ADVISORY COMMITTEE ON CRIMINAL RULES

File Copy

Gleneden Beach, OR
October 15-16, 2003

CRIMINAL RULES COMMITTEE MEETING

October 15 - 16, 2003
Gleneden Beach, Oregon

I PRELIMINARY MATTERS

A. **Chair's Remarks, Introductions, and Administrative Announcements**

B. **Review/Approval of Minutes of April 2003, Meeting in Santa Barbara, California**

C. **Status of Criminal Rules: Report of Rules Committee Support Office.**

II. CRIMINAL RULES UNDER CONSIDERATION

A. **Rule Amendments Approved by Standing Committee and Forwarded to Judicial Conference**

1. Rules Governing § 2254 and § 2255 Proceedings.

2. Official Forms Accompanying Rules Governing § 2254 and § 2255 Proceedings.

3. Rule 35; Proposed Amendment re Added Definition of Sentencing.

B. **Proposed Amendments Approved for Publication and Public Comment**

1. Rule 12.2. Notice Of Insanity Defense; Mental Examination. Proposed Amendment Regarding Sanction For Defense Failure To Disclose Information.

2. Rules 29, 33 And 34; Proposed Amendments Re Rulings By Court On Motions To Extend Time For Filing Motions Under Those Rules.

3. Rule 32, Sentencing; Proposed Amendment Re Allocution Rights of Victims of Non-Violent and Non-Sexual Abuse Felonies.

4 Rule 32.1. Revoking or Modifying Probation or Supervised Release. Proposed Amendments to Rule Concerning Defendant's Right of Allocution.

5. Rule 59; Proposed New Rule Concerning Rulings By Magistrate Judges.

C. Proposed Amendments to Rules Under Active Consideration

1. Rule 29; Proposed Amendment Regarding Appeal for Judgments of Acquittal (Memo).

2. Rule 32.1. Revoking or Modifying Probation or Supervised Release; Proposed Amendment to Remove Requirement for Production of Certified Copies of Judgment. (Memo).

3. Rule 41. Search Warrants.

   a. Tracking-Device Warrants (Memo).

   b. Proposed Amendment to Address Warrants for Electronic Files (Memo).

D. Other Proposed Amendments to Rules — Pending and Deferred as Listed on Criminal Rules Docket

1. Rule 4. Proposed Amendment From Magistrate Judge B. Zimmerman re Clarification of Ability of Judges to Issue Warrants via Facsimilie Transmission (Referred to Chair and Reporter and Pending Further Action).

2. Rule 6. Proposed Amendment from ABA to Permit Counsel to Accompany Witness to Grand Jury (Referred to Chair and Reporter and Pending Further Action).

3. Rule 7(b). Proposed Amendment re Effect of Tardy Indictment, Proposed by Congressional Constituent (Referred to Chair and Reporter and Pending Further Action).

4. Rule 10. Proposal by Magistrate Judge W. Crigler re Guilty Plea at Arraignment (Committee Considered , 10/94; Deferred Indefinitely).

5. Rule 11. Proposal by Mr. Richard Douglas, Senate Foreign Relations Committee re Advising Defendant of Collateral Consequences (Immigration) of Guilty Plea (Referred to Chair and Reporter and Pending Further Action).

6. Rule 11. Proposal by Judge David Dowd re Determining Whether Plea Agreement was Communicated to Defendant (Referred to Chair and Reporter and Pending Further Action).

7. Rule 16. Proposal from Judge W. Wilson re Disclosure of Government Witnesses to Defense (Referred to Chair and Reporter and Pending Further Action).

8. Rule 23. Proposal from Mr. Jeremy Bell re Issue of Whether Jury Trial is Authorized (Referred to Chair and Reporter and Pending Further Action).

9. Rule 32(c)(5). Proposal from Mr. Gino Agnello, Clerk of 7th Circuit re Whether Clerk is Required to File Notice of Appeal (Referred to Chair and Reporter and Pending Further Action).

10. Rule 32.1. Decision in October 1997 to Monitor Legislation re Victims' Rights (Pending Further Action).

11. Rule 35. Proposal from ABA to Permit Defendant to Move for Reduction of Sentence (Referred to Chair and Reporter and Pending Further Action).

12. Rule 40. Proposal from Magistrate Judge Collings to Authorize Magistrate to Set New Conditions on Release (Referred to Chair and Reporter and Pending Further Action).

13. Rule 41. Proposal from Judge David Dowd re Recording of Oral Search Warrant (Committee Deferred Until Study Reveals Need for Change; Deferred Indefinitely).

14. Rule 57. Proposal from Standing Committee (12/97) re Uniform Effective Date for Local Rules (Deferred Indefinitely).

III. RULES AND PROJECTS PENDING BEFORE CONGRESS, STANDING COMMITTEE, JUDICIAL CONFERENCE, AND OTHER ADVISORY COMMITTEES.

A. **Status Report on Legislation Affecting Federal Rules of Criminal Procedure.**

B. **Other Matters**

IV. DESIGNATION OF TIMES AND PLACES FOR FUTURE MEETINGS

ADVISORY COMMITTEE ON CRIMINAL RULES

October 1, 2003

Chair:

Honorable Edward E. Carnes
United States Circuit Judge
United States Court of Appeals
United States Courthouse, Suite 500D
One Church Street
Montgomery, AL 36104

Members:

Honorable Susan C. Bucklew
United States District Judge
United States District Court
109 United States Courthouse
611 North Florida Avenue
Tampa, FL 33602

Honorable Paul L. Friedman
United States District Judge
United States District Court
6321 E. Barrett Prettyman
United States Courthouse
333 Constitution Avenue, N.W.
Washington, DC 20001-2802

Honorable David G. Trager
United States District Judge
United States District Court
225 Cadman Plaza, East
Room 224
Brooklyn, NY 11201

Honorable Harvey Bartle III
United States District Judge
United States District Court
16614 James A. Byrne United States
Courthouse
601 Market Street
Philadelphia, PA 19106-1714

Honorable James P. Jones
United States District Judge
United States District Court
180 West Main Street
Abingdon, VA 24210

Honorable Anthony J. Battaglia
United States Magistrate Judge
United States District Court
1145 Edward J. Schwartz United States
Courthouse
940 Front Street
San Diego, CA 92101-8927

Honorable Reta M. Strubhar
Judge
Court of Criminal Appeals of Oklahoma
State Capitol Building, Room 230
2300 North Lincoln Boulevard
Oklahoma City, OK 73105

Professor Nancy J. King
Vanderbilt University Law School
131 21st Avenue South, Room 248
Nashville, TN 37203-1181

Robert B. Fiske, Jr., Esquire
Davis Polk & Wardwell
450 Lexington Avenue
New York, NY 10017

Donald J. Goldberg, Esquire
Ballard Spahr Andrews & Ingersoll, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599

Lucien B. Campbell
Federal Public Defender
Western District of Texas
727 E. Durango Boulevard, B-207
San Antonio, TX 78206-1278

Assistant Attorney General
Criminal Division (ex officio)
Honorable Christopher A. Wray
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 4208
Washington, DC 20530-0001

Reporter:

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

Liaison Member:

Honorable Mark R. Kravitz
United States District Judge
United States District Court
Richard C. Lee United States Courthouse
141 Church Street
New Haven, CT 06510

Advisors and Consultants:

Professor Ira P. Robbins
American University
Washington College of Law
4801 Massachusetts Avenue, N.W.
Washington, DC 20016

Secretary:

Peter G. McCabe
Secretary, Committee on Rules of
Practice and Procedure
Washington, DC 20544

ADVISORY COMMITTEE ON CRIMINAL RULES

SUBCOMMITTEES

Rule 41 Subcommittee
(Open), Chair
Judge Harvey Bartle III
Professor Nancy J. King
Lucien B. Campbell, Esquire
DOJ representative

Subcommittee on Grand Jury
Judge Susan C. Bucklew, Chair
Judge Paul L. Friedman
Robert B. Fiske, Jr., Esquire
Donald J. Goldberg, Esquire
DOJ representative

Subcommittee on Habeas Corpus
Judge David G. Trager, Chair
Professor Nancy J. King
Lucien B. Campbell, Esquire
DOJ representative
Professor Ira P. Robbins, Consultant

JUDICIAL CONFERENCE RULES COMMITTEES

Chairs	**Reporters**
Honorable David F. Levi Chief Judge, United States District Court United States Courthouse 501 I Street, 14th Floor Sacramento, CA 95814	Prof. Daniel R. Coquillette Boston College Law School 885 Centre Street Newton Centre, MA 02159
Honorable Samuel A. Alito, Jr. United States Circuit Judge 357 United States Post Office and Courthouse 50 Walnut Street Newark, NJ 07101	Prof. Patrick J. Schiltz University of St. Thomas School of Law 1000 La Salle Avenue, MSL 400 Minneapolis, MN 55403-2015
Honorable A. Thomas Small United States Bankruptcy Judge United States Bankruptcy Court Post Office Drawer 2747 Raleigh, NC 27602	Prof. Jeffrey W. Morris University of Dayton School of Law 300 College Park Dayton, OH 45469-2772
Honorable Lee H. Rosenthal United States District Judge United States District Court 11535 Bob Casey U.S. Courthouse 515 Rusk Avenue Houston, TX 77002-2698	Prof. Edward H. Cooper University of Michigan Law School 312 Hutchins Hall Ann Arbor, MI 48109-1215
Honorable Edward E. Carnes United States Circuit Judge United States Court of Appeals United States Courthouse, Suite 500D One Church Street Montgomery, AL 36104	Prof. David A. Schlueter St. Mary's University School of Law One Camino Santa Maria San Antonio, TX 78228-8602
Honorable Jerry E. Smith United States Circuit Judge United States Court of Appeals 12621 Bob Casey U.S. Courthouse 515 Rusk Avenue Houston, TX 77002-2698	Prof. Daniel J. Capra Fordham University School of Law 140 West 62nd Street New York, NY 10023

Item IB

MINUTES (DRAFT)
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

April 28-29, 2003
Santa Barbara, California

The Advisory Committee on the Federal Rules of Criminal Procedure met at Santa Barbara, California on April 28 and 29, 2003. These minutes reflect the discussion and actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Carnes, Chair of the Committee, called the meeting to order at 8:30 a.m. on Monday, April 27, 2003. The following persons were present for all or a part of the Committee's meeting:

Hon. Edward E. Carnes, Chair
Hon. John M. Roll
Hon. Susan C. Bucklew
Hon. David G. Trager
Hon. Harvey Bartle III
Hon. Tommy E. Miller
Hon. Reta M. Strubhar
Prof. Nancy J. King
Mr. Lucien B. Campbell
Mr. Jonathan Wroblewski, designate of the Asst. Attorney General for the Criminal Division, Department of Justice
Prof. David A. Schlueter, Reporter

Also present at the meeting were: Hon. A. Wallace Tashima, member of the Standing Committee and liaison to the Criminal Rules Committee; Mr. Peter McCabe and Mr. James Ishida of the Administrative Office of the United States Courts, and Mr. John Rabiej Chief of the Rules Committee Support Office of the Administrative Office of the United States Courts.

Judge Carnes noted later in the meeting that Judge Miller's and Judge Roll's terms of appointment would expire in September 2003 and expressed deep appreciation for their hard work on a number of significant projects in their six years on the Committee. Judge Carnes pointed out that Judge Tashima's term on the Standing Committee would also end in September 2003, and thanked him for his contributions as a liaison member to the Criminal Rules Committee.

II. APPROVAL OF MINUTES

Judge Miller moved that the minutes of the Committee's meeting in Cape Elizabeth, Maine in September 2002 be approved. The motion was seconded by Judge Roll and following minor corrections to the Minutes, carried by a unanimous vote.

III. RULES PENDING BEFORE THE CONGRESS

Professor Schlueter informed the Committee that the package of Style amendments to Rules 1-60, the proposed substantive amendments to Rules 5, 10, 12.2, 12.4, 30, and 35 had become effective on December 1, 2002.

IV. RULES PUBLISHED FOR PUBLIC COMMENT:

A. Rule 41. Tracking-Device Warrants

Judge Miller informed the Committee that the comment period for the proposed amendments to Rule 41, regarding tracking-device warrants, and other amendments, had closed on February 15, 2003, and that the Committee had received written comments from seven persons or organizations. He added that those comments had been considered by the Rule 41 Subcommittee (Judge Miller, chair, Judge Bartle, Prof. King, Mr. Campbell, and Mr. Jaso), which in turn recommended only minor changes to the rule and note as published.

The Committee discussed a proposal from the National Assn' of Criminal Defense Lawyers (NADCL) that the rule contain a cross-reference to Rule 1(c), regarding the authority of federal judicial officers, other than magistrate judges, to issue search warrants. The Committee decided not to make the change to the rule. The Committee did agree with NADCL that the words "has authority" should be inserted in Rule 41(c)(3), and (4) to parallel similar language in Rule 41(c)(1) and (2). The Committee also considered, but rejected, a proposal from NADCL to completely redraft Rule 41(d) , regarding the finding of probable cause.

Mr. Wroblewski stated that the Department of Justice had raised the issue of whether the proposed rule should contain any reference to the point that some justification less than probable cause might support issuance of a warrant to install and use a tracking device. The Committee believed that doing so would be outside the scope of the amendment and that that issue should be left to the courts for resolution..

Judge Miller noted that Mr. Campbell had proposed several changes to Rule 41(e)(2)(B) concerning the time to be set for using a tracking device. His suggestion, that the word "reasonable" be inserted at several places in the rule, was adopted. The

Committee rejected a suggestion from NADCL that the rule place a limit of 90 days on monitoring activity.

Following additional discussion concerning the Committee Note, Judge Miller moved that the proposed amendments to Rule 41 be approved and forwarded to the Standing Committee for transmittal to the Judicial Conference. Judge Bartle seconded the motion, which passed with a unanimous vote.

B. Restyled Rules Governing § 2254 and § 2255 Proceedings and Official Forms Accompanying Rules

Judge Trager, chair of the Habeas Rules Subcommittee, provided a brief overview of the process of reviewing the public comments the Committee had received on the proposed amendments to the Rules Governing §§ 2254 and 2255 Proceedings and the official forms that accompany those rules.

1. Rules Governing § 2254 Proceedings.

Rule 1. Scope of Rules

It was noted that one of the commentators had suggested that Rule 1(b) be modified to reflect that for a habeas corpus petition not covered by § 2254, the court may apply some, but all of the rules. Following a brief discussion, Rule 1(b) was modified to reflect that point.

Rule 2. The Petition

Judge Trager noted that the Subcommittee recommended that Rule 2(c)(2) should read "state the facts" rather than "briefly summarize the facts." As one commentator noted, the current language may actually mislead the petitioner and is also redundant.

Also, he noted Rule (2)(c)(5) should be changed to emphasize that any person, other than the petitioner, who signs the petition must be authorized to do so; the revised rule now specifically cites § 2242. The Reporter added that the Committee Note has been amended to reflect that point.

Several members raised the question whether the proposed language in Rule 2(c)(4) would include petitions typed or printed on a computer. Following a brief discussion the Committee decided to insert the word "printed" in the rule..

Rule 3. Filing the Petition; Inmate Filing

Judge Trager pointed out that The Committee Note has been changed to reflect that the clerk must file a petition, even in those instances where the necessary filing fee or

in forma pauperis form is not attached. The Note also includes new language concerning the equitable tolling of the statute of limitations.

Rule 4. Preliminary Review; Serving the Petition and Order

Judge Trager explained that the Subcommittee recommended that the rule be modified to reflect the view of some commentators that it is common practice in some districts for the government to file a pre-answer motion to dismiss. The Committee agreed with that recommendation and changed the word "pleading" in the rule to "response." It also made several minor changes to the Committee Note.

Rule 5. The Answer and the Reply

He pointed out that the Subcommittee recommended that Rule 5(a) be modified to read that the government is not required to "respond" to the petition unless the court so orders; the term "respond" has been suggested because it leaves open the possibility that the government's first response (as it is in some districts) is in the form of a pre-answer motion to dismiss the petition. The Note has been changed to reflect the fact that although the rule itself does not reflect that particular motion, it is used in some districts and refers the reader to Rule 4.

Judge Trager also informed the Committee that the proposed rule was potentially confusing to the extent that it required that the answer address affirmative defenses. That term, he noted, was a misnomer. Following additional discussion, the Committee agreed to delete the term from Rule 5(b) and changed the Note; it now reflects that there has been a potential substantive change from the current rule, to the extent that the published rule now requires that the answer address procedural bars and any statute of limitations. The Note states that the Committee believes the new language reflects current law.

The Committee discussed proposed Rule 5(e) that would provide the petitioner with the right to file a response to the respondent's answer. Judge Miller moved, and Judge Trager seconded, a motion that the rule remain as published, that is, petitioners would have the right to reply in all cases. The motion carried by a vote of 5 to 3.

The Note also addresses the use of the term "traverse." One commentator noted that that is the term that is commonly used but that it does not appear in the rule itself.

Rule 6. Discovery

Judge Trager pointed out that the Subcommittee had recommended new language for Rule 6(b), to require that discovery requests be supported by reasons, to assist the court in deciding what, if any, discovery should take place. The Committee agreed with the change and amended the Note to reflect the view that it believed that the change made explicit what has been implicit in current practice.

Rule 7. Expanding the Record

Judge Trager noted that the Subcommittee had recommended a minor change to Rule 7(a) by removing the reference to the "merits" of the petition. One commentator, he observed, had commented that the court might wish to expand the record for purposes other than the merits of the case. The Committee agreed to the change and also changed the rule to reflect that someone other than a party may authenticate the materials.

Rule 8. Evidentiary Hearing

Following a brief discussion, the Committee decided to change the Committee Note to reflect the view that the amendments to Rule 8 were not intended to supercede the restrictions on evidentiary hearings contained in § 2254(e)(2).

Rule 9. Second or Successive Petitions

Judge Trager pointed out the Subcommittee had recommended that new language be added to Rule 9 that would require the court to transfer a second or successive petition to the court of appeals. That practice, he observed, is currently used in several circuits, as reflected in the Note. Judge Carnes stated that there would certainly be cases that would not need to be transferred and the proposed rule would potentially impose an unnecessary burden on the courts of appeal. Judge Trager pointed out that for pro se petitioners, the proposed rule would expedite the process and insure that they had their day in court. Ultimately, the Committee voted to delete the new language.

Rule 10. Powers of a Magistrate Judge

Following a brief discussion, the Committee restyled the proposed rule

Rule 11. Applicability of Federal Rules of Civil Procedure

Judge Trager stated that the Subcommittee had no proposed changes to Rule 11.

2. Rules Governing § 2255 Proceedings.

Rule 1. Scope

Judge Trager stated that the Subcommittee had no proposed changes to Rule 1.

Rule 2. The Motion

Judge Trager stated that the Subcommittee recommended that Rule 2(b)(2) should read "state the facts" rather than "briefly summarize the facts." He pointed out that one

commentator had written that the current language may actually mislead the petitioner and is also redundant.

Several members raised the question whether the proposed language in Rule 2(b)(4) would include petitions typed or printed on a computer. Following a brief discussion the Committee decided to insert the word "printed" in the rule..

Judge Trager also noted Rule (2)(b)(5) should be changed to emphasize that any person, other than the petitioner, who signs the petition must be authorized to do so. Following discussion on whether or not § 2254 covered § 2255 proceedings, the Committee decided not to specifically cross-reference that statute.

Rule 3. Filing the Motion; Inmate Filing

Judge Trager stated that the Subcommittee had recommended a revision to the Committee Note to reflect that the clerk must file a motion, even in those instances where the necessary filing fee or in forma pauperis form is not attached. The Note also includes new language concerning the equitable tolling of the statute of limitations.

Rule 4. Preliminary Review

Judge Trager observed that the Habeas Subcommittee recommended that Rule 4 be changed to reflect the view of some commentators that it is common practice in some districts for the government to file a pre-answer motion to dismiss the § 2255 motion. The Committee agreed with that recommendation and changed the word "pleading" in the rule to "response." It also made several minor changes to the Committee Note.

Rule 5. The Answer and the Reply

Judge Trager pointed out that the Subcommittee recommended that Rule 5(a) be modified to read that the government is not required to "respond" to the motion unless the court so orders; the term "respond" has been suggested because it leaves open the possibility that the government's first response (as it is in some districts) is in the form of a pre-answer motion to dismiss the motion. The Note has been changed, he stated, to reflect the fact that although the rule itself does not reflect that particular motion, it is used in some districts and refers the reader to Rule 4.

The Committee had previously discussed the proposed amendment to proposed Rule 5(e), of the § 2254 rules that would provide the petitioner with the right to file a response to the respondent's answer. That proposal had been approved by a vote of 5 to 3, supra. The Committee agreed that the approach should be applied to Rule 5(d) of the § 2255 rules.

Finally, he stated that the Subcommittee recommended a change to the Note to addresses the use of the term "traverse," a point raised by one of the commentators on the proposed rule.

Rule 6. Discovery

Judge Trager stated that the Subcommittee had recommended new language for Rule 6(b), to require that discovery requests be supported by reasons, to assist the court in deciding what, if any, discovery should take place. The Committee agreed with the change and amended the Note to reflect the view that it believed that the change made explicit what has been implicit in current practice.

Rule 7. Expanding the Record

Judge Trager stated that the Habeas Rules Subcommittee had recommended a minor change to Rule 7(a) by removing the reference to the "merits" of the petition. He pointed out that one commentator had stated that the court may wish to expand the record for purposes other than the merits of the case. The Committee agreed to the change and also changed the rule to reflect that someone other than a party may authenticate the materials.

Rule 8. Evidentiary Hearing

The Committee made no changes to Rule 8, as published for public comment.

Rule 9. Second or Successive Petitions

Judge Trager pointed out that the subcommittee has recommended that new language be added to Rule 9 that would require the court to transfer a second or successive motion to the court of appeals. That practice is currently used in several circuits, as reflected in the Note. Applying its decision, supra, regarding Rule 9 of the § 2254 Rules, the Committee decided not to include the recommended language.

Rule 10. Powers of a Magistrate Judge

Following a brief discussion, the Committee restyled the proposed rule

Rule 11. Time to Appeal

Following a brief discussion on whether the rule should include any reference to a certificate of appeal, the Committee made no changes to Rule 11.

Rule 12. Applicability of Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure

The Committee made no changes to Rule 12.

3. Official Forms Accompanying the § 2254 and § 2255 Rules

Judge Trager initiated discussion regarding the official forms for the § 2254 proceedings and § 2255 proceedings, by observing that a number of commentators had addressed the wisdom of including possible grounds for relief in the official forms. Several members pointed out that listing possible grounds for relief might lead to petitioners and movants raising a number of nonmeritorius arguments; other members responded that the list would provide useful guides for petitioners and movants in framing the issues for the court's consideration. Following additional discussion, Judge Bartle moved that the list of possible grounds for relief be deleted from the forms accompanying the § 2254 Rules. Judge Miller seconded the motion, which carried by a vote of 6 to 4. Following additional brief discussion, Judge Bartle moved, and Judge Miller seconded, a motion to delete the list of possible grounds of relief from the § 2255 forms. That motion also passed by a vote of 6 to 4.

Judge Trager moved that the Committee approve the §§ 2254 and 2255 Rules and the accompanying forms, and forward them to the Standing Committee for transmittal to the Judicial Conference. Judge Miller seconded the motion, which carried by a unanimous vote..

