest in the property. The determination may be made at any time before the order of forfeiture becomes final under

subdivision ~~(c)~~ (d), and may be based on evidence already in the record, including a written plea agreement, or on evidence submitted by the defendant and the government. ~~in a motion for entry of a final order of forfeiture~~. A defendant may not object to a final order of forfeiture on the ground that the property belongs, in whole or in part, to a codefendant or a third party. If the court determines that the defendant or codefendants are the only persons with a legal interest (or in the case of illegally obtained property, a possessory interest) in the property, the court shall enter a final order forfeiting the property in its entirety. If the court determines that a defendant or codefendants had a legal interest (or in the case of illegally obtained property, a possessory interest) in only a portion of the property, the court shall enter a final order forfeiting the property to the extent of that interest.

(3) When the court enters a preliminary order of forfeiture, the Attorney General may seize the property subject to forfeiture; conduct any discovery that the court considers proper in identifying, locating or disposing of the property; and commence proceedings consistent with any statutory requirement pertaining to third-party rights. At sentencing—or at any time before sentencing if the defendant consents—the order of forfeiture becomes final as

to the defendant and shall be made a part of the sentence and included in the judgment. The court may include in the order of forfeiture whatever conditions are reasonably necessary to preserve the property's value pending any appeal.

(d) ~~(e)~~ *ANCILLARY PROCEEDING.*

(1) If, as prescribed by statute, a third party files a petition asserting an interest in the forfeited property, the court shall conduct an ancillary proceeding.

(A) The court may consider a motion to dismiss the petition for lack of standing, for failure to state a claim upon which relief can be granted, or for any other ground. For purposes of the motion, the facts set forth in the petition are assumed to be true.

(B) If a Rule 32.2(d)(1)(A) ~~32.2(c)(1)(A)~~ motion to dismiss is denied, or is made and denied, the court may permit the parties to conduct discovery in accordance with the Federal Rules of Civil Procedure to the extent that the court determines such discovery to be necessary or desirable in resolving factual issues before an evidentiary hearing. After discovery ends, either party may move for summary

judgment as provided in Rule 56 of the Federal Rules of Civil Procedure.

(2) After the ancillary proceeding, the court shall enter a final order of forfeiture amending the preliminary order as necessary to account for the disposition of any third-party petition.

(3) If multiple petitions are filed in the same case, an order dismissing or granting fewer than all of the petitions is not appealable until all petitions are resolved, unless the court determines that there is no just reason for delay and directs the entry of final judgment on one or more but fewer than all of the petitions.

(4) The ancillary proceeding is not considered a part of sentencing.

~~(d)~~ (e) *STAY OF FORFEITURE PENDING APPEAL.* If the defendant appeals from the conviction or order of forfeiture, the court may stay the order of forfeiture upon terms that the court finds appropriate to ensure that the property remains available in case the conviction or order of forfeiture is vacated. The stay will not delay the ancillary proceeding or the determination of a third party's rights or interests. If the defendant's appeal is still pending when the court decides to amend the order of forfeiture to recognize a third party's interest in the property, the court shall amend the

order of forfeiture but refrain from directing the transfer of any property or interest to the third party until the defendant's appeal is final, unless the defendant consents in writing, or on the record, to the transfer of the property or interest to the third party.

~~(e)~~ (f) *SUBSEQUENTLY LOCATED PROPERTY; SUBSTITUTE PROPERTY.*

(1) On motion by the government, the court may at any time enter an order of forfeiture—or amend an existing order of forfeiture—to include property that:

(A) is subject to forfeiture under an existing order of forfeiture and was located and identified after that order of forfeiture was entered; or

(B) is substitute property that qualifies for forfeiture under an applicable statute.

(2) If the government shows that the property is subject to forfeiture under either (f)(1)(i) ~~(e)(1)(i)~~ or (f)(1)(ii) ~~(e)(1)(ii)~~, the court shall:

(A) enter an order forfeiting the property, or amend an existing preliminary or final order to include that property;

(B) if a third party files a petition with the court, conduct an ancillary proceeding under subdivision (d) ~~(c)~~ as to the property; and

(C) if no third party files a petition, enter an order forfeiting the property under subdivision (c)(2) ~~(b)(2)~~.

U.S. Department of Justice

Criminal Division

Washington, DC 20530-0001

August 26, 1998

MEMORANDUM

To: Hon. W. Eugene Davis, Hon. David D. Dowd, and Prof. David A. Schlueter

From: Roger A. Pauley and Mary Harkenrider

Re: Rule 32.2

We are in receipt of Professor Schlueter's August 24, 1998, memorandum and suggested redraft which follows a "minimalist approach" as compared to the more significant revisions contained in the Department's latest proposal. For a number of reasons, we believe the revisions we have proposed embody substantial improvements worthy of the Advisory Committee's attention, and which if adopted could well enhance the Rule's prospects of being approved by the Standing Committee.

While most of the stated opposition to the proposed Rule focused on the jury issue, on further reflection we believe there are other ways in which the proposed Rule can and should be improved. For example, the Rule as presented to the Standing Committee did not adequately deal with the important distinction between the forfeiture of specific assets, and the entry of a money judgment based on a finding that a specific dollar amount was realized as criminal proceeds. In addition, changes that were made to the proposed Rule by the Advisory Committee at its last meeting would have consequences for cases where no petition is filed by a third party that were unforeseen (at least by us) at the time the draft Rule was submitted.

We believe that the Standing Committee's rejection of the proposed Rule has fortuitously provided an opportunity to improve the Rule in these and other respects, and it is therefore our view that whatever delay might be occasioned by the Advisory Committee's consideration of our suggested changes would be acceptable in the interest of "getting it right" before the Rule is resubmitted to the Standing Committee.

In any event, even if the Advisory Committee determines to reject all of our suggestions and follow a minimalist approach, the redraft appended to Professor Schlueter's memorandum is problematic.

The redraft would require a special verdict on the nexus question in every case in which the indictment contained a forfeiture count (see the first sentence of proposed new subdivision (b)). Only if a guilty verdict were returned by a jury would there be a possibility of waiver (see third sentence of proposed subdivision (b)). In other words, in a case tried to the court or in which there was a plea of guilty, a jury trial would nevertheless be required (and could not be waived) on the forfeiture nexus issue. This is the opposite of what we presume Dave intended. Rather, what is needed is a redraft that limits the right to a jury trial nexus determination (which may be waived in any event; see Rule 23(a); there is no need for the Rule to so provide) to those cases in which there has been a jury trial and verdict of guilty.

United States District Court
Northern District of Ohio
United States Courthouse
2 South Main Street
Akron, Ohio 44308

David D. Dowd, Jr.
Judge

(330) 375-5834
Fax: (330) 375-5628

August 26, 1998

Professor Kate Stith
Yale Law School
P.O. Box 208215
New Haven, CT 06520-8215

Robert C. Josefsberg, Esq.
City National Bank Bldg.
Suite 800
25 West Flagler Street
Miami, FL 33130-1780

Roger A. Pauley, Esq.
Mary Frances Harkenrider, Esq.
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

Re: Proposed Revisions for Proposed Criminal Rule 32.2 (Criminal Forfeiture)

Dear Committee Members:

You will recall that the Standing Committee rejected proposed Rule 32.2 at its meeting following our April, 1998 meeting. Judge Davis has asked that our sub-committee be prepared with recommendations as to the next move of the committee at our October meeting in Maine.

Roger Pauley, on behalf of Justice, has submitted a revision of Rule 32.2 and I enclose a copy of that revision which indicates the before and after of the proposed rule. (Before rejection and after rejection.)

Additionally, David Schlueter, our tireless reporter, has sent to me and Judge Davis his reaction to the Justice revision. Those suggestions are also enclosed.

To aid the other members of the committee, I request that Roger Pauley respond to the

Schlueter suggestions with copies to all members of the sub-committee as well as Judge Davis. Then I ask that the other members of the sub-committee weigh in with your thoughts by memos to the other members of the committee. I am hopeful that we will be able to forward to John Rabiej early in October, if not sooner, our collective wisdom on this subject by way of a written recommendation to the entire committee in advance of the October meeting.

I might add as anecdotal information that I had my second experience with forfeiture in a criminal trial last month. At stake was the government's contention that $31,000.00 in currency found in the attic of the defendant's residence where he stayed with his mother constituted the proceeds of cocaine traffic. The jury deliberated all of ten minutes in returning a verdict for the government on the issue. However, the jury was not happy that their service was extended for that process which included additional instructions and argument of counsel.

My best wishes and I look forward to your comments.

Yours very truly,

David D. Dowd, Jr.
U.S. District Judge

cc: Judge W. Eugene Davis
Professor David A. Schlueter
Mr. John K. Rabiej, Chief, Rules Support Office

Yale Law School

KATE STITH - *Lafayette S. Foster Professor of Law*

BY FAX

September 14, 1998

Hon. David D. Dowd, Jr.– 330-375-5628
Roger A. Pauley, Esq.– 202-514-4042
Mary Frances Harkenrider, Esq.
Robert C. Josefsberg, Esq. – 305-358-2382

Re: Proposed Criminal Rule 32.2

Dear Subcommittee Members:

Although I like the sleekness of the Department's proposed new Rule 32.2, I am troubled that it leaves out too much. In particular, there is no requirement that the fact-finder (judge or jury) find that the defendant had an interest in the property being forfeited. The proposed rule nicely deals with the **crime-nexus** requirement (the relationship of the property to the crime), but it fails to address the **defendant-nexus** requirement that is the very foundation of the distinction between civil (*in rem*) and criminal (*in personam*) forfeiture.

As we all understand the forfeiture statutes, criminal forfeiture is a punishment of the defendant, and, of course, forfeiting somebody else's property doesn't punish the defendant. The requirement of a defendant-nexus is explicit in the criminal (as opposed to civil) forfeiture statutes. A typical statute provides that: "any person convicted . . shall forfeit . . . any property constituting . . . any proceeds the person obtained. . . [and] any of the person's property used . . . . to commit . . . such violation." *See* attached statute and typical instructions in attached case excerpt.

It is no answer that the ancillary proceeding (if any) would deal with questions of ownership. Creation of a presumption that property used in, or constituting proceeds of, a crime belongs to any person convicted of that crime (unless someone comes forth with proof to the contrary) is a substantive change in the law and is not appropriately achieved by a change in the Criminal Rules.

Sincerely,

cc: Hon. W. Eugene Davis – 318-262-6664
Professor David A. Schuleter – 210-436-3717

P.O. BOX 208215, NEW HAVEN, CONNECTICUT 06520-8215 · TELEPHONE 203 432-4835 · FACSIMILE 203 432-1148
COURIER ADDRESS 127 WALL STREET, NEW HAVEN, CONNECTICUT 06511 · EMAIL KATE.STITH@YALE.EDU

21 U.S.C. Section 853:

(A) Property subject to criminal forfeiture. Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law –

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

. . . .

931 F.2d 1186
(Cite as: 931 F.2d 1186)

UNITED STATES of America, Plaintiff-Appellee,
v.
Dominic SIMONE, Robert "Bosko" Struminikovski, Nicholas Simone, John Peter Suchan, Vasil Struminikovski, Panagiotis "Pete" Pistas, Deborah Cerveny and Lubin Milevski, Defendants-Appellants.

Nos. 88-3412, 88-3479, 88-3480, 88-3513 to 88-3515, 88-3522 and 89-1094.

United States Court of Appeals, Seventh Circuit.

Argued Sept. 14, 1990.

Decided May 3, 1991.
Rehearing and Rehearing En Banc Denied June 5, 1991.

Defendants were convicted in the United States District Court for the Northern District of Illinois, Ilana Diamond Rovner, J., of various conspiracy and drug trafficking offenses, and they appealed. The Court of Appeals, Grant, Senior District Judge, sitting by designation, held that: (1) defendants' challenge to indictment charging them with narcotics offenses, based on claim that indictment improperly charged multiple conspiracies on single count, was waived; (2) jury instructions made it sufficiently clear that defendant could not be convicted without knowingly becoming member of conspiracy; (3) defendant was not denied effective assistance of counsel when defense counsel admitted during summation that defendant was a drug dealer; (4) forfeiture instruction was harmless; and (5) evidence was sufficient to establish that defendant was member of single overall narcotics distribution conspiracy charged in indictment.

Affirmed.

[1] INDICTMENT AND INFORMATI⊂⇒196(1)
210k196(1)
Failure to object to alleged defects in indictment before trial constitutes waiver. Fed.Rules Cr.Proc.Rule 12(f), 18 U.S.C.A.

[2] CRIMINAL LAW ⊂⇒1134(3)
110k1134(3)
Appellate court addresses waived claim only if cause is shown that might justify granting of relief from waiver. Fed.Rules Cr.Proc.Rule 12(f), 18 U.S.C.A.

[3] CRIMINAL LAW ⊂⇒1030(1)
110k1030(1)
If there is sufficient cause for relief from waived claim, court evaluates claim under plain error doctrine. Fed.Rules Cr.Proc.Rule 12(f), 18 U.S.C.A.

[4] CRIMINAL LAW ⊂⇒1032(6)
110k1032(6)
Defendants' challenge to indictment charging them with narcotics offenses, based on claim that indictment improperly charged multiple conspiracies on single count, was waived, and would not be considered on appeal, where defendants did not challenge indictment prior to trial, and failed to give any cause to justify relief from waiver. Fed.Rules Cr.Proc.Rules 8(b), 12(f), 18 U.S.C.A.

[4] INDICTMENT AND INFORMATI⊂⇒196(7)
210k196(7)
Defendants' challenge to indictment charging them with narcotics offenses, based on claim that indictment improperly charged multiple conspiracies on single count, was waived, and would not be considered on appeal, where defendants did not challenge indictment prior to trial, and failed to give any cause to justify relief from waiver. Fed.Rules Cr.Proc.Rules 8(b), 12(f), 18 U.S.C.A.

[5] CONSPIRACY ⊂⇒43(6)
91k43(6)
Count of indictment charging defendants with conspiracy to distribute and possess with intent to distribute cocaine and heroin properly alleged single scheme carried out by series of acts and sufficiently informed defendants of nature of charges against them; count described single ongoing drug distribution conspiracy under direction of one defendant, involving core members who bought from and sold to various suppliers and dealers who changed over time. Comprehensive Drug Abuse Prevention and Control Act of 1970 § 401(a)(1), as amended, 21 U.S.C.A. § 841(a)(1); Fed.Rules Cr.Proc.Rules 8, 8(a, b), 18 U.S.C.A.

[5] INDICTMENT AND INFORMATI⊂⇒125(5.5)

931 F.2d 1186
(Cite as: 931 F.2d 1186, *1197)

104 S.Ct. 2039, 2045 n. 19, 80 L.Ed.2d 657 (1984). Applying that guidance to this case, we recognize that it would have been foolhardy for Bosko's counsel to deny the drug sales so credibly proven by the government. But, rather than concede guilt completely, Mr. Muslin competently challenged the prosecution's proof of the other charges.

[12] We do not approve of a defense counsel's deliberate, explicit admission that a jury should find his client guilty of a charge in the absence of any suggestion that the defendant concurred in the decision to proceed in such a manner. However, in the case before us, Bosko's attorney intentionally stipulated facts and conceded those charges for which there was unrefutable evidence and no mandatory sentences, but forcefully argued Bosko's innocence on the charges with heavier penalties, as part of a trial strategy. It was a reasonable plan that was evident from the beginning of the trial. At no time did the defendant object to it; in fact, we believe he chose or at least condoned the tactics. Our position was reinforced by Bosko's post-trial letter to the sentencing judge which provided ample evidence of his approval of the strategy.

As part of its highly deferential scrutiny, an appellate court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689, 104 S.Ct. at 2065. It was incumbent on the defendant to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " Id., citing Michel v. Louisiana, 350 U.S. 91, 101, 76 S.Ct. 158, 164, 100 L.Ed. 83 (1955). Bosko did not do so. We hold that the defendant Bosko failed to show that the conduct of his trial counsel, in following this reasonably sound strategy, fell below an objective standard of reasonableness. [FN16] Consequently, we will not overturn Bosko's conviction on the basis of his sixth amendment challenge.

FN16. Since the performance prong of the Strickland standard of ineffective assistance was not met, we need not address the prejudice prong. However, we note that Bosko did not argue that the jury's decision would probably have been different absent his counsel's alleged errors in his closing argument.

V. Forfeiture

[13] Defendants Bosko and Vasil Struminikovski argue that the district court erred during the forfeiture phase of the trial by presenting in its instruction to the jury two burdens of proof with respect to the forfeiture allegations in the indictment, both "preponderance of the evidence" and "beyond a reasonable doubt." They contend that the jury should have been instructed to find that property was forfeitable only if the government had proven it subject to confiscation beyond a reasonable doubt.

The court first reminded the jury that its previous determination of the guilt of Bosko and Vasil was final and conclusive, and that its duty now was to decide whether the defendants must forfeit certain property. The court then began the forfeiture instructions:

> You are instructed that as to each claim of forfeiture, the Government mu *1197 establish beyond a reasonable doubt that:
> 1. The property constituted or was derived from the proceeds obtained, directly or indirectly, as a result of a violation of Title 21 United States Code Sections 841(a)(1), 845b(f), 846 or 848; or
> 2. The property was used or intended to be used in any manner or part to commit or to facilitate the commission of a violation of those statutes; or
> 3. With respect to Bosko Struminikovski, the property constituted an interest in, claim against, or contractual right affording a source of control over the continuing criminal enterprise charged in the indictment.
> You are further instructed with respect to the forfeiture allegations, that if you find that any of the property set out therein is the property of defendants Bosko Struminikovski or Vasil Struminikovski and that the Government has established by a preponderance of the evidence that:
> 1. Such property was acquired by such person during the period of a violation of Title 21 United States Code Sections 841(a)(1), 845b(f), 846, or 848 or within a reasonable time after such period; and
> 2. There was no likely source for such property, other than a violation of Title 21 United States Code Sections 841(a)(1), 845b(f), 846, or 848, then a rebuttable presumption arises that the property is subject to forfeiture.
> Tr. at 5509-5511.

As a preliminary matter we note that no objection

Item III C 7

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Rule 43; Proposal to Permit Defendant to Appear Before Initial Appearances and Arraignments Via Teleconferencing**

DATE: **September 17, 1998**

Attached is a letter from Hon. Fred Biery (W.D. Texas) to Judge Stotler recommending that the Criminal Rules (in particular Rule 5) be amended to permit initial appearances and arraignments to be conducted through teleconferencing.

Judge Biery raises an issue that comes before the Committee with some frequency. This matter was first considered by the Committee in 1992 and eventually resulted in proposed amendments to Rule 10 regarding arraignments. The proposal was tabled in 1994 pending the outcome of FJC pilot programs involving teleconferencing.

Although this particular proposal focuses on Rule 5, an amendment would certainly be required in Rule 43 as well. That might be a better place to start with any amendments concerning teleconferencing--which might eventually involve arraignments, pleas, and other hearings.

#4987

98-CR-A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
655 EAST DURANGO BOULEVARD
SAN ANTONIO, TEXAS 78206

CHAMBERS OF
FRED BIERY
JUDGE

TELEPHONE
(210) 472-6505

May 22, 1998

The Honorable Alicemarie H. Stotler
United States District Judge
U.S. Courthouse
751 West Santa Ana Blvd.
Santa Ana, California 92701

Re: Video Teleconferencing of Initial Appearances and Arraignments

Dear Judge Stotler:

I write to you in your capacity as Chair of the Rules Committee specifically with reference to Federal Rule of Criminal Procedure 5. Although my duty station is San Antonio, one of my responsibilities is the Del Rio criminal docket. Del Rio, Texas is part of the 92,000 square mile Western District of Texas and is located three hours from San Antonio. Del Rio does not have a resident district judge and has one full-time magistrate judge and one part-time magistrate judge. Because of law enforcement initiatives on the United States-Mexico border, felony defendants in the Del Rio sector have increased from 150 in 1994 to a projected 800 to 900 in the present year. Misdemeanors have historically been at about 2,000 per year.

Because most of these defendants are not American citizens, very few of them are released on bond. And are incarcerated in about ten different jails spread out over the region. An incredible amount of time and resources are expended transporting defendants from the jails to the United States Courthouse in Del Rio. As you can imagine, these large numbers of defendants in the courthouse also present a security risk.

We have available now or in the near future video teleconferencing capabilities in some of the jails. Although aware of the 9th Circuit opinion in Valenzuela-Gonzalez v. United States District Court for the District of Arizona, 915 F.2nd 1276, I respectfully suggest that we need to take advantage of available technology, given our limited judicial and United States Marshal resources and the exponential growth in the caseloads on the Southwest border. The consideration by the Committee of these ideas would be greatly appreciated by all members of the court family who work in

particularly remote areas and under the geographical challenges outlined above.

Sincerely yours,

Fred Biery,
United States District Judge

cc:\Tom Hnatowski, Esq.
Dan Jackson, Esq.
Philip R. Argetsinger, Esq.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

May 29, 1998

The Honorable Fred Biery
United States District Court
Western District of Texas
655 East Durango Boulevard
San Antonio, Texas 78206

Re: Criminal Rule 5

Dear Judge Biery:

Thank you for your letter of May 22, 1998, regarding video teleconferencing of initial appearances and arraignments. By copy of this letter, I am forwarding your suggestion to Judge Davis, chair of the Criminal Rules Advisory Committee, for consideration by that committee. Your comments are very helpful to the rules committees — thank you for your interest in the rulemaking process.

Sincerely,

Alicemarie H. Stotler

Alicemarie H. Stotler

cc: Judge W. Eugene Davis, Chair,
Advisory Committee on Criminal Rules
Peter G. McCabe, Secretary,
Committee on Rules of Practice and Procedure

g:\docs\rules\crim\r5-biery\trn

Item III C-8

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor David A. Schlueter, Reporter**

RE: **Report of Subcommittee on Rules Governing § 2254 Proceedings (State Custody) and Rules Governing § 2255 Proceedings (Federal Custody)**

DATE: **September 16, 1998**

Following the Committee's Fall 1997 meeting, Judge Davis appointed a subcommittee to study the rules governing §§ 2254 and 2255 proceedings: Judge Carnes (Chair), Judge Miller, Mr. Jackson, and Mr. Pauley or Ms. Harkenrider. At its last meeting, the Committee considered that subcommittee's report, which is attached.

Following discussion on the issues raised in the subcommittee's report, the subcommittee was asked to poll magistrate judges to determine what their reaction might be. It was also asked to consider the possibility of blending the two sets of habeas rules into one set.

The subcommittee's latest report and related materials are attached as are the supporting documents included in the agenda book for the Spring 1998 meeting.

United States Court of Appeals
For The Eleventh Circuit
15 LEE STREET
MONTGOMERY, ALABAMA 36104

ED CARNES
CIRCUIT JUDGE

TELEPHONE (334) 223-7132
FAX (334) 223-7676

September 14, 1998

Professor David A. Schlueter
St. Mary's University
School of Law
One Camino Santa Maria
San Antonio, Texas 78228-8602

Re: Proposed Amendments to Habeas Corpus Rules

Dear Dave:

The habeas corpus subcommittee had a phone conference today and discussed how we thought the Committee should proceed in regard to deciding about amendments to the rules relating to 28 U.S.C. §§ 2254 and 2255 cases.