C. Rule 35. Definition of Sentencing

Professor Schlueter pointed out that at the Committee's Spring 2002 meeting that the Committee had approved a change to Rule 35 that would have substituted the term "oral announcement of the sentence" in place of the term "sentencing," throughout the rule. He continued by noting that that task had proved cumbersome and that at the September 2002 meeting, the Committee had agreed to insert a new Rule 35(a) that would include a definition of sentencing for purposes of Rule 35. He also pointed out that he had drafted a proposed Note to accompany that new provision.

Following brief discussion, the Committee agreed to designate the new definitional provision as Rule 35(c) in order to maintain the current numbering within the rule, in particular Rule 35(b), which is readily identifiable to courts and counsel. The Committee ultimately approved the rule and voted to forward the amendment to the Standing Committee with a recommendation to transmit it to the Judicial Conference.

V. PENDING PROPOSED AMENDMENTS TO RULES

A. Rule 11(b)(1)(A). Use of Defendant's Statements; Proposal to Clarify Restyled Language.

Judge Carnes informed the Committee that Judge Brock Hornby had written to the Committee, suggesting that restyled Rule 11 now contained an ambiguity. In his view, as rewritten, Rule 11(b)(1)(A) seems to require that the judge need only advise a defendant of the consequences of making a false statement under oath, if the defendant is entering a guilty plea to a charge involving perjury or false statement. The Committee discussed the issue and concluded that no corrective action was required.

B. Rule 11. Proposal to Require Judge to Address Defendant re Collateral Consequences of Plea.

Judge Friedman, participating by telephone, recommended that the Committee consider an amendment to Rule 11 that would require the court to inform an alien who is pleading guilty of the possible collateral consequences that might result, i.e., deportation. Judge Friedman pointed out the suggestion had originated in a memo prepared by Mr. Roger Pauley, after he had left the Committee. The Reporter pointed out that the Committee had considered, and rejected a similar proposal in 1992. Judge Trager responded that since 1992, there had been a change in the law, to the effect that currently, a finding of guilt for an aggravated felony results in mandatory deportation. Judge Tashima added that offenses other than an aggravated felony may serve as grounds for deportation, but that requiring the advice could prove to be a slippery slope. Professor King noted that she was aware of cases where defendants had alleged ineffective assistance of counsel where the defendant had not been informed by counsel of the possibility of deportation if he or she entered a plea of guilty to an aggravated felony.

Mr. Campbell expressed the view that the general advice regarding possible consequences would be sufficient and Judge Roll observed that the area of immigration statutes and regulations was a highly technical area and that it would be dangerous to require judges to give any specific warning about possible deportation.

Mr. Wroblewski pointed out the possible legal implications of amending Rule 11 to require the warning and noted that the ABA is studying the issue of collateral consequences.. Judge Miller added that if the proposal were adopted, that there might be other areas where a warning about collateral consequences would be required, e.g., tax consequences, civil liability, etc. Judge Trager believed that no amendment was required; judges could give the advice, without being required to do so.

Following additional comments, Judge Trager moved, and Mr. Campbell seconded, a motion to table the proposal. That motion failed by a vote of 5-6. Judge Roll then moved that Rule 11 not be amended to include a warning requirement concerning collateral consequences vis a vis, immigration issues. Judge Miller seconded the motion, which carried by a vote of 6-3-1.

C. Rule 12.2. Notice of Insanity Defense; Mental Examination and Sanctions for Failure to Disclose.

The Reporter noted that Mr. Pauley had written to the Committee in July 2001 suggesting that the revised Rule 12.2, currently pending before the Supreme Court, was missing a sanction provision for those cases where the defense fails to disclose the results of a mental examination conducted by the defense expert. The issue had been discussed briefly at the April 2002 meeting and again at the September 2002 meeting. At that meeting Judge Carnes had appointed a subcommittee, consisting of Mr. Campbell and Mr. Jaso to consider language for the amendment.

Using language submitted by that Subcommittee, the Reporter presented the proposed language and suggested Committee Note.

Several members suggested rewriting the last paragraph of the Committee Note to recognize that the court's sanction should be proportional to counsel's failure to disclose. Following additional discussion, Mr. Campbell moved that the Committee approve the proposed amendment and submit it to the Standing Committee with a recommendation to publish the rule for public comment. Judge Roll seconded the motion, which carried with a unanimous vote.

D. Rules 29, 33, 34, and 45; Proposed Amendments re Rulings by Court and Setting Times for Filing Motions.

Judge Carnes reviewed briefly the Committee's consideration of amendments to Rules 29, 33, 34, and 45, proposed by Judge Friedman, who participated by telephone. He noted that under the rules, the court was required to rule on any motion for an extension of time, within the seven-day period specified for filing the underlying motion. Failure to do so, deprived the court of the jurisdiction to consider an underlying motion, filed after the seven-day period. Those proposals, said Judge Carnes, had been under consideration for several years and that the Reporter had drafted language to make the necessary changes. Judge Friedman urged the Committee to make the amendment and endorsed the language suggested by the Reporter.

Following additional brief discussion, the Judge Miller moved that the Committee approve the proposed language and forward the amendments to the Standing Committee with a recommendation to publish them for public comment. Professor King seconded the motion, which carried by a vote of 8 to 2.

E. Rule 29; Proposed Amendment Regarding Appeal for Judgments of Acquittal.

Judge Carnes informed the Committee that the Department of Justice had submitted a lengthy memo regarding a proposed change to Rule 29, that would preserve the government's right to appeal an adverse ruling on a motion for a judgment of acquittal. Mr. Wroblewski explained that under the current rule permits the judge to reserve ruling on a motion for a judgment of acquittal until after the jury has returned a verdict. Rulings made before a verdict cannot be appealed by the government, no matter

how erroneous. In his view, the Department's proposal would correct an anomaly in the Rules, that is, the ability of a court to grant an unappealable judgment of acquittal. He offered several examples of cases in which the court had granted a motion after jeopardy has attached, but before the jury returned a verdict, and where the reasons given by the courts to support granting the motion were unsupportable. He noted that the proposal was controversial and believed that it was important to published a proposed amendment and obtain public comment.

Judge Carnes noted the gravity of the proposed amendment and recognized examples where the district court may have abused its discretion. But he questioned whether an amendment to Rule 29 was the only remedy available to correct those possible abuses. Judge Trager noted that he supported the proposal. Professor King observed that there were weighty policy considerations involved in any decision to expand the government's right to appeal.

Judge Miller recommended that the matter be deferred to a later meeting and that it would be helpful to obtain additional data on the scope of the problem. The Committee discussed the possibility of calling upon the Federal Judicial Center to study the issue.

Judge Roll added that it would be helpful to address related issues, for example, the issue of lesser-included offenses or multiple-count cases, and also to examine those cases where is clear that there may be obviously flawed cases where the court does not wish to put the jury through the motions of deliberating to a verdict.

Finally, several members observed that after the jury returns a guilty verdict in a high-profile case, the judge may face additional political pressure not to grant the motion.

F. Rule 32, Sentencing; Proposed Amendment re Allocution Rights of Victims of Non-violent and Non-sexual Abuse Felonies.

Judge Carnes pointed out that at its September 2002, meeting the Committee had agreed to amend Rule 32 to provide for allocution for victims of non-violent and non-sexual abuse felonies. The Reporter explained that based upon those discussions he had drafted proposed language for the amendment, including a provision that would provide that a court's decision regarding allocution would not be reviewable, based upon concerns raised at the September meeting.

Several members expressed concern over the advisability of including a nonreviewability provision in the rules. Others observed that there was some authority for the view that victims did not have standing to appeal a court's decision denying them the ability to address the court. Following additional discussion, Judge Miller moved and Judge Bartle seconded, a motion to delete the nonreviewability provision. That motion carried by a vote of 9-0-1.

The Reporter also explained that the draft amendment did not make any specific provision for hearing from representatives of victims of non-violent or non-sexual abuse felonies, on the view that the policy reasons for permitting statements by third persons did not seem as compelling, for what would usually be considered "economic" crimes. Judge Roll agreed and stated that he would be opposed to an amendment extending the allocution right to third persons. Judge Bartle observed that in any event, the court could decide to hear from third persons, speaking on behalf of a victim.

Judge Miller moved that the Committee approve the amendment and forward it to the Standing Committee with a recommendation that it be published for public comment. Judge Bartle seconded the motion, which carried by a vote of 7-2-1.

G. Rule 32.1. Revoking Or Modifying Probation Or Supervised Release. Proposed Amendments To Rule Concerning Defendant's Right Of Allocution.

The Reporter briefly reminded the Committee that in 2002, Judge had provided the Committee with a copy of *United States v. Frazier*, 283 F.3d 1242 (11th Cir. 2002), where the court observed that there is no explicit provision in Rule 32.1 for the defendant's right to allocution; he pointed out that the court had recommended that the Advisory Committee might wish to address that issue. At the April 2002 meeting, the Committee had voted to amend Rule 32.1 and that in response to that vote, the Reporter had drafted proposed language, that would add a new Paragraph (E) in Subdivision (b)(2). He added that although the Committee had addressed only the question of allocution rights at revocation hearings, a similar provision might be appropriate at proceedings to modify a sentence. The Committee had agreed with that view and asked the Reporter to consider the issue and prepare an additional draft amendment. He noted that he had done so.

Following a brief discussion of the draft, Judge Miller moved that the Committee approve the proposed amendment to Rule 32.1 and forward it to the Standing Committee with a recommendation that it be published for public comment. Judge Roll seconded the motion, which carried by a unanimous vote.

H. Rule 32.1. Revoking Or Modifying Probation Or Supervised Release; Proposed Amendment To Remove Requirement For Production Of Certified Copies Of Judgment..

Judge Carnes noted that Magistrate Judge Sanderson had recommended that Rule 32.1 be amended to remove the requirement that the government provided certified copies of the judgment. Judge Miller observed that Rule 5 did not contain that requirement and that the language in Rule 32.1 was probably a carry-over from the attempt to move parts of former Rule 40 to Rules 5 and 32.1. He noted that some deficiencies in Rule 40 continue to surface and recommended deferring the recommendation to see if other problems with the restyled rules surface. He offered to

poll other magistrate judges to see if this is a problem, and if there are other problems that should be addressed.

I. Rule 59; Proposed New Rule Concerning Rulings by Magistrate

Judge Miller provided a brief history of the proposed new rule that would address the issue of review of magistrate judge decisions: Judge Tashima had originally proposed that the Committee consider adding a new rule to the Rules of Criminal Procedure that would parallel Rule of Civil Procedure 72(a). The issue had been raised in *United States v. Abonce-Barerra*, 257 F.3d 959, 969 (9th Cir. 2001). At its April 2002 meeting, the Committee had voted consider the issue further and at its September 2002 meeting he had Judge Roll had presented language for the Committee's consideration, which would have been in the form of an amendment to Rule 12. Following discussion at that meeting the subcommittee had amended the proposal to include reference to magistrate judges taking guilty pleas. After that September meeting, he had consulted the Magistrate Judges Committee to solicit their views on the proposed amendment.

After further consideration, the subcommittee now recommended that any proposed rule not include reference to guilty pleas. First, he noted, the Magistrate Judges' Committee was opposed to any reference in the rule to taking guilty pleas. And second, the Ninth Circuit had granted *en banc* review in *United States v. Reyna-Tapia*, 294 F.3d 1192 (9th Cir.), *vacated by* 315 F.3d 1107 (9th Cir. 2002), the case that had provided the impetus for including reference to guilty pleas in the proposed rule.

Judge Miller also explained that the subcommittee had redrafted the rule as a new Rule 59.

In considering the proposed language, several members noted that there was no provision for appealing a magistrate judge's oral orders. Additional language addressing that point was discussed and added to the draft.

Following a brief discussion concerning the differences between "nondispositive" and "dispositive" matters, Judge Trager moved that the Committee approve the new Rule 59 and forward it to the Standing Committee with a recommendation that it be published for public comment. Judge Roll seconded the motion, which carried by a vote of 8 to 1.

VI. OTHER RULES AND PROJECTS PENDING BEFORE ADVISORY COMMITTEES, STANDING COMMITTEE AND JUDICIAL CONFERENCE

A. Status Report on Legislation Affecting the Federal Rules of Criminal Procedure

1. Rule 6. Grand Jury

Mr. Rabiej reported that as the restyled Criminal Rules were going into effect in December 2002, Congress had further amended Rule 6, based upon the former version of the rule. The amendment permits the government to share grand jury information with foreign governments in terrorism cases. He noted that he, the Reporter, Judge Carnes, and the Department of Justice had prepared conforming language to remedy the conflict in the language, to date Congress had not made the change. Thus, there is a potential conflict between the rule that went into effect on December 1, 2002, and the subsequent legislative amendment.

2. Congressional Consideration of an Amendment to Rule 46.

Mr. Rabiej briefly reported that Congress had considered an amendment to Rule 46, urged by bail bondsmen that would potentially limit the ability of judges to send conditions for release, other than for failure to appear in court. Mr. Rabiej added that the bail bondsmen were concerned that if left intact, Rule 46 might serve as the basis for similar treatment in state practice. Judge Carnes indicated that he had testified on the matter and presented additional statistical data supporting the current version of the rule.

VII. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

The Committee tentatively agreed to hold its next meeting in October 2003, in Oregon, depending on availability of accommodations.

Respectfully submitted

David A. Schlueter
Professor of Law
Reporter, Criminal Rules Committee

Item IIB

Preliminary Draft of

Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure

Request For Comment

ALL WRITTEN COMMENTS DUE BY

February 16, 2004

COMMENTS ARE SOUGHT ON AMENDMENTS TO:

Appellate Rules	4, 26, 27, 28, 32, 34, 35, 45, and new Rules 28.1 and 32.1
Bankruptcy Rules	1007, 3004, 3005, 4008, 7004, and 9006
Civil Rules	6, 24, 27, 45, and new Rule 5.1
Admiralty Rules	B and C
Criminal Rules	12.2, 29, 32, 32.1, 33, 34, 45, and new Rule 59

PUBLIC HEARINGS WILL BE HELD ON THE AMENDMENTS TO:

Appellate Rules in Los Angeles, California, on January 20, 2004, and in Washington, D.C., on January 26, 2004; Bankruptcy Rules in Washington, D.C., on January 30, 2004; Civil Rules in Houston, Texas, on January 9, 2004; and Criminal Rules in Atlanta, Georgia, on January 23, 2004.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE JUDICIAL CONFERENCE OF THE UNITED STATES
August 2003

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES

August 15, 2003

TO THE BENCH, BAR, AND PUBLIC:

Proposed Rules and Official Forms Amendments

The Judicial Conference Advisory Committees on the Appellate, Bankruptcy, Civil, and Criminal Rules have proposed amendments to federal rules and forms and requested that the proposals be circulated to the bench, bar, and public for comment. The proposed amendments are posted on the Internet at <http://www.uscourts.gov/rules>.

Opportunity for Public Comment

Please provide any comments and suggestions on the proposed amendments whether favorable, adverse, or otherwise as soon as possible. **The comment deadline is February 16, 2004**. Please send all correspondence to: Secretary of the Committee on Rules of Practice and Procedure, Administrative Office of the United States Courts, Washington, D.C. 20544. Comments may also be sent electronically via the Internet to http://www.uscourts.gov/rules.

The Advisory Committees will hold public hearings on the proposed amendments to the rules and forms on the following dates:

January 9, 2004	Houston, Texas	Civil Rules
January 20, 2004	Los Angeles, California	Appellate Rules
January 23, 2004	Atlanta, Georgia	Criminal Rules
January 26, 2004	Washington, D.C.	Appellate Rules
January 30, 2004	Washington, D.C.	Bankruptcy Rules

If you wish to testify you must contact the Committee Secretary at the above address **at least 30 days before the hearing**. The Advisory Committees will review all timely comments. All comments are made part of the official record and are available to the public.

After the public comment period, the Advisory Committees will decide whether to submit the proposed amendments to the Standing Committee on Rules of Practice and Procedure. At present, the Standing Committee has not approved these proposed amendments, except to authorize their publication for comment. The proposed amendments have not been submitted to nor considered by the Judicial Conference or the Supreme Court.

Anthony J. Scirica
Chair

Peter G. McCabe
Secretary

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

ANTHONY J. SCIRICA
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

SAMUEL A. ALITO, JR.
APPELLATE RULES

A. THOMAS SMALL
BANKRUPTCY RULES

DAVID F. LEVI
CIVIL RULES

EDWARD E. CARNES
CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

TO: Hon. Anthony J. Scirica, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Ed Carnes, Chair
Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT: Report of the Advisory Committee on Criminal Rules

DATE: May 15, 2003

I. Introduction.

The Advisory Committee on the Rules of Criminal Procedure met on April 28-29, 2003, in Santa Barbara, California and took action on proposed amendments to the Rules of Criminal Procedure.

* * * * *

II. Action Items—Summary and Recommendations.

* * * * *

Second, the Committee has considered and recommended amendments to the following Rules:

- Rule 12.2. Notice of Insanity Defense; Mental Examination; Sanction for Failing to Disclose.
- Rules 29, 33, 34 & 45. Regarding Ruling by Judge on Motions to Extend Time for Filing Motions Under Those Rules.
- Rule 32. Sentencing; Regarding Victim Allocution.
- Rule 32.1. Revoking or Modifying Probation or Supervised Release; Regarding Allocution by Defendant.
- New Rule 59. Review of Rulings by Magistrate Judges.

The Committee recommends that those rules be published for public comment.

* * * * *

IV. Action Items—Recommendation to Publish Amendments to Rules.

A. ACTION ITEM—Rule 12.2. Notice of Insanity Defense; Mental Examination and Sanctions for Failure to Disclose.

For the last year the Committee has considered a proposal to amend Rule 12.2 to fill a perceived gap. Although the rule

contains a sanctions provision for failing to comply with the requirements of the rule, there is no provision stating possible sanctions if the defendant does not comply with Rule 12.2(c)(3), which requires the defendant to disclose to the government the results and reports of the defendant's expert examination.

The Committee has unanimously proposed an amendment to Rule 12.2(d) to address that issue and requests that the rule be published for public comment.

* * * * *

B. ACTION ITEM—Rules 29, 33, 34, and 45; Proposed Amendments re Rulings by Court and Setting Times for Filing Motions.

In Rules 29, 33, and 34 the court is required to rule on any motion for an extension of time, within the seven-day period specified for filing the underlying motion. Failure to do so deprives the court of the jurisdiction to consider an underlying motion, filed after the seven-day period. *See United States v. Smith*, 331 U.S. 469, 473-474 (1947) (rejecting argument that trial court had power to grant new trial on its own motion after expiration of time in Rule 33); *United States v. Marquez*, 291 F.3d 23, 27-28 (D.C. Cir. 2002) (citing language of Rule 33, and holding that "district court forfeited the power to act when it failed to fix a time for filing a motion for new trial within seven days of the verdict"). Thus, if a defendant files a request for an extension of time to file a motion for a judgment of acquittal within the seven-day period, the judge must rule on that motion or request within the same seven-day period. If for some reason the court does not act on the request within the seven days, the court lacks jurisdiction to act on the underlying substantive motion.

Parallel amendments have been proposed for Rules 29, 33, and 34 and a conforming change has been proposed for Rule 45. The defendant would still be required to file motions under those rules within the specified seven-day period unless the time is extended. And the defendant would still be required to file within that seven-day period any request for extension. The change is that the court would not be required to act on that motion within the same seven-day period on the request for the extension.

The Rule and Committee Note . . . was approved by an 8 to 2 vote of the Committee . . ..

C. ACTION ITEM—Rule 32, Sentencing; Proposed Amendment re Allocution Rights of Victims of Non-violent and Non-sexual Abuse Felonies.

Currently, Rule 32(i)(4) provides for allocution at sentencing by victims of violent crimes and sexual abuse. Although there is no provision in the current rule for victim allocution for other felonies, the Committee understands that many courts nonetheless consider statements from victims of felonies that do not involve violence or sexual abuse.

At its September 2002 meeting, the Committee decided to amend Rule 32 to provide for allocution for victims of non-violent and non-sexual abuse felonies. At its April 2003 meeting, the Committee continued its discussion of the proposed amendment and voted by a margin of 7 to 2, with one abstention, to recommend that the proposed amendment be published for comment.

The Committee considered but rejected a provision that would provide that a court's decision regarding allocution in this type of case would not be reviewable. In rejecting that provision, the Committee considered the fact that there is already some authority for the view that victims do not have standing to appeal a court's decision denying them the ability to address the court.

The proposed amendment does not make any specific provision for hearing from representatives of victims of non-violent or non-sexual abuse felonies, because the Committee believes that the policy reasons for permitting statements by third persons are not as compelling in cases involving "economic" crimes. In any event, the rule does not prohibit the court from considering statements from third persons, speaking on behalf of victims.

* * * * *

D. ACTION ITEM—Rule 32.1. Revoking Or Modifying Probation Or Supervised Release. Proposed Amendments To Rule Concerning Defendant's Right Of Allocution.

In *United States v. Frazier*, 283 F.3d 1242 (11th Cir. 2002), the court observed that there is no explicit provision in Rule 32.1 giving the defendant a right to allocution; it suggested that the Advisory Committee might wish to address that matter. At the Committee's April 2002 meeting, it voted to amend Rule 32.1 to address allocution rights at revocation hearings; at its September 2002 meeting, the Committee decided to consider a further amendment to the rule that would include a similar allocution provision in proceedings to modify a sentence.

The Committee unanimously approved the proposed amendment to Rule 32.1 and recommends that the Standing Committee approve the amendments for publication.

*****

E. ACTION ITEM—Rule 59; Proposed New Rule Concerning Rulings by a Magistrate Judge

In response to a decision by the Ninth Circuit in *United States v. Abonce-Barerra*, 257 F.3d 959, 969 (9th Cir. 2001), the Committee has considered an amendment to the Rules of Criminal Procedure that would parallel Federal Rule of Civil Procedure 72, which addresses procedures for appealing decisions by magistrate judges.

At its April 2002 meeting, the Committee voted to consider the issue further and at its September 2002 meeting the Committee adopted a draft rule that would have included not only procedures for appealing a magistrate judge's decision but would also have addressed the ability of a magistrate judge to take a guilty plea. That provision was dropped, however, due to two developments. First, the Magistrate Judges' Committee was opposed to any reference in the rule to taking guilty pleas. And second, the Ninth Circuit had granted *en banc* review in *United States v. Reyna-Tapia*, 294 F.3d 1192 (9th Cir.), *vacated by* 315 F.3d 1107 (9th Cir. 2002), the case that had provided the impetus for including reference to guilty pleas in the proposed rule. [Following the meeting, the Committee learned the court had decided that a magistrate judge could hear Rule 11 plea colloquies, for findings and recommendations and that the district court was not required to conduct a de novo review unless one of the parties objected.]

The current draft, approved by a vote of 8 to 1 would be new Rule 59 and it would address only the issue of appealing a magistrate judge's orders, both for dispositive and nondispositive matters.