As you will recall, at the April meeting we previewed for the Committee our recommendations for amendments to these rules, but there was insufficient time for any discussion or decision regarding any amendment. The logical next step is to have the Committee as a whole consider our recommendations and decide which ones to adopt.

In order to facilitate discussion and decision-making, the materials before the Committee at the upcoming meeting should include a copy of our subcommittee's March 27, 1998 memorandum report, along with the written comments of Judge Miller which were attached to that report. Since our last meeting, Judge Miller has solicited comments from magistrate judges across the country. Magistrate Judge Mary Feinberg of the Southern District of West Virginia responded with a thoughtful letter to him, dated August 20, 1998. That letter should be included in the meeting book, too. (Judge Miller can furnish you with a cleaner copy of that letter than I can.)

We are aware of your suggestion that consideration should be given to combining the rules governing §§ 2254 and 2255 into one rule. We believe, however, that it would be premature to undertake such a consolidation until we know how the Committee wants to amend the existing provisions of the two rules. After we know that, we can consider consolidating the two rules if the Committee wants to explore that approach.

Unfortunately, my Court's fall en banc sitting will conflict with the upcoming Committee meeting, but Judge Miller is prepared to take the lead in presenting our subcommittee's report. My regret at missing the meeting and not being able to see my friends on the Committee is mitigated only by the certain knowledge that neither the Committee nor the Republic will suffer from my absence.

Sincerely,

ED CARNES
United States Circuit Judge

EC:bb

c: Honorable Tommy E. Miller
Darryl W. Jackson, Esq.
Roger A. Pauley, Esq.
Mary Harkenrider, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
ELIZABETH KEE FEDERAL BUILDING
601 FEDERAL STREET, ROOM 1013
BLUEFIELD, WEST VIRGINIA 24701

MARY S. FEINBERG
UNITED STATES MAGISTRATE JUDGE

304/327-0376
FAX 304/325-7662

August 20, 1998

Hon. Tommy E. Miller
United States Magistrate Judge
United States Courthouse
600 Granby Street, Suite 173
Norfolk, VA 23510

Re: Proposed Amendments to Habeas Corpus Rules

Dear Judge Miller:

I appreciate your work and that of the Habeas Corpus Rules Subcommittee concerning the possibility of amending the habeas corpus rules. I have six years of experience in filing findings and recommendations in all types of habeas corpus cases, preceded by fifteen years of responding to § 2255 motions filed by persons whom I prosecuted. This letter responds to the Subcommittee's Proposals and your E-mail message.

Subcommittee's Proposals

A. I agree that the reference to 18 U.S.C. § 3006A should omit any subsection.

B. I have reviewed Proposal B and support its adoption by the Criminal Rules Advisory Committee. It adequately addresses the problems I have encountered in setting an answer deadline for respondent in a case filed pursuant to § 2241. I find the habeas corpus rules to be easy to apply, and I look forward to using them in the context of a § 2241.

C. I. Rule 2(e) [§ 2254] and 2(d) [§ 2255] which provide for returning a non-compliant application to the petitioner should be retained. and amended to change "received" to "filed." From time to time, I use this provision, especially when the prisoner has not used the standard form at all. In our district, we have a form with a checklist of things that may be missing or erroneous; we check the applicable blocks, or write in the deficiency, I sign it, and it goes to the petitioner. We always "file" the non-compliant document the day it is received.

C. II. I agree with the proposal to amend Rule 3(b) to eliminate the clerk's discretion to file or not file a petition.

C. III. I am opposed to amending Rule 5 to add to the topics which must be addressed in an answer, specifically successive petitions and periods of limitation. In my experience, respondents invoke these defenses as a matter of course in a motion to dismiss. An answer should be substantive; successiveness and periods of limitation are procedural bars to the consideration of the allegations of the petition. I believe that substance and procedure should not be mixed in a substantive document. Also, with respect to a § 2254 petition, I would rather not receive voluminous transcripts of a petitioner's state trial if the case is going to be dismissed for being successive or time-barred.

C. IV. See A., above.

C. V. I agree that nothing should be done.

C. VI. I favor doing nothing to Rule 9(a) unless and until we determine that it is hopelessly in conflict with the statutes, is causing trouble, and is not helping in any cases. The AEDPA is still very new; it is too early to determine whether Rule 9(a) retains some usefulness.

C. VII. I favor deleting Rule 9(b) and replacing it with nothing.

E-mail Message

1. In the event that the Committee or Subcommittee decides that a radical revision of the habeas corpus rules is in order, I oppose the adoption of one set of habeas corpus rules or their inclusion in the Federal Rules of Civil/Criminal Procedure. The present system recognizes the significant differences between §§ 2255 and 2254, and the distinction between a present prosecution and a post-conviction collateral attack. These differences and distinctions should be retained and emphasized.

2. See C. II., above.

3. See C. III., above.

4. See C. VII., above. I favor warning petitioners that strict periods of limitation may bar them from relief.

5. My copy of the § 2254 and § 2255 rules does not have a Rule 9(c).

You did not ask about this, but I would favor amending Rule 7 to permit the judge to expand the record on his/her own motion. Sometimes I have to get documents from the Clerk's office of other courts (state or federal), and it is easier if I do it. Ordering the parties to do it

results in delay or submission of the wrong document. I give the parties an opportunity to object to what I've added.

Thank you for your attention to the habeas corpus rules. I will be interested in reading the results of your work.

Very truly yours,

Mary S. Feinberg

Mary S. Feinberg
United States Magistrate Judge

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

April 15, 1998
Federal Express Mail

MEMORANDUM TO ADVISORY COMMITTEE ON CRIMINAL RULES

SUBJECT: *Report from the Habeas Corpus Rules Subcommittee*

I have attached the report of the Habeas Corpus Subcommittee, which proposes changes to the rules relating to actions filed under 28 U.S.C. §§ 2241, 2254, and 2255. I am also including a copy of the reply of the National Association of Criminal Defense Lawyers to the Department of Justice memorandum on proposed new Rule 32.2.

John K. Rabiej

Attachments

cc: Honorable Alicemarie H. Stotler
Professor Daniel R. Coquillette

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Hon. Ed Carnes
U.S. Circuit Judge

Frank M. Johnson Jr. Federal Bldg.
& U.S. Courthouse
15 Lee Street, Room 408
Montgomery, Alabama 36104
(334) 223-7132

TO: **Criminal Rules Advisory Committee**

FROM: **Habeas Corpus Rules Subcommittee**
(Ed Carnes, Darryl Jackson, Tommy Miller,
Mary Francis Harkenrider, Roger Pauley)

RE: **Proposals for Modification to the Rules Relating to Actions Filed Pursuant to 28 U.S.C. § § 2241, 2254, and 2255**

DATE: **March 27, 1998**

Having studied and conferred about whether changes are needed in the rules relating to 28 U.S.C. §§ 2241, 2254, and 2255 proceedings, the Habeas Corpus Subcommittee makes the following proposals.

A. REFERENCES IN THE RULES TO 18 U.S.C. § 3006(A)

The last sentence of Rule 6(a) of the rules governing § 2254 cases now refers to "the appointment of counsel under 18 U.S.C. § 3006A(g)." Likewise, the first sentence of Rule 8(c) of the rules governing § 2255 proceedings also refers to "the appointment of counsel under 18 U.S.C. § 3006A(g)." That specific statutory subsection has been repealed, and the authority for appointment of counsel in such cases is now contained in 18 U.S.C. §

3006A(a). The references in those two rules to the statutory authority for appointment of counsel needs to be updated. In order to leave some wiggle room in case Congress rearranges the statutory subsections again, we recommend that the references in both of these rules be changed to 18 U.S.C. § 3006A, instead of to § 3006A(a).

B. THE RULES APPLICABLE TO 28 U.S.C. § 2241 PROCEEDINGS

In connection with the Committee meeting last fall, it was brought to our attention that there are problems and inconsistencies with various rules as they relate to a period of time for a response to a habeas petition or § 2255 motion, and there is confusion about which rules govern § 2241 cases. Those problems and inconsistencies involve the wording of the rules applicable to § 2254 and § 2255 cases, as well as the wording of Federal Rule of Civil Procedure 81(a)(2).

After considering the matter, we recommend that Rule 1(b) of both the § 2254 and § 2255 rules, as well as Civil Rule 81(a)(2), be amended as indicated in the first three attachments to this memorandum (each of which is labelled "Proposal B").

We believe that the changes we propose will clarify that in all §§ 2241, 2254, and 2255 proceedings, the answer or other responsive pleading shall be filed by the respondent "within the period of time fixed by the court" as provided in Rule 4 of the rules governing § 2254 cases and Rule 4(b) of the rules governing § 2255 cases. The proposed changes will provide a uniform rule for the filing of all such petitions and motions.

We do recognize that our proposed changes in the three rules will not remove the outdated language in 28 U.S.C. § 2243 requiring that a response be filed "within three days unless for good cause additional time, not exceeding twenty days, is allowed," and that "a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed." We believe that that conflict between § 2243 and the rules is taken care of by the Rules Enabling Act and that there is nothing that the Committee can do about § 2243.

C. JUDGE MILLER'S PROPOSALS

Subcommittee member Judge Miller volunteered to survey the remainder of the § 2254 and § 2255 Rules in order to see if any other changes needed to be made, particularly in light of the Antiterrorism and Effective Death Penalty Act of 1996. He did an excellent job, and his report to the other subcommittee members ("Comments on the Habeas Corpus Rules") is attached hereto. After considering his proposals, we make the following recommendations concerning them:

I. & II. The Proposals Concerning the Provisions About Return of a Petition or Motion that Does Not Comply with the Rules (pp. 1-3):

We were divided over these two proposals and agreed to forward them to the Committee for discussion and debate.

III. Statement in the Petition or Motion and in the Answer Concerning Second Application Permission and the Statute of Limitations (pp. 3-4):

We recommend adoption of Proposal III. In addition, we also recommend that similar changes be made to Rule 2(c) of the § 2254 rules and to Rule 2(b) of the § 2255 rules. More specifically, we recommend that Rule 2(c) of the § 2254 Rules be amended as follows:

> **(c) Form of Petition.** The petition shall be in substantially the form annexed to these rules, except that any district court may by local rule require that petitions filed with it shall be in a form prescribed by the local rule. Blank petitions in the prescribed form shall be made available without charge by the clerk of the district court to applicants upon their request. It shall specify all the grounds for relief which are available to the petitioner and of which he has or by the exercise of reasonable diligence should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified. It shall ~~also~~ state whether a previous petition has been filed in this matter and, if so, whether the appropriate court of appeals has authorized the filing of this petition. The petition shall also state whether it complies with the applicable limitations period, and shall specify the relief requested. The petition shall be typewritten or legibly handwritten and shall be signed under penalty of perjury by the petitioner.

Likewise, for Rule 2(b) of the § 2255 Rules, we recommend the following amendment:

> **(b) Form of Motion.** The motion shall be in substantially the form annexed to these rules, except that any district court may by local rule require that motions filed with it shall be in a form prescribed by the local rule. Blank motions in the prescribed form shall be made available without charge by the clerk of the district court to applicants upon their request. It shall specify all the grounds for relief which are available to the movant and of which he has or, by the exercise of reasonable diligence, should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified. It shall ~~also~~ state whether a previous motion has been filed in this matter and, if so, whether the appropriate court of appeals has authorized the filing of this motion. The motion shall also state whether it complies with the applicable limitations period, and shall specify the relief requested. The

motion shall be typewritten or legibly handwritten and shall be signed under penalty of perjury by the petitioner.

IV. The Outdated References to 18 U.S.C. § 3006A (p. 5):

This proposal involves the same subject as Proposal A, which is discussed on pp. 1-2 of this memorandum, above.

V. The Provision in 28 U.S.C. § 2243 Regarding the Time for an Answer or Response and the Time for a Hearing.

This proposal involves the same subject as our Proposal B, which is discussed on pp. 2-3 of this memorandum, above.

VI. The § 2254 and § 2255 Rules 9(a) Concerning Delayed Petitions (pp. 6-8):

After discussing this matter, all of us including Judge Miller, initially agreed to recommend that Rule 9(a) of both the § 2254 and § 2255 Rules be deleted. We believed that the statutes of limitation that were enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 were intended to and do have the effect of superseding the rule provisions concerning delayed petitions. However, after our conference, Roger Pauley and Mary Harkenrider gave the matter some more thought and came to the conclusion that there may be some limited circumstances in which Rule 9(a) could continue to have some field of operation. They will present their concerns at the Committee meeting.

VII. The § 2254 and § 2255 Rules 9(b) Concerning Second Petitions (pp. 10-11):

We recommend that Rule 9(b) of both the § 2254 and § 2255 Rules be deleted. We believe that the statutory provisions relating to second or successive petitions, that were

enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996, were intended to and do have the effect of superseding the rule provisions regarding the same subject.

[Proposal B]

Rule 1 of the Rules Governing Section 2254 Cases

Rule 1. Scope of Rules

(a) Applicable to cases involving custody pursuant to a judgment of a state court. These rules govern the procedure in the United States district courts on applications under 28 U.S.C. § 2254:

(1) by a person in custody pursuant to a judgment of a state court, for a determination that such custody is in violation of the Constitution, laws, or treaties of the United States; and

(2) by a person in custody pursuant to a judgment of either a state or a federal court, who makes application for a determination that custody to which he may be subject in the future under a judgment of a state court will be in violation of the Constitution, laws, or treaties of the United States.

(b) Other situations. In applications for habeas corpus in cases not covered by subdivision (a), <u>including petitions filed under 28 U.S.C. § 2241 by state prisoners or detainees, Rule 4 of these rules shall apply and other relevant parts of</u> these rules may be applied at the discretion of the United States district court.

[Proposal B]

Rule 1 of the Rules Governing Section 2255 Cases

Rule 1. Scope of Rules

(a) These rules govern the procedure in the district court on a motion under 28 U.S.C. § 2255:

(1) by a person in custody pursuant to a judgment of that court for a determination that the judgment was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such judgment, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack; and

(2) by a person in custody pursuant to a judgment of a state or other federal court and subject to future custody under a judgment of the district court for a determination that such future custody will be in violation of the Constitution or laws of the United States, or that the district court was without jurisdiction to impose such judgment, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.

(b) Rule 4(b) of these rules shall apply and other relevant parts of these rules may be applied at the discretion of the United States district court in proceedings filed under 28 U.S.C. § 2241 by federal prisoners or detainees.

[Proposal B]

Rules of Civil Procedure

Rule 81. Applicability in General

(a) To What Proceedings Applicable

(1) These rules do not apply to prize proceedings in admiralty governed by Title 10, U.S.C., §§ 7651-7681. They do not apply to proceedings in bankruptcy or proceedings in copyright under Title 17, U.S.C., except in so far as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States. They do not apply to mental health proceedings in the United States District Court for the District of Columbia.

(2) These rules are applicable to proceedings for admission to citizenship, habeas corpus, and quo warranto, to the extent that the practice in such proceedings is not set forth in statutes or rules of the United States and has heretofore conformed to the practice in civil actions. ~~The writ of habeas corpus, or order to show cause, shall be directed to the person having custody of the person detained. It shall be returned within 3 days unless for good cause shown additional time is allowed which in cases brought under 28 U.S.C. § 2254 shall not exceed 40 days, and in all other cases shall not exceed 20 days.~~

COMMENTS ON THE HABEAS CORPUS RULES

Tommy E. Miller
United States Magistrate Judge
Norfolk, Virginia
February 17, 1998

I

Federal Rule of Civil Procedure 5(e), which defines filing with the Court, was amended in 1991 so that its final sentence now reads:

> The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices.

The Advisory Committee Notes of 1991 explain why this change was made.

> Several local district rules have directed the office of the clerk to refuse to accept for filing papers not conforming to certain requirements of form imposed by local rules or practice. This is not a suitable role for the office of the clerk, and the practice exposes litigants to the hazards of time bars; for these reasons, such rules are proscribed by this revision. The enforcement of these rules and of the local rules is a role for a judicial officer. A clerk may of course advise a party or counsel that a particular instrument is not in proper form, and may be directed to so inform the court.

Thus in the usual civil case the clerk does not have the discretion as to whether to file a "paper." If there is a problem the clerk may call it to the attention of the court.

Section 2254 Rule 2(e) and Section 2255 Rule 2(d) conflict with Fed. R. Civ. P. 5(e).

Section 2254 Rule 2(e) reads:

> **(e) Return of insufficient petition.** If a petition <u>received</u> by the clerk of a district court does not substantially comply with the requirements of rule 2 or rule 3, it may be returned to the petitioner, if a judge of the court so directs, together with a statement of the reason for its return. The clerk shall retain a copy of the petition.

Section 2255 Rule 2(d) reads:

> **(d) Return of insufficient motion.** If a motion received by the clerk of a district court does not substantially comply with the requirements of rule 2 or rule 3, it may be returned to the movant, if a judge of the court so directs, together with a statement of the reason for its return. The clerk shall retain a copy of the motion.

RECOMMENDATION:

The underlined word "received" be changed to "filed" to bring these rules into conformity with Fed. R. Civ. P. 5(e).

II

Similarly, Section 2254 Rule 3(b) and Section 2255 Rule 3(b) conflict with Fed. R. Civ. P. 5(e).

Section 2254 Rule 3(b) reads:

> **(b) Filing and service.** Upon receipt of the petition and the filing fee, or an order granting leave to the petitioner to proceed in forma pauperis, and having ascertained that the petition appears on its face to comply with rules 2 and 3, the clerk of the district court shall file the petition and enter it on the docket in his office. The filing of the petition shall not require the respondent to answer the petition or otherwise move with respect to it unless so ordered by the court.

Section 2255 Rule 3(b) reads:

> **(b) Filing and service.** Upon receipt of the motion and having ascertained that it appears on its face to comply with rules 2 and 3, the clerk of the district court shall file the motion and enter it on the docket in his office in the criminal action in which was entered the judgment to which it is directed. He shall thereupon deliver or serve a copy of the motion together with a notice of its filing on the United States Attorney of the district in which the judgment under attack was entered. The filing of the motion shall not require said United States Attorney to answer the motion or otherwise move with respect to it unless so ordered by the court.

The underlined portion of each rule conflicts with Fed. R. Civ. P. 5(e)'s requirement that the clerk file the papers. As a practical matter I believe that the practice is for the clerk to file the petition and refer it to a judge for consideration of any defects. The current habeas corpus rules burden the clerk with a decision-making responsibility that should not be placed on a clerk and conflict with the requirements of Fed. R. Civ. P. 5(e).

RECOMMENDATION:

The above underlined portions of Section 2254 Rule 3(b) and Section 2255 Rule 3(b) should be deleted in order to conform to Fed. R. Civ. P. 5(e) and current practice.

III

Section 2254 Rule 5 and Section 2255 Rule 5(a) describe the contents of the answer by the state or U.S. Attorney. Two procedural hurdles were added for the petitioner or movant in both Section 2254 and Section 2255 actions by the Antiterrorism and Effective Death Penalty Act of 1996.

The first hurdle is that a one-year period of limitation applies to both state habeas petitions under 28 U.S.C. § 2254 (see § 2244(d), reproduced in part VI of this outline) and federal motions attacking sentence under 28 U.S.C. § 2255 (see § 2255, ¶6, reproduced in part VI of this outline).

The second hurdle is that the petitioner or movant may not file a second petition or motion attacking sentence without obtaining permission from the appropriate court of appeals. See 28 U.S.C. § 2244(b), reproduced in part VII of this outline, for state habeas and 28 U.S.C. § 2255, ¶8, reproduced in part VII of this outline, for federal motions.

The question has occurred to me whether the rules should affirmatively require the answer to contain information so that the court can determine whether the statute of limitations has run and whether the papers before the court are in fact second petitions. I believe that the sooner the court has all the information that it needs to decide a matter, the better off everyone is.

RECOMMENDATION:

The following language in italics be added at the appropriate place.

Section 2254 Rule 5:

Rule 5. Answer; Contents

The answer shall respond to the allegations of the petition. In addition it shall state whether the petitioner has exhausted his state remedies including any post-conviction remedies available to him under the statutes or procedural rules of the state and including also his right of appeal both from the judgment of conviction and from any adverse judgment or order in the post-conviction proceeding. The answer shall indicate what transcripts (of pretrial, trial, sentencing, and post-conviction proceedings) are available, when they can be furnished, and also what proceedings have been recorded and not transcribed. There shall be attached to the answer such portions of the transcripts as the answering party deems relevant. The court on its own motion or upon request of the petitioner may order that further portions of the existing transcripts be furnished or that certain portions of the non-transcribed proceedings be transcribed and furnished. If a transcript is neither available nor procurable, a narrative summary of the evidence may be submitted. If the petitioner appealed from the judgment of conviction or from an adverse judgment or order in a post-conviction proceeding, a copy of the petitioner's brief on appeal and of the opinion of the appellate court, if any, shall also be filed by the respondent with the answer. *The answer shall state whether a previous federal petition has been filed in this matter and whether the appropriate court of appeals has authorized the filing of this petition. The answer shall also state whether the petition complies with the applicable limitation period.*

Section 2255 Rule 5(a):

Rule 5. Answer; Contents

(a) Contents of answer. The answer shall respond to the allegations of the motion. In addition it shall state whether the movant has used any other available federal remedies including any prior post-conviction motions under these rules or those existing previous to the adoption of the present rules. The answer shall also state whether an evidentiary hearing was accorded the movant in a federal court. *The answer shall state whether the appropriate court of appeals has authorized the filing of a successive motion. The answer shall also state whether the motion complies with the applicable limitations period.*

IV

Section 2254 Rules 6(a) and 8(c) and Section 2255 Rules 6(a) and 8(c) should be amended to refer to 18 U.S.C. § 3006A instead of 18 U.S.C. § 3006A(g).

V

We have discussed the conflict between the fourth paragraph of 28 U.S.C. § 2243 and Section § 2254 Rule 8(c) regarding the timing of a hearing. The 1976 Advisory Committee Notes recognize this conflict. Recognition of the conflict, combined with the Rules Enabling Act, seems to confirm that the timing in Section 2254 Rule 8(c) trumps the time limit in 28 U.S.C. § 2243, ¶4.

RECOMMENDATION:

Do nothing.

VI

"Delayed Petitions or Motions"

State Prisoners

Section 2254 Rule 9(a) provides:

(a) Delayed petitions. A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

Section 2244(d), effective April 24, 1996, provides:

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Federal Prisoners

Section 2255 Rule 9(a) provides:

> **(a) Delayed motions.** A motion for relief made pursuant to these rules may be dismissed if it appears that the government has been prejudiced in its ability to respond to the motion by delay in its filing unless the movant shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred.

Section 2255, ¶6, effective April 24, 1996, provides:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--
>
> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

The Antiterrorism and Effective Death Penalty Act of 1996 provides for a limitation period in both Section 2254 and Section 2255 cases. When I first examined the two Rules 9(a) and compared them to the new limitation statute, I thought that the rules should be amended to reflect the new statute of limitations. I am not so certain any more.