* * * * *

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 12.2. Notice of an Insanity Defense; Mental Examination

1 * * * * *

2 **(d) Failure to Comply.**

3 (1) *Failure to Give Notice or to Submit to*

4 *Examination.* ~~If the defendant fails to give~~

5 ~~notice under Rule 12.2(b) or does not submit to~~

6 ~~an examination when ordered under Rule~~

7 ~~12.2(c), the~~ The court may exclude any expert

8 evidence from the defendant on the issue of the

9 defendant's mental disease, mental defect, or any

10 other mental condition bearing on the

11 defendant's guilt or the issue of punishment in a

12 capital case~~.~~ if the defendant fails to:

13 (A) give notice under Rule 12.2(b); or

---

*New material is underlined; matter to be omitted is lined through.

14 (B) submit to an examination when ordered

15 under Rule 12.2(c).

16 (2) ***Failure to Disclose.*** The court may exclude any

17 expert evidence for which the defendant has

18 failed to comply with the disclosure requirement

19 of Rule 12.2(c)(3).

20 * * * * *

COMMITTEE NOTE

The amendment to Rule 12.2(d) fills a gap created in the 2002 amendments to the rule. The substantively amended rule that took effect December 1, 2002, permits a sanction of exclusion of "any expert evidence" for failure to give notice or failure to submit to an examination, but provides no sanction for failure to disclose reports. The proposed amendment is designed to address that specific issue.

Rule 12.2(d)(1) is a slightly restructured version of current Rule 12.2(d). Rule 12.2(d)(2) is new and permits the court to exclude any expert evidence for failure to comply with the disclosure requirement in Rule 12.2(c)(3). The sanction is intended to apply only to the evidence related to the matters addressed in the report that the defense failed to disclose. Unlike the broader sanction for the two violations listed in Rule 12.2(d)(1)—which can substantially affect the entire hearing—the Committee believed that it would be overbroad to expressly authorize exclusion of "any" expert evidence, even evidence unrelated to the

results and reports that were not disclosed as required in Rule 12.2(c)(3).

As with sanctions for violating other parts of the rule, the amendment entrusts to the court the discretion to fashion an appropriate sanction proportional to the failure to disclose the results and reports of the defendant's expert examination. *See Taylor v. Illinois*, 484 U.S. 400, 414 n. 19 (1988) (court should consider "the effectiveness of less severe sanctions, the impact of preclusion on the evidence at trial and the outcome of the case, the extent of prosecutorial surprise or prejudice, and whether the violation was willful"), citing *Fendler v. Goldsmith*, 728 F.2d 1181 (9th Cir. 1983).

Rule 29. Motion for a Judgment of Acquittal

1 * * * * *

2 **(c) After Jury Verdict or Discharge.**

3 **(1) Time for a Motion.** A defendant may move for

4 a judgment of acquittal, or renew such a motion,

5 within 7 days after a guilty verdict or after the

6 court discharges the jury, whichever is later. ~~, or~~

7 ~~within any other time the court sets during the 7-~~

8 ~~day period.~~

9 * * * * *

COMMITTEE NOTE

Rule 29(c) has been amended to remove the requirement that the court must act within seven days after a guilty verdict or after the court discharges the jury, if it sets another time for filing a motion for a judgment of acquittal. This amendment parallels similar changes to Rules 33 and 34. Further, a conforming amendment has been made to Rule 45(b)(2).

Currently, Rule 29(c) requires the defendant to move for a judgment of acquittal within seven days of the guilty verdict, or after the court discharges the jury, whichever occurs later, or some other time set by the court in an order issued within that same seven-day period. Similar provisions exist in Rules 33 and 34. Courts have held that the seven-day rule is jurisdictional. Thus, if a defendant files a request for an extension of time to file a motion for a judgment of acquittal within the seven-day period, the court must rule on that motion or request within the same seven-day period. If for some reason the court does not rule on the request within the seven days, it loses jurisdiction to act on the underlying substantive motion. *See, e.g., United States v. Smith*, 331 U.S. 469, 473-474 (1947) (rejecting argument that trial court had power to grant new trial on its own motion after expiration of time in Rule 33); *United States v. Marquez*, 291 F.3d 23, 27-28 (D.C. Cir. 2002) (citing language of Rule 33, and holding that "district court forfeited the power to act when it failed to fix a time for filing a motion for new trial within seven days of the verdict").

Assuming that the current rule was intended to promote finality, there is nothing to prevent the court from granting the defendant a significant extension of time, so long as it does so within the seven-day period. Thus, the Committee believed that the rule should be amended to be consistent with all of the other timing requirements in the rules, which do not force the court to

act on a motion to extend the time for filing within a particular period of time or lose jurisdiction to do so.

Accordingly, the amendment deletes the language regarding the court's acting within seven days to set the time for filing. Read in conjunction with the conforming amendment to Rule 45(b), the defendant is still required to file a timely motion for a judgment of acquittal under Rule 29 within the seven-day period specified. The defendant may, under Rule 45, seek an extension of time to file the underlying motion as long as the defendant does so within the seven-day period. But the court itself is not required to act on that motion within any particular time. Further, under Rule 45(b)(1)(B), if for some reason the defendant fails to file the underlying motion within the specified time, the court may nonetheless consider that untimely motion if the court determines that the failure to file it on time was the result of excusable neglect.

Rule 32. Sentencing and Judgment

1 * * * * *

2 **(i) Sentencing.**

3 * * * * *

4 *(4) Opportunity to Speak.*

5 * * * * *

6 (B) *By a Victim of a Crime of Violence or*

7 *Sexual Abuse*. Before imposing sentence,

8 the court must address any victim of a

9 crime of violence or sexual abuse who is
10 present at sentencing and must permit the
11 victim to speak or submit any information
12 about the sentence. Whether or not the
13 victim is present, a victim's right to address
14 the court may be exercised by the following
15 persons if present:
16 (i) a parent or legal guardian, if the
17 victim is younger than 18 years or is
18 incompetent; or
19 (ii) one or more family members or
20 relatives the court designates, if the
21 victim is deceased or incapacitated.
22 (C) *By a Victim of a Felony Offense.* Before
23 imposing sentence, the court must address
24 any victim of a felony offense, not
25 involving violence or sexual abuse, who is

26 present at sentencing and must permit the
27 victim to speak or submit any information
28 about the sentence. If the felony offense
29 involved multiple victims, the court may
30 limit the number of victims who will
31 address the court.
32 ~~(C)~~(D) *In Camera Proceedings.* Upon a party's
33 motion and for good cause, the court may
34 hear in camera any statement made under
35 Rule 32(i)(4).
36 * * * * *

COMMITTEE NOTE

In a series of amendments, Rule 32 has been modified to provide allocution for victims of violent crimes, and more recently for victims of sexual offenses. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-222, 108 Stat. 1796 (amending Rule 32 to provide for victim allocution in crimes of violence). In 2002, Rule 32 was amended to extend the right of victim allocution to victims of sexual abuse. *See* Rule 32(a)(1)(B). The amendment to Rule 32(i)(4) expands the right of victim-allocution to all felony cases.

The role of victim allocution has become part of the accepted landscape in federal sentencing. *See generally* J. Barnard, *Allocution for Victims of Economic Crimes*, 77 NOTRE DAME L. REV. 39 (2001). And although the actual practice varies, some courts currently permit statements from victims of crimes that do not involve violence or sexual abuse. Typical examples include statements from victims of fraud and other economic crimes. Victims of non-violent felonies may have pertinent information that could affect application of a particular sentencing guideline. At the same time, however, there are potential problems with victim allocution, particularly in cases involving a large number of victims. *See* Barnard, *supra*, at 65-78 (noting arguments against victim allocution).

Rule 32(i)(4)(C) is a new provision that extends the right of allocution to victims of felonies that do not involve either sexual abuse or violence. The amendment attempts to strike a reasonable balance between the interest of victims in being heard and the ability of the court to efficiently move its sentencing docket. Although the rule requires the court to hear from victims if any are present and wish to speak, it gives the court some discretion about the manner in which victims are to be heard. In a particular case, the court may permit, or require some or all of the victims to present their information in the form of written statements. The rule explicitly states that if there are multiple victims, the court may properly limit the number of persons who will be permitted to address the court during sentencing.

The amendment does not include any provision requiring a court to permit a representative to speak on behalf of a victim, as the court must do for victims of sexual abuse or violence. The Committee believed that the policy reasons for permitting a victim to speak through a representative in a case involving sexual abuse or violence do not exist in most other types of cases. Nonetheless,

there is nothing in the rule that would prohibit the court from permitting a third person to represent the views of one or more victims of a felony not involving violence or sexual assault.

Rule 32.1. Revoking or Modifying Probation or Supervised Release

1 * * * * *

2 **(b) Revocation.**

3 * * * * *

4 **(2) Revocation Hearing.** Unless waived by the
5 person, the court must hold the revocation
6 hearing within a reasonable time in the district
7 having jurisdiction. The person is entitled to:
8 (A) written notice of the alleged violation;
9 (B) disclosure of the evidence against the
10 person;
11 (C) an opportunity to appear, present evidence,
12 and question any adverse witness unless the
13 court determines that the interest of justice
14 does not require the witness to appear; ~~and~~

15 (D) notice of the person's right to retain counsel
16 or to request that counsel be appointed if
17 the person cannot obtain counsel~~.~~ ; and
18 (E) an opportunity to make a statement and
19 present any information in mitigation.
20 **(c) Modification.**
21 *(1) In General.* Before modifying the conditions of
22 probation or supervised release, the court must
23 hold a hearing, at which the person has the right
24 to counsel~~.~~ and an opportunity to make a
25 statement and present any information in
26 mitigation.
27 * * * * *

COMMITTEE NOTE

The amendments to Rule 32.1(b) and (c) are intended to address a gap in the rule. As noted by the court in *United States v. Frazier*, 283 F.3d 1242 (11th Cir. 2002) (per curiam), there is no explicit provision in current Rule 32.1 for allocution rights for a person upon resentencing. In that case the court noted that several circuits had concluded that the right to allocution in Rule 32 extended to supervised release revocation hearings. *See United States v. Patterson*, 128 F.3d 1259, 1261 (8th Cir. 1997) (Rule 32 right to allocution applies); *United States v. Rodriguez*, 23 F.3d 919, 921 (5th Cir. 1997) (right of allocution, in Rule 32, applies at revocation proceeding). But the court agreed with the Sixth Circuit that the allocution right in Rule 32 was not incorporated into Rule 32.1. *See United States v. Waters*, 158 F.3d 933 (6th Cir. 1998) (allocution right in Rule 32 does not apply to revocation proceedings). The *Frazier* court observed that the problem with the incorporation approach is that it would require application of other provisions specifically applicable to sentencing proceedings under Rule 32, but not expressly addressed in Rule 32.1. 283 F.3d at 1245. The court, however, believed that it would be "better practice" for courts to provide for allocution at revocation proceedings and stated that "[t]he right of allocution seems both important and firmly embedded in our jurisprudence." *Id.*

The amended rule recognizes the importance of allocution and now explicitly recognizes that right at revocation hearings, Rule 32.1(b)(2), and extends it as well to modification hearings where the court may decide to modify the terms or conditions of the defendant's probation, Rule 32.1(c)(1). In each instance the court is required to give the defendant the opportunity to make a statement and present any mitigating information.

Rule 33. New Trial

1 * * * * *

2 **(b) Time to File.**

3 * * * * *

4 **(2) Other Grounds.** Any motion for a new trial
5 grounded on any reason other than newly
6 discovered evidence must be filed within 7 days
7 after the verdict or finding of guilty. ~~, or within~~
8 ~~such further time as the court sets during the 7-~~
9 ~~day period.~~

COMMITTEE NOTE

Rule 33(b)(2) has been amended to remove the requirement that the court must act within seven days after a verdict or finding of guilty if it sets another time for filing a motion for a new trial. This amendment parallels similar changes to Rules 29 and 34. Further, a conforming amendment has been made to Rule 45(b)(2).

Currently, Rule 33(b)(2) requires the defendant to move for a new trial within seven days after the verdict or the finding of guilty verdict, or within some other time set by the court in an order issued during that same seven-day period. Similar provisions exist in Rules 29 and 34. Courts have held that the seven-day rule is jurisdictional. Thus, if a defendant files a request for an

extension of time to file a motion for a judgment of acquittal within the seven-day period, the court must rule on that motion or request within the same seven-day period. If for some reason the court does not rule on the request within the seven days, it loses jurisdiction to act on the underlying substantive motion. *See, e.g., United States v. Smith*, 331 U.S. 469, 473-474 (1947) (rejecting argument that trial court had power to grant new trial on its own motion after expiration of time in Rule 33); *United States v. Marquez*, 291 F.3d 23, 27-28 (D.C. Cir. 2002) (citing language of Rule 33, and holding that "district court forfeited the power to act when it failed to fix a time for filing a motion for new trial within seven days of the verdict").

Assuming that the current rule was intended to promote finality, there is nothing to prevent the court from granting the defendant a significant extension of time, so long as it does so within the seven-day period. Thus, the Committee believed that the rule should be amended to be consistent with all of the other timing requirements in the rules, which do not force the court to act on a motion to extend the time for filing within a particular period of time or lose jurisdiction to do so.

Accordingly, the amendment deletes the language regarding the court's acting within seven days to set the time for filing. Read in conjunction with the conforming amendment to Rule 45(b), the defendant is still required to file a timely motion for a new trial under Rule 33(b)(2) within the seven-day period specified. The defendant may, under Rule 45, seek an extension of time to file the underlying motion as long as the defendant does so within the seven-day period. But the court itself is not required to act on that motion within any particular time. Further, under Rule 45(b)(1)(B), if for some reason the defendant fails to file the underlying motion for new trial within the specified time, the court may nonetheless consider that untimely underlying motion if the

court determines that the failure to file it on time was the result of excusable neglect.

Rule 34. Arresting Judgment

1 * * * * *

2 **(b) Time to File.** The defendant must move to arrest
3 judgment within 7 days after the court accepts a
4 verdict or finding of guilty, or after a plea of guilty or
5 nolo contendere. ~~, or within such further time as the~~
6 ~~court sets during the 7-day period.~~

COMMITTEE NOTE

Rule 34(b) has been amended to remove the requirement that the court must act within seven days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere if it sets another time for filing a motion to arrest a judgment. The amendment parallels similar amendments to Rules 29 and 33. Further, a conforming amendment has been made to Rule 45(b).

Currently, Rule 34(b) requires the defendant to move to arrest judgment acquittal within seven days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere, or within some other time set by the court in an order issued by the court within that same seven-day period. Similar provisions exist in Rules 29 and 33. Courts have held that the

seven-day rule is jurisdictional. Thus, if a defendant files a request for an extension of time to file a motion for a judgment of acquittal within the seven-day period, the judge must rule on that motion or request within the same seven-day period. If for some reason the court does not rule on the request within the seven days, the court loses jurisdiction to act on the underlying substantive motion, if it is not filed within the seven days. *See, e.g., United States v. Smith*, 331 U.S. 469, 473-474 (1947) (rejecting argument that trial court had power to grant new trial on its own motion after expiration of time in Rule 33); *United States v. Marquez*, 291 F.3d 23, 27-28 (D.C. Cir. 2002) (citing language of Rule 33, and holding that "district court forfeited the power to act when it failed to fix a time for filing a motion for new trial within seven days of the verdict").

Assuming that the current rule was intended to promote finality, there is nothing to prevent the court from granting the defendant a significant extension of time, so long as it does so within the seven-day period. Thus, the Committee believed that the rule should be amended to be consistent with all of the other timing requirements in the rules, which do not force the court to rule on a motion to extend the time for filing within a particular period of time or lose jurisdiction to do so.

Accordingly, the amendment deletes the language regarding the court's acting within seven days to set the time for filing. Read in conjunction with the conforming amendment to Rule 45(b), the defendant is still required to file a timely motion to arrest judgment under Rule 34 within the seven-day period specified. The defendant may, under Rule 45, seek an extension of time to file the underlying motion as long as the defendant does so within the seven-day period. But the court itself is not required to act on that motion within any particular time. Further, under Rule 45(b)(1)(b), if for some reason the defendant fails to file the underlying motion within the specified time, the court may

nonetheless consider that untimely motion if the court determines that the failure to file it on time was the result of excusable neglect.

Rule 45. Computing and Extending Time

1 * * * * *

2 **(b) Extending Time.**

3 **(1) In General.** When an act must or may be done

4 within a specified period, the court on its own

5 may extend the time, or for good cause may do

6 so on a party's motion made:

7 (A) before the originally prescribed or

8 previously extended time expires; or

9 (B) after the time expires if the party failed to

10 act because of excusable neglect.

11 **(2) Exception.** The court may not extend the time to

12 take any action under Rule ~~Rules 29, 33, 34, and~~

13 35, except as stated in ~~those rules~~ that rule.

14 * * * * *

COMMITTEE NOTE

Rule 45(b) has been amended to conform to amendments to Rules 29, 33, and 34, which have been amended to remove the requirement that the court must act within the seven-day period specified in each of those rules if it sets another time for filing a motion under those rules.

Currently, Rules 29(c)(1), 33(b)(1), and 34(b) require the defendant to move for relief under those rules within the seven-day periods specified in those rules or within some other time set by the court in an order issued during that same seven-day period. Courts have held that the seven-day rule is jurisdictional. Thus, for example, if a defendant files a request for an extension of time to file a motion for a judgment of acquittal or a motion for new trial within the seven-day period, the court must rule on that motion or request within the same seven-day period. If for some reason the court does not rule on the request for an extension of time within the seven days, the court loses jurisdiction to act on the underlying substantive motion. *See, e.g., United States v. Smith*, 331 U.S. 469, 473-474 (1947) (rejecting argument that trial court had power to grant new trial on its own motion after expiration of time in Rule 33); *United States v. Marquez*, 291 F.3d 23, 27-28 (D.C. Cir. 2002) (citing language of Rule 33, and holding that "district court forfeited the power to act when it failed to fix a time for filing a motion for new trial within seven days of the verdict").

Rule 45(b)(2) currently specifies that a court may not extend the time for taking action under Rules 29, 33, or 34, except as provided in those rules.

Assuming that the current provisions in Rules 29, 33, and 34 were intended to promote finality, there is nothing to prevent the court from granting the defendant a significant extension of

time, under those rules, as long as it does so within the seven-day period. Thus, the Committee believed that those rules should be amended to be consistent with all of the other timing requirements in the rules, which do not force the court to rule on a motion to extend the time for filing, within a particular period of time or lose jurisdiction to do so. The change to Rule 45(b)(2) is thus a conforming amendment.

The defendant is still required to file motions under Rules 29, 33, and 34 within the seven-day period specified in those rules. The defendant, however, may consistently with Rule 45, seek an extension of time to file the underlying motion as long as the defendant does so within the seven-day period. But the court itself is not required to act on that motion within any particular time. Further, under Rule 45(b)(1), if for some reason the defendant fails to file the underlying motion within the specified time, the court may nonetheless consider that untimely motion if the court determines that the failure to file it on time was the result of excusable neglect.

Rule 59. Matters Before a Magistrate Judge

1 (a) *Nondispositive Matters*. A district judge may refer to
2 a magistrate judge for determination any matter that
3 does not dispose of the case. The magistrate judge
4 must promptly conduct the required proceedings and,
5 when appropriate, enter on the record an oral or
6 written order stating the determination. A party may

7 serve and file any objections to the order within 10
8 days after being served with a copy of a written order
9 or after the oral order is made on the record, or at
10 some other time the court sets. The district judge
11 must consider any timely objections and modify or set
12 aside any part of the order that is clearly erroneous or
13 contrary to law. Failure to object in accordance with
14 this rule waives a party's right to review.

15 (b) *Dispositive Matters.*

16 *(1) Referral to magistrate judge.* A district judge
17 may refer to a magistrate judge for
18 recommendation any matter that may dispose of
19 the case including a defendant's motion to
20 dismiss or quash an indictment or information, or
21 a motion to suppress evidence. The magistrate
22 judge must promptly conduct the required
23 proceedings. A record must be made of any

24 evidentiary proceeding before the magistrate
25 judge and of any other proceeding if the
26 magistrate judge considers it necessary. The
27 magistrate judge must enter on the record a
28 recommendation for disposing of the matter,
29 including any proposed findings of fact. The
30 clerk must immediately serve copies on all
31 parties.
32 (2) *Objections to findings and recommendations.*
33 Within 10 days after being served with a copy of
34 the recommended disposition, or such other
35 period as fixed by the court, a party may serve
36 and file any specific written objections to the
37 proposed findings and recommendations. Unless
38 the district judge directs otherwise, the party
39 objecting to the recommendation must promptly
40 arrange for transcribing the record, or whatever

41 portions of it the parties agree to or the
42 magistrate judge considers sufficient. Failure to
43 object in accordance with this rule waives a
44 party's right to review.
45 *(3) De novo review of recommendations.* The
46 district judge must consider de novo any
47 objection to the magistrate judge's
48 recommendation. The district judge may accept,
49 reject, or modify the recommendation, receive
50 further evidence, or may resubmit the matter to
51 the magistrate judge with instructions.

COMMITTEE NOTE

Rule 59 is a new rule that creates a procedure for a district judge to review nondispositive and dispositive decisions by magistrate judges. The rule is derived in part from Federal Rule of Civil Procedure 72.

The Committee's consideration of a new rule on the subject of review of magistrate judges' decisions resulted from *United States v. Abonce-Barrera*, 257 F.3d 959 (9th Cir. 2001). In that case the Ninth Circuit held that the Criminal Rules do not require appeals from nondispositive decisions by magistrate judges to

district judges as a requirement for review by a court of appeals. The court suggested that Federal Rule of Civil Procedure 72 could serve as a suitable model for a criminal rule.

New Rule 59(a) sets out procedures to be used in reviewing nondispositive matters, that is, those matters that do not dispose of the case. The rule requires that if the district judge has referred a matter to a magistrate judge, that the magistrate judge must issue an oral or written order on the record. To preserve the issue for further review, a party must object to that order within 10 days after being served with a copy of the order or after the oral order is made on the record or at some other time set by the court. If an objection is made, the district court is required to consider the objection. If the court determines that the magistrate judge's order, or a portion of the order, is clearly erroneous or contrary to law, the court must set aside the order, or the affected part of the order. *See also* 28 U.S.C. § 636(b)(1)(A).

Rule 59(b) provides for assignment and review of recommendations made by magistrate judges on dispositive matters, including motions to suppress or quash an indictment or information. The rule directs the magistrate judge to consider the matter promptly, hold any necessary evidentiary hearings, and enter his or her recommendation on the record. After being served with a copy of the magistrate judge's recommendation, under Rule 59(b)(2), the parties have a period of 10 days to file any objections. If any objections are filed, the district court must consider the matter de novo and accept, reject, or modify the recommendation, or return the matter to the magistrate judge for further consideration.

Both Rule 59(a) and (b) contain a provision that explicitly states that failure to file an objection in accordance with the rule amounts to a waiver of the issue. This waiver provision is

Item IIC1

MEMO TO: Members, Criminal Rules Committee

FROM: Professor Dave Schlueter, Reporter

RE: Rule 29; Proposed Amendment from Department of Justice

DATE: September 3, 2003

At its meeting in April in Santa Barbara, the Committee considered a proposal from the Department of Justice to amend Rule 29. The amendment is intended to preserve the government's right to appeal a court's motion for a judgment of acquittal. The issue was deferred, pending additional research by the Department on the scope of the problems outlined in its original memo on the proposal.

The Department was requested to provide additional data on the types and numbers of Rule 29 judgments of acquittal. The Federal Judicial Center was requested to survey the state court judgment of acquittal practices. The attached materials include:

(1) a September 15, 2003, memorandum from Eric Jaso presenting the Department's response to the Committee's request for additional data, including charts listing the number of Rule 29 pre-verdict and post-verdict acquittals in the district courts from 1999 to 2003;

(2) a March 31, 2003, memorandum from Eric Jaso submitting the Department's original proposal to amend Rule 29;

(3) the Federal Judicial Center's report on the use of judgments of acquittal in the state courts; and

(4) background materials on the 1994 amendments to Rule 29, which authorized a court to reserve judgment of acquittal (in its discretion) until after a verdict. The materials include a discussion of the rejection of the same amendment proposed in 1983. Comments from the Department, Association of the Bar of the City of New York, American College of Trial Lawyers, and Criminal Justice Section of the American Bar Association are included in the materials.

This item is on the Committee's agenda for the October meeting in Oregon.

U.S. Department of Justice

Criminal Division

Assistant Attorney General *Washington, D.C. 20530*

September 15, 2003

MEMORANDUM

TO: Hon. Edward E. Carnes
Chairman, Advisory Committee on Criminal Rules

FROM: Eric H. Jaso
Counselor to the Assistant Attorney General & Ex Officio

SUBJECT: Proposed Amendment to Criminal Rule 29

On March 31, 2003, the Department of Justice submitted a memorandum requesting that the Criminal Rules Advisory Committee amend Rule 29 of the Federal Rules of Criminal Procedure to complete the revision of the rule commenced in 1994 in order to preserve the Government's right to appeal to correct erroneous district court decisions to grant a motion for judgment of acquittal. On April 28-29, 2003, the Committee discussed the proposal and requested additional information and discussion. The additional information is attached to this memorandum, which also provides an expanded discussion of the reasons why the rule should be amended.

Summary

Rule 29 currently permits an anomaly – orders disposing of entire prosecutions or counts without any possibility of appellate review. This anomaly was partially remedied, first by judicial decisions, and then by the 1994 amendment to Rule 29(b), which permitted and encouraged district judges to reserve decision on a motion for judgment of acquittal until after the guilty verdict. The proposed amendment merely requires district judges to do what the 1994 amendment permitted and encouraged them to do – reserve decision until after a guilty verdict. The amendment is necessary to correct this legal anomaly, to ensure the Government its full statutory right to appeal, to permit the correction of erroneous rulings dismissing whole prosecutions and counts, and to prevent abusive rulings from being intentionally shielded from review. The Department urges the Committee to consider its concerns, including the examples of improper judgments of acquittal we note herein, and adopt the proposed amendment, which will preserve judicial review of the sufficiency of the evidence while ensuring that it is properly exercised.

The Need for The Proposed Amendment to Rule 29

The proposed amendment would correct an anomaly in the Rules – the ability of a district court to grant an unappealable order disposing of entire counts and prosecutions. As commentators have recognized:

> In all of federal jurisprudence there is only one district court ruling that is both absolutely dispositive and entirely unappealable. Federal Rule of Criminal Procedure 29 enables the trial judge upon her own initiative or motion of the defense to direct a judgment of acquittal in a criminal trial at any time prior to the submission of the case to the jury. Once the judgment of acquittal is entered, the government's right of appeal is effectively blocked by the Double Jeopardy Clause of the U.S. Constitution, as the only remedy available to the Court of Appeals would be to order a retrial. No matter how irrational or capricious, the district judge's ruling terminating the prosecution cannot be appealed.

Richard Sauber & Michael Waldman, Unlimited Power: Rule 29(a) and the Unreviewability of Directed Judgments of Acquittal, 44 Am. U. L. Rev. 433, 433-34 (1994) (footnote omitted) (hereafter "Unlimited Power"). As these commentators note: "Though there is only one such rule in federal jurisprudence, it is one too many." *Id.* (footnote omitted).

This anomaly arises from a relatively recent historical accident. Rule 29 first authorized the granting of judgments of acquittal in 1944.[1] At that time, the Government had extremely limited rights to appeal under the 1907 Criminal Appeals Act, and could not appeal a judgment of acquittal whether rendered before or after the guilty verdict. *See* United States v. Sisson, 399 U.S. 267 (1970). It was thus of no moment that Rule 29 allowed the court to grant a motion for judgment of acquittal at the close of the government's case, or at the close of all the evidence, or after the jury verdict. *See* Fed. R. Crim. P. 29 (1944).[2]

---

[1] "The preverdict acquittal of Rule 29 has no impressive historical lineage." Unlimited Power, at 434. Prior to 1944, some courts directed verdicts of acquittal, but "the power to direct an acquittal developed as a corollary to the [appealable] directed verdict in civil cases, with little thought or reasoning." Id. (note omitted). The practice of directing the jury to enter a verdict in a criminal case was never codified, and was abolished by Rule 29. Fed R. Crim. P. 29(a) (1944).

[2] The authorization of rulings at these different times was thus not intended to create differences in appealability. Indeed, Rule 29 was patterned after Civil Rule 50, which allowed a district court to direct a verdict at the close of the opponent's case, at the close of all the evidence, or after the jury's verdict, *see* Fed. R. Civ. P. 50 (1937). Fed. R. Crim. P. 29, 1944 Advisory Committee Notes. Civil Rule 50, like Criminal Rule 29, was not drawing any distinctions concerning appealablility – these civil judgments would be appealable regardless of their timing. *See* Unlimited Power, at 456-57 & nn.168-70.

In 1971, however, Congress enacted a new Criminal Appeals Act permitting the Government to appeal from any judgment dismissing an indictment or any count thereof, including a judgment of acquittal under Rule 29, unless "the double jeopardy clause of the United States Constitution prohibits further prosecution." 18 U.S.C. § 3731; *see* United States v. Scott, 437 U.S. 82, 91 & n.7 (1978); United States v. Wilson, 420 U.S. 332, 337, 352-53 (1978); United States v. Genova, 333 F.3d 750, 756 & n.1 (7th Cir. 2003) (citing cases). In enacting § 3731, "Congress intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit.... Congress was determined to avoid creating non-constitutional bars to the Government's right to appeal." Wilson, 420 U.S. at 337-38.

"When Congress removed all statutory barriers to government appeals in 1971, the unappealable preverdict acquittal of Rule 29(a) emerged as an historic anachronism, a procedural appendix left over from an era in which appeals of any kind were unavailable." Unlimited Power, at 434. Nonetheless, for many years Rule 29 was not amended to reflect the expansion of the Government's right of appeal. As a result, this non-constitutional rule of procedure inadvertently created a bar to the Government's right to appeal, by permitting district courts to enter judgments of acquittal at times (at the close of the Government's case, at the close of all the evidence, after the jury is discharged without returning a verdict) when the Double Jeopardy Clause prohibited appeal. The result was a flurry of litigation, in the Supreme Court and lower courts, over whether a ruling was an unappealable pre-verdict judgment of acquittal under Rule 29 or was an appealable pre-verdict dismissal. *E.g.*, United States v. Scott, 437 U.S. 82, 85, 95 (1978), *overruling* United States v. Jenkins, 420 U.S. 358 (1975); United States v. Martin Linen Supply Co., 430 U.S. 564, 570-72 (1977); United States v. Torkington, 874 F.2d 1441, 1444 (11th Cir. 1989); United States v. Giampa, 758 F.2d 928, 932-36 (3d Cir. 1985); United States v. Ember, 726 F.2d 522, 524-26 (9th Cir. 1984); United States v. Gonzales, 617 F.2d 1358, 1361-62 (9th Cir. 1980).[3]

In 1994, a partial correction was made. Based on a proposal of this Committee, the Supreme Court amended Rule 29 to permit and encourage district judges to preserve the right to appeal. The 1994 amendment allowed district courts, who received motions for judgment of acquittal at the close of the Government's case, to "reserve decision on a motion for judgment of acquittal, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury and decide the motion ... after it returns a verdict of guilty ...." Fed. R. Crim. P. 29(b) (1994).

---

[3] Both the majority and the dissent in Martin Linen decried the idea of having the appealability and "the constitutional significance of a Rule 29 judgment of acquittal [turn] on a matter of timing." 430 U.S. at 574-75 (majority) ("Rule 29 contemplated no such artificial distinctions"), 583 (dissent) ("hinging the outcome of this case on the timing ... elevat[es] form over substance"). That, however, was the consequence of failing to amend the Rule. *See* Scott, 437 U.S. at 91 n.7; United States v. DiFrancesco, 449 U.S. 117, 130 (1980) ("the Double Jeopardy Clause does not bar a Government appeal from a ruling in favor of the defendant after a guilty verdict has been entered by the trier of fact," citing post-verdict Rule 29 cases).

Reservation of decision was not a new idea. Beginning with its 1944 enactment, Rule 29 has always permitted a judge to reserve decision on a motion for judgment of acquittal made at the close of all the evidence, and to decide it after the jury's verdict, Fed. R. Crim. P. 29(b) & Advisory Committee Note (1944). After the 1971 enactment of the new Criminal Appeals Act, appellate courts encouraged judges to reserve decision on motions made at the close of the evidence. *See* United States v. Singleton, 702 F.2d 1159, 1163 n.12 (D.C. Cir. 1983) ("where all the evidence has been presented, trial courts should reserve judgment on motions for acquittal until after the return of the jury verdict"). Even before the 1994 amendment, courts began to reserve decision on motions made at the close of the Government's case, and the Supreme Court commended the practice. *See* 1994 Advisory Committee Notes *below*. The 1994 amendment explicitly authorized such reservation of decision on motions made at the close of the Government's case, and encouraged district judges to do so, stating:

> The amendment permits the reservation of a motion for a judgment of acquittal made at the close of the government's case in the same manner as the rule now permits for motions made at the close of all of the evidence. Although the rule as written did not permit the court to reserve such motions made at the end of the government's case, trial courts on occasion have nonetheless reserved ruling. *See, e.g.,* United States v. Bruno, 873 F.2d 555 (2d Cir.), cert. denied, 110 S. Ct. 125 (1989); United States v. Reifsteck, 841 F.2d 701 (6th Cir. 1988). While the amendment will not affect a large number of cases, it should remove the dilemma in those close cases in which the court would feel pressured into making an immediate, and possibly erroneous, decision or violating the rule as presently written by reserving its ruling on the motion.
>
> The amendment also permits the trial court to balance the defendant's interest in an immediate resolution of the motion against the interest of the government in proceeding to a verdict thereby preserving its right to appeal in the event a verdict of guilty is returned but is then set aside by the granting of a judgment of acquittal. Under the double jeopardy clause the government may appeal the granting of a motion for judgment of acquittal only if there would be no necessity for another trial, i.e., only where the jury has returned a verdict of guilty. United States v. Martin Linen Supply Co., 430 U.S. 564 (1977). Thus, the government's right to appeal a Rule 29 motion is only preserved where the ruling is reserved until after the verdict.
>
> In addressing the issue of preserving the government's right to appeal and at the same time recognizing double jeopardy concerns, the Supreme Court observed:
>
>> We should point out that it is entirely possible for a trial court to reconcile the public interest in the Government's right to appeal from an erroneous conclusion of law with the defendant's interest in avoiding a

> second prosecution. In United States v. Wilson, 420 U.S. 332 (1975), the court permitted the case to go to the jury, which returned a verdict of guilty, but it subsequently dismissed the indictment for preindictment delay on the basis of evidence adduced at trial. Most recently in United States v. Ceccolini, 435 U.S. 268 (1978), we described similar action with approval: 'The District Court had sensibly made its finding on the factual question of guilt or innocence, and then ruled on the motion to suppress; a reversal of these rulings would require no further proceeding in the District Court, but merely a reinstatement of the finding of guilt.' Id. at 271.
>
> United States v. Scott, 437 U.S. 82, 100 n.13 (1978). By analogy, reserving a ruling on a motion for judgment of acquittal strikes the same balance as that reflected by the Supreme Court in Scott.

Fed. R. Crim. P. 29 Advisory Committee Note (1994).

To ensure that reservation did not prejudice the defendant, the 1994 amendment also altered what evidence could be considered. Under governing law, if a defendant makes a motion for judgment of acquittal at the close of the government's case, and then decides to put on evidence, he "waives his objections to the denial of his motion to acquit," United States v. Calderon, 348 U.S. 160, 164 & n.1 (1954), and takes "the risk that in so doing he will bolster the Government case enough for it to support a verdict of guilty," McGautha v. California, 402 U.S. 183, 215 (1971), *vacated in part on other grounds,* Crampton v. Ohio, 408 U.S. 941, 942 (1972). *See, e.g.*, United States v. Vallo, 238 F.3d 1242, 1247-48 (10th Cir. 2001); United States v. Brown, 53 F.3d 312, 314 (11th Cir. 1995). The 1994 amendment provided: "If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved." Fed. R. Crim. P. 29(b) (1994) & Advisory Committee Note. The 1994 amendment thus ensured that defendant received the same ruling on the sufficiency of the Government's case as he would have had the decision not been reserved, while it preserved the ability for the Government to appeal, and for errors to be corrected.

Since the 1994 amendment, courts and commentators have continued to encourage reservation as a best practice. *E.g.*, United States v. Renick, 273 F.3d 1009, 1013 (11th Cir. 2001); United States v. Byrne, 203 F.3d 671, 675 (9th Cir. 2001); 5 W. LaFave, J. Israel & N. King, Criminal Procedure, §24.6(b) p.545 (1999).[4] Unfortunately, as set forth below, district courts have not always followed that best practice, instead issuing erroneous judgments of

---

[4] The commentary on the 1994 amendments in the Supreme Court has been similarly favorable. Carlisle v. United States, 517 U.S. 416, 444-45 (1996) (Stevens joined by Kennedy, JJ., dissenting) (Rule 29(b) "accommodates the defendant's right to a move for a directed acquittal with the Government's right to seek appellate review. Indeed, the subdivision was amended in 1994 for the very purpose of striking a more proper balance between those two interests.").

acquittal before verdict which are unappealable. Indeed, in some instances, district judges have intentionally timed their entry of the judgment of acquittal to prevent its review. To end such egregious dispositions, and to conform federal practice to this best practice, the Government proposes to finish what the Committee began in 1994.

Summary of the Proposed Amendment to Rule 29

The proposed amendment would simply complete the work of the 1994 amendment and make the best practice the standard practice. As amended, the Rule would require that, if a motion for judgment of acquittal is made before the jury returns a verdict, the decision must be reserved (unless the court simply denies the motion) until after the jury returns a verdict. The amended Rule thus would preclude the entry of a judgment of acquittal before the jury returns a verdict, or if the jury is discharged without having returned a verdict. The reserved decision would be based on the evidence at the time that the motion was made. Attached is a red-lined copy of the proposed rule change (Attachment "A") and a "clean" version of the amended rule (Attachment "B").

The proposed amendment would bring substantial benefits. It "reconcile[s] the public interest in the Government's right to appeal from an erroneous conclusion of law with the defendant's interest in avoiding a second prosecution," as the Supreme Court suggested. *See* Fed. R. Crim. P. 29 Advisory Committee Note (1994) (*quoting* Scott, 437 U.S. at 100 n.13). By requiring reservation until after the jury verdict of guilty, the Government's right to appeal is preserved. The resulting appellate review protects the public's interests in correcting erroneous rulings, convicting defendants against whom sufficient evidence has been presented, and confining dangerous defendants who would otherwise be erroneously freed to prey again on the public.

At the same time, the proposed amendment safeguards the defendant's constitutionally-protected interest in avoiding a second trial: if the jury acquits, or if the jury convicts and the government declines to appeal or the appellate court affirms the district judge's judgment of acquittal, the defendant has a final acquittal; if the appellate court reverses, the jury's guilty verdict is simply reinstated. *See* Carlisle v. United States, 517 U.S. 416, 445 (1996) (Stevens joined by Kennedy, JJ., dissenting) ("The defendant's interests are obviously fully protected by an acquittal, while the Government's right to appeal is protected because the jury has already returned its verdict of guilty.").

The proposed amendment, like the 1994 amendment, further protects defendants' rights by requiring that the reserved decision on a motion at the close of the Government's case be made "on the basis of the evidence at the time the ruling was reserved." Fed. R. Crim. P. 29(b). Thus, a defendant still can require that the Government set forth sufficient evidence in its case in chief by making his Rule 29 motion at the close of the Government's case. That defendant will receive precisely the same ruling he would have received had the decision not been reserved.

The proposed amendment preserves the power of the district court to enter a judgment of acquittal on the defendant's motion, but simply shifts its timing. The amendment also preserves the court's power to grant a judgment of acquittal *sua sponte*, again merely moving the timing of such a motion from before submission of the case to the jury to within seven days after the verdict. In so doing, the proposal grants district judges a power they do not now possess. Carlisle, 517 U.S. at 421-33 (district judges do not have the power to grant a post-verdict judgment of acquittal *sua sponte*). The proposed amendment thus preserves the longstanding ability of district courts to dismiss criminal counts as insufficiently supported by the evidence, but simply requires that decision, like virtually all others, be subject to judicial review. The amendment also permits the appellate courts to provide the same checks and balances against judicial error they do in virtually every other context. *See* Unlimited Power, at 452-56 (detailing the virtues of ensuring appellate review of Rule 29 decisions).

The proposed amendment achieves other goals as well. The amendment removes the pressure on the district court for a quick decision on a dispositive issue. As the 1994 Advisory Committee noted, reservation allows the district judge to rule after the verdict, rather than in the midst of trial while the jury, counsel and witnesses are waiting, and thus "remove[s] the dilemma in those close cases in which the court would feel pressured into making an immediate, and possibly erroneous, decision." *Id.*[5]

The proposed amendment also reduces litigation. If the jury acquits, the district court is relieved of the burden of ruling on the motion. Also, by requiring reservation, the proposed amendment will reduce or eliminate appellate litigation over whether the district court granted a pre-verdict judgment of acquittal, whether the Double Jeopardy Clause permits review, *see supra*, and whether the district court reserved or granted the motion. Unlimited Power, at 458-59; *see, e.g.,* United States v. Baggett, 251 F.3d 1087, 1093-95 (6th Cir. 2001) (noting that "the district court's confused handling of the defendant's Rule 29 motion creates significant difficulties for this Court on review.").

Further, the proposed amendment, when considered in the context of the entire prosecution, will result in less wasted time and effort. When an erroneous judgment of acquittal is granted, all of the time and effort invested by the prosecutors, by the judge, and by the jury – in investigation, grand jury presentations, pre-trial motion practice, trial preparation, jury selection, and the bulk of the trial – are totally and irretrievably wasted. By contrast, in most cases, reserving the ruling until after the verdict involves relatively little delay. Where the motion is made at the close of the evidence, all that remains of trial is closing arguments, jury instructions, and deliberations. If the motion is made at the close of the Government's case, the only

---

[5] The proposed amendment thus "afford[s] a trial judge the maximum opportunity to consider with care a pending acquittal motion," which has been termed the purpose of Rule 29's "differentiations in timing," *see* Martin Linen, 430 U.S. at 574.

additional portion of trial remaining is the defense case, if any, and any rebuttal case.[6] In most cases, these portions of the trial are brief. In almost all cases, particularly more substantial prosecutions, these portions of the trial are relatively short compared to the length of the completed portions of the trial, and are dwarfed by the length of the prosecution as a whole. Thus, the relatively short time "saved" by granting a motion for judgment of acquittal pre-verdict is outweighed by the time and effort lost when a judgment of acquittal is erroneously granted, thus wrongly discarding the already completed portions of the trial and prosecution, and the time and effort already invested by the judge, jury, and prosecution. Overall, the proposed amendment saves time and effort.

Finally, the proposed amendment respects the role of the jurors. Reserving a Rule 29 motion allows the jury to complete the task which is its raison d'etre, and for which the jurors were called to serve.

There are no legal barriers to achieving these benefits through the proposed amendment. The Supreme Court has ruled that the district courts retain no inherent power to grant judgments of acquittal if that would "circumvent or conflict" with requirements clearly set forth in Rule 29. Carlisle, 517 U.S. at 425-30 (district courts have "no authority" to grant a motion for judgment of acquittal one day beyond the time limits set in Rule 29(c)). The proposed amendment thus could effectively bar the grant of a judgment of acquittal until after the jury reaches a verdict. There is also no legal barrier to forestalling a Rule 29 ruling where a trial ends in a hung jury; the Supreme Court has ruled that "a trial court's declaration of a mistrial following a hung jury is not an event that terminates the original jeopardy to which petitioner was subjected," and that "[r]egardless of the sufficiency of the evidence at [a defendant's] first [hung] trial, he has no valid double jeopardy claim to prevent his retrial." Richardson v. United States, 468 U.S. 317, 326 (1984).

In sum, the proposed amendment merely requires judges to do what the 1994 amendment permits and encourages them to do - reserve decision until after a guilty verdict. In so doing, the proposed amendment (1) conforms Rule 29 to § 3731, securing the Government's full scope of its right to appeal under that statute and the Constitution, (2) provides district judges with additional time to consider and correctly rule on Rule 29 motions, (3) ensures that erroneous grants of judgments of acquittal can be corrected, (4) protects the public from dangerous defendants who would otherwise be erroneously freed, and (5) prevents the waste of the judicial, juror and prosecutorial time and effort already invested in the prosecution and trial. At the same time, the proposed amendment preserves (a) the defendant's ability to obtain a judgment of acquittal, (b) the defendant's ability to move for a judgment of acquittal at the close of the government's case in chief, and to require that the evidence be sufficient at that point, and (c) the district court's ability

[6] If the defendant believes that the merits of his Rule 29 motion are clear, he can shorten any delay by foregoing a defense case and thus precluding any rebuttal case. If the merits of the Rule 29 motion are less clear, reservation is all the more desirable.

on its own motion to move for a judgment of acquittal. The proposed amendment will thus be a marked improvement in Rule 29.

Examples of Problems Encountered Under the Current Version of Rule 29

The proposed amendment, moreover, is not solely a matter of law reform. It is particularly necessary because pre-verdict judgments of acquittal are frequent, often wrong, and on significant occasions abusive.

District courts grant substantial numbers of judgments of acquittal each year, many of which are granted before the jury reaches a verdict. The Administrative Office of the Courts ("AOC") reports that in the year ending on September 30, 2002, 336 defendants were totally acquitted by judges – almost as many defendants as were acquitted by juries (400) or convicted by judges (423). AOC, Judicial Business of the United States Courts 2002, Table D-4.[7] Given that during this period only 2,671 defendants had their cases disposed of by jury verdict, and 759 by judicial verdict, these 336 judicial acquittals represent a substantial proportion – almost 10% – of the verdicts issued at trial. *Id.*, Table D-6. These judicial acquittals occurred on all types of crimes, including crimes that pose a significant risk to the public (homicide, assault, robbery, extortion, theft, fraud, sex offenses, drug crimes, firearms crimes, and drunk driving). *Id.*, Table D-4. While the AOC data is imprecise,[8] it does indicate that a significant number and percentage of defendants may be receiving pre-verdict judgments of acquittal.[9]

That is confirmed by the experience of the Department of Justice. During 2002 and again in mid-2003, the Department conducted a survey of all United States Attorney's Offices asking for empirical data regarding the instances of judges granting judgments of acquittal both before and after the jury's verdict after October 1, 1999. We received responses from 83 districts.[10] They reported that in this period, judges had granted judgments of acquittal in a total of 256 cases. In 184 of the cases, judgments of acquittal were granted before the jury verdict. In other words, in only 72 cases – less than 29% – did judges follow the intent of the 1994 amendment and reserve all Rule 29 rulings until after the verdict. In 134 (over 70%) of the 184 cases in which judgments of acquittal were entered before the jury verdict, the judgments of acquittal ended the entire prosecution and freed all of the defendants; in 9 more cases, the judgments of acquittal freed some of the defendants.