If the petitioner or movant is beyond one year in filing the petition or motion, then the responding attorney should assert the specific limitation period in the answer. If we amend the two Rule 5(a)'s as I have previously suggested, then the answer will almost certainly contain a section discussing the statutory limitation issues.

Under some circumstances I can foresee cases which pend for

years on state appeal and state post-conviction proceedings before reaching the federal system. This time is not counted in the one-year limitation period. However, such a petition timely filed within the 28 U.S.C. § 2244(d) limitation period may run afoul of the "prejudicial" requirements of both Rules 9(a). After thinking it over I suggest that at this time we make no change.

RECOMMENDATION:

Do nothing.

VII

Successive Petitions

State Prisoners

Section 2254 Rule 9(b) provides:

> **(b) Successive petitions.** A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

Section 2244(b), effective April 24, 1996, provides:

> (b)(1) A claim presented in a second or successive habeas corpus application under Section 2254 that was presented in a prior application shall be dismissed.
>
> (2) A claim presented in a second or successive habeas corpus application under Section 2254 that was not presented in a prior application shall be dismissed unless--
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

Federal Prisoners

Section 2255 Rule 9(b) provides:

(b) Successive motions. A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

Section 2244(a) provides:

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a

judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in Section 2255.

Section 2255, final paragraph, effective 4-24-96, provides:

> A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--
>
> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

The Antiterrorism and Effective Death Penalty Act of 1996 completely changed the procedure and standards for deciding whether to consider successive petitions and motions. The change is so radical that the only solution that I see is to delete both Section 2254 Rule 9(b) and Section 2255 Rule 9(b). If we leave them in these rules they will simply create confusion.

Other than simply tracking the statutory language, I do not believe that amending these rules will have any use.

One thing that might be beneficial would be to refer the prisoner to the procedure used by the appropriate court of appeals. John Rabiej tells me that there is no move to amend the Federal Rules of Appellate Procedure to provide a procedure for this second or successive petition or motion language. Attached is the procedure used by the Court of Appeals for the Fourth Circuit.

We could recommend amending each of the Rules 9(b) to read:

> 9(b) Successive petitions (or motions):
>
> Before a second or successive petition (or motion) is presented to the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the petition (motion).

RECOMMENDATION:

Delete both Rules (b) and possibly replace with a reference to the appellate procedure.

VIII

There may be other changes needed in these rules that I have missed. Most of the rules have not been amended since their creation in 1976. I hope that if we publish these changes for comment any other needed amendments will surface.

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor David A. Schlueter, Reporter**

RE: **Report of Subcommittee on Rules Governing § 2254 Proceedings (State Custody) and Rules Governing § 2255 Proceedings (Federal Custody)**

DATE: **March 28, 1998**

After the Committee's meeting in Monterey, Judge Davis appointed a subcommittee to study the rules governing §§ 2254 and 2255 proceedings: Judge Carnes (Chair), Judge Miller, Mr. Jackson, and Mr. Pauley or Ms. Harkenrider.

The subcommittee's report and related materials are attached.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
556 JEFFERSON STREET
SUITE 300
LAFAYETTE, LOUISIANA 70501

W. EUGENE DAVIS
CIRCUIT JUDGE

October 20, 1997

Honorable Edward E. Carnes
United States Circuit Judge
Frank M. Johnson, Jr., Federal
Building and Courthouse
15 Lee Street
Montgomery, AL 36104

Roger A. Pauley, Esq.
Director, Criminal Legislation
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Room 2244
Washington, D.C. 20530

or

Darryl W. Jackson, Esq.
Arnold & Porter
555 Twelfth Street, N.W.
Washington, D.C. 20004

Mary Frances Harkenrider, Esq.
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Room 2212
Washington, D.C. 20530

Honorable Tommy E. Miller
United States Magistrate Judge
173 Walter E.Hoffman Courthouse
600 Grandby Street
Norfolk, VA 23510

Dear Colleagues:

Confirming our conversation in Monterey, I ask that you (with Judge Carnes as chair) serve on a subcommittee to deal with our agenda item II-E-10 concerning rules governing §§ 2254 and 2255 proceedings.

Dave Schlueter's September 10, 1997 memo summarizes the problems that seem to me to need addressing. After a little digging, you may find other areas that should be addressed. If we are going out for comment for changes in these rules, it would be better to send them all out at one time.

We, of course, have no jurisdiction over Civil Rule 81 but I'm sure the Civil Rules Committee would be receptive to our recommendation on any changes we think they should make to that rule to harmonize it with our proposed changes.

My thanks to all of you. If I can help, please call me. Dave Schlueter offers any support that you may need from him.

Sincerely,

W. Eugene Davis

WED/df

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

Date: November 17, 1997

TO: Dave Schlueter

FROM: W. Eugene Davis

SUBJECT: Minutes

Dear Dave,

I only have one change for the minutes. Under Item K on page 11, the subcommittee members are Judges Carnes, Chair, along with Darryl Jackson, Tommy Miller, and either Roger Pauley or Mary Frances Harkenrider.

My letter appointing the subcommittee is attached. I'm sorry I overlooked sending you a copy.

Sincerely,

W. Eugene Davis

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
556 JEFFERSON STREET
SUITE 300
LAFAYETTE, LOUISIANA 70501

W. EUGENE DAVIS
CIRCUIT JUDGE

(318) 262-6664
FAX (318) 262-6685

January 27, 1998

Honorable Edward E. Carnes
United States Circuit Judge
Frank M. Johnson, Jr., Federal Bldg. & Courthouse
15 Lee Street
Montgomery, AL 36104

Dear Ed:

I do not know whether the problem raised by Judge Dorsey in this attached letter relates to your work on possible amendments to the rules relating to § 2254 and § 2255 actions. But in case it does, I pass it on to you for your consideration.

Sincerely,

W. Eugene Davis

WED/lhw

cc: Professor David A. Schlueter

97-CR-F

United States District Court
District of Connecticut
141 CHURCH STREET
NEW HAVEN, CT 06510

JUL 14 3 38 PM '97

Chambers Of
Peter C. Dorsey
Chief Judge

(203) 773-2427

RECEIVED 8/4/97

July 9, 1997

Honorable Alicemarie H. Stotler
U.S. Courthouse
751 West Santa Ana Boulevard
Santa Ana, California 92701

Dear Judge Stotler:

It has come to my attention that there is an apparent mistake in Rule 8(c) of the Federal Rules Governing § 2255 proceedings. In relevant part, Rule 8(c) states: "If an evidentiary hearing is required, the judge shall appoint counsel for a movant who qualifies for the appointment of counsel under 18 U.S.C. § 3006A(g) . . ." *See* Exh 1. The problem is that § 3006A(g), which used to address discretionary appointment of counsel in proceedings under §§ 2241, 2254, and 2255, was repealed in 1986. *See* Exh. 2 and Exh. 3. Courts still have discretion to appoint counsel in such cases, but their authority is now pursuant to subsection (a). *See* Exh. 4. The reference to subsection (g) in Rule 8(c) seemingly should be eliminated.

Rule 8(c) of the Federal Rules Governing § 2254 proceedings appears to contain the same error.

Very truly yours,

Peter C. Dorsey
Chief Judge

PCD/km

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

July 28, 1997

Honorable Peter C. Dorsey
Chief Judge
United States District Court
141 Church Street
New Haven, CT 06510

Re: Mistake in Rule 8(c) of § 2255 Rules

Dear Chief Judge Dorsey:

I very much appreciate the time and trouble that went into your letter of July 9. Somehow the attachments went astray, but we are tracking down the problem to find out how this got by us. As you know, the Administrative Office founded a "Rules Committee Support Office" (only in 1992) whose staff's duties include combing through recent legislation to prevent just these types of problems from occurring.

I am forwarding your letter to Judge Niemeyer, chair of the Advisory Committee on Civil Rules, Professor Ed Cooper, the Reporter, and to Mr. Rabiej who heads the Rules Committee Support Office. The Support Office maintains a docket of all correspondence received, and as soon as a plan is formulated to correct the rules defects identified in your letter, you will hear from me, perhaps Judge Niemeyer, and probably also from Peter McCabe, formal secretary to the rules committees.

Thank you again for taking the time to write, and I hope that no more rules errors ever come to your attention.

Sincerely,

Alicemarie H. Stotler

cc: Judge Paul V. Niemeyer
Professor Edward H. Cooper
John K. Rabiej, Esq.

G:\Docs\AHSC\rules\civ\8c-S2255.pcd

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

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BANKRUPTCY RULES

PAUL V. NIEMEYER
CIVIL RULES

D. LOWELL JENSEN
CRIMINAL RULES

FERN M. SMITH
EVIDENCE RULES

August 18, 1997

Honorable Peter C. Dorsey
Chief Judge
United States District Court
141 Church Street
New Haven, Connecticut 06510

Dear Judge Dorsey:

Thank you for your suggestion to Rule 8(c) of the Federal Rules Governing § 2255 proceedings. A copy of your letter had been sent to the chair and reporter of the Advisory Committee on Civil Rules. The issues raised by your suggestion are also relevant to review by the Advisory Committee on Criminal Rules. Accordingly, I am sending a copy of your letter to the chair and reporter of the Advisory Committee on Criminal Rules for their consideration.

We welcome your suggestion and appreciate your interest in the rulemaking process.

Sincerely,

John K. Rabiej

for Peter G. McCabe
Secretary

cc: Honorable Alicemarie H. Stotler
Honorable W. Eugene Davis
Professor David A. Schlueter

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

January 16, 1998

Honorable Peter C. Dorsey
Chief Judge
United States District Court
141 Church Street
New Haven, Connecticut 06510

Dear Judge Dorsey:

I am writing to update you regarding the status of your suggestion to delete the outdated statutory citation in Rule 8(c) of the Federal Rules Governing § 2255 proceedings, which was presented to the Advisory Committee on Criminal Rules. The Advisory Committee reviewed it at its October 1997 meeting. The committee voted to refer your proposal to a subcommittee, which is to undertake a comprehensive review of the Rules Governing §§ 2254 & 2255. I will advise you regarding further developments.

I again thank you for your suggestion and interest in the rulemaking process.

Sincerely,

Peter G. McCabe
Secretary

cc: Honorable Alicemarie H. Stotler
Honorable W. Eugene Davis
Professor David A. Schlueter

Item III D-F

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

July 29, 1998
(Revised)

MEMORANDUM TO JUDGE W. EUGENE DAVIS

SUBJECT: *Grand Jury Pending Legislation*

On July 22, 1998, the Senate passed an amendment sponsored by Senator Bumpers to the Judiciary's Appropriation Act that requires the Judicial Conference to report to Congress by September 1, 1999, its evaluation of whether "an amendment to Rule 6 of the Federal Rules of Criminal Procedure permitting the presence in the grand jury room of counsel for a witness who is testifying before the grand jury would further the interests of justice and law enforcement ... In preparing the report ... the Judicial Conference shall consider the views of the Department of Justice, the organized Bar, the academic legal community, and other interested parties."

Our Legislative Affairs Office will advise Congressman Hyde of the provision and believes that Hyde will object to the provision at the Congressional conference on the bill. The provision might be withdrawn, because the House has not had the opportunity to legislate it.

The *Legal Times* reported in its July 27, 1998, issue that "Bumpers, a former defense lawyer, also extracted a promise from Hatch ... to hold hearings on a wider range of issues relating to the grand jury process." In light of the Congressional interest, it may be prudent to place, at a minimum, the "presence of counsel at a grand jury session" issue as an item on the agenda for the fall meeting. If hearings are held next year, we may be asked to testify. I have attached excerpts from the 1975 advisory committee report on grand jury dealing with the question of counsel at a grand jury session. The original draft of the reporter favors allowing a witness to have counsel attend the grand jury session. But the final report of the committee concludes otherwise.

The advisory committee's report addresses a wide range of grand jury issues. A copy of the report's table of contents is also attached, which sets out the other issues considered by the committee at that time. I can provide you with a complete copy of the reports (each about 75 pages), if you want to consider tackling some of these broader grand jury issues.

I am also attaching a request from the National Association of Defense Lawyers asking the committee to revisit the issue of permitting counsel to accompany a witness and attend a grand jury session. In addition, the Governmental Affairs Office of the American Bar Association sent a

copy of its approved-grand jury reform proposals, which included the proposal to have counsel accompany a witness attending a grand jury session. Finally, I have included a memorandum prepared by the Department of Justice in opposition to the proposal.

John K. Rabiej

Attachments

cc: Honorable Alicemarie H. Stotler (with attach.)
Honorable Anthony J. Scirica (with attach.)
Professor David A. Schlueter (with attach.)
Peter G. McCabe, Secretary (with attach.)

September 18, 1998
By Facsimile and Hand Delivery

Honorable W. Eugene Davis
Chair, Advisory Committee on Federal Rules of Criminal Procedure
for the Committee on Rules of Practice and Procedure of the
U.S. Judicial Conference
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Possible Proposed Amendment to Rule 6 -- Providing Witness Counsel in the Grand Jury

Dear Judge Davis:

We understand that the Advisory Committee will spend some time at its next meeting, October 19, discussing whether to consider a possible amendment to Rule 6, which would allow witness counsel in the grand jury. We appreciate the interest of the Committee in this important subject, and hope you will indeed move to amend the rule in this modest, but important manner.

Enclosed is an article by our Immediate Past President, Gerald B. Lefcourt, reprinted in a recent issue of Judicature, which outlines several basic reforms we believe are necessary. Primary among them is the right of witnesses to have their counsel with them when appearing before the grand jury -- not to disrupt, or even make objections, but simply to stand ready for consultation should the witness feel the need to avail herself of it. This is in fact the rule in many states (e.g., Colorado and New York), where it works quite well and at no disadvantage to the prosecutor in performing her job.

Your consideration of this issue is timely. At no time has the public's awareness of, and concern about, the federal grand jury process been more acute. And yet, at no time in modern history has the federal judiciary's actual power to protect grand jury witnesses from prosecution excesses been more limited.

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Realistically, only counsel before the grand jury, and not the courts, can protect a witness against prosecutorial overreaching or the witness's innocent but fatal missteps. And this may well be a more *efficient* system as well. It avoids the delay associated with a witness having to repeatedly stop questioning and leave the room in order to consult with counsel.

In light of the Supreme Court's 1992 decision in *U.S. v. Williams*, in particular, it is now clear that the protection of grand jury witnesses, even against prosecutorial overreaching, can only be achieved through a rule amendment or legislation of this kind. The courts are without the inherent oversight authority to safeguard citizens appearing before the grand jury.

It is certainly not only the criminal defense bar which is concerned about the unfairness of the current federal grand jury process. As U.S. House Judiciary Committee Chairman Henry J. Hyde recently put it in a letter circulated to his colleagues:

> The Department of Justice tries to assure us that abusive prosecutions will be reined in because "prosecutors must already go to a grand jury before they can indict a defendant." As the late William J. Campbell, former federal Chief Judge in Chicago, once stated: "[T]he grand jury is the total captive of the prosecutor who, if he is candid, will concede that he can indict anybody, at any time, for almost anything, before any grand jury."
>
> (Dear Colleague letter of October 27, 1997)

As former Watergate special prosecutor (now White House Counsel) Charles Ruff has testified before Congress, in support of allowing the witness a right to have his counsel with him in the grand jury room: "Most prosecutors would admit . . . that they count on the burden [to the witness] of leaving the room to *dissuade the witness from asserting his right to counsel.*" (Emphasis added.) We agree with Mr. Ruff, that this is an unfair "advantage" for prosecutors at the expense of citizen rights. The proposed reform simply attempts to better level the balance of grand jury power in the direction of greater fairness and efficiency by eliminating the time-consuming drill of the witness leaving the room each time she needs to consult with counsel.

Widely-acknowledged inadequacies in federal grand jury procedures have galvanized formation of a new blue-ribbon Task Force on Grand Jury Reform, urging several basic reforms, including the right of witnesses to have their counsel with them in the grand jury room. The Task Force includes leaders in the bar and academia from across the nation, *representing both prosecution and defense perspectives*. Among those serving on the Task Force are the following:

Elkan Abramowitz, *Morvillo, Abramowitz, Grand, Iason &Silberberg*, New York City; former Chief, Criminal Division, U.S. Attorneys Office for the Southern District of New York.
Arnold I. Burns, *Proskauer, Rose, Goetz & Mendelsohn*, New York City; former Deputy Attorney General, Reagan Administration.
W. Thomas Dillard, III, *Ritchie, Fels & Dillard*, Knoxville, Tennessee; former U.S. Magistrate; former U.S. Attorney, Reagan Administration.
Frederick Hafetz, *Goldman & Hafetz*, New York City; former Chief of the Criminal Division, U.S. Attorneys Office for the Southern District of New York.
John W. Keker, *Keker & Van Nest*, San Francisco, California, former Trial Attorney, Iran/Contra Independent Counsel.
Gerald B. Lefcourt, *Gerald B. Lefcourt, P.C.*, New York City; Immediate Past President, National Association of Criminal Defense Lawyers.
Herbert J. Miller, Jr., *Miller, Cassidy, Larroca & Lewin*, Washington, DC; former Assistant Attorney General, Criminal Division, Kennedy Administration; former member of the Advisory Committee on Criminal Rules for the Committee on Rules of Practice and Procedure of the U.S. Judicial Conference (1983-1988).
William L. Murphy, *Richmond County District Attorney*, New York; Immediate Past President, National District Attorneys Association.
Brendan Sullivan, *Williams & Connolly*, Washington, DC.
William W. Taylor, III, *Zuckerman, Spaeder, Goldstein, Taylor & Kolker*, Washington, D.C., former Chair, American Bar Association Criminal Justice Section.
Anton R. Valukas, *Jenner & Block*, Chicago, Illinois; former U.S. Attorney, Reagan Administration.
Theodore Wells, Jr., *Lowenstein, Sandler, Kohl, Fisher & Boylan*, Roseland, New Jersey.
Frank Wohl, *Lankler, Siffert & Wohl*, New York City, former Assistant Chief of the Criminal Division and Chief of the Civil Division, U.S. Attorneys Office, Southern District of New York.

Thank you for considering our views. We hope the Advisory Committee *will* decide to revisit the issue of whether witness counsel should be allowed in the federal grand jury room. We respectfully submit that the time has come for this basic fairness to citizens called before a grand jury.

We welcome the opportunity to answer any questions you may have and to be of assistance in any way we can. Our Legislative Director and Counsel Leslie Hagin is available in the national office to serve as a ready liaison to your Committee. She has compiled a good deal of research, which we would be happy to make available to you.

Sincerely,

Larry S. Pozner
Enclosure.

Curbing abuse of the grand jury

by Gerald B. Lefcourt

The grand jury is an institution embodied in our common law traditions of due process. When it emerged in England in the 12th century, it may have been as much a tool to further the powers of the crown as it was a protective shield between citizen and crown. Yet when the American colonists brought the grand jury to this country, it was clearly viewed as a citizen's body, to protect them from the whims of royal governors and English tyranny. It was according to this colonial conception of the institution—as a means of protecting citizens—that the founders enshrined the right to grand jury indictment in the Constitution.

But, far from the concept of the founders, the federal grand jury is no longer a shield to protect citizens from being arbitrarily charged. Due to the Supreme Court's regrettable 5-4 decision in *U.S. v. Williams* in 1992, just about everything the independent counsel has been criticized for will stand as long as a defendant charged by his grand jury is later given a fair trial. No judge or magistrate can check the independent prosecutor's unbridled grand inquisitor powers, nor those of any other federal prosecutor. And, as we know well, federal prosecutors do this sort of thing all the time.

Correcting abuses

Only Congress can reverse the steady erosion of grand jury independence. It can start on reform by considering the following proposals:

- A federal prosecutor should not be allowed to intentionally withhold clearly exculpatory information from the grand jury. Without this duty, the grand jury is simply a tool to be manipulated by a prosecutor seeking an indictment. To ensure that this duty is real, courts must be given the power to review grand jury minutes and dismiss indictments (without prejudice) that result from procedures where this duty is violated.
- A federal prosecutor should not be allowed to intentionally use illegally seized information to secure an indictment. If federal agents and prosecutors know they can use such information, they will hardly be discouraged from engaging in illegal practices. The federal code recognizes as much in its electronic surveillance sections: 18 U.S.C. 2515 prohibits illegally "intercepted" information from being used before a grand jury. This rule should apply to all evidence acquired by confession or search.
- A target of a grand jury should be able to approach the foreperson in writing, to offer information to the grand jury. Again, this is to ensure that the grand jury receives all the relevant information it needs to make an informed decision. Note that there is no requirement that the foreperson accept the proffered information. This simply ensures that he or she is made aware of its existence, and afforded the choice as to whether it is relevant and helpful to the important work of the grand jurors in deciding the fate of their fellow citizens.
- All witnesses called before a grand jury should be given a *Miranda*-type warning by the prosecutor before being questioned. Prosecutors routinely tell witnesses they are not "targets" to get them to answer questions without counsel before the grand jury, only to indict them later, after they have helplessly incriminated themselves. The problem can be addressed by requiring the brief issuance to grand jury witnesses of a *Miranda*-type warning. This is only fair.

Complex and important legal issues face any grand jury witness. The experience is especially daunting for the typical lay witness. An appearance before the grand jury may subject an individual to the grave danger of self-incrimination or imprisonment for contempt.

- Witnesses called before the grand jury should be allowed to have counsel present. Currently, when a federal prosecutor places a citizen under oath before a grand jury, the person cannot have counsel in attendance. This is both unfair and inefficient.

Without counsel's presence, the witness is at a decided disadvantage. Inherent pressures and accompanying nervousness associated with appearing before a grand jury can make it difficult for any witness, especially the average lay witness, to re-

This is an edited version of an article that originally appeared in *The Champion*, April 1998.

member counsel's instructions relative to each question from the prosecutor. A witness must make quick judgments that even a seasoned lawyer would find difficult. She is forced to make judgments, even while testifying, that will legally bind and potentially incriminate her, or subject her to a perjury charge. Her testimony can also be used at a later trial to impeach her. The witness who wants to consult with counsel is unrealistically expected to go through a disruptive drill in the midst of questioning—asking permission to leave, getting up, going outside the room, repeating to her attorney (from memory) the prosecutor's question, remembering her attorney's advice, and then returning to the room. The process could be repeated numerous times. This routine hurts the witness by annoying grand jurors and raising inevitable speculation in their minds as to the purpose of the consultation.

• All subpoenas for witnesses called before a grand jury should be issued at least 72 hours before the date of appearance, not including weekends and holidays, unless good cause is shown for an exception. This would prohibit the all-too-frequent ambushing of witnesses by prosecutors, who serve "forthwith" subpoenas at the 11th hour. They often do so simply to gain an undue advantage over an unprepared (and most likely uncounseled) witness.

• Witnesses should have the right to receive a transcript (at their own expense) of their grand jury testimony. Federal Rule of Criminal Procedure 6 does not apply an obligation of secrecy to witnesses who appear before the grand jury. Thus, there is no reason they should not be allowed access to their own statements before the grand jury, as transcribed. Since the government may well seek to use these statements against the witness, this is only fair.

• Grand jurors should be given meaningful jury instructions, on the record. Grand jurors cannot exercise their historic powers of independence without meaningful instructions regarding their duties and powers, including the power to reject, as well as accept, the prosecutor's request for charges. Grand jurors, additionally, are entitled to receive instructions regarding the elements of the charges they are to consider. All instructions, as well as any statements made to grand jurors by prosecutors regarding the charges or the people who are being investigated, must be on the record so that courts, upon a proper showing by the parties, are able to properly supervise the fairness and integrity of the grand jury process.

Toward reform

Many of these proposals are law in some states such as New York, which has dutifully considered the matter. There, an indictment cannot be based on inadmissible or incompetent testimony such as hearsay evidence or on illegally obtained evidence. Evidence in the prosecutor's possession that substantially indicates a suspect may be innocent must be presented to the grand jury. A defendant on notice of the grand jury investigation has an absolute right to testify before the panel if he or she chooses. Most important, the court has the power to inspect minutes from the grand jury, and to dismiss any charges against a citizen if the grand jury evidence is actually insufficient. The judge can even reduce the charges to a lesser offense.

These are essential checks and balances for the grand jury process. In the aggregate, they can prevent prosecutorial abuse of individuals whether they are targets or witnesses. And they can help to secure institutional credibility and citizen confidence in the grand jury, and indeed, the criminal justice process itself. These rights and safeguards, which have enabled the grand jury system to work effectively and fairly in New York, enjoy the broad support of prosecutors and defense attorneys alike.

Only when reforms such as these are in place will grand juries be liberated from their captivity by prosecutors. When that happens, grand juries can resume serving their important historic role as a neutral, apolitical buffer between the government and the citizenry.

***GERALD B. LEFCOURT** is president of the National Association of Criminal Defense Lawyers.*

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DIRECTORS

9.1.98

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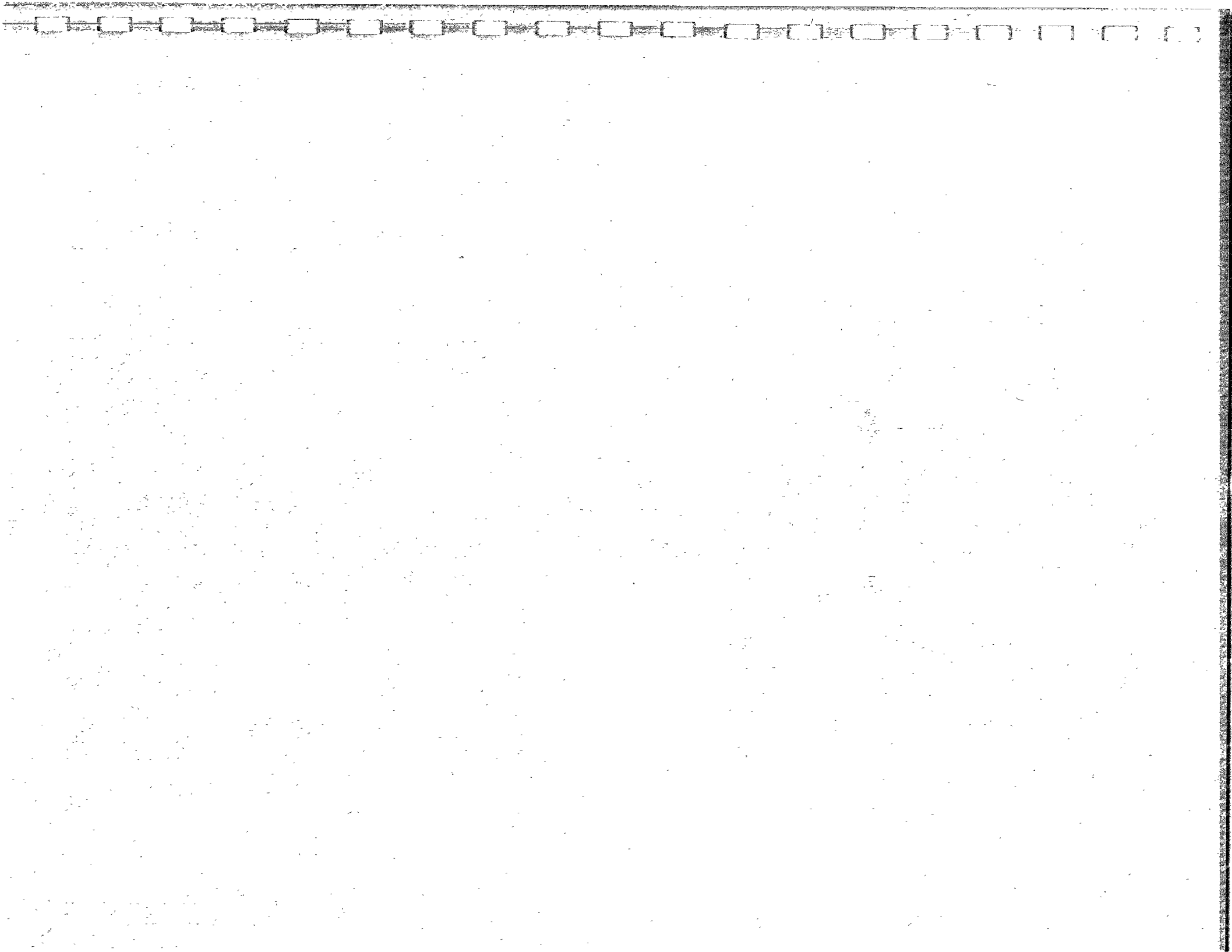

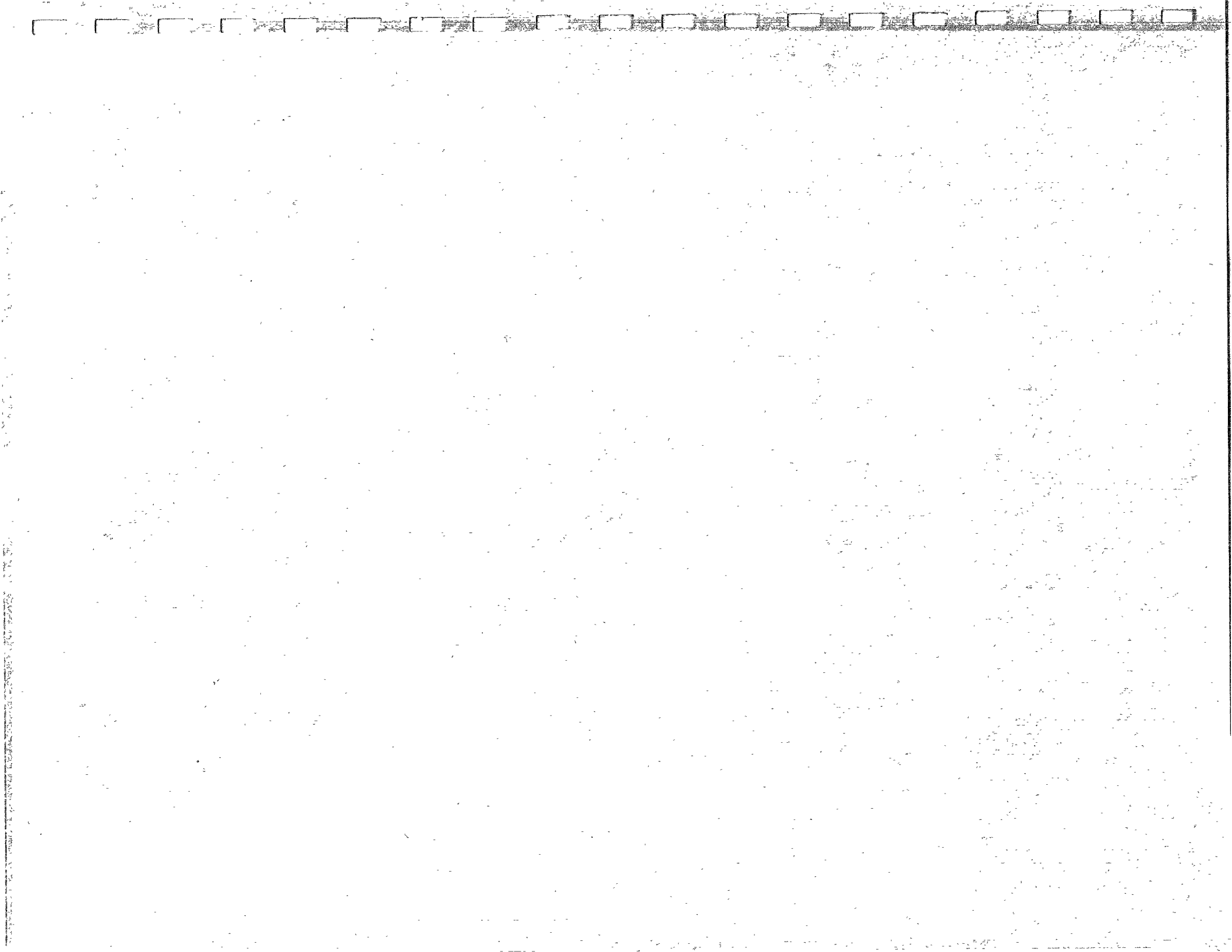

REPORT OF THE SECTION OF CRIMINAL JUSTICE

RECOMMENDATION*

Be It Resolved, That the American Bar Association support in principle grand jury reform legislation which adheres to the following principles:

1. Expanding on the already-established ABA policy, a witness before the grand jury shall have the right to be accompanied by counsel in his or her appearance before the grand jury. Such counsel shall be allowed to be present in the grand jury room only during the questioning of the witness and shall be allowed to advise the witness. Such counsel shall not be permitted to address the grand jurors or otherwise take part in proceedings before the grand jury. The court shall have the power to remove such counsel from the grand jury room for conduct inconsistent with this principle.

2. No prosecutor shall knowingly fail to disclose to the grand jury evidence which will tend substantially to negate guilt.

3. A prosecutor should recommend that the grand jury not indict if he or she believes the evidence presented does not warrant an indictment under governing law.

4. A target of a grand jury investigation shall be given the right to testify before the grand jury, provided he/she signs a waiver of immunity. Prosecutors shall notify such targets of their opportunity to testify unless notification may result in flight or endanger other persons or obstruct justice; or the prosecutor is unable with reasonable diligence to notify said persons.

5. The prosecutor shall not present to the grand jury evidence which he or she knows to be constitutionally inadmissible at trial.

6. The grand jury shall not name a person in an indictment as an unindicted co-conspirator to a criminal conspiracy. Nothing herein shall prevent supplying such names in a bill of particulars.

7. A grand jury should not issue any report which singles out persons to impugn their motives, hold them up to scorn or criticism or speaks of their qualifications or moral fitness to hold an office or position. No grand jury report shall be accepted for filing and publication until the presiding judge submits *in camera* a copy thereof to all persons named or identifiable and such persons are given the opportunity to move to expunge any objectionable portion of said report and have a final judicial determination prior to the report's being published or made public. Such motion to expunge shall be made within ten days of receipt of notice of such report. Hearings on such motions shall be held *in camera*.

8. The grand jury should not be used by the prosecutor in order to

*The recommendation was amended, then approved. See page 512.

obtain tangible, documentary or testimonial evidence to assist the prosecutor in preparation for trial of a defendant who has already been charged by indictment or information. However, the grand jury should not be restricted in investigating other potential offenses of the same or other defendants.

9. The grand jury should not be used by the prosecutor for the purpose of aiding or assisting in any administrative inquiry.

10. Witnesses who have been summoned to appear before a grand jury to testify or to produce tangible or documentary evidence should not be subjected to unreasonable delay before appearing or unnecessarily repeated appearances or harassment.

11. It shall not be necessary for the prosecutor to obtain approval of the grand jury for a grand jury subpoena.

12. A grand jury subpoena should indicate the statute or general subject area that is the concern of the grand jury inquiry. The return of an indictment in a subject area not disclosed by the grand jury subpoena shall not be a basis for dismissal.

13. In any case in which a subpocaned witness moves on proper grounds to quash a grand jury subpoena, the prosecutor should be required to make a reasonable showing *in camera* (which may be *ex parte* at the court's discretion) and on the record before the court convening the grand jury that the evidence being sought is: (a) likely to be relevant to the grand jury investigation; (b) not sought primarily for an improper purpose.

14. A subpoena should be returnable only when the grand jury is sitting.

15. When the circumstances place a hardship on the witness, motions to quash or modify subpoenas may be brought at the place where the witness resides, the documents sought are maintained, or before the court which issued the subpoena at the election of the witness. Such motions should be heard *in camera* and on the record.

16. All matters before a grand jury, including the charge by the impaneling judge, if any; any comments or charges by any jurist to the grand jury at any time; any and all comments to the grand jury by the prosecutor; and the questioning of and testimony by any witness, shall be recorded either stenographically or electronically. However, the deliberations of the grand jury shall not be recorded.

17. The prosecutor should not make statements or arguments in an effort to influence grand jury action in a manner which would be impermissible at trial before a petit jury.

18. Expanding on the already-established ABA position favoring transactional immunity, immunity should be granted only when the testimony sought is in the public interest; there is no other reasonable way to elicit such testimony; and the witness has refused to testify or indicated an intent to invoke the privilege against self-incrimination.

19. Immunity shall be granted on prosecution motion *in camera* by the trial court which convened the grand jury, under standards expressed in Principle #18.

20. The granting of immunity in grand jury proceedings should not be a matter of public record prior to the issuance of an indictment or testimony in any cause.

21. A lawyer or lawyers who are associated in practice should not continue multiple representation of clients in a grand jury proceeding if the exercise of the lawyer's independent professional judgement on behalf of one of the clients will be or is likely to be adversely affected by his or her representation of another client. If the court determines that this principle is violated, it may order separate representation of witnesses, giving appropriate weight to an individual's right to counsel of his or her own choosing.

22. The confidential nature of the grand jury proceedings requires that the identity of witnesses appearing before the grand jury be unavailable to public scrutiny.

23. It is the duty of the court which impanels a grand jury fully to charge the jurors by means of a written charge completely explaining their duties and limitations.

24. All stages of the grand jury proceedings should be conducted with proper consideration for the preservation of press freedom, attorney-client relationships, and comparable values.

25. The period of confinement for a witness who refuses to testify before a grand jury is found in contempt should not exceed 6 months.

26. The court shall impose appropriate sanctions whenever any of the foregoing principles have been violated.

REPORT

The Section of Criminal Justice urges House of Delegates approval for 26 legislative Principles to which it believes grand jury reform legislation should adhere. The Section has spent more than three years studying the grand jury. In August 1975—at Section urging—the House of Delegates approved a policy addressing one grand jury bill (H.R. 1277) in the 94th Congress. That policy is a limited one, but includes Association support for such key elements of grand jury reform as allowing counsel in the grand jury room, transactional immunity, and strengthened penalties for unauthorized disclosure of grand jury information. Since 1975, the Section's Grand Jury Committee has analyzed a number of pending bills, including H.R. 2986 and S. 3274 (94th Congress), both with a broader focus than H.R. 1277, on which the current ABA policy was formulated. New legislation, including H.R. 94, H.R. 3736, and S. 1449, has been introduced in the 95th Congress; hearings are already being held on these proposals.

Based on its continued study of this issue since 1975, the Criminal Justice Section now asks House of Delegates adoption of Association policy addressing a broader range of grand jury issues. This is timely not only because of the increasing public, press and professional attention being focused on this issue, but also because action is anticipated in the 95th Congress on the pending legislation. Further, a number of states are now considering—and some have already enacted into law—similar bills.

In February 1977, the Section asked the House of Delegates to approve a package of 23 legislative principles. At the personal request of Attorney General Bell, the Section asked the House to defer action until the August Annual Meeting. Since February, the Section has revised several Principles to clarify intent; has added 3 new Principles concerning prosecutorial conduct; and has met with Honorable Benjamin Civiletti, Assistant Attorney General in charge of the Criminal Division, U.S. Department of Justice, and other Department representatives to discuss the Principles. Mr. Civiletti has expressed support for some 15 of the Principles, and noted that the Department would take no position on an additional five. On several additional Principles, Mr. Civiletti said that some rephrasing might moot Department objections. In an attempt to reach compromise in as many areas as possible, the Section's Grand Jury Committee held a special meeting in early June, made additional amendments to a number of the Principles, and gained Council approval for these changes via a special mail ballot.

It should be noted that the proposed Principles were drafted by a Committee composed almost entirely of present and former prosecutors. It is chaired by Richard E. Gerstein, State Attorney for the greater Miami area for more than 20 years, and former President of the National District Attorneys Association. The Committee also included members with state and federal prosecutorial experience (including the last Watergate Special Prosecutor, Charles Ruff), judges, law professors and members of the defense bar. The Principles further represent a consensus of the Criminal Justice Section Council, which includes a similar mix of persons from all parts of the criminal justice system. Most of the Principles were approved by the Council unanimously.

In recent years, the grand jury as an institution has come under increasing criticism for a number of reasons and from a number of sources. It has been accused of an absence of procedural safeguards. Reflecting these and other concerns, England—where the grand jury originated—abolished the institution in 1933; the majority of states in our country allow prosecution either by indictment or by information. However, it remains a part of the federal system and in many state systems because of constitutional provisions. The ABA House of Delegates in 1975 went on record opposing amendment of the United States Constitution to eliminate the requirement for indictment by a grand jury. That position of the ABA should not be changed, but a comprehensive effort is needed to correct existing abuses. The Section believes that its proposed legislative Principles will go a long way towards remedying the ills of the grand jury as an institution.

Principles

Following are comments on each of the 26 proposed Principles:

1. The American Bar Association has already gone on record (in August, 1975) supporting the right of a witness to have counsel present in the grand jury room. Principle 1 represents a reaffirmation of that position. Since this report was first presented to the House of Delegates in February, the Section has rewritten Principle 1 to spell out more specifically what role counsel should play in the grand jury room. That role is now carefully defined in the Principle to make it clear that it is *strictly* limited to advising the witness. This limited role will preclude the grand jury's becoming a "mini-trial"—as some have feared—and will not impair expeditious investigations. Under the proposed Principle, counsel is not allowed to address the grand jurors or in any other way take part in the proceedings. Further, the Section had added a provision to allow removal of counsel who are disruptive or do not otherwise stay within the prescribed boundaries laid down by the Principle. Clarification of the attorney's limited role, coupled with the mechanism for removing disruptive counsel, should meet the objections raised by those who have feared creation of a "mini-trial."

Almost nowhere else in the criminal justice process—except before the grand jury—is a person who desires a lawyer denied that right. Requiring a witness who needs advice of counsel to consult his attorney outside the grand jury room door is awkward and prejudicial. It unnecessarily prolongs the grand jury proceeding and places the witness in an unfavorable light before the grand jurors. The American Law Institute has called it a "degrading and irrational" procedure. It is extremely damaging to the witness to continually get up, go outside, and consult with counsel. A recent Seventh Circuit decision (U.S. v. Kopel, 552 F.2d 1265 (1977)) points to additional problems with the procedure of consulting counsel outside the grand jury room. In that case, the Seventh Circuit said the U.S. Attorney, who had granted the witness permission to leave the grand jury room, was free at trial to bring up this fact as relevant to the perjury charges against the defendant. Dissenting, Judge Swygert decried the fact that the government was "permitted to 'sandbag' him [the defendant] by using the fact that he consulted his attorney against him." Nor is the right to leave the grand jury room to consult counsel absolute. (See In re Tierney, 465 F.2d 806 (5th Cir. 1972), in which the court said a limit could be placed on how frequently the witness could leave the room to consult his lawyer.)

The prestigious American Law Institute, in its Model Code of Pre-Arraignment Procedure adopted in 1975, supports counsel in the grand jury room. "While this is a break with tradition and prevailing practice," the ALI notes, "it is consistent with the provisions of some recent state procedure codes . . . it seems *unfair and inefficient* to require a witness to leave the grand jury room each time he wishes to consult with counsel." [at 237; emphasis added] The ALI commentary goes on to state that "exclusion of counsel . . . is closely related to the traditional view that proceedings should be secret, and concern lest the presence of counsel hamper the

freedom of the grand jury and the prosecutor in their investigation . . . The difficulty with this view . . . is that complex and important legal issues face a witness before a grand jury. An appearance before that body may subject an individual to the grave danger of self-incrimination or imprisonment for contempt . . . The witness may also inadvertently lose his right to claim the privilege by operation of the doctrine of waiver . . . And the inherent pressure and accompanying nervousness of a grand jury appearance upon an individual may make it very difficult for him to remember his attorney's instructions . . . For effective implementation of this right, an attorney should be present to follow the flow of the interrogation." [at 601]

Some nine states now have statutes allowing counsel to be present in the grand jury room—Arizona (for target witnesses), Illinois (for target witnesses), Kansas, Michigan (one-man grand juries), Oklahoma, South Dakota, Minnesota, Virginia and Washington State. The Section has contacted practicing attorneys and prosecutors in these states; none has reported problems. In fact, some prosecutors who said they initially fought the procedure now support it as a means of insuring fairness in the system. Congressman Joshua Eilberg (D–PA), writing in a recent issue of *Judicature* (Vol. 60, No. 8), similarly reported that those states which have implemented the practice have not reported any serious problems. Further, a number of additional states are now considering such legislation—including Colorado (where it has passed both houses of the legislature), New York, Massachusetts, and California (where it has the support of the state's Attorney General).

Several arguments are raised by opponents. First, it is argued that allowing counsel in the grand jury room will be a breach of the secrecy rule. In fact, grand jury secrecy is not served by keeping the lawyer outside the grand jury room, since the witness is free to tell his attorney anything that occurred inside (Federal Rule of Criminal Procedure 6(e)). Secondly, it is argued that the presence of the witness' lawyer will restrict free testimony in cases of organized crime, corporate and political corruption investigations. The Section notes that the states which allow counsel in the grand jury room have retained the grand jury in most instances as an investigatory body for precisely these kinds of investigations, and have no record of negative results. Further, there are alternate ways of securing a cooperative witness' statement, and this evidence can be summarized for the grand jury in the form of hearsay, *Costello v. United States*, 350 U.S. 359 (1956). When a witness is called to testify before a grand jury, the witness' attorney, sitting outside the grand jury room, can easily conclude from the time spent with the jury whether the witness takes the Fifth Amendment or testifies in full. Experienced prosecutors, further, have noted that very few witnesses indicate a desire to cooperate without the knowledge of their counsel; if the witness' testimony is helpful to the government, that fact will become evident to the attorney fairly quickly.

Recognizing that problems arising from multiple representation of witnesses could be exacerbated by allowing counsel in the grand jury room, the Section has strengthened Principle #21, which addresses that subject.

The presence of the attorney will not only reduce unfair speculation about the prosecutor's conduct, but will also serve to inhibit the prosecutor from possible improper conduct. Analogous to having counsel present to witness a line-up, the presence of the attorney in the grand jury room will help to insure the fairness of the proceedings. Watergate Special Prosecutor Charles Ruff in supporting this proposal in recent Congressional testimony—declared that "... the mere possibility of occasional disruption simply cannot overcome the right of the individual witness to consult his attorney without going through the mildly absurd process of leaving the grand jury room every time. Indeed, most prosecutors would admit, I think, that they count on the burden of leaving the room to dissuade the witness from asserting his right to counsel." (Testimony before House Judiciary Subcommittee, April 27, 1977, at 3.)