---

[7] These AOC Tables were obtained from www.uscourts.gov/judbus2002/contents.html.

[8] The AOC data does not differentiate between pre- and post-trial judgments of acquittals and "not guilty" verdicts in bench trials, and includes an inordinate number of such acquittals from a single district (M.D. Ga.). Id., Tables D-4, D-7.

[9] The pertinent Tables are attached as Exhibit A.

[10] A Summary Table is attached as Exhibit B.

Published opinions indicate that district judges often err in granting judgments of acquittal. There are 18 appellate opinions just in the 18 months ending June 30, 2003, which reverse judgments of acquittal entered after the verdict. *E.g.*, United States v. Jackson, 335 F.3d 170 (2d Cir. 2003); United States v. Velte, 331 F.3d 673 (9th Cir. 2003); United States v. Lenertz, 63 Fed.Appx. 704, 2003 WL 21129842 (4th Cir. 2003); United States v. Hernandez, 327 F.3d 1110 (10th Cir. 2003); United States v. Bologna, 58 Fed.Appx. 865, 2003 WL 282461 (2d Cir. 2003); United States v. Brown, 52 Fed.Appx. 612, 2002 WL 31771265 (4th Cir. 2002); United States v. Donaldson, 52 Fed.Appx. 700, 2002 WL 31770311 (6th Cir. 2002); United States v. Brown, 50 Fed.Appx. 970, 2002 WL 31529016 (10th Cir. 2002); United States v. Moran, 312 F.3d 480 (1st Cir. 2002); United States v. Zheng, 306 F.3d 1080 (11th Cir. 2002); United States v. Reyes, 302 F.3d 48 (2d Cir. 2002); United States v. Smith, 294 F.3d 473 (3d Cir. 2002); United States v. Johnson, 39 Fed.Appx. 114, 2002 WL 818229 (6th Cir. 2002); United States v. Thompson, 285 F.3d 731 (8th Cir. 2002); United States v. Oberhauser, 284 F.3d 827 (8th Cir. 2002); United States v. Canine, 30 Fed.Appx. 678, 2002 WL 417271 (8th Cir. 2002); United States v. Timmons, 283 F.3d 1246, 1250 (11th Cir. 2002); United States v. Deville, 278 F.3d 500 (5th Cir. 2002).

The frequency of reversible error is confirmed by data from the Criminal Appellate section at Main Justice, which handles reports of adverse decisions and requests for Government appeals. During 2000 and 2001, Criminal Appellate handled a total of 34 reports of post-verdict judgments of acquittals. The Solicitor General, who is selective in authorizing appeals, authorized appeal in 25 cases, and the appellate court reversed in 17 of those cases, and reversed in part in an 18th case. Thus, the appellate court found reversible error in almost 72% of the cases appealed, and over 50% of the cases reported. During 2002 alone, Criminal Appellate handled 22 reports of post-verdict judgments of acquittal, and the Solicitor General authorized appeal in 15 of them; rulings have been received in 7 of those cases, 5 of them reversals.[11]

Given the substantial rate of reversible error in judgments of acquittal entered after the verdict, there is no reason to believe that district judges err any less frequently when they grant motions for judgment of acquittal before verdict.[12] Indeed, the rate of error may be even higher, since such pre-verdict rulings are made when the jury, witnesses and counsel are waiting in the courtroom, a situation "in which the court would feel pressured into making an immediate, and possibly erroneous, decision." Fed. R. Crim. P. 29, 1994 Advisory Committee Notes. The proposed amendment should thus allow correction of a substantial number of erroneous

---

[11] A Table, and summaries of the facts of the cases, are attached as Exhibit C.

[12] The Supreme Court cases finding such decisions unappealable certainly confirm the occurrence of such errors, some of them glaring. *See, e.g.*, Sanabria v. United States, 437 U.S. 54, 68 & n.22, 77-78 (1978) ("The trial court's ruling here led to an erroneous resolution in the defendant's favor ..."); Fong Foo v. United States, 369 U.S. 141, 142-43 (1969) (acquittal was improperly entered well before the Government completed its case, and was "based upon an egregiously erroneous foundation").

judgments of acquittal, which would otherwise be entered before the verdict and be uncorrectable.

In any event, as this Committee stated with regard to the 1994 amendment, even if the proposed amendment would "not affect a large number of cases," it is still a worthwhile and necessary amendment. Fed. R. Crim. P. 29, 1994 Advisory Committee Notes.[13] The Department has observed repeated instances in which judges enter pre-verdict judgments of acquittal which are entirely erroneous, and are based not only on incorrect evaluations of the sufficiency of the evidence but on extraneous issues, including dislike of the law being enforced, claims of pre-trial or trial error, or the judge's personal schedule. These extraordinary abuses by certain judges not only cause untenable results in criminal cases, but also can bring the entire judicial system into disrepute. What follows are some particularly egregious examples of pre-verdict judgments of acquittal, none of which could be appealed under the current Rule.

Even though a judgment of acquittal under Rule 29 can be based solely on the insufficiency of the evidence, some judges grant judgments of acquittal in whole or in part for extraneous reasons. For example, in the District of Guam, a judge granted a judgment of acquittal for the sole reason that he was scheduled to attend a conference. When it appeared that the trial would continue longer than the judge expected, he invited defense counsel to move for acquittal at the close of the government's case. The defense attorney told the judge he thought it was unethical to make the motion because he did not believe it was well founded. The judge entered a judgment of acquittal on all charges and attended the conference.

In the District of New Jersey, in Hobbs Act extortion case involving organized crime, the judge indicated he was uncomfortable with how the FBI conducted its investigation. The judge observed that while the defendants did not have a legally sufficient entrapment case, it was somewhat unfair of the government to send the cooperator to meet with the defendants. Even though the evidence was sufficient and presented a clear jury issue as to whether the payments made by the contractor were extortion or a "finder's fee," as defendants claimed, the judge at the close of the government's case entered judgments of acquittal on all five Hobbs Act extortion counts as to all three of the defendants.

In other cases, some of which also involve extraneous factors, judges misconstrued the statute being enforced. For example, in the District of New Jersey, at the conclusion of the testimony, one defendant brought a motion to dismiss based on the latest of several allegations of discovery violations. The judge instead *sua sponte* granted a judgment of acquittal on three counts of money laundering against two defendants pursuant to Rule 29, based upon a fundamental misapprehension of the law of money laundering. The evidence showed that the defendants took proceeds from a mail fraud scheme and transferred it to a dummy corporation set

---

[13] To the extent that the amendment does not affect a large number of cases, moreover, any reduction in its beneficial effect is offset by a reduction in any concern that it could prevent the early termination of many trials, or result in numerous Government appeals.

up in the Cayman Islands, and then got the now-laundered money transferred into nominee accounts they could access. The judge opined that money laundering can only occur if the money goes to the third party, not where money takes a "circuitous route" back to the criminals who generated it. As a result, these defendants escaped all prosecution for the money laundering crimes they committed, and one defendant, a lawyer, was freed from all charges.

In the Central District of California the court granted judgments of acquittal at the close of the government's case, ending a false statement prosecution under 18 U.S.C. § 1001. During the Rule 29 hearing the court demonstrated visibly strong emotion upon defense attorney's argument that the defendant, a senior citizen, with no criminal history, should never have been charged. The judge granted the Rule 29 motion on an unraised legal ground, of which the government was given no advance notice or opportunity to respond. The court ruled that under § 1001, a false statement to a private lender in a government-guaranteed loan had to be material not only to the government-guaranteed lender, but also to a government agency. This was directly contrary to the case law under § 1001.

In other cases, judges misapplied the Rule 29 standard to take sufficient cases from the jury. For example, in the Southern District of New York, the defendant was charged in an "anthrax hoax" case with leaving a note at his place of employment, in October 2001, that said "Anthrax is here." After the note was discovered, the entire store was evacuated and the police and fire departments rushed to the scene. The defendant was charged with violating 18 U.S.C. § 2332a by threatening to use a weapon of mass destruction. The court granted a pre-verdict Rule 29 motion on the theory that there could have been no "threat to use" anthrax because the note was phrased in the present tense (it said anthrax <u>is</u> here) and didn't threaten that the defendant would take any <u>future</u> action.

In the District of Massachusetts, the defendant was charged with two bank robberies, both of which involved demand notes which demanded money and threatened to shoot the tellers in the face. The evidence showed that: a fingerprint expert lifted good quality latent prints from both notes that matched defendant's prints; the tellers and another bank employees gave descriptions of the robber which generally matched the defendant, and the bank camera photographs were consistent with the defendant's appearance. The judge granted the defendant complete judgements of acquittal at the close of the government's case, even though the judge had ruled in a previous case that similar evidence was sufficient to support a guilty verdict, and been affirmed by the First Circuit.

In the Central District of California, the defendants were charged with health care fraud for charging Medicare for surgeries done on consecutive days when, in fact, the patients were present only on one day. Witnesses (with their calendars) testified that they only saw the doctor on one day. In addition, the government presented evidence demonstrating that the doctor falsified his own medical records to reflect that the patients were there two days in a row. The judge granted judgments of acquittal on much of the case before verdict, and after verdict on the other counts the judge indicated that he may have made a (uncorrectable) mistake.

In a number of cases, the judges in granting judgments of acquittal made clear that their ruling was based on their dislike of the type of prosecution, an impermissible basis for granting a Rule 29 motion. For example, the District of Colorado reported that one judge has exhibited great hostility towards firearms prosecutions, and has commented that these cases are a waste of time and resources. In one case, the judge granted an acquittal pre-verdict, stating that the government had failed to establish that the firearm traveled in interstate commerce, even though the evidence showed that there are no gun manufacturers in Colorado and that the gun was stamped with the name of an out-of-state manufacturer – sufficient evidence under 10th Circuit precedent.

In the Southern District of Illinois, the defendants were charged with using insufficient fund checks to bilk the U.S. Postal Service of over $200,000 in postal fees for defendants' mailing of fliers advertising their near-bankrupt company. The evidence, including the testimony of the defendants' accountant, showed that when the defendants ordered the bulk mailing, they knew that the company lacked the funds, and that when the company president wrote the checks she knew the checks would not clear, and that what she was doing was illegal. The judge granted judgements of acquittal on the entire case before verdict, calling it a bad check case that should have been brought in state court.

In the Eastern District of New York, a judge granted a judgment of acquittal on all charges in a prosecution for failure to pay child support, stating that there was insufficient evidence that the defendant lived in a different state than the child, despite overwhelming evidence (sworn statements, utility records, etc.) that the defendant had established residence elsewhere. The United States Attorney from that district is of the view that the judge viewed the case as a dispute better resolved in state court.

Finally, some judges have admitted that they grant judgments of acquittal before verdict precisely to prevent their decisions from being reviewed. For example, in the Northern District of Texas, a judge granted a judgment of acquittal ending a bank fraud prosecution pre-verdict despite ample evidence that a defendant had knowledge that the checks he deposited were stolen. When the government pointed out that a post-verdict judgment of acquittal at least would give the government some recourse to seek review of the judge's ruling, the judge responded, "I don't play the game that way." Similarly, the Eastern District of Michigan and the Middle District of Georgia reported that, following successful government appeals of post-verdict judgments of acquittal, the respective judges announced that in the future they would enter acquittals in such cases *before* submission to the jury.

As these data and examples demonstrate, despite the 1994 amendment encouraging reservation of the decision, a disturbing number of district judges refuse to follow the encouraged course, refuse to reserve decision, and thus preclude (often intentionally) appellate review of sometimes erroneous and occasionally egregious decisions. Allowing these decisions, which dispose of entire cases or counts, to escape the appellate review which protects against error in all other such rulings, is anomalous, shields error, invites abuse, releases dangerous individuals, and

prevents the jury and the justice system from performing their most basic function, adjudicating guilt correctly.

Committee Questions

The Committee in its April meeting raised some questions about the proposed amendment, which the Department is happy to answer.

First, the proposed amendment does not prevent the giving of an instruction or the return of a verdict on a lesser included offense. Such an instruction can be given at the request of either the defense or the prosecution. *See* Schmuck v. United States, 489 U.S. 705, 717 & n.9 (1989); Fed. R. Crim. P. 31(c). If the jury convicts only of the lesser offense, reprosecution of the greater offense will be barred by double jeopardy. *See, e.g.*, Poland v. Arizona, 476 U.S. 147, 153 n.2 (1986). If the jury convicts of the greater offense – whether or not such an instruction is given – a court considering a reserved motion for judgment of acquittal will be required to consider whether the evidence would be sufficient to sustain a conviction on the greater offense or a lesser included offense. *E.g.*, United States v. Wood, 207 F.3d 1222, 1229 (10th Cir. 2000). Thus, reserving the issue of whether there is insufficient evidence of the greater offense will not prevent the district judge from granting a judgment of acquittal on that offense, or from entering a guilty verdict on the lesser offense.

Second, the proposed amendment would not prevent bail pending sentencing or appeal. If the court reserves decision, after the jury's guilty verdict it may release the defendant pending resolution of the motion just as it can any other defendant pending sentencing.18 U.S.C. § 3143(a)(1). Even if the defendant has been convicted of a crime serious enough to be listed under 18 U.S.C. § 3142(f)(1), the "substantial likelihood that a motion for acquittal ... will be granted" is a factor favoring bail. 18 U.S.C. § 3143(a)(2). If the district judge thereafter grants the Rule 29 motion, and the United States appeals, the defendant will be entitled to bail on the same standard as bail pending trial. 18 U.S.C. § 3143(c). If the United States does not appeal, the defendant will be entitled to outright release.

Third, while the proposed amendment, like the current Rule 29, is phrased in terms of jury trials, it should apply to a district judge in a bench trial[14] – although in effect it would permit appeals only when the district judge so chose. The Supreme Court has held that "the Double Jeopardy Clause does not bar an appeal where errors of law may be corrected and the result of such correction will simply be a reinstatement of a jury's verdict of guilty or a judge's finding of guilty," Jenkins, 420 U.S. at 368 (bench trial), *overruled on other grounds*, Scott, 437 U.S. at 100-01, so reservation is equally desirable in bench trials as in jury trials to preserve the Government's right of appeal. *See* United States v. Habhab, 132 F.3d 410, 414-15 (8th Cir. 1997) (finding no prejudicial error from pre-1994 reservation of Rule 29 motion in bench trial, and

---

[14] The applicability of Rule 29 to bench trials could be made clear in the application notes.

noting that "the rule has since been amended to avoid the very difficulty at issue here").[15] Reservation will also be helpful to allow the district judge more time to apply the exacting standard for granting a Rule 29 motion. *See, e.g.,* United States v. Doe, 136 F.3d 631, 636 (9th Cir. 1998) ("The same test applies to both jury and bench trials"; the court "must review the evidence presented against the defendant in the light most favorable to the government to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt"). However, even if the Rule 29 decision is reserved, the district judge, sitting as the finder of fact, may enter a "not guilty" verdict at the end of the case based upon the reasonable doubt standard (which, unlike the Rule 29 standard, permits the finder of fact to discredit the Government's evidence and draw inferences unfavorable to the Government). Such a "not guilty" verdict in a bench trial precludes appeal in the same manner as a jury verdict of "not guilty." Martin Linen, 430 U.S. at 573 n.12. Accordingly, the proposed amendment provides district judges in bench trials with additional methods to ensure the correctness of their Rule 29 decision, while not precluding the entry of unappealable verdicts of "not guilty".

Finally, while requiring reservation would prevent the entry of a pre-verdict judgment of acquittal of one defendant in a multi-defendant trial, that is outweighed by the improvement resulting from the proposed amendment. First, multi-defendant trials are more likely than a single-defendant case to pose situations "in which the court would feel pressured into making an immediate, and possibly erroneous, decision" – pressure which reservation would avoid. *See* Fed. R. Crim. P. 29, 1994 Advisory Committee Notes. Second, the government's interest in an accurate, and if inaccurate appealable, disposition is no less for a defendant in a multi-defendant case than if that defendant were tried separately. Third, the supposed "time saved" by a pre-verdict judgment of acquittal is less in a multi-defendant case, as the trial, and the efforts of the judge, jury and prosecution, must continue regardless of the dismissal of one of several defendants. Finally, a defendant in such a case who is confident in his Rule 29 motion still can shorten the time until verdict by foregoing putting on his own defense case, and simply watching as other defendants put on the defense case.[16]

---

[15] The Supreme Court and commentary have suggested that district judges in bench trials could achieve the same salutary end of making appeal possible by making special findings of fact in their verdicts under Fed. R. Crim. P. 23(c), Jenkins, 420 U.S. at 366-67; Note, Double Jeopardy, Acquittal Appeals, and the Law-Fact Distinction, 86 Cornell L. Rev. 1131, 1163 (2001), but that has not yet proven practicable, Note, *supra.*

[16] The Committee also asked about directed verdict practice in the states. The Federal Judicial Center has been asked to review and report on state directed verdict law and practice, and will provide its information independently.

Conclusion

The Department of Justice has considered this issue at great length and does not lightly urge substantive amendments to the Criminal Rules, as this Committee is well aware. Nonetheless we believe that Rule 29 as currently constituted represents an anomaly within the Rules and indeed within the judicial system. Throughout the legal system, nearly every ruling made by the judge or decisionmaker can at some point be substantively appealed. For the Rules to permit a single judge to enter an unreviewable acquittal ending a federal prosecution in a criminal case, perhaps the most fundamental and grave proceeding in any system of laws, "runs directly counter to the principles of fairness and uniformity inherent in the process of appellate review." Unlimited Power, at 434, 452, 463 (urging that "a revision of Rule 29 that eliminates the power of trial judges to order pre-verdict judgments of acquittal would best serve the interests of justice and fairness").

To an extent rarely equaled in our history, citizens look to the federal criminal justice system to play a leading role in ensuring the national security, policing financial markets and corporate suites, and ensuring the consistent enforcement of a host of important laws. Particularly in these times, the societal costs suffered when even a small number of meritorious criminal cases are irretrievably and erroneously abrogated far outweigh the burdens placed on the court, the parties and the jurors to await the deliberation of the defendant's peers. The Rules should ensure a just result for crime victims and for the public as well as for the criminal defendant. The proposed amendment to Rule 29 would help "provide for the just determination of every criminal proceeding," the very purpose of the Rules of Criminal Procedure. Fed. R. Crim. P. 2. It also allows the Department of Justice to do a better job vindicating the interests of both the United States and the victims of crime. We know the Committee will seriously consider our views, and we urge the Committee to adopt the proposed amendment.

ATTACHMENT "A"

PROPOSED AMENDMENTS TO 2002 VERSION OF RULE 29

Rule 29. Motion for a Judgment of Acquittal

(a)Before Submission to the Jury.

After the government closes its evidence or after the close of all the evidence, the ~~court on the~~ defendant ~~'s motion must enter~~may move for a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may ~~on its own consider whether the evidence is insufficient to sustain a conviction~~deny the motion, or reserve decision on the motion, but the court may not grant the motion prior to the jury's return of a verdict of guilty. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.

(b)Reserving Decision.

~~The~~If the court ~~may~~ reserves decision on the motion, the court must proceed with the trial ~~(where the motion is made before the close of all the evidence)~~, submit the case to the jury, and decide the motion ~~either before~~after the jury returns a verdict ~~or after it returns a verdict~~ of guilty ~~or is discharged without having returned a verdict~~. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

(c)After Jury Verdict ~~or Discharge~~.

(1)*Time for a Motion.* ~~A~~Within 7 days after a guilty verdict, or within any other time the court sets during the 7-day period, a defendant may move for a judgment of acquittal, or renew such a motion, ~~within 7 days after a guilty verdict~~ or ~~after~~ the court ~~discharges the jury, whichever is later, or within any other time the court sets during the 7-day period.~~ on its own motion may grant a judgment of acquittal, if the evidence is insufficient to sustain the guilty verdict.

(2)*Ruling on the Motion.* ~~If~~After the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal. ~~If the jury has failed to return a verdict, the court may enter a judgment of acquittal.~~

(3)*No Prior Motion Required.* A defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury ~~discharge~~verdict.

(d)Conditional Ruling on a Motion for a New Trial.

(1)*Motion for a New Trial.* If the court enters a judgment of acquittal after a guilty verdict, the court must also conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or reversed. The court must specify the reasons for that determination.

(2)*Finality.* The court 's order conditionally granting a motion for a new trial does not affect the finality of the judgment of acquittal.

(3)*Appeal.*
(A)*Grant of a Motion for a New Trial.* If the court conditionally grants a motion for a new trial and an appellate court later reverses the judgment of acquittal, the trial court must proceed with the new trial unless the appellate court orders otherwise.
(B)*Denial of a Motion for a New Trial.* If the court conditionally denies a motion for a new trial, an appellee may assert that the denial was erroneous. If the appellate court later reverses the judgment of acquittal, the trial court must proceed as the appellate court directs.

ATTACHMENT "B"

PROPOSED AMENDMENT TO 2002 VERSION OF RULE 29

1 **Rule 29. Motion for a Judgment of Acquittal**

2 **(a)Before Submission to the Jury.** After the government closes
3 its evidence or after the close of all the evidence, the defendant
4 may move for a judgment of acquittal of any offense for which
5 the evidence is insufficient to sustain a conviction. The court may
6 deny the motion or reserve decision on the motion, but the court
7 may not grant the motion prior to the jury's return of a verdict of
8 guilty. If the court denies a motion for a judgment of acquittal at
9 the close of the government's evidence, the defendant may offer
10 evidence without having reserved the right to do so.

11 **(b)Reserving Decision.** If the court reserves decision on the
12 motion, the court must proceed with the trial, submit the case to
13 the jury, and decide the motion after the jury returns a verdict of
14 guilty. If the court reserves decision, it must decide the motion on
15 the basis of the evidence at the time the ruling was reserved.

16 **(c)After Jury Verdict.**

17 **(1)*Time for a Motion.*** Within 7 days after a guilty verdict, or
18 within any other time the court sets during the 7-day period, a
19 defendant may move for a judgment of acquittal, or renew such
20 a motion, or the court on its own motion may grant a judgment of
21 acquittal, if the evidence is insufficient to sustain the guilty
22 verdict.

23 **(2)*Ruling on the Motion.*** After the jury has returned a guilty
24 verdict, the court may set aside the verdict and enter an acquittal.