The American Bar Association has traditionally been a leader in asserting the right to assistance of counsel in the criminal justice process. As the *ABA Standards on Providing Defense Services* (§1.1) declare, "The objective of the bar should be to ensure the provision of competent counsel to all persons who need representation in criminal proceedings . . ." Enactment of Principle 1 will more meaningfully effectuate the Sixth Amendment right to assistance of counsel; but the limitations on the role of counsel will forestall the grand jury's being turned into an adversary proceeding.

2. Principle 2 states that the prosecutor shall not knowingly fail to disclose to the grand jury evidence which will tend substantially to negate guilt. The Section believes

DEPARTMENT OF JUSTICE
CRIMINAL DIVISION
OFFICE OF POLICY & LEGISLATION
VOICE PHONE 202/514-3202
FAX NUMBER 202/514-4042

FAX COVER SHEET

DATE: Sept. 14, 1998

TO: John Rabiej CTS#

ORGANIZATION:

FAX # 273-1826

VOICE #

FROM: Roger Pauley

PHONE NUMBER: 202/514

RE: Defense counsel in the federal grand jury

MESSAGE Attached for your information and that of the Committee (if you wish to include it in the agenda materials) is a letter and accompanying memorandum used by the Department to oppose legislative proposals to authorize the presence of defense counsel in the federal grand jury.

NUMBER OF PAGES
INCLUDING COVER SHEET

THE DEPUTY ATTORNEY GENERAL
WASHINGTON, D.C. 20530

CBR:PBH:RAP:cdh
Typed 4/18/80

Honorable Peter W. Rodino, Jr.
Chairman, Comittee on the Judiciary
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

I am writing to express the most serious concerns of the Department of Justice with respect to section 7312 of H.R. 6915, the Criminal Code Revision Act of 1980. This section, reversing two hundred years of federal law and practice, would permit a witness before a federal grand jury to be accompanied by counsel. As you know, Rule 6(d) of the Federal Rules of Criminal Procedure reflects the prevailing law and tradition in the federal criminal justice system that a witness may not bring counsel with him into the grand jury room, although the witness may leave the room without prejudice from time to time to consult with counsel during his testimony.

It is my firmly held personal view, as well as the position of the Administration, that this Rule is necessary to preserve the grand jury as an effective investigatory institution. The grand jury is the single most important tool available to the federal government to ferret out complex white collar and organized criminal activities and to bring the perpetrators to justice. For the reasons summarized in the attached memorandum, the fundamental change in grand jury practice proposed in section 7312 is unwise and would have consequences so harmful to federal law enforcement, all of whose felony cases must be begun by grand jury indictment, as to outweigh the benefits that might flow from enactment of a substantive revision of the Federal Criminal Code. Because of the chilling effect such a proposal would have on witness cooperation -- a problem aggravated by the common practice of multiple representation of witnesses by counsel in organized crime, white collar crime, and civil rights investigations -- the practical impact of the proposed change on the government's ability successfully to investigate such priority offenses would be devastating. The various adverse effects of the proposal are discussed in a recent law review article by former United States Attorney Earl Silbert, Defense Counsel in the Grand Jury -The Answer to the White Collar Criminal's Prayers, 15 Amer. Cr. L. Rev. 293 (1978).

Records
Pauley
McNemar
Files 2313
Heymann
Dep. AG
Hold

In addition, putting to one side the merits, we are disturbed by the process by which this section was adopted. The proposal was included without the benefit of hearings and with little debate at the final stage of the Subcommittee's consideration of the bill. The absence of recent hearings on this highly controversial proposal is particularly unfortunate. Since the date of previous Judiciary Committee hearings on the question in 1977, the law relating to grand jury procedure, as well as Department of Justice practices, has substantially changed. The amendment to Rule 6(e) of the Federal Rules of Criminal Procedure in 1979, requiring for the first time that all statements by prosecutors before the grand jury be recorded and available for review by the court provides a new and highly significant deterrent to misconduct. The adoption in 1977 of important additions to the United States Attorneys' Manual, requiring the giving of appropriate warnings to and the conferral of other procedural protections upon grand jury witnesses beyond those mandated by law also greatly changes the context for consideration of the issue. I am unaware of any alleged, much less demonstrated, grand jury improprieties subsequent to those events. In short, whatever may once have been thought by some to be the need for the proposal embodied in section 7312, that need has now been considerably diminished or eliminated. We deserve an opportunity to discuss these changes in the course of deliberate Congressional consideration of any such drastic modification of the processes of law enforcement.

Sincerely,

Charles B. Renfrew

M E M O R A N D U M

There are many reasons why the superficially appealing concept of permitting a witness to be accompanied by counsel before the grand jury would be unwise. In summary, they are as follows:

1. Loss of spontaneity of testimony. The sole purpose in calling a witness before the grand jury is to elicit from him whatever facts he knows that may be pertinent to the grand jury's investigation. If a witness had counsel at his side and was permitted to consult him before answering questions, the fact finding process would be severely impaired because of the tendency for the witness to become dependent upon, and to repeat or parrot responses discussed with the lawyer, rather than to testify fully and frankly in his own words. For similar reasons, witnesses at trial are not permitted to consult with counsel before responding to questions, save in rare instances.—/

2. Transformation of grand jury into an adversary proceeding. The fundamental change proposed would transform the federal grand jury process into a proceeding of an adversarial nature inconsistent with the function of the grand jury as a charging (rather than a guilt-determining) body. The result of such a proposal would be substantially increased delays, which are ill-affordable in our criminal justice system.

At the core of our deep-seated concern in this respect is our belief that counsel for the witness will act -- inevitably even if not intentionally -- in a manner that will disrupt and delay the grand jury's investigation. It is naive to expect

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/ A witness may be permitted to confer with counsel with regard to whether or not to invoke the Fifth Amendment. The infrequent instances in which such advice is needed as to a grand jury witness are met by the witness's right, without prejudice, to leave the room for a brief period for that purpose.

that counsel for a witness facing a grand jury will fail to do everything in his power to seek to protect his client from questions that he regards as irrelevant, overbroad, or in some way technically defective. While the section attempts to limit counsel's role by precluding him from addressing the grand jurors, counsel could still lodge objections with the prosecutor or as a practical matter speak through the witness. In this way, objections predicated upon various rules of evidence and procedure that have been held inapplicable to grand jury proceedings could be raised. In contrast to a court proceeding or a congressional committee hearing, there would be no official present, such as a judge or committee chairman, to rule authoritatively on such objections. To deal with any obstreperous witness would require a break in the proceedings in order to obtain the aid of a court to control the witness under penalty of contempt. We are concerned that the incidence of problems of this kind would mushroom if the long-established prohibition against having counsel present in the grand jury room was abandoned.

We also doubt the practicability of mechanisms for dealing with the problem, e.g., by replacement of counsel, if the proceedings were unduly delayed or impeded. To begin with, the very act of seeking a judicial hearing on the matter would likely consume several days; and it is our belief that courts would be extremely reluctant to order a witness's counsel removed or replaced for a breach of the bill's provisions. There may be, in addition, at least in the case of a witness who has retained his own counsel, a substantial constitutional difficulty in

ordering the witness to obtain other counsel against his wishes.

A number of judges have echoed our concerns about the practical effects of admitting defense counsel into the grand jury. Thus, for example, five judges of the United States Court of Appeals for the Second Circuit, in a memorandum accompanying their letter to the then Chairman of the House Subcommittee considering similar grand jury reform legislation in 1977, observed that:

> In practice, however, admitting counsel to the grand jury room poses the serious risk that the proceedings will be protracted and disrupted, with the court being forced to intervene repeatedly. Experience in criminal trials demonstrates that many lawyers simply would not adhere to the idealistic conception that they would limit themselves to advising their clients in sotto voce. Once in the grand jury room, many counsel, unimpeded by the presence of the court, would seek to influence the grand jury, using tactics of the type frequently employed in criminal trials, e.g., lengthy objections to questions, in which counsel refers to irrelevant prejudicial material as the basis for an objection. Advice to a witness could be given in tones that would be overheard by every grand juror. A witness' answers would be those of the attorney rather than of the witness himself. Judges would inevitably be invoked to rule on preliminary objections as to the relevancy and materiality of questions to discipline or remove counsel from the grand jury room and to substitute new counsel. Moreover, should a judge discipline or remove a witness' counsel, a serious question would then arise as to whether he had interfered with the witness' constitutional or statutory right to counsel of his own choice.

In short, the delays inevitably occasioned by permitting defense counsel inside the grand jury promise to be lengthy

and to spawn an entire new wave of costly litigation. These effects are inconsistent with the goal adopted by the Congress in the Speedy Trial Act of 1974 of reducing crime and the danger of recidivism by requiring speedy trials. In our view the marginal benefits to witnesses which this proposal might involve are far outweighed by the disadvantages to causing the wheels of the federal criminal justice system to grind even more slowly./

/ As one of the reasons given for favoring a proposal for witness's counsel in the grand jury room a representative on behalf of the ABA Criminal Justice Section appearing before a House Subcommittee in 1977, noted the allegedly problem-free experience of States with the practice. In view of this representation (acknowledged not to be based upon "any large sampling or empirical research"), the Department of Justice recently surveyed the law in all States having similar practices (less than 1/4 of the States).

The survey showed that in nearly all of these States substantial limitations exist with respect to the right of counsel for a witness to be inside the grand jury room. Thus, in at least one of the States, this practice is permitted only with respect to a one-man grand jury. In many of the States, moreover, the law allows counsel for a witness only under special circumstances such as when the witness is a target of the investigation, has waived his privilege against self-incrimination, or has received statutory immunity. In a number of the States in which the practice exists the grand jury is not commonly used; rather the prosecutor institutes criminal charges by information. In sum, the experience of the States is no predicate for concluding that the practice could be successfully adopted by the federal criminal justice system, which under the Constitution relies on the grand jury as the exclusive method for investigation and charging of all felonies.

3. Loss of secrecy with resultant chilling effect on witness cooperation in white collar crime cases; the problem of multiple representation. Beyond the problems of interruption and delay that would be caused by letting counsel for witnesses into the grand jury room, a further important concern arising from this proposal relates to impairment of the secrecy of grand jury proceedings, which exists in large part for the benefit of the witnesses themselves. Not infrequently, particularly in investigations of organized crime, business frauds, antitrust violations, and other "white collar" offenses, one attorney represents several potential witnesses. At times counsel is retained, by the very business, union, or other organization whose activities are under investigation, to represent all persons connected with the group. In such situations, the individual witness may possess relevant information and will be willing to cooperate with the investigation. Understandably, however, he may desire that his cooperation not become known to his employer, fellow union members, or others whom he knows his attorney represents or with whom the attorney has been associated. The problem should not be under-estimated. Several years ago, the Special Watergate Prosecutor, in his report to the Congress, noted that multiple legal representation -- several witnesses being represented by one attorney affiliated with an organization -- operated "in many cases" to preclude a witness from "giving adequate consideration to the possibility of cooperating with the Government." Report, Watergate Special Prosecution Force, p. 140. This view has also been expressed

by other commentators, and is one of the reasons why one knowledgeable prosecutor, the former United States Attorney for the District of Columbia, aptly characterized the proposal for defense counsel in the grand jury room as "The Answer to the White Collar Criminal's Prayers." See Silbert, Defense Counsel in the Grand Jury -- The Answer to the White Collar Criminal's Prayers, 15 Amer. Cr.L. Rev. 293, 296-300 (1978); see also Alan Y. Cole, Time For a Change: Multiple Representation Should Be Stopped (1976), an article distributed by Mr. Cole as Chairman to the members of the ABA Criminal Justice Section.

In our view, this problem has become so acute that congressional action thereon is necessary to deal with it. Absent such a solution being adopted, the point to be made with respect to section 7312 is that the problems of witnesses inclined to cooperate who have counsel representing other witnesses before the grand jury or representing the organization whose activities are under investigation would be exacerbated considerably if counsel were allowed to accompany the witness into the grand jury room.

Under the present system, in which counsel remains outside the grand jury room, the witness, while able to disclose as much of his testimony as he chooses, retains the important right to shield the extent of his cooperation or the fact that he was required to supply evidence against others. Were the practice changed to admit counsel to the grand jury room, the witness in such a situation would almost certainly feel less free to cooperate through his testimony. As a practical matter, he could not bar his attorney from the grand jury room without his action being given the worst possible interpretation by those who might wish that the investigation be thwarted. The consequences of shutting off this source of information in organized crime and corporate investigations would be devastating.

4. Prejudice to Indigent or Ordinary Witnesses. The proposal to permit counsel for any grand jury witness into the grand jury room will have as its greatest beneficiaries those persons most closely associated with the most serious and most profitable criminal violations, who will have counsel provided by their confederates or who can afford their own. But the vast bulk of honest Americans will not undergo the expense of counsel simply to be a fact witness before the grand jury, and persons who cannot afford counsel will similarly be disadvantaged (there are many reasons, also, why a proposal for appointed counsel for indigents would not operate effectively in the grand jury context).

6. Lack of Need for the proposal and change in law since last the Committee held hearings to consider the issue. Finally, we point out that there is a lack of demonstrated need for the proposal at this time. While any institution operated by human beings may occasionally produce abuses, and certainly any abuse is regrettable, the federal grand jury system over the years has functioned, and is now functioning, remarkably well. The instances of alleged (much less demonstrated) abuses have been few, given the fact that federal grand juries hear tens of thousands of matters each year, and that the conviction ratio on indictments returned is high (approximately 80%). Moreover, since this Committee last held hearings on this question in 1977, the law has changed to provide a further important safeguard against potential overreaching by prosecutors. On August 1, 1979, Rule 6 of the Federal Rules of Criminal Procedure was amended to mandate the recording of all matters occurring before the grand jury (other than its deliberations), including not only the examination of any witness, but the making of any remarks by the prosecutor. The existence of such recordings (theretofore required in only a few districts), coupled with the opportunity for subsequent review by the court, operates as a significant deterrent to prosecutorial improprieties. Moreover, the Department of Justice has substantially improved its grand jury practices, by promulgating in late 1977 a series of provisions in the United States Attorneys' Manual requiring

federal porseuctors to accord to grand jury witnessses warnings and other procedural benefits well beyond those mandated by law. We are unaware of any alleged pattern of abuse since these improvements were instituted. Thus, whatever may have been the situation in thr past, the case today for so fundamental a change in grand practice as to allow defense counsel inside the grand jury room is particularly weak.

CM 4903-30

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
SUPREME COURT BUILDING
WASHINGTON, D. C. 20544

ROSZEL C. THOMSEN
CHAIRMAN

WILLIAM E. FOLEY
SECRETARY

December 8, 1975

TO THE ADVISORY COMMITTEE ON CRIMINAL RULES

Enclosed is a copy of the Grand Jury Report which has been submitted to the House Judiciary Committee.

Sincerely,

William E. Foley
Secretary

cc: Honorable Alfonso J. Zirpoli
Honorable Alexander Harvey II
Honorable Roszel C. Thomsen
Professor Frank J. Remington

REPORT OF THE ADVISORY COMMITTEE

ON CRIMINAL RULES

CONCERNING

THE FEDERAL GRAND JURY

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(5th Cir. 1972); United States v. Kreps, 349 F.Supp. 1049 (W.D.Wis. 1972). (b) The cases reflect the fact that it is now common for prosecutors to give such a warning, particularly when the witness might be viewed as a potential defendant. See, e.g., United States v. Mingola, 424 F.2d 710 (2d Cir. 1970); United States v. Capaldo, 402 F.2d 821 (2d Cir. 1968); United States v. Irwin, 354 F.2d 192 (2d Cir. 1965); United States v. Winter, 348 F.2d 204 (2d Cir. 1965). (c) Consideration of the issue by the Supreme Court is pending. Certiorari was granted on March 24, 1975, in United States v. Mandujano, 496 F.2d 1050 (5th Cir. 1974). Thus, the Committee does not favor the proposals in H. R. 1277, H.R. 2986, H.R. 6006 and H.R. 6207 which would require warning, on a broader basis, of the privilege against self-incrimination and related matters.

(4) Right to Counsel of Grand Jury Witness. It is often said that there is no right to counsel for witnesses called to appear before a federal grand jury, see, e.g., 1967 Duke L.J. 97, 122 (1967) (collecting cases). However, the recent cases reflect the fact that the practice has developed of permitting a grand jury witness to leave the grand jury room in order to consult with his attorney. See, e.g., In re Tierney, 465 F.2d 806 (5th Cir. 1972); United States v. Daniels, 461 F.2d 1076 (5th Cir. 1972); United States v. Weinberg, 439 F.2d 743 (9th Cir. 1971);

United States v. Isaacs, 347 F.Supp. 743 (N.D. Ill. 1972). This being the case, a rule or statute on that point is not deemed necessary.

It is well-settled that a witness before a federal grand jury is not entitled to have an attorney accompany him into the grand jury room, United States v. Fitch, 472 F.2d 548 (9th Cir. 1973). See also In re Groban, 352 U.S. 330, 77 S.Ct. 510, 1 L.Ed.2d 376 (1957), where the Court, in deciding that a witness had no right to counsel during interrogation by a state fire marshal, noted that a "witness before a grand jury cannot insist, as a matter of constitutional right, in being represented by his counsel"; Black, J., dissenting, agreed as to the grand jury, noting it "would be very difficult for officers of the state seriously to abuse or deceive a witness in the presence of the grand jury."

The Committee does not favor a rule or statute which would invest a witness before the grand jury with a right to the presence of counsel in the jury room, and thus is not in agreement with the proposals to grant such a right in H.R. 1277, H.R. 2896, H.R. 6006 and H.R. 6207.

Grand jury proceedings are not adversary proceedings as to a potential defendant and certainly not as to the ordinary witness, and they should not become so. The problems of a

witness before a grand jury who is willing to do what the law obliges him to do, i.e., tell the whole truth, are relatively few. The witness does have a legitimate interest in the proper exercise of such privileges as the law may afford him, but in the opinion of the Committee he does not need a lawyer at his elbow in the grand jury room adequately to protect those privileges.

Grand jury proceedings are in the main conducted in the absence of a judge. Whether counsel before the grand jury represents the witness as provided in H.R. 6006 or merely advises him as provided in H.R. 1277, in the absence of a judge exercising immediate control, there is no way in which improper objections stated as such or by way of advise or unwarranted directions not to answer can be ruled upon with any dispatch. Deliberate obstruction would be most difficult to control.

A right to the presence of counsel for a witness before the grand jury carries with it a potential for an important breach of grand jury secrecy. "This problem could become particularly acute in an investigation directed toward an organized criminalgroup where each witness might appear before the grand jury with the same lawyer." Enker and Elsen, Counsel for the Suspect: Messiah v. United States and Escobedo v. Illinois, 49 Minn.L.Rev. 47, 74 n.84 (1964).

The arguments to the contrary, i.e., the attorney can better protect the witness if he hears the flow of the testimony; the proceedings will be more efficient if the witness does not have to make repeated trips out of the room to consult with counsel; and the secrecy of the proceedings is not impaired by the presence of counsel because the witness may disclose everything to his counsel anyway, are not without merit. See Model Code of Pre-Arraignment Procedure § 340.3, Comment (Proposed Official Draft, 1975); Meshbesher, Right to Counsel Before Grand Jury, 41 F.R.D. 189 (1966). The Committee, however, believes that the additional protections sought to be afforded to the witnesses are not necessary and that new rights should not be created at the risk of impairing the functioning of the grand jury.

(5) Requiring Showing of Grounds to Call a Witness. It has been alleged that there is a growing practice of subpoenaing witnesses without grounds to believe that those witnesses may be in a position to give information relating to the subject of the inquiry. See Donner and Cerruti, The Grand Jury Network, The Nation, Jan. 3, 1972. This has given rise to the suggestion that some minimal requirements be imposed upon the grand jury subpoena power, as by requiring some showing to a court before subpoenas are issued. Comment, 7 Harv. Civ. Rights-Civ. Lib.L. Rev. 432 (1972).

CM 4901- 97

MEMORANDUM

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CURRENT ISSUES RELATING TO THE USE OF FEDERAL GRAND JURIES

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TO: Advisory Committee on Criminal Rules

FROM: Wayne R. LaFave

DATE: July 12, 1973

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Finally, assuming that Fifth Amendment warnings are to be given to some or all grand jury witnesses, some consideration should be given to whether it should suffice that the warnings are given only after the witness has appeared and is about to testify. Another possibility is to also warn the witness in writing at the time that he is sent a subpoena. . See National Conference of Commissioners on Uniform State Laws, Uniform Rules of Criminal Procedure (Tent. Draft No. 2, 1973), which provides in Rule 26(b) for "written notification" of Fifth Amendment rights to "be served along with the subpoena," which is intended, "to insure that the witness has an adequate opportunity to make an informed determination relating to exercise of his rights."

C. Whether a Witness Before the Grand Jury Should be Entitled to be Represented by Counsel

Although the federal courts have rather consistently held that the right to counsel does not apply to grand jury proceedings, see 1967 Duke L.J. 97, 122 (1967) (collecting cases), the federal decisions have in the main been concerned with the need for advising the witness of his right to consult with counsel, see United States v. Luxenberg, 374 F.2d 241 (6th Cir. 1967), or the witness' right to have his lawyer present in the grand jury room, see United States v. Fitch, 472 F.2d 548 (9th Cir. 1973). This may be because there appears to have developed a practice of permitting a grand jury witness to consult with counsel outside the grand jury room. See, e.g., In re Tierney, 465 F.2d 806 (5th Cir. 1972) (each witness was "granted permission by the foreman to so consult, and usually after two and at no time after more than three questions had been propounded"; court notes Government counsel could facilitate the proceedings by making a set of questions available at one time to the witness so that they might be discussed as a group with counsel"); United States v. Daniels, 461 F.2d 1076 (5th Cir. 1972) (defendant signed a waiver of the privilege against self-incrimination which "included the statement that the witness could consult with his attorney outside the grand jury room"); United States v. Weinberg, 439 F.2d 743 (9th Cir. 1971) ("Each appellant was permitted, if he or she wished, to leave the jury room and confer with his or her attorney in the corridor. Some of the appellants followed this course after almost every question; others followed this course sparingly."); United States v. Isaacs, 347 F.Supp. 743 (N.D.Ill. 1972) (witness was "treated fairly and provided every opportunity to consult with counsel").

The leading case recognizing the right of a grand jury witness to consult with counsel outside the jury room is People v. Ianniello, 21 N.Y.2d 418, 288 N.Y.S.2d 462, 235 N.E.2d 439 (1968), where the court observed:

"Since a Grand Jury proceeding is properly an investigation rather than a prosecution directed against the witness, the witness has no right to be 'represented' by counsel, in the technical sense. . . . However, in light of current recognition of the importance of counsel in providing effective notice of rights, it is difficult to maintain that the witness is not entitled to the advice of his lawyer (cf. Miranda v. Arizona; Escobedo v. Illinois; . . .). As a matter of fairness, government ought not to compel individuals to make binding decisions concerning their legal rights in the enforced absence of counsel. . . . Courts have a particular responsibility to prevent unfairness in Grand Jury proceedings for the [illegible]

"The legal rights which may be critically affected before the Grand Jury, and concerning which the witness should be entitled to consult with his lawyer, are several. First, the witness may be put in a position of determining whether to assert or waive his privilege against self-incrimination. . . . Faced with a confusing variety of rules concerning the existence and scope of his privileges, a witness should not be required to make these choices unaided by his lawyer.