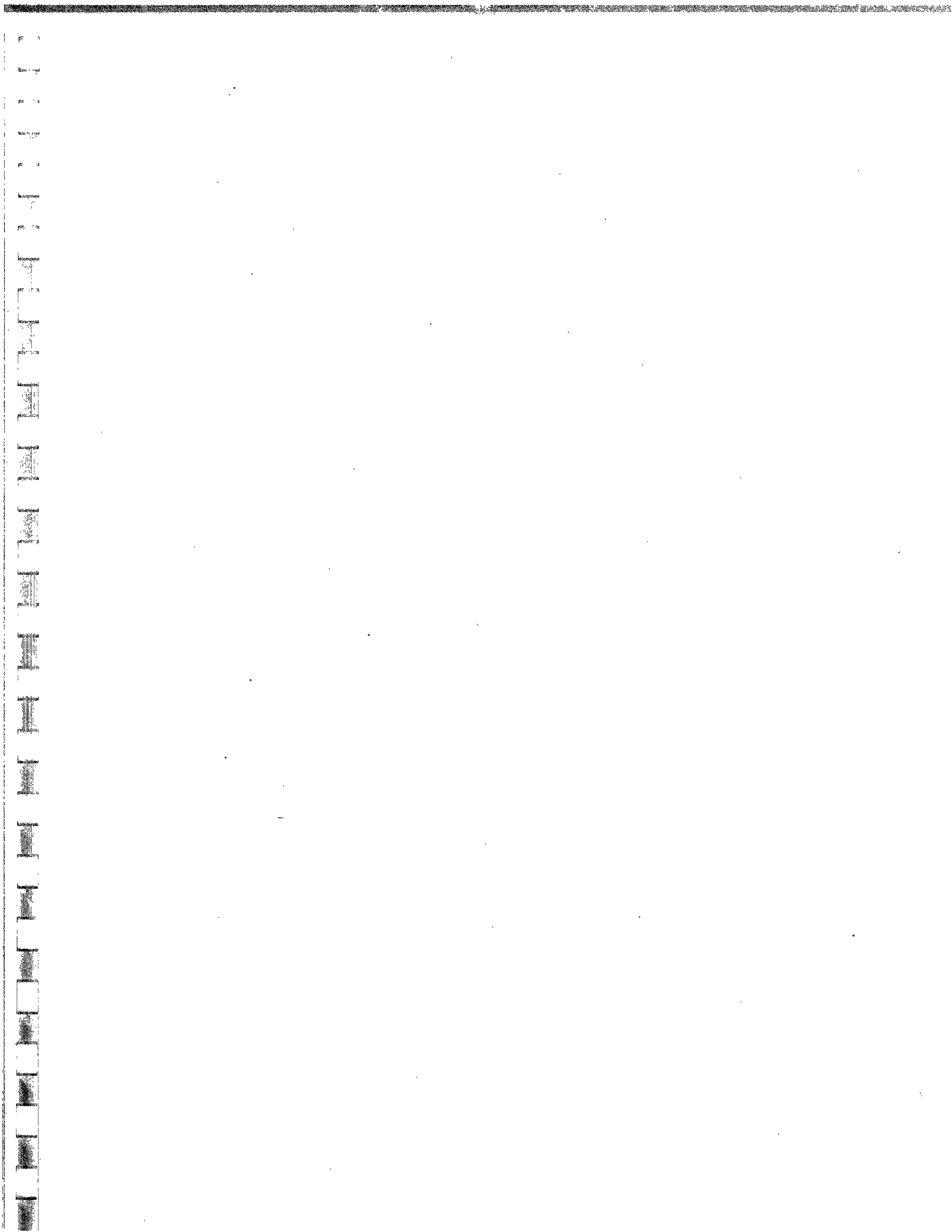
25 **(3)*No Prior Motion Required.*** A defendant is not required to
26 move for a judgment of acquittal before the court submits the case
27 to the jury as a prerequisite for making such a motion after jury
28 verdict.

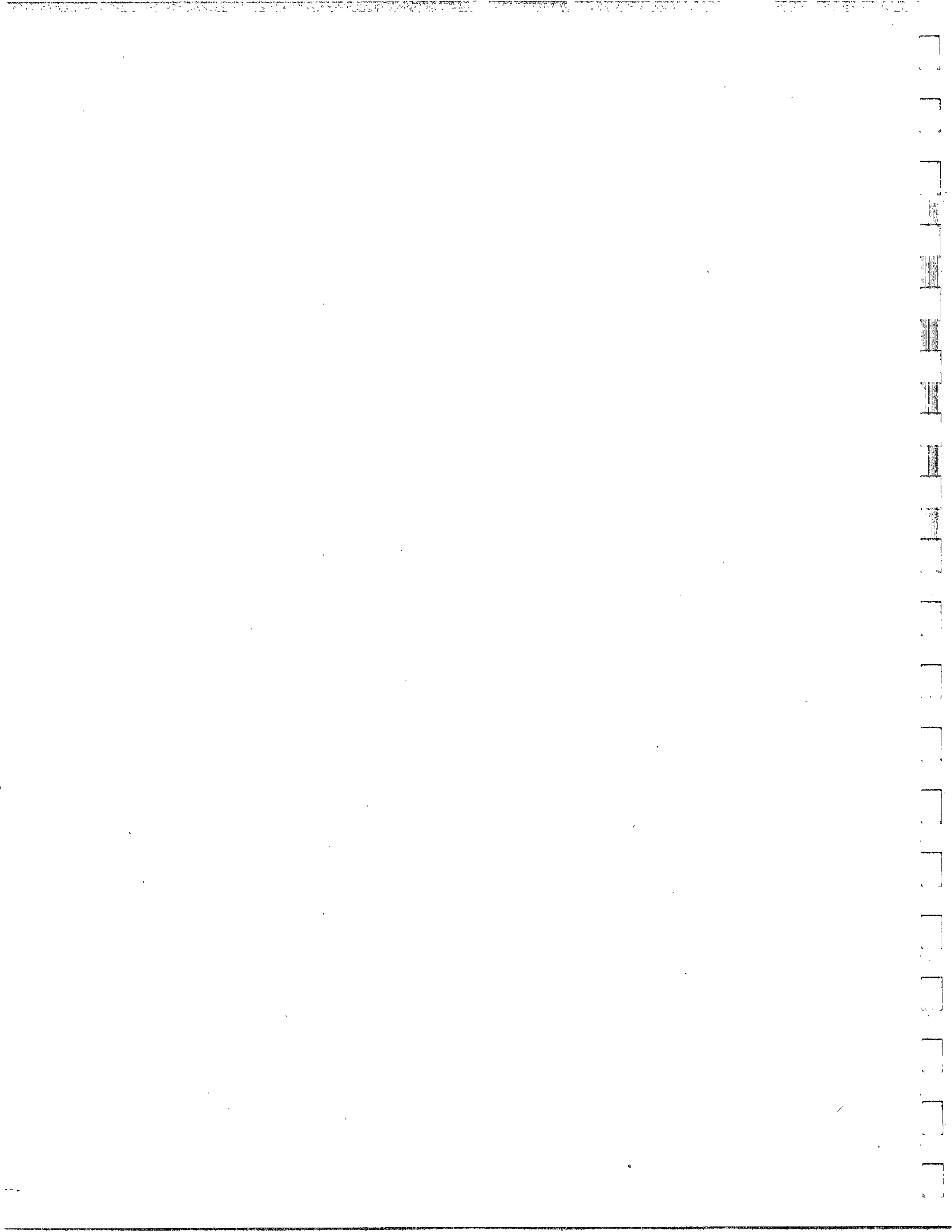
29 **(d)Conditional Ruling on a Motion for a New Trial.**

30 **(1)*Motion for a New Trial.*** If the court enters a judgment of
31 acquittal after a guilty verdict, the court must also conditionally
32 determine whether any motion for a new trial should be granted
33 if the judgment of acquittal is later vacated or reversed. The court
34 must specify the reasons for that determination.

35 **(2)*Finality.*** The court 's order conditionally granting a motion
36 for a new trial does not affect the finality of the judgment of
37 acquittal.

38 **(3)*Appeal.***
39 (A)*Grant of a Motion for a New Trial.* If the court conditionally
40 grants a motion for a new trial and an appellate court later
41 reverses the judgment of acquittal, the trial court must proceed
42 with the new trial unless the appellate court orders otherwise.
43 (B)*Denial of a Motion for a New Trial.* If the court conditionally
44 denies a motion for a new trial, an appellee may assert that the
45 denial was erroneous. If the appellate court later reverses the
46 judgment of acquittal, the trial court must proceed as the appellate
47 court directs.





Post-Verdict Rule 29s Reported to Criminal Appellate

2000 TABLE

APPEALS

Date	Case Name	District	Judge	Decision Upon Appeal
Oct. 29, 1999	US v. Dwight D. Sundby	D.N.D.	Conmy	Reversed 221 F.3d 1345 (8th Cir. 2000) (Table)
Dec. 7, 1999	US v. Michael Abbell and William Moran	S.D. Fla.	Hoeveler	Reversed 271 F.3d 1286 (11th Cir. 2001)
Jan 4, 2000	US v. Tony Johnson	W.D. TN	Todd	Reversed 39 Fed. Appx. 114 (6th Cir. 2002)
Jan 6, 2000	US v. Ronald Dean Deucher	D.N.M.	Vazquez	Reversed 3 Fed. Appx. 889 (10th Cir. 2000)
Jan. 21, 2000	US v. Eddie Tosado	M.D. Fla.	Sharpe	Affirmed 226 F.3d 649 (11th Cir. 2000) (Table)
Jan. 26, 2000	US v. Harline DeCordova Young No. 00-11137	M.D. Fla.	Aldrich	Affirmed in part, Reversed in part 252 F.3d 439 (11th Cir. 2001) (Table)
Jan. 27, 2000	US v. Daniel Bologna	N.D.N.Y.	Scullin, Jr.	Reversed 58 Fed. Appx. 865 (2d Cir. 2003)
Apr. 27, 2000	US v. Anthony J. Thompson	E.D. Missouri	Shaw	Reversed 285 F.3d 731 (8th Cir. 2002)
Sept. 18, 2000	US v. Tina Nichols	E.D.N.C.	Britt	Vacated 15 Fed.Appx. 80 (4th Cir. 2001)
Oct. 3, 2000	US v. Clifford Timmons	N.D. GA	Hunt	Reversed 283 F. 3d 1246 (11th Cir. 2002)

NO APPEALS

Date	Case Name	District	Judge
Sep. 21, 1999	US v. Jeffrey Holmes Ayers	N.D. Ca	Ware

Jan. 3, 2000	US v. Thomas O'Neil	E.D. Mich	Cleland
Jan. 21, 2000	US v. Mark Saripkin	W.D. Tenn.	Julia Smith Gibbons
Feb. 11, 2000	US v. Jose Madera-Melendez	D.P.R.	Fuste

2000 FACTS

APPEALS

United States v. Dwight D. Sundby (D.N.D. October 29, 1999)

The judge granted post-verdict motion of acquittal on two counts: conspiracy to possess with intent to distribute methamphetamine and possession with intent to distribute methamphetamine. The judge refused to draw adverse inferences from the fact that marked baggies were left at the defendant's house and there were corroborative entries in the defendant's drug ledger. Reversed.

United States v. Michael Abbell and William Moran (S.D. Fla. Dec. 7, 1999)

District court granted judgment of acquittal on a RICO conspiracy charge arising out of the defendant's participation in efforts by the Cali drug cartel to obstruct justice by seeing to it that the cartel members arrested and imprisoned in the U.S. remained silent about the cartel's activities. The court held that the defendants' inappropriate conduct did not demonstrate a direct link to the drug conspiracies. Reversed.

United States v. Tony Johnson (W.D. Tenn. Jan. 4, 2000)

District court granted judgment of acquittal on firearms counts, 18 U.S.C. 924c and 922(g). The court found no evidence that the defendant used or carried a firearm, and further ruled that his possession of a firearm was not related to a drug trafficking crime. The government appealed only on the judgment relating to the Section 924 count. Reversed.

United States v. Ronald Dean Deucher (D.N.M. Jan 6, 2000)

The judge granted the motion of acquittal after verdict convicting the defendant for possession with intent to distribute 50kg or more of marijuana and conspiracy to possess with the intent to distribute marijuana. The court found the following evidence insufficient to support a conviction: the defendant's nervousness at the border checkpoint, referral to cargo as UPS shipment, the fact that the trailer doors weren't secure even though he told the border agent he checked them, and the defendant's trial testimony denying guilt. Affirmed.

United States v. Eddie Tosado (M.D. Fla. Jan. 21, 2000)

The judge granted a judgment of acquittal on the charge of conspiracy to possess heroin with the intent to distribute. The judge found that there was insufficient evidence to establish an intent to distribute the heroin. The defendant possessed 50 grams of heroin, but because he bought that amount over a five month period, the judge contended that the defendant could have bought the heroin for personal use. Affirmed.

United States v. Harline DeCordova Young (M.D. Fla. Jan. 26, 2000)

The judge granted the motion for judgment of acquittal of the defendant, who was charged with importing and possessing cocaine, in violation of 21 U.S.C. 952 and 841(a)(1).

The judge said that traces of cocaine residue in the defendant's briefcase were inexplicable and could in no way be connected to the sealed drugs found in the airplane lavatory trash bin. The judge also found it impossible that the defendant could have gotten the drugs through airport security x-rays to place them in the lavatory. Affirmed in part, Reversed in part.

<u>United States v. Daniel Bologna</u> (N.D.N.Y Jan. 27, 2000)

The judge granted post-verdict motion for judgment of acquittal with respect to two counts involving false Reports of Investigation written by the defendant, a United States Customs Special Agent. Bologna allegedly filed false dates of convictions to justify the hundreds of hours he reported working on the cases. The court found that while Bologna reported false dates of conviction, there was insufficient evidence that he knew the dates were false and that he knowingly reported false dates. Reversed.

<u>United States v. Anthony J. Thompson</u> (E.D. Missouri Apr. 27, 2000)

The court granted a post-verdict motion of acquittal on a charge of possession of crack cocaine with intent to distribute and instead convicted the defendant of the lesser-included offense of simple possession of more than five grams of crack cocaine. The judge found there was insufficient evidence of the defendant's intent to distribute, even though the amount of cocaine was consistent with distribution and not personal use. Reversed.

<u>United States v. Tina Nichols</u> (E.D.N.C. Sept. 18, 2000)

Judge granted the motion for judgment of acquittal on the charge of bank fraud on the grounds that the evidence did not establish that the defendant misrepresented or concealed a material fact from the bank. The defendant oversaw the accounts for a partnership that built a shopping center in North Carolina. She deposited loan checks into her own account without the contractor's endorsement. The court found that depositing a check without more did not involve representation. Vacated.

<u>United States v. Clifford Timmons</u> (N.D. Ga. Oct. 3, 2000)

The district court granted a motion for judgment of acquittal on a firearms charge, finding the evidence insufficient to support the jury's finding that the defendant possessed a firearm "in furtherance of" a drug trafficking crime. Reversed.

NO APPEALS

<u>United States v. Jeffrey Holmes Ayers</u> (N.D. Ca Sep. 21, 1999)

District court granted post-verdict motion for judgment of acquittal on the ground that evidence that defendant possessed a shotgun and ammunition for 60 to 90 seconds was insufficient to support conviction for possession of firearms.

<u>United States v. Thomas O'Neil</u> (E.D. Mich. January 3, 2000)

The Rule 29 motion was granted 16 months after it was made because the evidence was insufficient to show that O'Neil (who was being prosecuted for dealing in explosive

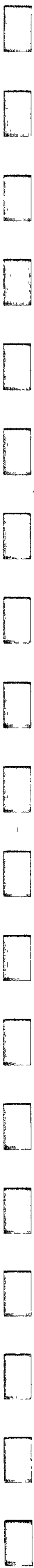
materials without a license) had sold "explosive materials" within the definitions of 18 U.S.C. 841(c) and (d).

<u>United States v. Mark Saripkin</u> (W.D. Tenn. Jan. 21, 2000)

Judge granted motion on Count 1: conspiracy to obstruct justice, to kill an FBI agent, and to kill a witness in violation of 18 U.S.C. 371. The court found that the evidence did not demonstrate that the defendant was part of the conspiracy, even though tapes of conversations appeared to show otherwise. The acquittal was entered after the jury was unable to reach a verdict and the court's ruling was not appealable.

<u>United States v. Jose Madera-Melendez</u> (D.P.R. Feb. 11, 2000)

After a jury found the defendant guilty of conspiracy to commit murder during a drug offense, the judge *sua sponte* reconsidered a Rule 29 motion made during trial. He concluded that there was not "even a scintilla of evidence" that the defendant joined the conspiracy, because, according to the judge, there was no admissible evidence that the defendant was part of the drug organization and the defendant was merely present at the murder scene.



2001 TABLE

APPEALS

Date	Case Name	District	Judge	Decision Upon Appeal
7/7/00	US v. Deville No. 98-60049-15	W.D. La.	Haik	Reversed 278 F.3d 500 (5th Cir. 2002)
7/13/00	US v. Moran No. 96-10335-RCL	D. Mass.	Lindsay	Reversed 312 F.3d 480 (1st Cir. 2002)
9/29/00	US v. Nance No. 3:99-CR-144	E.D. Tenn.	Jordan	Affirmed 40 Fed. Appx. 59 (6th Cir. 2002)
3/7/01	US v. Ares No. 98-943-Cr-Gold	S.D. Fla.	Gold	Affirmed 34 Fed.Appx. 388 (11th Cir. 2002)
4/4/01	US v. Oberhauser Crim. No. 99-20(07)	D. Minn.	Frank	Reversed 284 F.3d 827 (8th Cir. 2002)
4/18/01	US v. Reyes No. 01-1258	S.D.N.Y. D.N.	Patterso n	Reversed 302 F.3d 48 (2d Cir. 2002)
4/28/01	US v. Smith et al. No. 01-2605	D.N.J.	Lifland	Reversed 294 F.3d 473 (3d Cir. 2002)
6/26/01	US v. Donaldson No. 00-CR-20067-BC	E.D. Mich.	Tarnow	Reversed 52 Fed. Appx. 700 (6th Cir. 2002)
7/2/01	US v. Hernandez-Bautista No. P-01-CR-103	W.D. Tex.	Furgeso n	Affirmed 293 F.3d 845 (5th Cir. 2002)
8/7/01	US v. Canine No. CR 01-43	S.D. Iowa	Vietor	Reversed 30 Fed. Appx. 678 (8th Cir. 2002)
8/14/01	US v. Hernandez No. 01-57	S.D. Iowa	Vietor	Affirmed 301 F.3d 886 (8th Cir. 2002)
8/31/01	US v. Bruce Brown	E.D.N.C.	Howard	Reversed 52 Fed. Appx. 612 (4th Cir. 2002)
9/14/01	US v. Chang Qin Zheng D.C. No. 1-00-CR-338 (MMP)	N.D. Fla.	Paul	Reversed 306 F.3d 1080 (11th Cir. 2002)
9/25/01	US v. Lusk No. CR 00-564-RE	D. Oregon	Redden	Affirmed 41 Fed. Appx. 955 (9th Cir. 2002)
4/13/02	US v. As-Sadiq No. 5:00-CR-176-1F(3)	E.D. N.C.	Fox	Affirmed 58 Fed. Appx. 952 (4th Cir. 2003)

NO APPEALS

Date	Case Name	District	Judge
1/23/01	US v. Ayala-Torres No. CR00-5585R JB	W.D. Wa.	Burgess

4/18/01	**US v. Sanchez** **No. 992(B)-DDP**	**C.D. Cal.**	**Pregerson**
7/13/01	**US v. de Saad** **No. CR 98-504**	**C.D. Cal.**	**Friedman**
8/17/01	**US v. Sandoval-Ahumada** **CR 00-987-FMC**	**C.D. Cal.**	**?**
10/15/01	**US v. Sowada** **No. 4:01cr2(3)**	**E.D. Tex.**	**Brown**

2001 FACTS

APPEALS

United States v. Deville, (W.D. La. July 7, 2000)

The defendant, a former chief of police, was convicted of, *inter alia*, one count of possessing and carrying a firearm during, in relation to, and in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A)(i), for keeping his semi-automatic hand gun in a nearby overnight bag while transporting 62 pounds of marijuana from Texas to Louisiana. The district court entered a judgment of acquittal on the § 924(c) count, expressing concern about the lack of corroboration regarding certain pieces of evidence. Reversed.

United States v. Moran, (D. Mass. July 13, 2000)

Defendants, corporate insiders of the First American Bank for Savings, were convicted of one count of conspiracy to commit bank fraud, in violation of 18 U.S.C. § 371, and two counts of bank fraud, in violation of 18 U.S.C. § 1344. The district court, one year after the conviction, entered a judgment of acquittal on all counts for both defendants, arguing that one witness's testimony should be discounted due to his memory problems stemming from alcoholism, and that the government failed to prove that one of the defendants had knowingly acted to defraud the bank. Reversed.

United States v. Nance, (E.D. Tenn. Sept. 29, 2000)

The defendant was convicted of, *inter alia*, possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A), for firearms found in the defendant's car when the defendant was confronted, arrested, and searched in his apartment; the search of the defendant revealed drugs and related paraphernalia. The district court granted defendant's motion for acquittal on the § 924(c) charge because the court found that the gun was not on the defendant or within his reach, and that there were no drugs in the car; therefore, the defendant did not use or carry the firearm in furtherance of a drug trafficking violation within the meaning of the statute. Affirmed.

United States v. Ares, (S.D. Fla. Mar. 7, 2001)

The defendant was convicted of obstruction of justice, in violation of 18 U.S.C. § 1503, for giving false statements in response to a request by the Probation Office regarding the employment status of a former employee who was being sentenced for an unrelated crime. The district court granted a post-verdict judgment of acquittal, arguing that (1) there was insufficient proof that the defendant knew of a pending judicial proceeding; (2) there was insufficient evidence that she "corruptly" intended to impede it; (3) there was no evidence that the defendant's misrepresentations had the "natural and probable effect" of impeding the due administration of justice in the sentencing hearing. Affirmed.

United States v. Oberhauser, D. Minn. Apr. 4, 2001

The defendant was convicted of two counts of money laundering in violation of 18 U.S.C § 1956(a)(1)(A)(i) for setting up fraudulent trust accounts. The district court entered

a judgment of acquittal, finding primarily that there was insufficient evidence to show that the defendant was aware that the operation was fraudulent at the time of the specific transactions on which he was convicted. Reversed.

United States v. Reyes, (S.D.N.Y. Apr. 18, 2001)

The defendant was convicted of conspiring to transport stolen property in interstate commerce, in violation of 18 U.S.C. §§ 371 and 2314, for referring customers to a neighboring business that sold stolen automobile airbags. The district court entered a judgment of acquittal, finding that the evidence was insufficient to show that the defendant "had the specific intent to become a knowing and willing member of the . . . conspiracy to deal in stolen airbags." Reversed.

United States v. Smith, (D.N.J. April 28, 2001)

Five police officers were convicted under 18 U.S.C. § 241 of conspiracy to violate the civil rights of an arrestee they wrongly suspected of murder, by beating and pepper-spraying him, which led to his death. The district court entered a judgment of acquittal for all defendants (freeing two entirely) on the conspiracy count, misinterpreting the law of conspiracy by concluding that concerted action could not be inferred if there was any other possible inference, and by refusing to consider post-death conspiratorial acts. Reversed.

United States v. Donaldson, (E.D. Mich. June 26, 2001)

The defendant was convicted of bank robbery, in violation of 18 U.S.C. § 2113(a). The district court entered a judgment of acquittal, relying on the government's failure to produce several pieces of evidence as well as a number of other factors. Reversed.

United States v. Hernandez-Bautista, (W.D. Tex. July 2, 2001)

The defendants were convicted of possessing between 100 and 1000 kilograms of marijuana with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). The district court entered a judgment of acquittal and conditionally granted defendants' motion for a new trial, arguing that footprints found near abandoned bags of marijuana were not similar enough to the defendants' to establish anything more than proximity to the marijuana. Affirmed.

United States v. Canine, (N.D. Iowa Aug. 7, 2001)

The defendant was convicted of bankruptcy fraud, in violation of 18 U.S.C. § 157, for knowingly and intentionally failing to report funds that she and her husband had received as an inheritance from his husband's mother's estate. The district court entered a judgment of acquittal, arguing that the defendant had no duty to report the assets from her husband's mother's estate, and that there was no evidence that the defendant denied receiving her husband's inheritance. Reversed.

United States v. Hernandez, (S.D. Iowa Aug. 14, 2001)

The defendant was convicted of aiding and abetting the possession of methamphetamine for purposes of distribution. The district court entered a judgment of acquittal; among other grounds, although it found the evidence sufficient to demonstrate

that the defendant knew that her codefendants possessed with the intent to distribute, it concluded that knowledge was insufficient to give rise to criminal liability for aiding and abetting. Affirmed.

United States v. Brown, (E.D. N.C. Aug. 31, 2001)
The district court granted a motion for judgment of acquittal for bankruptcy fraud, finding that the jury's acquittal of a codefendant showed that the evidence was insufficient to support the defendant's conviction. Reversed.

United States v. Chang Qin Zheng, D.C. No. 1-00-CR-338 (MMP) (N.D. Fla. Sept. 14, 2001)
Defendants were convicted of conspiring to conceal or harbor illegal aliens for the purpose of commercial advantage and private financial gain, in violation of 8 U.S.C. § 1324 (a)(1)(A)(iii), for hiring and housing several illegal aliens. The district court entered a judgment of acquittal on all counts for both defendants, concluding that, although the defendants did harbor illegal aliens, they did so primarily in order to give the aliens shelter and hence were not harboring them "for commercial advantage or private financial gain" under the meaning of the statute. Reversed.

United States v. Lusk, No. CR 00-564-RE (D. Oregon Sept. 25, 2001)
In his first trial, the defendant was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). The district court denied defendant's motion for a judgment of acquittal but granted his motion for a new trial. In his second trial, the defendant was again convicted. The district court granted defendant's motion for a judgment of acquittal and, in the event the judgment of acquittal were to be vacated or reversed, granted defendant's motion for a new trial. The court found the evidence insufficient in the second trial despite finding the evidence sufficient in the first trial, because several pieces of evidence used in the first trial had been excluded or weakened. Affirmed.

United States v. As-Sadiq, No. 5:00-CR-176-1F(3) (E.D. N.C. Apr. 13, 2001)
The defendant was convicted of, *inter alia*, aiding and abetting the use of a firearm during a crime of violence, in violation of 18 U.S.C. §§ 2 and 924(c). A shotgun was found in his apartment after he "cased" a bank for his co-felons; and he was present at (but did not participate in) the bank robbery itself, during which a firearm was brandished. The district court granted a judgment of acquittal, finding that the bank robbery was "a separate and distinct crime" and that "you have no activity on that particular day that in any way indicates that Mr. As-Sadiq assisted in the obtaining, using, carrying, brandishing, or whatever, the gun." Affirmed.

NO APPEALS

United States v. Ayala-Torres, No. CR00-5585R JB (W.D. Wa. Jan. 23, 2001)
The defendant was convicted of attempted manufacture of metamphetamine, based on the defendant's physical presence in a mobile home where the drug was manufactured,

the presence of his identity card in the mobile home, and his fingerprints on several methamphetamine precursors and paraphernalia. The district court granted a post-verdict judgment of acquittal, arguing that "mere presence at a methamphetamine lab, even if supplemented by a poor or incredible explanation for that presence, is an insufficient basis for an inference, beyond a reasonable doubt, of intent to manufacture."

United States v. Sanchez, No. 992(B)-DDP (C.D. Cal. Apr. 18, 2001)
The defendant was convicted of conspiring to possess cocaine with the intent to distribute, in violation of 21 U.S.C. § 846, for allowing his brother to use the defendant's residence for drug dealing. After finding that it should have excluded the statements of defendant's coconspirators, the district court granted defendant's motion for a judgment of acquittal because the remaining evidence was insufficient to show that the defendant did anything to further the conspiracy. However, the district court subsequently granted a new trial motion as well on several different grounds, including its conclusion that the evidence heavily preponderated against a verdict.

United States v. de Saad, No. CR 98-504 (C.D. Cal. July 13, 2001)
The defendant, a high-level bank executive, was convicted of one count of conspiring to launder monetary instruments, in violation of 18 U.S.C. § 1956(h), and ten counts of aiding and abetting money laundering, in violation of 18 U.S.C. § 1956(a)(3)(B), after agreeing during a sting operation to move large amounts of money that she was told were derived from narcotics trafficking. The district court entered a judgment of acquittal, arguing that the evidence was insufficient to prove that the defendant actually thought, from the sting operators' statements, that she was managing drug proceeds.

United States v. Sandoval-Ahumada, CR 00-987-FMC (C.D. Cal. Aug. 17, 2001)
The defendant was convicted of, *inter alia*, hostage taking, in violation of 18 U.S.C. § 1203, for participating in the detention of several aliens after they failed to pay the defendant and her codefendants their smuggling fee. The district court entered a judgment of acquittal on the hostage-taking count, arguing that it was not foreseeable that the smuggling venture would involve the taking of hostages, and that the evidence was insufficient to show that the defendant aided and abetted her codefendants.

United States v. Sowada, No. 4:01cr2(3) (E.D. Tex. Oct. 15, 2001)
The defendant was convicted of marketing in motor vehicle parts with altered vehicle identification numbers and trafficking in motor vehicle parts with obliterated identification numbers, in violation of 18 U.S.C. § 2321, and conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h). The district court entered a judgment of acquittal on the money laundering count, finding the evidence insufficient to prove that the illegal funds generated were involved in the financial transactions that formed the basis for the charge.

2002 TABLE

APPEALS

Date	Case Name	District	Judge	Decision Upon Appeal
9/24/01	US v. Alan Mikell and Christopher Grisel	E.D. Mich.	Cleland	None so far
10/19/01	US v. Jack Carl Velte	S.D. Ca.	Breyer	Reversed 331 F.3d 673 (9th Cir. 2003)
1/3/02	US v. Virgil Brown and James Yazzie	D.N.M.	Parker	Reversed 50 Fed. Appx. 970 (10th Cir. 2002)
2/13/02	US v. Jerome Stack No. 00-CR-585	N.D. Ill.	Castillo	Affirmed 2003 WL 21418411 (7th Cir. 2003)
2/25/02	US v. Santos Iglesias Hernandez	D.N.M.	Vasquez	Reversed 327 F.3d 1110 (10th Cir. 2003)
3/22/02	US v. Herbert Pierre-Louis	S.D. Fla.	Gold	Affirmed 54 Fed. Appx. 691 (11th Cir. 2002)
3/22/02	US v. Lenertz No. 0:99-21	D.S.C.	Perry	Reversed 63 Fed. Appx. 704 (4th Cir. 2003)
4/5/02	US v. Charles Jackson	W.D.N.Y.	Larimer	Reversed 335 F.3d 170 (2nd Cir. 2003)
3/27/02	US v. Kerry Baker No. 8:01CR261	D. Neb.	Bataillon	None so far
5/7/02	US v. William Merlino Crim. No. 99-10098-RGS	D. Mass.	Stearns	None so far
6/5/02	US v. Stefan Brodie Cr. No. 00-629	E.D. Pa.	McLaughlin	None so far
8/22/02	US v. Alvarez & Gonzalez No. 5:0222-CR-86-H-3	E.D.N.C.	Howard	None so far
9/9/02	US v. Reginald Shelley No. CR-02-0298-W	N.D. Ala.	Clemon	None so far
9/26/02	US v. Alan Hammond No. 3-02-CR-006	N.D. Fla.	Vinson	None so far
10/16/02	US v. Gupta No. 98-6118-CR	S.D. Fla.	Ryskamp	None so far

NO APPEALS

Date	Case Name	District	Judge
11/7/01	US v. Cortez-Montano, et al.	W.D. La.	Trimble
1/7/02	US v. Anna Martinez	S.D. Iowa	Longstaff
1/30/02	US v. Royston	W.D. Va.	Turk

2/13/02	US v. Victor Piuneda	W.D. Va.	Turk
2/27/02	US v. John Miller, Pamela Joyce, and John Latourette	E.D. Pa.	Buckwalte r
5/7/02	US v. Brooke Jones Crim. No. CR 01-36-H-DWM	D. Mont.	Molloy
7/18/02	US v. Rodgers No. 3-02-CR-006 RV	N.D. Fla.	Vinson
8/28/02	US v. Stanley Sims CR No. 00-193-MV	D.N.M.	Vasquez

2002 FACTS

APPEALS

<u>United States v. Alan Mikell and Christopher Grisel</u> (E.D. Mich. Sept. 24, 2001)

Judge granted the defendants' post-verdict motion for judgment of acquittal on seven charges (a conspiracy count and six counts of wire fraud). The court found that the evidence did not establish that the defendant's scheme to defraud deprived a large milk cooperative (NFO) of any money or property because NFO's security interest in another company's (RPC) inventory did not have any value (because two other creditors filed their financing statements first and were owed money in excess of RPC's inventory). Pending.

<u>United States v. Jack Carl Velte</u> (S.D. Ca. Oct. 19, 2001)

Judge granted the defendant's post-verdict motion for judgment of acquittal on the charge of willfully and without authority setting on fire and burning down 300 acres in Cleveland National Forest. The judge found insufficient evidence that the defendant had no authority to set the fire. The defendant had been smoking a cigarette, which was permitted by forest regulations. The judge contended that the fact that an authorized fire spread does not lead to the conclusion that a fire was started without authority. Reversed.

<u>United States v. Virgil Brown and James Yazzie</u> (D.N.M. Jan. 3, 2002)

Judge granted the defendant's post-verdict motion for judgment of acquittal on the charge of assault resulting in serious bodily injury. The judge found that there was insufficient evidence of causation. The defendant testified that he had been knocked down and found that his leg was broken when he tried to get up. The judge said that this story did not adequately explain the seriousness of the injury, and common experience suggests that some aggravating factor must have caused the severity of the injury. Reversed.

<u>United States v. Jerome Stack</u>, No. 00-CR-585 (N.D. Ill. Feb. 13, 2002)

The defendant was convicted of, *inter alia*, two counts of theft of funds, in violation of 18 U.S.C. § 666, for his involvement in a long-running public corruption scheme with the mayor and city prosecutor in Calumet City, Illinois. The district court entered a judgment of acquittal on these two counts, reasoning that each count required a minimum jurisdictional amount of $5,000 for each year, and that the evidence did not support the Government's contention that this jurisdictional amount was satisfied. Affirmed.

<u>United States v. Santos Iglesias Hernandez</u> (D.N.M. Feb. 25, 2002)

Judge granted the defendant's post-verdict motion for judgment of acquittal on the charge of transporting an illegal alien in furtherance of the alien's presence in the United States. The judge held that there was insufficient evidence to prove that the defendant willfully acted in furtherance of the alien's violation of the law. The evidence showed that 15 illegal aliens were found in the sleeper compartment of the tractor cab, but the judge held that there was no evidence to demonstrate the defendant's intent/willfulness. Reversed.

United States v. Herbert Pierre-Louis (S.D. Fla. Mar. 22, 2002)

Judge granted the defendant's post-verdict motion for judgment of acquittal on two charges of causing the transmission of a program or code with the intention of causing damage to a protected computer, the pre-USA PATRIOT Act version of the Computer Fraud and Abuse Act. The district court found that the statutory definition of "loss" did not include "economic damages" and does not support a conclusion that "lost profits" or "loss revenue" was within the statutory definition. Affirmed.

United States v. Lenertz, (D.S.C. Mar. 22, 2002)

The defendant was convicted of three counts of wire fraud, in violation of 18 U.S.C. § 1343, for devising a scheme to defraud individuals into investing in the development of a resort project in the Bahamas. After defense counsel argued that the evidence was insufficient to prove that those who had actually wired the funds in question relied on the defendant's representations, the district court entered a judgment of acquittal without explaining its decision. Reversed.

United States v. Jackson (W.D. N.Y. April 5, 2002)

The defendant was convicted of conspiracy to import five or more kilograms of cocaine. The district court granted a motion for judgment of acquittal on that charge, instead finding that the defendant was guilty only of the lesser crime of conspiracy to import 500 grams to five kilos. Reversed.

United States v. Kerry Baker, No. 8:01CR261 (D. Neb. Mar. 27, 2002)

The defendant was convicted of, *inter alia*, conspiring to distribute crack cocaine. The district court entered a judgment of acquittal on the conspiracy count, finding that there was no physical evidence indicating that the defendant was involved in a conspiracy to distribute crack cocaine rather than powder cocaine, and that there was no credible testimony establishing defendant's participation in the crack conspiracy. Pending.

United States v. William Merlino, Crim. No. 99-10098-RGS (D. Mass. May 7, 2002)

The defendant was convicted of conspiracy and attempt to violate the Hobbs Act, 18 U.S.C. § 1951, and two counts of carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c), for being the driver and lookout in a scheme to rob an armored car facility. The district court entered a judgment of acquittal, finding the informant witness's testimony was "too slender a reed to support the mandatory thirty-year consecutive sentence" that was required under the § 924(c) charge. Pending.

United States v. Stefan Brodie, Cr. No. 00-629 (E.D. Pa. June 5, 2002)

The defendant, the president and CEO of Bro-Tech Corp., was convicted of conspiracy to make illegal sales to Cuba, in violation of 50 U.S.C. § 5(b) and 16, and 31 C.F.R. § 515.201(b), for selling goods to Cuba through the United Kingdom. The district court entered a judgment of acquittal, finding the evidence insufficient to conclude that the defendant knew that sales to Cuba through the U.K. violated the law during the time when the relevant sales were made. Pending.

United States v. Alvarez & Gonzalez, No. 5:0222-CR-86-H-3 (E.D.N.C Aug. 22, 2002)

Defendants were indicted for conspiracy to distribute crack cocaine and possession with intent to sell; defendant Alvarez was further charged with carrying a firearm during a drug conspiracy. The jury deadlocked and the court declared a mistrial. The defendants made a motion for judgment of acquittal; the district court said it was granting the motion, entered an order captioned "Judgment of Acquittal," but in the order seemed to rely on factors other than sufficiency of the evidence (though there were also hints that the district court thought the evidence insufficient). On appeal, the Government will argue that the judgment of acquittal should properly be considered a dismissal of an indictment. Pending.

United States v. Reginald Shelley, No. CR-02-0298-W (N.D. Ala. Sept. 9, 2002)

The defendant was convicted of being a felon in possession, in violation of 18 U.S.C. § 922(g)(1). Before trial, the district court granted the defendant's motion to bar the government from introducing evidence about the marijuana found next to the defendant's gun in the car. During cross-examination of the defendant, the government asked whether there was "something else" under the front seat near the gun. Defense counsel objected and moved for a mistrial. The court granted defense counsel's motion; then, three days later, the court entered an order labeled "judgment of acquittal" on the ground that it was sanctioning the government's misconduct. Pending.

United States v. Alan Hammond, No. 3-02-CR-006 (N.D. Fla. Sept. 26, 2002)

The defendant was convicted of one count of making an unregistered firearm and one count of possessing an unregistered firearm, in violation of 26 U.S.C. § 5861(d) and (f), for manufacturing a 13"-long cardboard tube with a fuse containing nine ounces of black powder and smokeless gunpowder. The district court entered a judgment of acquittal on the ground that the evidence was insufficient to show that the tube was a destructive device within the meaning of § 5864(f) because it was almost equivalent to dynamite (which is not considered a destructive device) and it was doubtful whether the device would explode. Pending.

United States v. Gupta, No. 98-6118-CR (S.D. Fla. Oct. 16, 2002)

Defendants were convicted of conspiracy to submit false claims, in violation of 18 U.S.C. § 286, and mail fraud, in violation of 18 U.S.C. § 1341, for overbilling and otherwise deceiving Medicare. A little under three years after the guilty verdict, after several motions by the defendants, the district court entered a judgment of acquittal. On appeal, the Government will argue that the district court lacked jurisdiction to rule on defendants' motions for judgments of acquittal and that the district court erred in finding the evidence insufficient. Pending.

NO APPEALS

United States v. Cortez-Montano, et al. (W.D. La. Nov. 7, 2001)

Judge granted all of the defendants' post-verdict motions for judgment of acquittal on the charges of conspiracy to possess with intent to distribute over 50 grams of cocaine base. The judge found that there was evidence to show multiple conspiracies, but not the single conspiracy charged. The court found that there was no common goal and no significant overlap in the defendants' various dealings.

United States v. Anna Martinez (S.D. Iowa Jan. 7, 2002)

Judge granted the defendant's post-verdict motion for judgment of acquittal on the charge of possession of a firearm in relation to a specific substantive drug offense. The judge found insufficient evidence as to whether the defendant knew the firearms were in the house of a codefendant where she was staying.

United States v. Royston (W.D. Va. Jan. 30, 2002)

Judge granted the defendant's post-verdict motion for judgment of acquittal on the charge of bank fraud. The court found insufficient evidence to demonstrate that the defendant intended to "victimize the bank" (though there was a legal question as to whether this intent was even required).

United States v. Victor Piuneda (W.D. Va. Feb. 13, 2002)

Judge granted the defendant's post-verdict motion for judgment of acquittal on the charges of methamphetamine trafficking. At trial, the government's main witness refused to incriminate the defendant and the government had no evidence against the defendant other than this testimony.

United States v. John Miller, Pamela Joyce, and John Latourette (E.D. Pa. Feb. 27, 2002)

Judge granted defendant Joyce's post-verdict motion for judgment of acquittal on the charges of conspiracy to possess and to possess with the intent to distribute crack cocaine. The judge found insufficient evidence to support an inference that Joyce's small drug purchases was evidence of her intent to join the other defendants' conspiracy.

United States v. Brooke Jones, Crim. No. CR 01-36-H-DWM (D. Mont. May 7, 2002)

The defendant, a bank bookkeeper, was convicted of embezzling funds from a bank insured by the Federal Deposit Insurance Corporation (FDIC), for creating fraudulent records showing money deposited into the account of a friend. The district court entered a judgment of acquittal, finding the evidence insufficient to prove that the bank was insured by the FDIC on the dates of the offense.

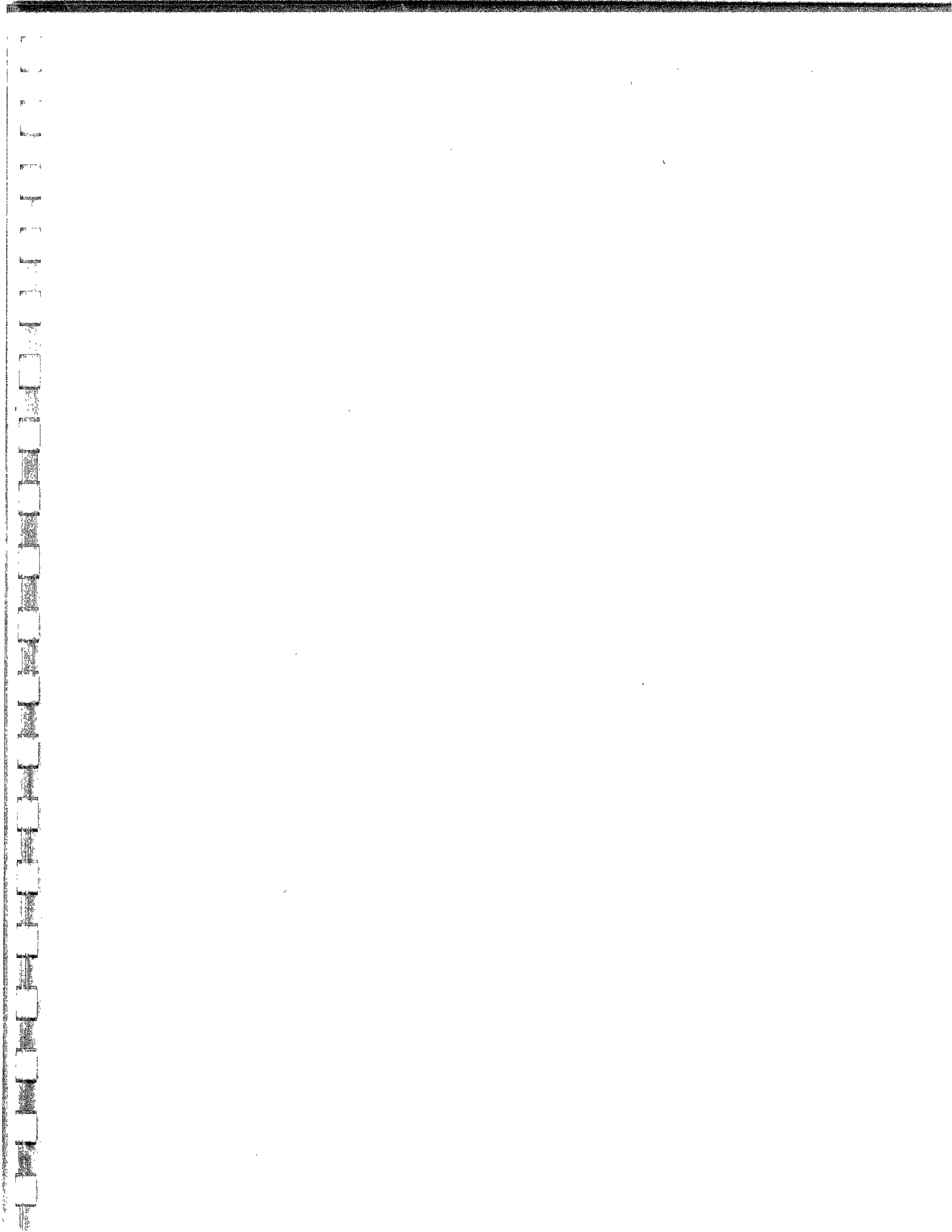
United States v. Rodgers, No. 3-02-CR-006 RV (N.D. Fla. July 18, 2002)

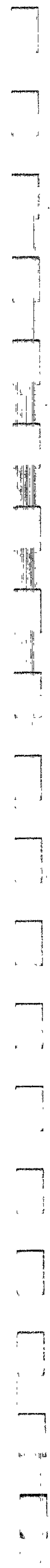
Defendants, viatical settlement sales agents, were convicted of various counts of fraud and interstate transportation of money obtained by fraud. The district court entered a judgment of acquittal, ruling that the evidence was insufficient to prove that the

defendants had knowledge of the parent corporation's fraudulent activities, and that the evidence could not prove that the defendants had the intent to defraud investors.

United States v. Stanley Sims, CR No. 00-193-MV (D.N.M.)

The defendant was convicted of, *inter alia*, one count of receiving material involving the sexual exploitation of minors, in violation of 18 U.S.C. § 2252(a)(2). The district court entered a judgment of acquittal on this count, on the ground that Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389 (2002), required the government to prove that the sexual depictions of minors involved in that count were real children.