"A second legal right which may be affected before the Grand Jury is the witness' right to refuse to answer questions having no bearing on the subject of the investigation. . . . Finally, where a question may involve a testimonial privilege enjoyed by the witness or to which he may be subject--for example, between attorney and client, doctor and patient or husband and wife--the witness should be permitted to consult with counsel.

"Whenever a witness demands to see his lawyer for counselling concerning his legal rights (as opposed to mere strategic advice), he should be given an opportunity to do so. If his right is denied, however, he does not have license to commit perjury or contempt. Rather, he must persist in his refusal to answer, thus forcing the prosecutor to take the matter into open court for ruling. By requiring the matter to be taken to the presiding Justice, the proceeding is expedited and the danger of stalling tactics reduced. The judge can rule on questions of pertinency, after argument of counsel."

Compare Commonwealth v. McCloskey, 443 Pa. 117, 277 A.2d 764 (1971), taking a somewhat more limited view. The court concluded that "in seeking to balance society's interest in the grand jury's freedom of orderly inquiry and a witnesses right to exercise his privilege against self-incrimination knowingly and intelligently, we believe the proper procedure is for the court supervising the investigating grand jury to instruct the witness while administering the oath that while he may consult with counsel prior to and after his appearance, he cannot consult with counsel while he is giving testimony. However, the witness should also be informed that should a problem arise while he is being interrogated, or should he be doubtful as to whether he can properly refuse to answer a particular question, the witness can come before the court accompanied by counsel and obtain a ruling as to whether he should answer the question." The court rejected the practice of permitting the witness to leave the room en consult with counsel prior to responding to every question as imposing a serious interruption and impairment upon the continuity of the grand jury investigation. A dissent argued that the witness could not, consistent with the Fifth and Sixth Amendments, be denied the opportunity of consulting with his legal counsel outside the grand jury room during his testimony. It found inconsistent the majority's conclusion that permitting the witness to leave the grand jury room for consultation would be a serious interruption, yet permitting the witness, if confronted with a question that tends toward incrimination, to "come back before the court and obtain a ruling."

It is said to be "well settled" that a witness before a federal grand jury is not entitled to have an attorney accompany him into the grand jury room, United States v. Fitch, supra. See also cases collected in 1 Wright, Federal Practice and Procedure - Criminal § 104 (1969). Although the

Supreme Court has not decided the issue, it noted in In re Groban, 352 U.S. 330, 77 S.Ct. 510, 1 L.Ed.2d 376 (1957), in deciding that a witness had no right to counsel during interrogation by a state fire marshal, that a "witness before a grand jury cannot insist, as a matter of constitutional right, in being represented by his counsel." Black, J., dissenting, agreed as to the grand jury, noting that it "would be very difficult for officers of the state seriously to abuse or deceive a witness in the presence of the grand jury."

However, recent law reform efforts have recognized a right to have counsel present during interrogation before the grand jury or in comparable situations. National Conference of Commissioners on Uniform State Laws, Uniform Rules of Criminal Procedure (Tent. Draft No. 2, 1973), provides in Rule 26(a) that the witness' counsel may be present during the taking of an investigatory deposition by the prosecutor (in the Rules, as substitute for the investigatory grand jury). More significant, Model Code of Pre-Arraignment Procedure § 340.3(1) (Tent. Draft No. 5, 1972) provides: "The counsel for a witness may accompany him before the grand jury while he testifies, but shall not participate in the proceedings except by advising the defendant." (Although the word "defendant" is used, the Note to this section observes: "The provision applies to all witnesses, not just those against whom a complaint has been filed.") [Note: While the provision quoted above was withdrawn in Tent. Draft No. 5A (1973) on the grounds that "this is an issue that goes far beyond the limited purpose for which certain provisions relating to the grand jury are included in this Draft" and that "the Draft gives the accused an absolute right to a preliminary hearing which cannot be preempted by a prior indictment," at which "an accused has a right to counsel," it was restored by vote of the Institute at the May 1973 meeting, 41 Law Week 2631 (May 22, 1973).] The Commentary to § 340.3 fairly summarizes the arguments in favor of such a provision:

"Subsection (1) also gives a witness a right to have his counsel with him in the grand jury room. This is inconsistent with the traditional rule and prevailing practice, although a number of states have in recent years passed legislation authorizing a witness appearing before a grand jury to have counsel present to advise him. Mich. Stats. Ann § 28:943 (Supp. 1965); Utah Code Ann § 77-19-3 (1967); Wash. Rev. Code § 10.28.075 (1967). The Michigan and Washington statutes require the attorney to maintain secrecy. The Washington statute, like the provision proposed here, allows the attorney to advise his client concerning his right to answer or not answer questions but forbids the attorney to engage in the proceeding in any other manner. See also Section 22-3009 of the new Kansas Code of Criminal Procedure, effective July 1, 1970.

"The exclusion of counsel from grand jury proceedings is closely related to the traditional view that proceedings should be secret and concern lest the presence of counsel hamper the freedom of the grand jury and the prosecutor in their investigation. See United States v. Smyth, 104 F.Supp. 283 (N.D. Cal. 1952). Furthermore, the defendant was seen as having no right to counsel because a grand jury proceeding 'is properly an investigation rather than a prosecution directed against the witness.' People v. Ianniello, 21 N.Y.2d 418, 235 N.E.2d 439, 288 N.Y.S.2d 462, cert. denied 393 U.S. 827, 89 S.Ct. 90 (1968). See also Gordon v. Gerstein, 189 So.2d 873, 875 (Fla. 1966).

"The difficulty with this view of the grand jury is that complex and important legal issues face a witness before a grand jury. An appearance before that body may subject an individual to the grave danger of self-incrimination or imprisonment for contempt. The testimony may be used by the prosecutor in formulating an indictment and strengthening the state's case. Furthermore, 'it is now universally conceded that a witness may be impeached in any subsequent trial. . . by self-contradictory testimony given by him before the grand jury. Similarly the admissions of a party made in testifying before the grand jury are admissible against him although he does not take the stand at trial.' 8 Wigmore, Evidence § 2363 (McNaughton Rev. 1961) The witness may also inadvertently lose his right to claim the privilege by operation of the doctrine of waiver. Id. at §§ 2275-76. In addition to self-incrimination, the witness appearing before the grand jury may be able to avoid answering questions by invoking applicable common law or statutory privileges such as the husband-wife privilege, the attorney-client privilege, the physician-patient privilege, or other similar rules guarding revelations or protecting relationships.

"Many jurisdictions allow the witness to consult with counsel outside the confines of the grand jury room. United States v. Leighton, 265 F.Supp. 27 (S.D.N.Y. 1967) cert. denied 390 U.S. 1025 (1969); People v. Iannielllo, 21 N.Y.2d 418, 235 N.E.2d 439, 288 N.Y.S.2d 462, cert. denied 393 U.S. 827, 89 S.Ct. 90 (1968). The difficulty is that counsel in advising his client how to react in the face of a possible future interrogation can never anticipate every possible question that may be put to his client. And the inherent pressure and accompanying nervousness of a grand jury appearance upon an individual may make it very difficult for him to remember his attorney's instructions even if his attorney could anticipate the questions. It will be difficult for the witness to know when a particular question does present a danger of self-incrimination, or when the question violates his right with respect to a certain type of privileged communication. For effective implementation of this right, an attorney should be present to follow the flow of the interrogation. If the witness plays safe by choosing to consult his attorney after every question, and thus avoids any possible violation of his legal rights, the resulting delay is immense.

"While the United States Supreme Court has not yet squarely passed on this issue, the Reporter has doubts that a rule excluding counsel from the grand jury room can be squared with Escobedo v. Illinois, 378 U.S. 478 (1964). See 'The Supreme Court' 1963, 78 Harv.L.Rev. 143, 222-23 (1964):

> 'the logic of Escobedo would seem to require application of its safeguards to grand jury and other investigatory proceedings, whose purposes are to determine probable guilt. Here the witness's privilege is more complicated than in police interrogations, for he can legally be compelled to answer nonincriminatory questions and will be held to have waived his privilege if he answers incriminatory ones.'

"While the central issue in Miranda v. Arizona was the obligation to warn a suspect of his right to have counsel appointed if he was indigent, its language and its reliance on counsel to protect 5th Amendment rights are relevant to this issue.

"The court in United States v. Levinson, 405 F.2d 971, 980 (6th Cir. 1968) cert. denied 395 U.S. 958 (1969) refused to extend the principle of these cases to the right of a potential defendant to have a lawyer with him in the grand jury room finding that there were other means of protecting a defendant from abuse of power by a prosecutor or from a violation of constitutional rights. Accord United States v. Kane, 243 F.Supp. 746 (S.D.N.Y. 1965) (refusal to extend Escobedo).

"Sheridan v. Garrison, 273 F.Supp. 673, 678 (E.D. La. 1967) (reversed on other grounds 415 F.2d 699 (5th Cir. 1969) held that the mandate of the Escobedo and Miranda cases does extend an absolute constitutional right to a person accused of a crime not to testify under oath before a grand jury in the absence of his lawyer. United States v. Levinson, supra noted that the district court in Sheridan was the only court to take this position. Several other recent decisions have continued to hold that a witness before the grand jury cannot insist on being represented by counsel, without dealing with Escobedo and Miranda. See, e.g., United States v. Addonizio, 313 F.Supp. 486 (D. New Jersey 1970); United States v. De Sapio, 299 F.Supp. 436, 440 (S.D.N.Y. 1969); United States v. Capaldo, 402 F.2d 821, 824 (2d Cir. 1968).

"See, in general, Meshbesher, Right to Counsel before Grand Jury, 41 F.R.D. 189 (1967).

"The Reporter believes that the spectacle of a witness leaving the grand jury room to report questions to a lawyer required to remain outside is degrading and irrational. It seems more likely to produce delay than avoid it, and if it gives the prosecution an advantage it is one achieved by dint of the witness's poor memory or confusion."

As the above commentary indicates, one of the major concerns about permitting counsel into the grand jury room is whether it will violate the policies underlying grand jury secrecy. Some have argued that it does not, given the fact that no secrecy is imposed upon the federal grand jury witness under Rule 6(e), in that whatever counsel would learn "is information he can obtain anyhow, and routinely does, once the client has left the grand jury room," as "it is a logical and reasonable inference that most, if not all, witnesses who appear before a grand jury inform their attorneys of what transpired." Meshbesher, Right to Counsel Before Grand Jury, 41 F.R.D. 189, 206-07 (1966). Compare Enker and Elsen, Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois, 49 Minn.L.Rev. 47, 74 n.84 (1964): "Permitting attorneys to be present in the grand jury room during the taking of testimony might constitute a serious breach of grand jury secrecy which could hamper investigations and prosecutions. Although the witness himself is not bound to secrecy . . ., the lawyer will probably recall more about the areas explored in the questioning and will be more able to infer therefrom the nature of the evidence available to the grand jury. This is both because he is trained in such skills and because he is an observer rather than a participant in the proceedings. The problem could become particularly acute in an investigation directed toward an organized criminal group where each witness might appear before the grand jury with the same lawyer."

If explicit recognition is given some right to counsel for a grand jury witness (in the grand jury room, outside the grand jury room available for consultation during the questioning, or prior to the testimony only), then there may exist certain collateral issues, including:

(1) Whether the right to counsel should be limited to certain witnesses who are potential defendants. The problems with such a limitation are essentially the same as those concerning a comparable limitation on a warning of Fifth Amendment rights, discussed supra. Consider also the Note to ALI § 340.3: "Limiting the right to those against whom a complaint has been filed would make it possible for the prosecutor effectively to deny the right by simply not filing a complaint prior to the grand jury appearance. The alternative of seeking to identify in advance those against whom a prosecution is likely to be brought raises the vexing problems of the Escobedo 'focusing of suspicion' approach from which the Supreme Court seems to have retreated in Miranda."

(2) Whether the grand jury witness should be specifically advised of his right to counsel at the time that he appears before the grand jury. It appears that warnings are now given, at least under some circumstances. See United States v. Daniels, supra, where the waiver of the privilege statement signed by the witness "included the statement that the witness could consult with his attorney outside the grand jury room." Cf. National Conference of Commissioners on Uniform State Laws, Uniform Rules of Criminal Procedure (Tent. Draft No. 2, 1973), Rule 26(g), which provides that before the prosecutor examines a witness who is to give an investigatory deposition the witness shall be informed "of his right to the assistance of a lawyer during the examination, and that the examination will be delayed to afford him a reasonable opportunity to obtain and consult with a lawyer."

(3) Whether the grand jury witness should be specifically advised of his right to counsel at the time that he receives a subpoena to appear. Cf. Uniform Rules, supra, Rule 26(b), which provides that a "written notification" of certain matters, including right to counsel, "shall be served along with the subpoena." The commentary thereto explains that this "will insure that the witness has an adequate opportunity to make an informed determination relating to exercise of his rights."

(4) Whether there should be some required "lead time" between the service of a grand jury subpoena and the time required for appearance so that the witness will have an opportunity to secure and consult with counsel. "'Forthwith' subpoenas--subpoenas which require the individual to report to the grand jury immediately--are not unknown and subpoenas which give the person just a few hours or a few days to prepare are not unusual." Comment, 7 Harv. Civ. Rights-Civ. Lib.L.Rev. 432, 447 n.60 (1972). For example, Robert Ellsberg, Daniel Ellsberg's 15-year-old son, was served with a subpoena at 7:30 a.m. commanding him to appear before the Los Angeles grand jury investigating the Pentagon Papers at 9:30 a.m. the same morning. Donner and Cerruti, The Grand Jury Network, The Nation, Jan. 3, 1972, at 18.

(5) Whether the subpoena should specifically advise the witness of the subject matter of the inquiry so that he will have a basis for discussing his situation with counsel. "Ordinarily, a subpoena states the name of the person or persons being investigated and the statute that covers the criminal acts which they are suspected of having committed. Bare as these facts are, they give the individual subpoenaed some notice as to what he is expected to testify about. A grand jury subpoena, however, does not have to give even this much information. Cases have accepted the proposition that 'the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning.' Blair v. United

States, 250 U.S. 273, 282 (1919). More specifically, courts have upheld 'John Doe' subpoenas--subpoenas stating that the case in question is against an unnamed person or persons--which have described the subject matter of the investigation only to the extent that they indicated that the general conspiracy statute, 18 U.S.C. § 371 (1970), would be involved, if that much. E.g., In re Black, 47 F.2d 542 (2d Cir. 1931)." Comment, supra, at 447 n.59.

(6) Whether some provision should be made for appointment of counsel for the indigent grand jury witness. Such a requirement was rejected in United States v. Daniels, supra, where the waiver-of-the-privilege form notified the witness that he could consult with his attorney outside the grand jury room. "First, it is clear that there is no right to counsel for witnesses appearing before a grand jury. [citing Groban] Daniels concedes as much, but argues that when an indigent witness is advised that he may have an attorney present, he must also be advised that if he is unable to provide his own counsel, one will be appointed for him free of cost. There is simply no such requirement. The need to advise a defendant of his right to appointed counsel arises only at certain critical stages of criminal proceedings. [citing Coleman, Wade, and Hamilton] Daniels was not under indictment when he appeared; he was only a witness. Merely because a grand jury or other administrative body has chosen to permit a witness to retain his own counsel is not controlling." But cf. Uniform Rules, supra, which provide in Rule 26(g) that a witness called before the prosecutor to give an investigatory deposition is to be informed "that if for any reason he is unable to obtain a lawyer, one will be appointed to assist him, and that if he is unable to pay for the services of a lawyer, the services will be provided for him." The Note to ALI § 340.3 observes that it "makes no provision for furnishing counsel to the indigent at this stage, but leaves that to the procedures in each jurisdiction."

D. Whether the Prosecutor, Upon Obtaining a Grand Jury Subpoena or Upon Challenge of a Subpoena, Should be Required to Make Some Showing of Grounds to Call the Witness

Recent efforts to establish constitutional limits upon the power of the prosecutor to subpoena witnesses before the grand jury have not succeeded. In Branzburg v. Hayes, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972), the Court, 5-4, rejected the claim of newspaper reporters that they "should not be forced either to appear or testify before a grand jury . . .until and unless sufficient grounds are shown for believing that the reporter possesses information relevant to the crime the grand jury is investigating" which is not available from other sources. In so holding, the Court stressed that "the investigative power of the grand jury is necessarily broad if its public responsibility is to be adequately discharged," and that the grand jury must be free to run down every available clue even though the investigation is triggered by no more than tips or rumors. Similarly, in United States v. Dionisio, 93 S.Ct. 764 (1973), the Court held "that a subpoena to appear before a grand jury is not a 'seizure' in the Fourth Amendment sense," so that a preliminary showing of reasonableness is not required.

It is significant, however, that in both cases the Court noted that the subpoenas were issued with some justification, in the sense that it appeared the witness might well be in a position to give evidence on the matters under investigation. In Branzburg, it was emphasized that "based on the stories Branzburg and Caldwell wrote and Pappas' admitted conduct, the grand jury called these reporters as they would others--because it was likely that they

CM 4903-14

ASSISTANT ATTORNEY GENERAL
LEGISLATIVE AFFAIRS

Department of Justice
Washington, D.C. 20530

Honorable Peter W. Rodino, Jr.
Chairman, Committee on the Judiciary
House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

This is in response to your request for the views of the Department of Justice on H.R. 1277, 94th Congress, 1st Session, a bill "to establish certain rules with respect to the appearance of witnesses before grand juries, to provide for independent inquiries by grand juries, and for other purposes."

H.R. 1277 is concerned with four major subjects affecting primarily grand jury investigations and to a lesser degree criminal trials. In the interest of clarity this letter discusses the various parts of H.R. 1277 separately under their own headings.

A. Recalcitrant Witnesses (Sec. 2, pp. 1-2 of the bill).

The Proposal. Under Section 2 of the bill, 28 U.S.C. 1826 would be amended in two principal respects: (1) confinement for civil contempt, which cannot now exceed eighteen months, would be limited to a maximum period of six months; and (2) provision would be added so that, once confined for civil contempt, a witness could not again be confined for civil contempt for subsequently refusing to testify or provide information concerning the same transaction or event. In addition, a sentence in 28 U.S.C. 1826(b) would be rewritten apparently to clarify that the burden of proof with respect to bail pending appeal from an order of confinement is on the party seeking to show that the appeal is frivolous or taken for delay. Finally, 18 U.S.C. 2515 would be amended by adding a provision so that a witness could not be confined for civil contempt in refusing to testify or provide other information when the inquiry is based upon or derived from any violation of the wire interception provisions of chapter 119 of title 18 of the United States Code.

Discussion.

a. Limiting Confinement for Civil Contempt to Six Months. The Department of Justice is firmly convinced that softening the force of civil contempt procedures would be inimical to the public interest. The power to compel citizens to testify is one of the most important and necessary powers of government in an ordered society. Murphy v. Waterfront Commission,

witnesses; of their being killed, intimidated, or bribed; of their avoiding process or fleeing the jurisdiction; of records and other physical evidence being hidden, altered, or destroyed; of search and arrest warrants not being utilized productively; and so forth. As the facts unfold in a grand jury investigation, the leads must be worked promptly as they develop and not episodically, week by week, at the pleasure of the witnesses. Abstract thoughts for the possible inconvenience of witnesses must surely yield to the greater public interest in the success of such investigations, which are often of exceptional importance.

An even greater potential for harm under the proposed legislation would exist in regard to investigations involving some enduring threat requiring the most immediate attention, such as a conspiracy to assassinate public officials or to destroy public installations. Perhaps the special need for urgency in such cases would allow courts to have all witnesses subpoenaed to appear promptly, as their identities became known. Under the proposal, however, if not physically detained, a witness would have a basis for going to any district in which he might claim residence and filing a motion to quash there. Looking ahead in the proposal, if a witness were ordered to testify under a grant of immunity, he could keep silent for a week, as an absolute right, subject to no compulsion. In view of such potential for abuse, and for all the reasons indicated, the Department urges that no legislation of this kind be enacted.

b. Allowing witness's counsel inside the grand jury room. Under long-standing Federal practice a witness may not have his counsel accompany him inside the grand jury room but may leave the room from time to time, as he wishes, to consult with counsel. Also under long-standing Federal practice the obligation of secrecy imposed upon the grand jurors, the stenographer, and government counsel may not be imposed upon witnesses. See Rule 6, Federal Rules of Criminal Procedure. It has been argued, with undeniable force, that since the witness can tell his counsel everything anyway, counsel should be permitted to accompany the witness inside the jury room, subject to the restriction that he not participate in the proceedings other than to advise his client. Whether such a restriction would prove effective may be doubted, but, in any event, upon careful reflection, the traditional practice is vindicated. There are strong reasons why counsel should not be admitted into the grand jury room, and they concern the witness's interests as well as the grand jury's.

A grand jury investigation may be initiated upon the basis of quite indefinite information and pass through various stages without necessarily resolving the questions whether a crime occurred and, if so, who committed the crime. Accordingly, a witness may be called when the information before the grand jury is in a highly amorphous state, and the witness may have to be recalled as the facts become better developed. Many witnesses have cooperated with grand jury investigations while being reluctant for anyone outside the grand jury to know of the fact or extent of their cooperation.

With counsel absent from the room, and grand jury secrecy prevailing, the witness retains the initiative if it happens, e.g., that he is required to give evidence against his employer, his union, or someone else whom he knows his attorney represents or with whom his attorney has been associated; indeed, a grand jury inquiry could conceivably involve the attorney. Rather than place witnesses in such a potentially difficult situation, it is better that they be put to the inconvenience of leaving the grand jury room to consult with counsel. Traditional grand jury secrecy allows the witness to speak freely and without fear of causing injury to anyone unless formal charges are filed. Also, to the extent that the witness gives his attorney only limited information in consulting with him, the attorney may be in a better position to avoid conflict of interest situations. Accordingly, there are good reasons why the law has for so long prevented counsel from entering the grand jury room, and the law should not be changed.

c. Empowering district courts other than courts of issuance to quash subpoenas. To require courts of equal stature to pass upon each other's compulsory process at a distance raises serious practical difficulties. How is a court to know what a distant grand jury has been doing or intends to do? Will the hearing involve tipping the witness to the grand jury's interests at a time when he need answer no questions? Can thorough investigations be accomplished by merely estimating the importance of a witness's testimony without ever securing it? Considering the relative ease of traveling today, would a witness be as inconvenienced by responding to the subpoena as in resisting it? How inconvenienced will the grand jurors be and how damaged the investigation by the delay involved in the court's acquiring sufficient information to bring to bear on the issues? The proposal is unwise. A grand jury has constitutional status, and courts should not interfere with "the exercise of its essential functions." United States v. U.S. District Court for the Southern District of West Virginia, supra, 238 F.2d at 719. In that light, the courts could not be expected often to find the witness's appearance to involve an "unnecessary hardship," and the provision would simply be another means whereby the witness could generate delay.

C(4). Recording Grand Jury Testimony (pp. 10-11).

The Proposal. A new section would be added to chapter 215 of title 18 of the United States Code to require the recording of all testimony given before a grand jury. Grand jury witnesses would be entitled to examine and copy the record of their own testimony (or to have their attorneys do so), under such conditions as the court deemed reasonable. A witness proceeding in forma pauperis would be furnished a transcript upon request.

Discussion. The Department has no fundamental objections to this proposal. The general thinking has been that a grand jury recording requirement can, and as a practical matter may have to, be implemented largely by

- CM. 490 1-9 -

February 27, 1974

M E M O R A N D U M

To: Criminal Rules Committee

From: Wayne LaFave WRL

Subject: Grand Jury Report

At our August 1973 meeting, the Committee asked that I proceed to prepare sections of our report recommending: (1) reduction in the size of the grand jury; (2) mandatory recording of grand jury procedings; (3) a prohibition on the challenge of the competency or adequacy of evidence produced before the grand jury; (4) some form of relief for the witness who would be required to travel a great distance to testify; (5) greater protection against the unauthorized release of grand jury testimony; and (6) the use of alternatives to the grand jury, such as investigatory depositions. Materials on these subjects are enclosed, all in the form of a draft of a section of the report. A memorandum on the special problem of whether secrecy should be required of grand jury witnesses, which was mentioned only in passing at our last meeting, is also enclosed. Finally, I have enclosed the section which would briefly discuss those areas as to which we have decided to make no recommendation.

I have not had an opportunity to explore the question of abolition of the grand jury, discussed at our last meeting, which in any event may have to await the results of the study requested of the Federal Judicial Center. Nor have I had a chance to put anything together on use of magistrates in connection with or instead of grand juries. (It is my misfortune to be Acting Dean of the College this semester, which has left me with little research time.)

Because the date of our meeting is rapidly approaching, I have had to send out this material without first discussing it with Judge Smith. He may have some thoughts on how we could best proceed to handle the enclosed material.

See you all on March 14.

PART ------: INVESTIGATORY DEPOSITIONS

It is recommended that the attorney for the government be given the power to subpoena witnesses for purposes of investigation. This recommendation rests upon the conclusion that such a means of investigation is generally preferable, both from the standpoint of the prosecutor and the witness, to use of the grand jury to investigate criminal activity. The grant of subpoena power to the attorney for the government would be essential if the grand jury were abolished or its use severely limited (see Part --- of this Report). However, even if the grand jury continues to be utilized to return indictments, there is still merit in utilizing the procedures set out below where the objective is investigation of possible criminal offenses.

The recommendation is consistent with that recently made by the National Advisory Commission on Criminal Justice Standards and Goals. Standard 12.8 in National Advisory Commission on Criminal Justice Standards and Goals, Courts (1973), reads in part:

"The prosecutor should be given the power, subject to appropriate safeguards, to issue subpenas requiring potential witnesses in criminal cases to appear for questioning. Such witnesses should be subject to contempt penalties for unjustified failure to appear for questioning or to respond to specific questions."

In the commentary thereto, the Commission observes:

"The standard also recommends giving the prosecutor subpena power. This is intended in part to balance the emphasis in Chapter 4, The Litigated Case, on discouraging the use of the grand jury. In many cases, the only advantage of a grand jury proceeding is that it permits the prosecution to subpena witnesses and interrogate them. (See United States v. Hughes, 413 F.2d 1244 (5th Cir. 1969).)

magistrate] in the manner provided in civil actions.

(d) WHO MAY BE PRESENT. In addition to the [federal magistrate] [person] before whom the deposition is taken, attorneys for the government, the witness under examination, counsel for the witness, interpreters when needed and, for the purpose of taking the deposition, a stenographer or operator of a recording device may be present. Counsel for the witness may interpose objections on behalf of the witness, but shall not be permitted to examine or cross-examine the witness.

(e) SECRECY AND DISCLOSURE. The attorney for the government shall not disclose that a subpoena has issued except as necessary to its issuance or service. Disclosure of a deposition taken under this rule may be made to a grand jury and to the attorneys for the government for use in the performance of their duties. For purposes of this subdivision, "attorneys for the government" includes those enumerated in rule 54(c); it also includes such other government personnel as are necessary to assist the attorneys for the government in the performance of their duties. Otherwise an attorney for the government, [witness, counsel for the witness,] interpreter, stenographer, operator of a recording device, or any typist who transcribes the deposition may disclose the nature or purpose of the deposition or anything which transpired during the examination only when so directed by the court preliminarily to or in connection with a judicial proceeding. [No obligation of secrecy may be imposed upon any person except in accordance with this rule.]

(f) NOTIFICATION OF RIGHTS. Prior to examining a witness, the [attorney for the government] [federal magistrate] shall inform him:

(1) of his right to the assistance of counsel during the examination, and that if he is unable to obtain counsel he is

'seizure' in the Fourth Amendment sense," so that a preliminary showing of reasonableness is not required.

Under subdivision (a), application is limited to investigation of an offense for which no information or indictment has been filed and which is punishable by imprisonment for more than one year. Depositions taken to preserve testimony after the filing of an indictment or information are governed by 18 U.S.C. § 3503. Cf. In re Grand Jury Proceedings, 485 F.2d 85 (3d Cir. 1973); United States v. Doe, 455 F.2d 1270 (1st Cir. 1972), noting the longstanding rule that it is improper to utilize a grand jury for the sole or dominating purpose of preparing an already pending indictment for trial. The need for investigatory depositions with regard to offenses punishable by no more than one year does not appear to be sufficiently great that this new procedure should be extended to investigation of such offenses. Cf. proposed rule 41.1, so limiting nontestimonial identification procedures.

Subdivision (b) makes it clear that the attendance of witnesses and the production of documentary evidence and objects may be compelled pursuant to the subpoena provisions of rule 17. It also provides that a written notice of certain matters is to be served with the subpoena. For one thing, the notice is to inform the witness of the matters specified in subdivision (f), namely, of his right to counsel and of his right to refuse to testify or produce objects under certain circumstances, as to which consultation with counsel would often be necessary. Given the fact that the witness is given a right to counsel under subsection (f), it is appropriate that he be apprised of this fact at the time the subpoena is served, for otherwise it might be necessary to delay the taking of the deposition because the witness appeared without counsel in ignorance of his right thereto. To the same effect is Uniform Rule 26(b). Secondly, the notice is to inform the witness

then I would assume that it would not be practicable to limit the place of the deposition as provided in present rule 17(f)(2).]

Subdivision (d) lists the persons who may be present at the taking of a deposition under this rule. Except for the inclusion of counsel for the witness, it parallels rule 6(d) with respect to who may be present before a grand jury. It is similar to Uniform Rule 26(e), as to which the comment notes: "In part, this limitation is designed to protect the secrecy of the proceeding, but it is also designed to keep the deposition from taking on the appearance of a public hearing. The prosecutor may not conduct the investigatory deposition in the publicity-oriented fashion in which legislative hearings are sometimes conducted."

The right to counsel of a witness subpoenaed to give an investigatory deposition is discussed below in connection with subdivision (f). Subdivision (d) would allow counsel to be present during the taking of the deposition. It is "well settled" that a witness before a federal grand jury is not entitled to have an attorney accompany him into the grand jury room, see United States v. Fitch, 472 F.2d 548 (9th Cir. 1973) and cases collected in 1 Wright, Federal Practice and Procedure - Criminal § 104 (1969). However, there has developed the practice of allowing the witness to consult with his counsel outside the grand jury room. See, e.g., In re Tierney, 465 F.2d 806 (5th Cir. 1972); United States v. Daniels, 461 F.2d 1076 (5th Cir. 1972); United States v. Weinberg, 439 F.2d 743 (9th Cir. 1971); United States v. Isaacs, 347 F.Supp. 743 (N.D.Ill. 1972). The restriction with regard to counsel before the grand jury is based upon concerns (e.g., possible attempts to influence the grand jury) that are not present in the deposition context. Moreover, the witness before the prosecutor on an investigatory deposition lacks the "protective shield" of the grand jurors that has been stressed as one of the factors justifying exclusion of counsel

before the grand jury. See In re Groban, 352 U.S. 330, 77 S.Ct. 510, 1 L.Ed.2d 376 (1957) (Black, J., dissenting). See also Gill v. State ex rel. Mobley, 242 Ark. 797, 416 S.W.2d 269 (1967) (holding right to counsel applicable to examination before prosecutor), and Kan. Stat. Ann. § 22-3104 (providing that when prosecutor takes deposition, "counsel for any witness shall be present while the witness is testifying and may interpose objections on behalf of the witness"). The last sentence of subdivision (d), which sets forth the limits on counsel's participation, is based upon the aforementioned Kansas statute.

Subdivision (e), for the most part, parallels the comparable provisions concerning grand jury secrecy which appear in rule 6(e). In the grand jury setting, secrecy is thought to be necessary for several reasons: "(1) To prevent the escape of those whose indictment may be contemplated; (2) to ensure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt." United States v. Procter & Gamble Co., 356 U.S. 677, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958). Only the second of these is purely a product of the grand jury setting; the others may be equally applicable to the investigatory deposition under the circumstances of a particular case.

The first sentence of subdivision (e) is based upon Uniform Rule 26(f)(1). As noted in the comment thereto, it "is to protect the individual against the

Subdivision (f) specifically provides that if the witness is unable to obtain counsel, then he is entitled to have counsel assigned to represent him, absent a waiver of such appointment. The language is essentially the same as that in rule 44(a), which deals with the right to counsel from initial appearance through appeal. A similar provision is to be found in Kan. Stat. Ann. § 22-3104 and Uniform Rule 26(g); see also National Advisory Commission on Criminal Justice Standards and Goals, Courts 245 (1973), supporting the investigative deposition concept where the rights of the witness are protected, which "should include the right to have an attorney present during the interrogation and to have an attorney at State expense if the subject is unable to provide his own."

Although the strongest argument for a constitutional right to appointment of counsel may be where the witness is a target of the investigation, see United States v. Rangel, 365 F.Supp. 155 (W.D. Tex. 1973); State ex rel. Lowe v. Nelson, supra, subdivision (f) goes beyond that situation. One reason for doing so is the difficulty involved in applying the target standard. See Birzon and Gerart, The Prospective Defendant Rule and the Privilege Against Self-Incrimination in New York, 15 Buff.L.Rev. 595 (1966). Another is the fact that there may be a real need for assistance even when the witness is not the target. Where the witness is willing to give a voluntary statement, there will often be no need to utilize this rule, and the issue of counsel will not then arise. If, on the other hand, the witness refuses to provide information except pursuant to a subpoena, his very posture evidences a possible need for counsel. Given the kinds of offenses likely to be investigated and the brief period of representation required, it is fair to conclude that the percentage of persons unable to afford retained counsel for this limited purpose will be substantially lower than for the complete defense against a criminal charge.

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

July 16, 1998

MEMORANDUM TO JUDGES DAVIS AND DOWD, AND PROFESSOR SCHLUETER

SUBJECT: *S. 2289 and S.J. RES. 44*

For your information, I have attached S. 2289, a bill relating to grand jury proceedings, and S. J. RES. 44, a resolution to protect the rights of crime victims. We will monitor both the bill and the resolution and advise you of any developments.

John K. Rabiej

2 Attachments

cc: Honorable Alicemarie H. Stotler (with attach.)
Honorable Anthony J. Scirica (with attach.)

II

105TH CONGRESS
2D SESSION

S. 2289

To amend the Federal Rules of Criminal Procedure, relating to grand jury proceedings, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JULY 10, 1998

Mr. BUMPERS introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend the Federal Rules of Criminal Procedure, relating to grand jury proceedings, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Grand Jury Reform Act of 1998".

SEC. 2. GRAND JURIES.

(a) IN GENERAL.—Rule 6 of the Federal Rules of Criminal Procedure is amended—

(1) in subdivision (a), by adding at the end the following:

"(3) INSTRUCTION ON RIGHTS, RESPONSIBILITIES, AND DUTIES.—Upon impaneling a grand jury, the court shall instruct and charge the grand jury on the rights, responsibilities, and duties of the grand jury under this rule, including—

"(A) the duty to inquire into criminal offenses that are alleged to have been committed within the jurisdiction;

"(B) the right to call and interrogate witnesses;

"(C) the right to request production of a book, paper, document, or other object, including exculpatory evidence;

"(D) the necessity of finding credible evidence of each material element of the crime charged before returning a true bill;

"(E) the right to request that the attorney for the government draft indictments for charges other than those originally requested by that attorney;

"(F) the obligation of secrecy under subdivision (e)(2); and

"(G) such other rights, responsibilities, and duties as the court determines to be appropriate.";

(2) in subdivision (d), by inserting "and counsel for that witness (as provided in subdivision (i))" after "under examination";

(3) in subdivision (e)(2), by adding at the end the following: "The court shall have the authority to investigate any violation of this paragraph, including the authority to appoint counsel to investigate and report to the court regarding any such violation."; and

(4) by adding at the end the following:

"(h) NOTICE TO WITNESSES.—Upon service of any subpoena requiring any witness to testify or produce information at any proceeding before a grand jury impaneled before a district court, the witness shall be given adequate and reasonable notice of—

"(1) his or her right to counsel, as provided in subdivision (i);

"(2) his or her privilege against self-incrimination;

"(3) the subject matter of the grand jury investigation;

"(4) whether his or her own conduct is under investigation by the grand jury;

"(5) the criminal statute, the violation of which is under consideration by the grand jury, if such

statute is known at the time of issuance of the subpoena;

"(6) his or her rights regarding immunity; and

"(7) any other rights and privileges which the court deems necessary or appropriate.

"(i) COUNSEL FOR GRAND JURY WITNESSES.—

"(1) IN GENERAL.—

"(A) RIGHT OF ASSISTANCE.—Each witness subpoenaed to appear and testify before a grand jury in a district court, or to produce books, papers, documents, or other objects before that grand jury, shall be allowed the assistance of counsel during such time as the witness is questioned in the grand jury room.

"(B) RETENTION OR APPOINTMENT.—Counsel for a witness described in subparagraph (A)—

"(i) may be retained by the witness; or

"(ii) in the case of a witness who is determined by the court to be financially unable to obtain counsel, shall be appointed as provided in section 3006A of title 18, United States Code.

"(2) POWERS AND DUTIES OF COUNSEL.—A counsel retained by or appointed for a witness under paragraph (1)—

"(A) shall be allowed to be present in the grand jury room only during the questioning of the witness and only to advise the witness; and

"(B) shall not be permitted to address any grand juror, or otherwise participate in the proceedings before the grand jury.

"(3) POWERS OF THE COURT.—

"(A) IN GENERAL.—If the court determines that counsel retained by or appointed for a witness under this subdivision has violated paragraph (2), or that such action is necessary to ensure that the activities of the grand jury are not unduly delayed or impeded, the court may remove the counsel and either appoint new counsel or order the witness to obtain new counsel.

"(B) NO EFFECT ON OTHER SANCTIONS.—Nothing in this paragraph shall be construed to affect the contempt powers of the court or the power of the court to impose other appropriate sanctions.

"(j) EXCULPATORY EVIDENCE.—An attorney for the government shall disclose to the grand jury any substantial evidence of which that attorney has knowledge that directly negates the guilt of the accused. Failure to disclose such evidence may be the basis for a motion to dismiss the indictment, if the court determines that the evidence might reasonably be expected to lead the grand jury not to indict.

"(k) AVAILABILITY OF GRAND JURY TRANSCRIPTS AND OTHER STATEMENTS.—

"(1) IN GENERAL.—Subject to paragraph (2), not later than 10 days before trial (unless the court shall for good cause determine otherwise), and after the return of an indictment or the filing of any information, a defendant shall, upon request, and as the court determines to be reasonable, be entitled to examine and duplicate a transcript or electronic recording of—

"(A) the grand jury testimony of all witnesses to be called at trial;

"(B) all statements relating to the defendant's case made to the grand jury by the court, the attorney for the government, or a special attorney;

"(C) all grand jury testimony or evidence which in any manner could be considered exculpatory; and

"(D) all other grand jury testimony or evidence that is determined by the court to be material to the defense.

"(2) EXCEPTION.—The court may refuse to allow a defendant to examine and duplicate a transcript or electronic recording of any testimony, statement, or evidence described in paragraph (1), if the court determines that such examination or duplication would endanger any witness.".

(b) CONFORMING AMENDMENTS.—Section 3500(e) of title 18, United States Code, is amended—

(1) in paragraph (1), by adding "or" at the end;

(2) in paragraph (2), by striking ", or" and inserting a period; and

(3) by striking paragraph (3).

○

Calendar No. 445

105TH CONGRESS
2D SESSION

S. J. RES. 44

Proposing an amendment to the Constitution of the United States to protect the rights of crime victims.

IN THE SENATE OF THE UNITED STATES

APRIL 1, 1998

Mr. KYL (for himself, Mrs. FEINSTEIN, Mr. BIDEN, Mr. LOTT, Mr. THURMOND, Mr. TORRICELLI, Mr. BREAUX, Mr. GRASSLEY, Mr. DEWINE, Mr. FORD, Mr. REID, Mr. GRAMM, Mr. MACK, Ms. LANDRIEU, Mr. CLELAND, Mr. COVERDELL, Mr. CRAIG, Mr. INOUYE, Mr. BRYAN, Ms. SNOWE, Mr. THOMAS, Mr. WARNER, Mr. LIEBERMAN, Mr. ALLARD, Mrs. HUTCHISON, Mr. D'AMATO, Mr. SHELBY, Mr. CAMPBELL, Mr. COATS, Mr. FAIRCLOTH, Mr. FRIST, Mr. SMITH of New Hampshire, Mr. GREGG, Mr. HAGEL, Mr. HELMS, Mr. SMITH of Oregon, Mr. HUTCHINSON, Mr. INHOFE, Mr. MURKOWSKI, Mr. BOND, Mr. GRAMS, and Mr. WYDEN) introduced the following joint resolution; which was read twice and referred to the Committee on the Judiciary

JULY 7, 1998

Reported by Mr. HATCH, with an amendment

[Strike out all after the resolving clause and insert the part printed in italic]

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States to protect the rights of crime victims.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled

(two-thirds of each House concurring therein), ~~That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid for all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:~~

~~"ARTICLE —~~

~~"SECTION 1. Each victim of a crime of violence shall have the rights to reasonable notice of, and not to be excluded from, all public proceedings relating to the crime—~~

~~"to be heard, if present, and to submit a statement at all public proceedings to determine a release from custody, an acceptance of a negotiated plea, or a sentence;~~

~~"to the foregoing rights at a parole proceeding that is not public, to the extent those rights are afforded to the convicted offender;~~

~~"to reasonable notice of a release or escape from custody relating to the crime;~~

~~"to consideration for the interest of the victim in a trial free from unreasonable delay;~~

~~"to an order of restitution from the convicted offender;~~

"to consideration for the safety of the victim in determining any release from custody; and

"to reasonable notice of the rights established by this article.

"SECTION 2. Only the victim or the victim's representative shall have standing to assert the rights established by this article. Nothing in this article shall provide grounds for the victim to challenge a charging decision or a conviction; to overturn a sentence or negotiated plea; to obtain a stay of trial; or to compel a new trial. Nothing in this article shall give rise to a claim for damages against the United States, a State, a political subdivision, or a public official.

"SECTION 3. The Congress and the States shall have the power to implement and enforce this article within their respective jurisdictions by appropriate legislation, including the power to enact exceptions when necessary to achieve a compelling interest.

"SECTION 4. The rights established by this article shall apply to all proceedings that begin on or after the 180th day after the ratification of this article.

"SECTION 5. The rights established by this article shall apply in all Federal and State proceedings, including military proceedings to the extent that Congress may provide by law, juvenile justice proceedings, and proceedings

~~in any district or territory of the United States not within a State.".~~

That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid for all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"ARTICLE—

"SECTION 1. A victim of a crime of violence, as these terms may be defined by law, shall have the rights:

"to reasonable notice of, and not to be excluded from, any public proceedings relating to the crime;

"to be heard, if present, and to submit a statement at all such proceedings to determine a conditional release from custody, an acceptance of a negotiated plea, or a sentence;

"to the foregoing rights at a parole proceeding that is not public, to the extent those rights are afforded to the convicted offender;

"to reasonable notice of a release or escape from custody relating to the crime;

"to consideration of the interest of the victim that any trial be free from unreasonable delay;

"to an order of restitution from the convicted offender;

"to consideration for the safety of the victim in determining any conditional release from custody relating to the crime; and

"to reasonable notice of the rights established by this article.

"SECTION 2. Only the victim or the victim's lawful representative shall have standing to assert the rights established by this article. Nothing in this article shall provide grounds to stay or continue any trial, reopen any proceeding or invalidate any ruling, except with respect to conditional release or restitution or to provide rights guaranteed by this article in future proceedings, without staying or continuing a trial. Nothing in this article shall give rise to or authorize the creation of a claim for damages against the United States, a State, a political subdivision, or a public officer or employee.

"SECTION 3. The Congress shall have the power to enforce this article by appropriate legislation. Exceptions to the rights established by this article may be created only when necessary to achieve a compelling interest.

"SECTION 4. This article shall take effect on the 180th day after the ratification of this article. The right to an order of restitution established by this article shall not

apply to crimes committed before the effective date of this article.

"SECTION 5. The rights and immunities established by this article shall apply in Federal and State proceedings, including military proceedings to the extent that the Congress may provide by law, juvenile justice proceedings, and proceedings in the District of Columbia and any commonwealth, territory or possession of the United States.".

Calendar No. 445

105TH CONGRESS
2D SESSION

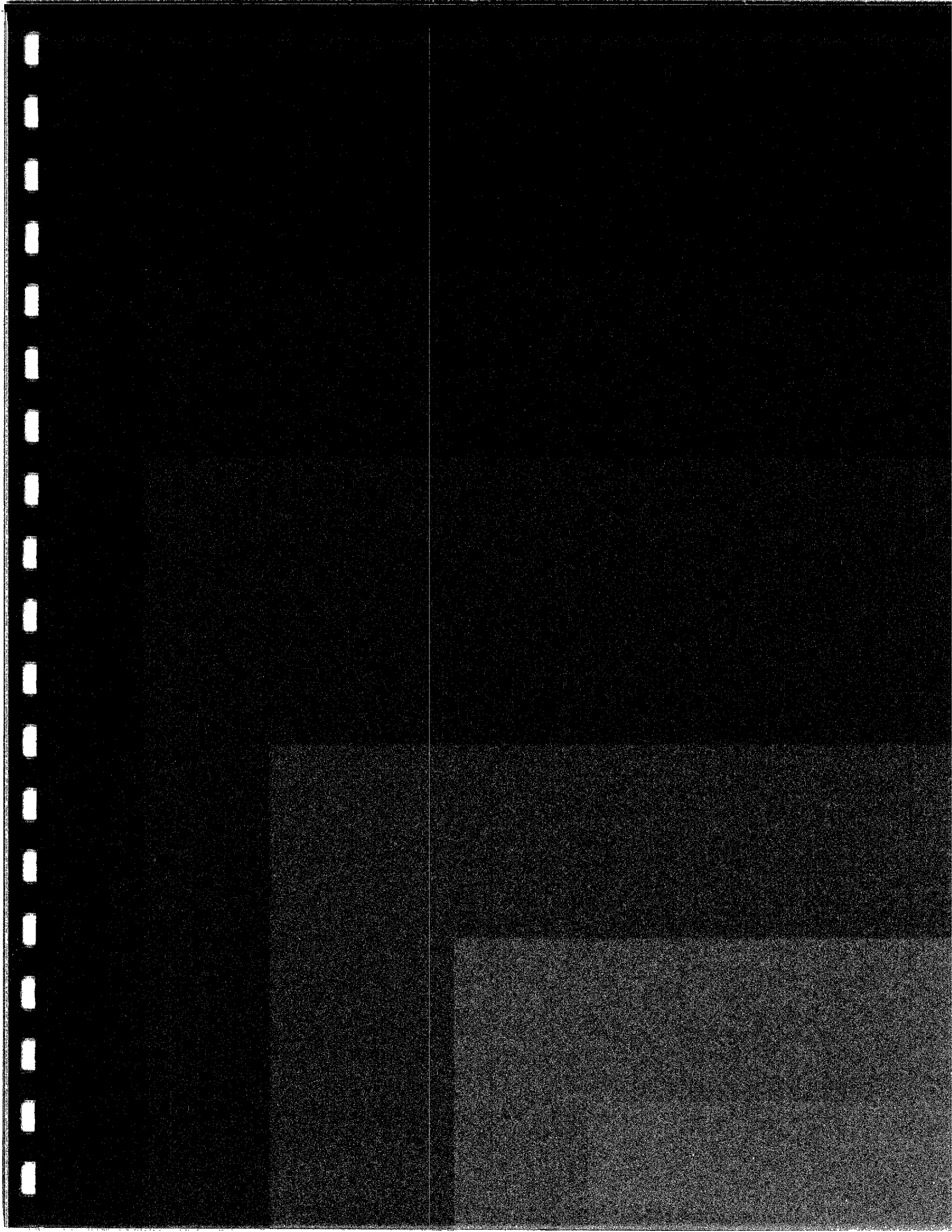
S. J. RES. 44

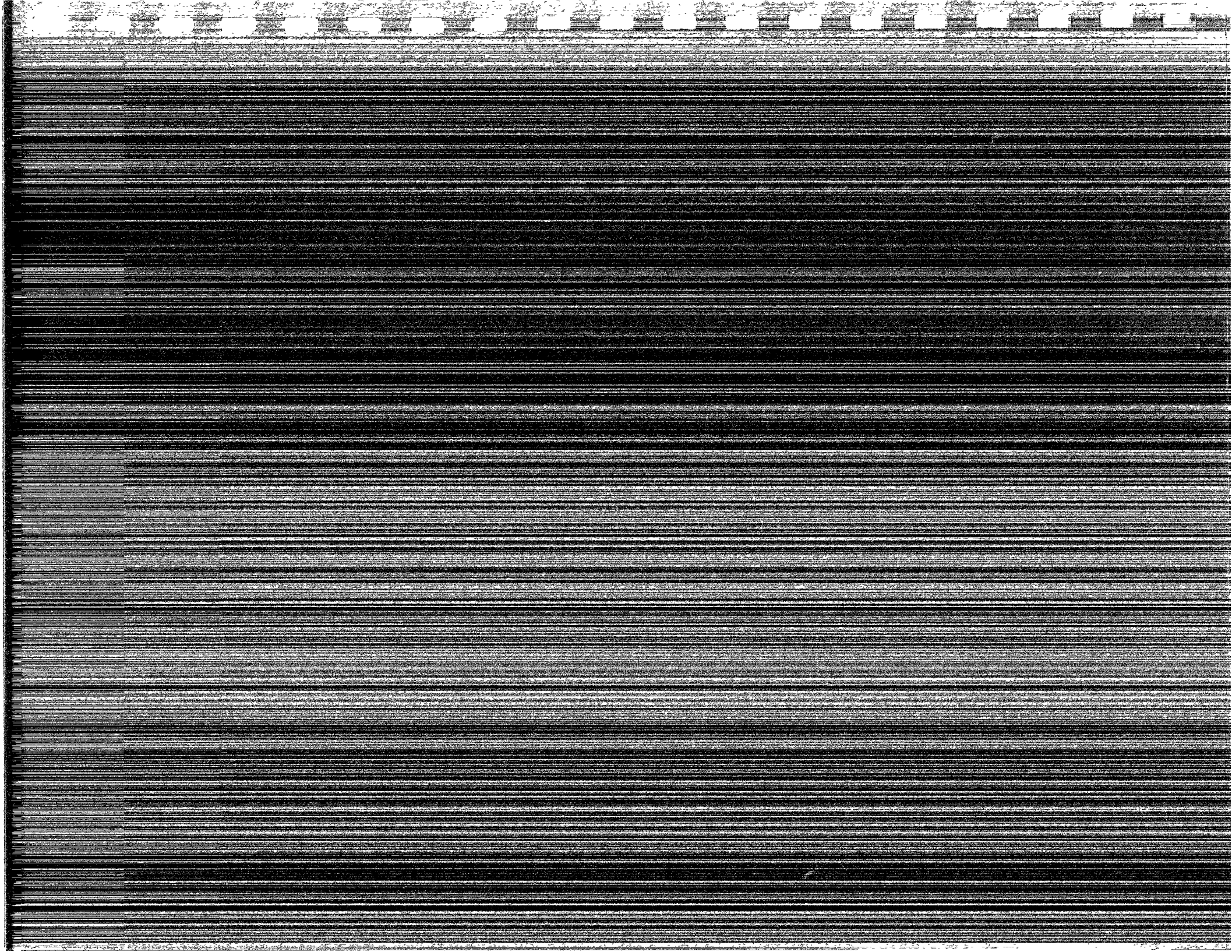
JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States to protect the rights of crime victims.

JULY 7, 1998

Reported with an amendment





LEGISLATION AFFECTING
THE FEDERAL RULES OF PRACTICE AND PROCEDURE
105th Congress

SENATE BILLS

S. 3 Omnibus Crime Control Act of 1997

- Introduced by: Hatch and others
- Date Introduced: January 21, 1997
- Status: Referred to the Committee on Judiciary
- Provisions affecting rules
  - *Sec. 501.* Increase the number of government peremptory challenges from 6 to 10 **[CR24(b)]**
  - *Sec. 502.* Allow for 6 person juries in criminal cases upon request of the defendant, approval of the court, and consent of the government **[CR23(b)]**
  - *Sec. 505.* Requires an equal number of prosecutors and defense counsel on all rules committees **[§ 2073]**
  - *Sec. 713.* Allow admission of evidence of other crimes, acts, or wrongs to prove disposition toward a particular individual **[EV404(b)]**
  - *Sec. 821.* Amends the language of CR35(b) (Reduction of Sentence) and the sentencing guidelines **[CR35(b)]**
  - *Sec. 904.* Amends the statute governing proceedings in forma pauperis **[AP Form 4]**

S. 79 Civil Justice Fairness Act of 1997 (See H.R. 903)

- Introduced by: Hatch
- Date Introduced: January 21, 1997
- Status: Referred to Committee on the Judiciary — letter from Standing Committee to Hatch (4/29/97)
- Provisions affecting the Rules:
  - *Sec. 302* Amends Evidence Rule 702 regarding expert testimony **[EV702]**
  - *Sec. 302* Amends Civil Rule 68 regarding offers of judgment **[CV68]**

S. 225 Sunshine in Litigation Act of 1997

- Introduced by: Kohl
- Date Introduced: January 28, 1997
- Status: Referred to Committee on the Judiciary — letter from Standing Committee to Hatch (4/1/97)
- Provisions affecting rules
  - *Sec. 2* Adds a new section to title 28 controlling procedures for entering and modifying protective orders **[CV26(c)]**

S. 254 Class Action Fairness Act of 1997

- Introduced by: Kohl
- Date Introduced: January 30, 1997
- Status: Referred to Committee on the Judiciary; Subcommittee on Oversight and Courts.
- Provisions affecting rules
  - *Sec. 2* requires class counsel to serve, after a proposed settlement, the State AG and DOJ as if they were parties to the class action. A hearing on the fairness of the proposed settlement may not be held earlier than 120 days after the date of that service. **[CV23]**

S. 400 Frivolous Lawsuit Prevention Act of 1997

- Introduced by: Grassley
- Date Introduced: March 5, 1997
- Status: Referred to Committee on the Judiciary; Subcom. on Oversight and the Courts
- Provisions affecting rules:
  - Section 2 amends Civil Rule 11(c) removing judicial discretion not to impose sanctions for violations of rule 11. **[CV11]**

S. 1081 Crime Victim's Assistance Act (See H.R. 924; H.R. 1322; S.J. Res 6)

- Introduced by: Kennedy and Leahy
- Date Introduced: July 29, 1997
- Status: Referred to Committee on Judiciary.
- Provisions affecting rules:
  - Section 121 would amend Criminal Rule 11 by adding a requirement that victims be notified of the time and date of, and be given an opportunity to be heard at a hearing at which the defendant will enter a plea of guilty or nolo contendere. **[CR11]**
  - Section 122 would amend Criminal Rule 32 to provide for an enhanced victim impact statement to be included in the Presentence Report. Victims should be notified of the preparation of the Presentence Report and provided a copy. **[CR32]**
  - Section 123 would amend Criminal Rule 32.1 by requiring the Government notify victims of certain crimes of preliminary hearings on revocation or modification of probation or supervised release. The victims will also be given the right of allocution at those hearings. **[CR32.1]**
  - Section 131 would amend Evidence Rule 615 to add victims of certain crimes to the list of witnesses the court can not exclude from the court room. **[EV615]**

S. 1301 Consumer Bankruptcy Reform Act of 1997

- Introduced by: Grassley
- Introduced: October 21, 1997
- Status: 5/21/98 - Ordered to be reported with amendments favorably; 6/4/98 placed on Senate Legislative Calendar; Jul 21, 1998 Senator Hatch from Committee on Judiciary; filed written report. Report No. 105-253(Additional and minority views filed.) Letter sent from Judge Stotler.
- Provisions affecting rules: None directly amending the rules or instructing judicial conference to propose rule amendments, will likely move with either H.R. 3150, S. 1914, or both, which do contain rules issues.

S. 1352 Untitled

- Introduced by: Grassley
- Date Introduced: October 31, 1997
- Status: Referred to Committee on the Judiciary — letter from Civil Rules Committee to Hatch (4/17/98)
  - 4/2/98 Approved by Subcom. on Oversight and Courts; Sent to full committee
- Provisions affecting rules
  - amends Civil Rule 30 restoring stenographic preference for recording depositions

S. 1721 Untitled

- Introduced by: Leahy
- Date Introduced: March 6, 1998
- Status: Referred to Committee on the Judiciary
- Provisions affecting rules
  - requires the Judicial Conference to review and report to Congress on whether the FRE should be amended to create a privilege for communications between parents and children

S. 1737 Taxpayer Confidentiality Act (See Public Law 105-????) 206

- Introduced by: Mack
- Date Introduced: March 10, 1998
- Status: Referred to Committee on Finance; included in the IRS restructuring Bill marked-up on 3/31/98 (HR 2676); HR 2676 passed the Senate on 5/7/98; June 24th Conference Report;
- Provisions affecting rules
  - Amends the Internal Revenue Code to apply attorney-client privilege to communications between a taxpayer and any authorized tax practitioner (CPA, Enrolled Agent, etc) in noncriminal matters before the IRS and in federal court

S. 1914 Business Bankruptcy Reform Act

- Introduced by: Grassley
- Introduced: April 2, 1998

- Status: 6/2/98 Subcommittee on Oversight and Courts concluded hearings; letter from Judge Stotler sent; likely to be attached to S. 1301 following July 4 recess.
- Provisions affecting rules: several provisions request the bankruptcy rules committee to propose for adoption rules or forms to implement statutory changes; See H.R. 3150 and S. 1301

S. 2030 Grand Jury Due Process Act (See S. 2260)
- Introduced by: Bumpers
- Date Introduced: May 4, 1998
- Status: Referred to Committee on Judiciary
- Provisions affecting rules
  - Would amend CR 6 [The Grand Jury] to allow witnesses before the grand jury the assistance of counsel while in the grand jury room

S. 2083 Class Action Fairness Act of 1998
- Introduced by: Grassley and Kohl
- Introduced on: May 14, 1998
- Status: Referred on 5/15/98 to Judiciary Subcommittee on Oversight and Courts
- Provisions affecting rules
  - Limits attorney fees in class actions to a reasonable percentage of damages actually paid; general removal of class actions from state to federal courts; undoes 1993 amendments to Civil Rule 11 and requires sanction for frivolous filing **[CV11]**

S. 2163 Judicial Improvement Act of 1998 (See H.R. 660; H.R. 1252)
- Introduced by: Senator Hatch
- Introduced on: June 11, 1998
- Status: Committee on the Judiciary
- Provisions affecting rules
  - Section 3 deals with special masters;
  - Section 4 allows for interlocutory appeal of court orders granting or denying class action certification decisions

*S. 2260 Appropriations for Department of Commerce; Justice etc.- **Amendment 3262***
- Introduced by: Bumpers
- Date Introduced: July 22
- Status: Amendment agreed to(S. 2260 passed the senate 99-0 on 7/23/98)
- Provisions affecting rules:
  Requires Judicial Conference to issue a report on the grand jury amendments by 9/1/99

S. 2289 Grand Jury Reform Act of 1998 (SEE S. 2030)
- Introduced by: Senator Bumpers
- Introduced on: July 10, 1998
- Status: Committee on the Judiciary

- Provisions affecting rules
  - Section 2 would amend **CR6** [The Grand Jury] to list the rights and responsibilities of jurors and providing notice to witness of certain rights
  - Section 2 would also give Grand Jury witnesses the right to an attorney, paid for under 18 USC 3006A if necessary

S. 2373 Alternative Dispute Resolution of 1998
- Introduced by: Senator Grassley
- Introduced on: July 30, 1998
- Status: Committee on the Judiciary
- Provisions affecting rules
  - Requires courts to authorize by local rule adopted under 2071 the use of voluntary ADR procedures

HOUSE BILLS

H.R. 660 Untitled (See S. 2163)
- Introduced by: Canady
- Date Introduced: February 10, 1997
- Status: Referred to Committee on the Judiciary; letter from Standing Committee to Canady (4/1/97); Judge Niemeyer met with and discussed bill with Canady on 4/29/97
- Provisions affecting rules
  - *Sec. 1* would amend title 28 to allow for an interlocutory appeal from the decision certifying or not certifying a class **[CV23]**

H.R. 903 Alternative Dispute Resolution and Settlement Encouragement Act (See S. 79)
- Introduced by: Coble
- Date Introduced: March 3, 1997; Mar 7, 1997 Referred to the Subcommittee on Courts and Intellectual Property.
- Status: Letter to Hyde from Standing Committee (4/21/97)
- Provisions affecting rules:
  - Section 3 Amends title 28 to provide an offer of judgment provision **[CV68]** and
  - Section 4 amends Evidence Rule 702 governing expert witness testimony. **[EV702]**

H.R. 924 Victim Rights Clarification Act
- Introduced by: McCullum
- Date Introduced: March 5, 1997
- Status: Passed and signed into law.(Pub. L. No. 105-6)
- Provisions affecting the rules:
  - Adds new section 3510 to title 18 that prohibits a judge from excluding from viewing a trial any victim who wishes to testify as an impact witness at the sentencing phase of the trial. **[EV 615]**

H.R. 1252 Judicial Reform Act of 1997 (See H.R. 660; S. 2163)

- Introduced by: Hyde
- Date Introduced: April 9, 1997
- Status: 4/23/98 passed House; 4/24/98 referred to Senate—Letter from Civil Rules Committee to Hatch, re: Section 3 (5/7/98)
- Provisions affecting rules:
  - Section 3 amends title 28, section 1292(b), and would provide for interlocutory appeal of a class action certification decision. **[CV23]**
  - Provides discretion to judge to televise civil and criminal case proceedings, including trials
  - Sunsets provision governing CJRA plans

H.R. 1280 Sunshine in the Courtroom Act

- Introduced by: Chabot
- Date Introduced: April 10, 1997
- Status: Referred to Committee on the Judiciary
- Provisions affecting rules:
  - Enacts a stand alone statute that would authorize the presiding judge to allow media coverage of court proceedings. Authorizes the Judicial Conference to promulgate advisory guidelines to assist judges in the administration of media coverage. **[CR53]**

H.R. 1492 Prisoner Frivolous Lawsuit Prevention Act of 1997

- Introduced by: Gallegly
- Date Introduced: April 30, 1997
- Status: Referred to Committee on the Judiciary, Subcommittee on Crime
- Provisions affecting rules:
  - Would amend Civil Rule 11 to mandate imposition of a sanction for any violation of Rule by a prisoner. **[CV11]**

H.R. 1536 Grand Jury Reduction Act

- Introduced by: Goodlatte
- Date Introduced: May 6, 1997
- Status: Referred to Committee on the Judiciary — CACM considered proposal 6/97; referred to ST, rec'd that Judicial Conference oppose the legislation; Rec. Approved 3/98; letter sent by Conference Secretary to Goodlatte (4/17/98)
- Provisions affecting rules:
  - Would amend Section 3321 of title 28, reducing the number of grand jurors to 9, with 7 required to indict. **[CR6]**

H.R. 1745 Forfeiture Act of 1997

- Introduced by: Schumer on behalf of the Administration —
- Date Introduced: May 22, 1997

- Status: Referred to Judiciary and Ways and Means
- Provisions affecting rules:
  - Several including §§102 and 105 directly amending Admiralty Rules and § 503 creating a new Criminal Rule 32.2 on forfeiture and related conforming amendments to other criminal rules **[CR32.2]**

H.R. 1965 (formerly H.R. 1835) *Civil Asset Forfeiture Reform Act*

- Introduced by: Hyde and Conyers
- Date Introduced: June 20, 1997
- Status: Reported to the House, 10/30/97; Letter with Judiciary's comments being coordinated by LAO; including concerns about time deadlines in admiralty cases
- Provisions affecting rules:
  - Section 12(b) amends Paragraph 6 of Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims (extends the notice requirement from 10 days to 20).

H.R. 2135 Bail Bond Fairness Act of 1997

- Introduced by: McCollum
- Date Introduced: July 10, 1997
- Status: 3/12/98 Judge Davis testified at Subcommittee Hearings Held.
- Provisions affecting rules: Section 2 of the bill would amend CR46(e)

H.R. 2603 (became H.R.3528) *Alternative Dispute Resolution and Settlement Encouragement Act*

- Introduced by: Coble and Goodlatte
- Date Introduced: October 2, 1997
- Status: April 21, 1998 passed House, amended; 04/22/98 Referred to Senate Committee on the Judiciary
- Provisions affecting rules:
  - Requires courts to authorize by local rule adopted under 2071 the use of voluntary ADR procedures
  - Section 3 would amend § 1332 of title 28, United States Code, to provide for awarding reasonable costs, including attorneys' fees, if a written offer of judgment is not accepted and the final judgment is not more favorable to the offeree than the offer.

H.R. 3150 Bankruptcy Reform Act of 1998

- Introduced by: Gekas
- Introduced: February 3, 1998
- Status: 6/10/98 Passed House; 6/5/98 letter sent to Judiciary Committee leadership; 7/7/98 Placed on Senate Legislative Calendar, Calendar No. 457; 8/?/98 passed as part of the Justice Department, Commerce, etc Appropriations bill

- Provisions affecting rules: several provisions request the bankruptcy rules committee to propose for adoption rules or forms to implement statutory changes

H.R. 3396 Citizens Protection Act of 1998 (See S. 2260)

- Introduced by McDade
- Introduced on March 5, 1998
- Status: referred on 3/5/98 to full Judiciary Committee (193 co-sponsors as of 8/4/8)
- Provisions affecting rules: Subjects government lawyers to attorney conduct rules established by State laws or rules

H.R. 3577 Confidence in the Family Act (See H.R. 4286)

- Introduced by: Lofgren
- Date Introduced: March 27, 1998
- Status: Referred to Judiciary; attempt to add to HR 1252 failed
- Provisions affecting rules:
  - would amend **EV501** by adding a new section creating a privilege for communications between parents and children

H.R. 3745 Money Laundering Act of 1998 (See also H.R. 1756 and S. 2165)

- Introduced by: McCollum
- Date Introduced: May 5, 1998
- Status: 6/5/98 Forwarded by Subcommittee to Full Committee; 6/12/98 letter sent to Judiciary Committee leadership.
- Provisions affecting rules: Section 11 provides for admission of foreign records in civil cases. It is consistent with the proposed amendments to EV 803 and 902, which will be published for comment this fall.

H.R. 3789 Class Action Jurisdiction Act of 1998

- Introduced by: Hyde
- Date Introduced: April 29, 1998
- Status: Referred to Judiciary; mark-up by subcommittee; mark-up by full committee 8/5;
- Provisions affecting rules: The bill would give federal courts original jurisdiction in class actions in diversity cases without regard to the value of the item in controversy and provide for removal of all class actions from state courts.

H.R. 3905 Fairness in Asbestos Compensation Act of 1998

- Introduced by: Representative Hyde
- Date Introduced: May 20, 1998
- Status: Referred to Committee on the Judiciary
- Provisions affecting rules
    - Creates the Asbestos resolution Corporation to conduct medical reviews and ADR. Also sets out provisions governing asbestos litigation in courts, including offer of judgment provisions, limits on class actions, and pre-filing medical certification.

H.R. 4221 Untitled

- Introduced by: Representative Coble
- Date Introduced: July 16, 1998
- Status: Referred to Committee on the Judiciary — letter from Civil Rules Committee to Hatch (7/21/98)
- Provisions affecting rules
    - Amends Civil Rule 30 restoring stenographic preference for recording depositions

H.R. 4286 Parent-Child Privilege (See H.R. 3577)

- Introduced by: Representative Andrews
- Date Introduced: July 21, 1998
- Status: Referred to Committee on the Judiciary; 7/31/98 referred to Subcommittee on Courts and Intellectual Property
- Provisions affecting rules
    - Adds Rule 502 to Federal Rules of Evidence establishing a parent/child privilege
    - Has technical error in section b Clerical amendments and a very strange effective date.

Joint Resolutions

S.J. Res. 6 (See also **S.J 44**; H.J. Res 71; HR 1322; S. 1081; H.R. 924))

- Introduced by: Kyl and Feinstein
- Date Introduced: January 21, 1997
- Status: Referred to Committee on the Judiciary; 4/28/98 hearing held **(S.J. 44)**; amended 7/7/98; 7/7/98 Reported to Senate by Senator Hatch with an amendment in the nature of a substitute. Placed on Senate Legislative Calendar - Calendar No. 455.
- Provisions affecting rules:
  - Victim's rights **[CR32]**