SURVEY OF U.S. ATTORNEYS' OFFICES

RULE 29 ACQUITTALS FROM 10/1/99 INTO 2003[1]

Unless otherwise noted, in all cases the judgments of acquittal ended the case as to all defendants and all counts.

District	Total Cases	Pre Verdict Acquittal	Post Verdict Acquittal	Comments
M.D. Ala.	7	5*	2	*In one of these cases, two of the defendants were Rule 29ed. In another, three of the counts were Rule 29ed.
N.D. Ala.	6	6		
S.D. Ala.	0			
D. Ariz.	1		1	
C.D. Cal.	6	6*		*In four of these cases, some of the counts were Rule 29ed.
E.D. Cal.	1	1*		*One of the counts was dismissed. A case was entirely Rule 29ed before the verdict earlier in 1999.
S.D. Cal.	12	2	10	
D. Colo.	1	1		
D. Conn.	2	1	1	
D. Del.	?	?	?	Delaware assumes they have had Rule 29s, however, they are unsure due to lack of data.

[1] Returns for 2003 are incomplete.

Unless otherwise noted, in all cases the judgments of acquittal ended the case as to all defendants and all counts.				
M.D. Fla.	5	4*	1	*In one of these cases, one of the defendants was Rule 29ed.
N.D. Fla.	17	8*	9	*In one of these cases, two of the counts were Rule 29ed.
S.D. Fla.	5	3	2	
M.D. Ga.	3	1	2	
N.D. Ga.				
S.D. Ga.	0			
D. Guam, N. Mariana Islands	0			One case was completely Rule 29ed pre-verdict in 1998.
Hawaii	1	1*		*One of the counts was Rule 29ed.
N.D. Ill.	5	5*		*In four of the cases, some of the counts were Rule 29ed.
S.D. Ill.	1	1		
N.D. Ind.	2	2		
S.D. Ind.	0			
S.D. Iowa	4	1	3*	*In one of these cases, some of the counts were Rule 29ed.
D. Kan.	3	3		
E.D. Ky.	1	1		
W.D. Ky.	3	3		
E.D. La.	1		1	

Unless otherwise noted, in all cases the judgments of acquittal ended the case as to all defendants and all counts.				
M.D. La.	0			
W.D. La.	2	2*		*In one of these cases, three defendants were Rule 29ed pre-verdict, and the other two defendants were Rule 29ed after guilty verdicts.
D. Me.	3	3		
D. Mass.	9	9*		*In three of these cases, some of the counts were Rule 29ed. In addition, 9 cases were wholly or partially Rule 29ed in 1995-99, and 7 cases were wholly or partially Rule 29ed in 1988-94 -- all before verdict.
E.D. Mich.	7	2	5	
W.D. Mich.	3	3*		*In one case, one of the defendants was Rule29ed. In another case, one of the counts was Rule 29ed.
D. Minn.	1		1	
N.D. Miss.	2	2*		*In both (related) cases, one of the counts was Rule 29ed.
S.D. Miss.	2	2		
E.D. Mo.	1	0	1	*Four pre-1999 cases had some of the counts Rule 29ed.
W.D. Mo.	2	2		
D. Mont.	7	6*	1	*In five of these cases, some of the counts were Rule 29ed.
D. Neb.	1		1*	*One of the counts was Rule 29ed.
D. Nev.	1	1		

Unless otherwise noted, in all cases the judgments of acquittal ended the case as to all defendants and all counts.				
D.N.H.	0	0		Govt. dismissed one case after the judge hinted he would Rule 29 it.
D.N.J.	9	8*	1**	*In one of these cases, two defendants were Rule 29ed, and some of the counts were Rule 29ed against the remaining defendant; in four of these cases, some of the counts were Rule 29ed. **Two defendants were Rule 29ed, and the principal count against the three others was Rule 29ed.
D.N.M.	10	6	4	
N.D.N.Y.	6	2*	4**	*One case was a partial Rule 29. **One case was a partial Rule 29.
W.D.N.Y.	5	4*	1	*In two cases, some of the defendants and counts were Rule 29ed; in the other two cases, some of the counts were Rule 29ed.
S.D.N.Y.	10	8	2	
E.D.N.Y.	9	9		
E.D.N.C	5	2	3	
M.D.N.C.	2	2		
W.D.N.C.	8	6	2	
D.N.D.	1	1*		*One of seven defendants was Rule 29ed.
N.D. Ohio	1	1*		*One of the counts was Rule 29ed.
S.D. Ohio	2	2*		*One of the counts was Rule 29ed.
E.D. Okl.	5	4	1	

Unless otherwise noted, in all cases the judgments of acquittal ended the case as to all defendants and all counts.				
N.D. Okl.	0			
W.D. Okl.	1	1		
D. Or.	0			
E.D. Pa.	0			
M.D. Pa.	3	3*		*In these cases, some of the counts were Rule 29ed.
W.D. Pa.	1	1		
D.P.R.	3	2	1	
D.R.I.	2	2		
D.S.C.	4	4*		*In three of these cases, one or more of the counts were Rule 29ed.
D.S.D.	1	1		
M.D. Tenn.	0			
W.D. Tenn	0			
E.D. Tex.	5	4*	1	*In three of these cases, some of the counts were Rule 29ed.
N.D. Tex.	4	4*		*In one of these cases, one of the counts was Rule 29ed.
S.D. Tex.	2	2		
W.D. Tex.	5	1	4*	*In one of these cases, one of the counts was dismissed. On another, it is unclear whether the Rule 29 was pre- or post-verdict.
D. Utah	1	1		

Unless otherwise noted, in all cases the judgments of acquittal ended the case as to all defendants and all counts.				
D. Vt.	3	1	2*	*In one of these cases, one of the defendants was Rule 29ed; in the other, some of the counts were Rule 29ed.
E.D. Va.	5	2	3	
W.D. Va.	1	1		
D.V.I.	4	4		
E.D. Wash.	3	3*		*In these cases, some of the counts were Rule 29ed.
W.D. Wash.	0			
N.D. W.Va.	0			
S.D. W.Va.	6	5*	1	*In four of the cases, some of the counts were Rule 29ed.
E.D. Wis.	1		1*	*One of the counts was Rule 29ed.
W.D. Wis.	0			
D. Wyo.	0			

last update: 9/12/03

Table D-4. Defendants
U.S. District Courts—Criminal Defendants Disposed of, by Type of Disposition and Major Offense, During the 12-Month Period Ending September 30, 2002

Nature of Offense	Total Defendants	Not Convicted				Convicted and Sentenced				
				Acquitted by					Convicted by	
		Total	Dismissed	Court	Jury	Total	Plea of Guilty	Nolo Contendere	Court	Jury
TOTAL	**78,835**	**7,953**	**7,217**	**336**	**400**	**70,882**	**67,856**	**332**	**423**	**2,271**
GENERAL OFFENSES										
HOMICIDE	**301**	**36**	**31**	**1**	**4**	**265**	**232**	**-**	**2**	**31**
MURDER—FIRST DEGREE	226	30	26	1	3	196	165	-	1	30
MURDER—SECOND DEGREE	24	1	-	-	1	23	23	-	-	-
MANSLAUGHTER	51	5	5	-	-	46	44	-	1	1
ROBBERY	**1,505**	**53**	**45**	**2**	**6**	**1,452**	**1,390**	**2**	**3**	**57**
BANK	1,446	42	34	2	6	1,404	1,349	2	3	50
POSTAL	30	5	5	-	-	25	20	-	-	5
OTHER	29	6	6	-	-	23	21	-	-	2
ASSAULT	**599**	**118**	**104**	**5**	**9**	**481**	**442.**	**2**	**11**	**26**
BURGLARY	**58**	**6**	**6**	**-**	**-**	**52**	**50**	**-**	**1**	**1**
BANK	-	-	-	-	-	-	-	-	-	-
POSTAL	13	-	-	-	-	13	12	-	-	1
INTERSTATE SHIPMENTS	4	-	-	-	-	4	4	-	-	-
OTHER	41	6	6	-	-	35	34	-	1	-
LARCENY AND THEFT	**3,316**	**753**	**723**	**16**	**14**	**2,563**	**2,451**	**41**	**18**	**53**
BANK	271	8	7	-	1	263	261	-	2	-
POSTAL	547	34	34	-	-	513	510	-	1	2
INTERSTATE SHIPMENTS	286	37	32	3	2	249	227	-	2	20
OTHER U.S. PROPERTY	1,705	509	495	9	5	1,196	1,130	40	12	14
TRANSPORT, ETC., STOLEN PROP.	239	43	35	3	5	196	180	-	-	16
OTHER	268	122	120	1	1	146	143	1	1	1
EMBEZZLEMENT	**1,048**	**120**	**114**	**2**	**4**	**928**	**902**	**-**	**3**	**23**
BANK	511	52	49	1	2	459	454	-	1	4
POSTAL	239	20	20	-	-	219	216	-	-	3
OTHER	298	48	45	1	2	250	232	-	2	16

Table D-4. (September 30, 2002—Continued)

Nature of Offense	Total Defendants	Not Convicted				Convicted and Sentenced				
				Acquitted by					Convicted by	
		Total	Dismissed	Court	Jury	Total	Plea of Guilty	Nolo Contendere	Court	Jury
FRAUD	**10,722**	**818**	**739**	**23**	**56**	**9,904**	**9,514**	**4**	**11**	**375**
INCOME TAX	580	21	18	1	2	559	524	-	2	33
LENDING INSTITUTION	1,510	104	101	2	1	1,406	1,351	-	1	54
POSTAL	1,586	143	129	4	10	1,443	1,367	-	1	75
VETERANS AND ALLOTMENTS	10	-	-	-	-	10	9	1	-	-
SECURITIES AND EXCHANGE	132	6	6	-	-	126	116	-	-	10
SOCIAL SECURITY	531	98	94	2	2	433	418	1	1	13
FALSE PERSONATION	46	6	3	1	2	40	38	-	-	2
NATIONALITY LAWS	231	13	11	1	1	218	215	-	1	2
PASSPORT FRAUD	279	17	17	-	-	262	260	-	-	2
FALSE CLAIMS & STATEMENTS	1,770	153	133	2	18	1,617	1,558	1	4	54
OTHER	4,047	257	227	10	20	3,790	3,658	1	1	130
AUTO THEFT	**209**	**32**	**30**	**1**	**1**	**177**	**160**	-	-	**17**
FORGERY AND COUNTERFEITING	**1,544**	**140**	**134**	**1**	**5**	**1,404**	**1,366**	-	**2**	**36**
TRANSPORT FORGED SECURITIES	-	-	-	-	-	-	-	-	-	-
POSTAL FORGERY	-	-	-	-	-	-	-	-	-	-
OTHER FORGERY	129	16	16	-	-	113	110	-	-	3
COUNTERFEITING	1,415	124	118	1	5	1,291	1,256	-	2	33
SEX OFFENSES	**1,013**	**101**	**90**	**2**	**9**	**912**	**862**	**1**	**6**	**43**
SEXUAL ABUSE	390	52	44	-	8	338	308	-	3	27
OTHER	623	49	46	2	1	574	554	1	3	16
DRUGS	**29,477**	**2,351**	**2,167**	**41**	**143**	**27,126**	**26,110**	**22**	**53**	**941**
MISCELLANEOUS GENERAL OFFENSE	**13,617**	**2,494**	**2,167**	**216**	**111**	**11,123**	**10,216**	**240**	**185**	**482**
BRIBERY	163	13	10	-	3	150	142	-	-	8
DRUNK DRIVING AND TRAFFIC	4,400	1,279	1,098	179	2	3,121	2,772	219	126	4
ESCAPE[1]	546	65	59	1	5	481	470	-	3	8
EXTORT., RACKETEERING, THREATS	1,146	119	105	3	11	1,027	940	1	4	82
GAMBLING AND LOTTERY	21	4	4	-	-	17	17	-	-	-
KIDNAPPING	112	17	16	-	1	95	82	-	-	13
PERJURY	116	17	17	-	-	99	83	-	4	12
WEAPONS AND FIREARMS	6,154	723	616	22	85	5,431	5,055	2	32	342
OTHER	959	257	242	11	4	702	655	18	16	13

Table D-4. (September 30, 2002—Continued)

Nature of Offense	Total Defendants	Not Convicted				Convicted and Sentenced				
		Total	Dismissed	Acquitted by		Total	Plea of Guilty	Nolo Contendere	Convicted by	
				Court	Jury				Court	Jury
SPECIAL OFFENSES										
IMMIGRATION LAWS	**12,191**	**479**	**463**	**8**	**8**	**11,712**	**11,585**	**5**	**29**	**93**
LIQUOR, INTERNAL REVENUE	**9**	**-**	**-**	**-**	**-**	**9**	**8**	**-**	**-**	**1**
FEDERAL STATUTES	**3,226**	**452**	**404**	**18**	**30**	**2,774**	**2,568**	**15**	**99**	**92**
AGRI./CONSERVATION ACTS	294	69	66	3	-	225	209	-	14	2
ANTITRUST VIOLATIONS	42	4	-	-	4	38	33	-	-	5
FOOD AND DRUG ACT	95	5	5	-	-	90	89	-	-	1
MIGRATORY BIRD LAWS	111	17	16	1	-	94	89	2	3	-
MOTOR CARRIER ACT	7	-	-	-	-	7	7	-	-	-
NATIONAL DEFENSE LAWS	1	-	-	-	-	1	1	-	-	-
CIVIL RIGHTS	98	24	13	1	10	74	62	-	-	12
CONTEMPT	70	14	13	1	-	56	41	9	4	2
CUSTOMS LAWS	155	17	16	1	-	138	131	-	-	7
POSTAL LAWS[2]	187	18	18	-	-	169	167	1	-	1
OTHER	2,166	284	257	11	16	1,882	1,739	3	78	62

NOTE. DEFENDANTS CHARGED IN TWO OR MORE CASES THAT WERE TERMINATED DURING THIS YEAR ARE REPORTED ONLY ONCE; THEREFORE, THIS TABLE'S FIGURES FOR TOTAL DEFENDANTS DISPOSED OF ARE LESS THAN THE FIGURES IN TABLES D AND D-1 FOR TOTAL DEFENDANTS TERMINATED. THIS TABLE'S FIGURES FOR TOTAL DEFENDANTS EXCLUDE 703 TRANSFERS AND 1,282 TERMINATIONS FOR DEFENDANTS CHARGED IN MORE THAN ONE CASE DURING THIS YEAR. THIS TABLE INCLUDES DEFENDANTS IN ALL FELONY AND CLASS A MISDEMEANOR CASES, BUT INCLUDES ONLY THOSE PETTY OFFENSE DEFENDANTS WHOSE CASES HAVE BEEN ASSIGNED TO DISTRICT JUDGES.

[1]INCLUDES ESCAPE FROM CUTODY, AIDING OR ABETTING AN ESCAPE, FAILURE TO APPEAR IN COURT AND BAIL JUMPING.

[2]OBSTRUCTING MAIL, MAILING NONMAILABLE MATERIAL, AND OTHER POSTAL REGULATIONS

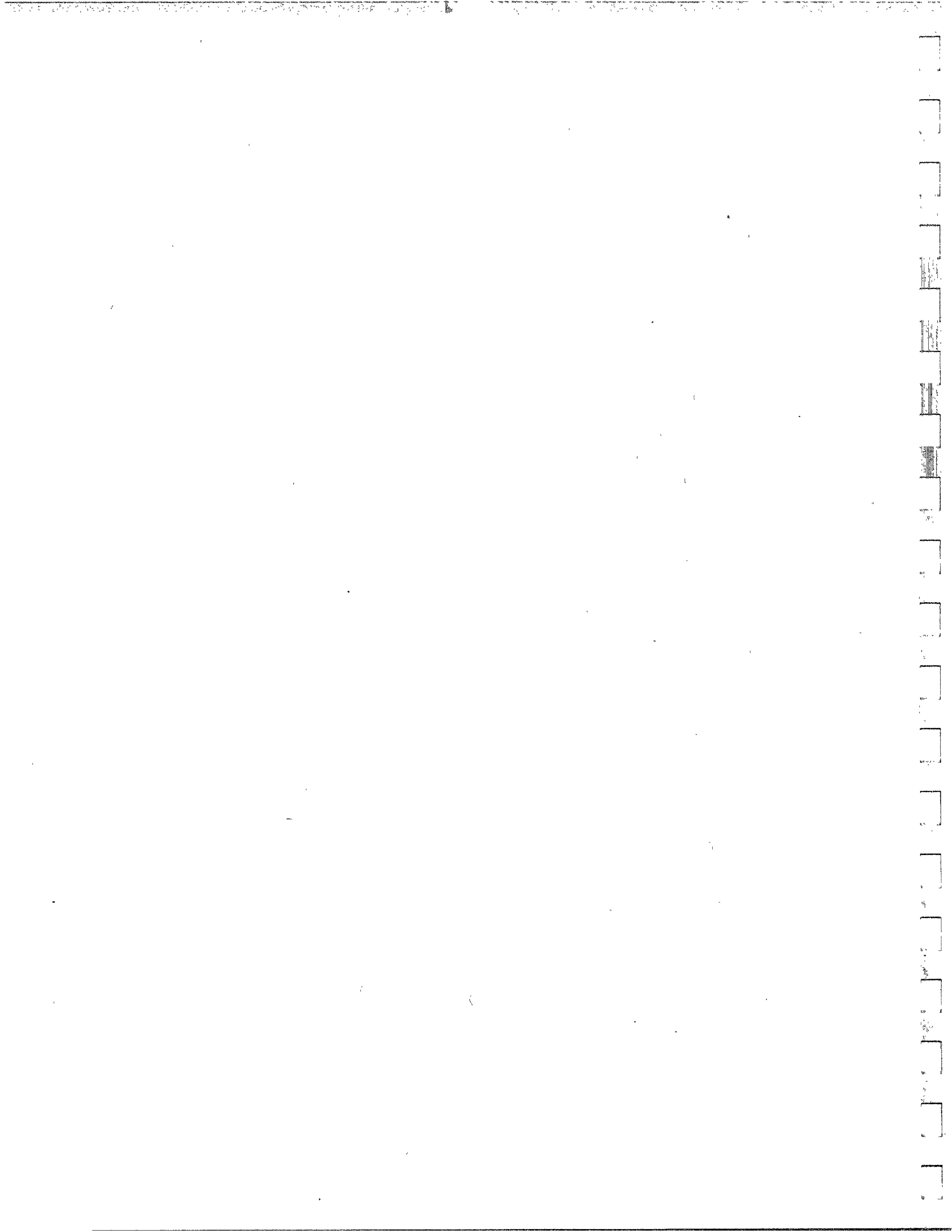


Table D-6. Defendants
U.S. District Courts—Median Time Intervals From Filing to Disposition of Criminal Defendants Disposed of, by District (Excluding Transfers), During the 12-Month Period Ending September 30, 2002

Circuit and District	Total		Dismissed		Plea of Guilty		Court Trial		Jury Trial	
	Number	Median (in Months)*	Number	Median (in Months)*	Number	Median (in Months)*	Number	Median (in Months)*	Number	Median (in Months)*
TOTAL	**78,835**	**6.2**	**7,217**	**5.2**	**68,188**	**6.1**	**759**	**3.0**	**2,671**	**11.9**
DC	**436**	**9.5**	**46**	**6.1**	**369**	**10.1**	**1**	**-**	**20**	**16.5**
1ST	**2,404**	**11.2**	**283**	**23.3**	**1,968**	**10.3**	**54**	**3.2**	**99**	**20.5**
ME	230	5.3	11	9.1	208	5.2	2	-	9	-
MA	620	13.4	26	12.6	573	13.4	5	-	16	17.3
NH	154	9.8	16	11.8	127	9.1	1	-	10	11.5
RI	177	6.9	9	-	151	6.5	1	-	16	10.4
PR	1,223	13.4	221	31.1	909	11.8	45	2.6	48	40.1
2ND	**4,968**	**11.1**	**166**	**19.7**	**4,543**	**10.5**	**12**	**8.6**	**247**	**20.3**
CT	367	10.6	20	10.9	329	10.2	1	-	17	15.3
NY,N	445	8.2	5	-	422	7.9	3	-	15	19.8
NY,E	1,700	11.2	50	34.4	1,588	10.8	2	-	60	18.2
NY,S	1,785	12.6	75	20.3	1,576	11.6	5	-	129	21.6
NY,W	483	10.3	9	-	448	9.1	-	-	26	24.7
VT	188	10.6	7	-	180	10.7	1	-	-	-
3RD	**3,419**	**8.7**	**307**	**5.7**	**2,959**	**8.6**	**15**	**9.0**	**138**	**18.3**
DE	101	9.3	18	9.1	81	9.2	1	-	1	-
NJ	976	8.1	99	3.9	851	8.4	1	-	25	23.4
PA,E	1,055	10.5	36	9.4	947	10.1	4	-	68	18.2
PA,M	481	11.0	48	7.1	418	11.0	2	-	13	16.0
PA,W	406	7.3	52	3.9	339	7.6	1	-	14	11.8
VI	400	.2	54	10.4	323	.1	6	-	17	19.1
4TH	**8,937**	**5.6**	**1,540**	**2.7**	**6,924**	**5.8**	**157**	**2.8**	**316**	**9.7**
MD	1,171	5.5	332	2.5	789	6.6	9	-	41	13.8
NC,E	992	5.8	112	1.7	845	6.0	16	4.9	19	10.7
NC,M	504	6.5	33	16.1	429	6.5	2	-	40	6.9
NC,W	651	12.0	42	13.8	573	11.4	-	-	36	18.1
SC	1,256	8.6	178	7.5	1,042	8.5	4	-	32	10.8
VA,E	3,313	2.8	773	1.8	2,346	3.1	116	2.4	78	6.4
VA,W	468	8.7	16	18.2	406	8.4	6	-	40	9.1
WV,N	291	5.9	24	15.9	250	5.7	1	-	16	12.3
WV,S	291	5.5	30	23.2	244	5.2	3	-	14	9.5

Table D-6. (September 30, 2002—Continued)

Circuit and District	Total		Dismissed		Plea of Guilty		Court Trial		Jury Trial	
	Number	Median (in Months)*	Number	Median (in Months)*	Number	Median (in Months)*	Number	Median (in Months)*	Number	Median (in Months)*
5TH	**14,200**	**5.2**	**809**	**5.3**	**12,914**	**5.2**	**71**	**7.9**	**406**	**9.6**
LA,E	477	6.6	23	6.6	435	6.6	-	-	19	15.7
LA,M	146	6.8	29	3.7	106	7.3	-	-	11	14.4
LA,W	462	6.9	48	4.7	386	6.7	7	-	21	8.7
MS,N	188	6.9	11	4.8	170	6.9	-	-	7	-
MS,S	454	7.6	39	7.8	393	7.5	1	-	21	11.4
TX,N	1,244	6.0	93	11.3	1,090	5.9	5	-	56	7.8
TX,E	689	8.8	51	7.7	611	8.7	3	-	24	11.6
TX,S	5,070	4.7	257	3.0	4,668	4.7	21	7.3	124	8.0
TX,W	5,470	5.0	258	5.9	5,055	4.9	34	6.7	123	9.7
6TH	**5,612**	**7.5**	**540**	**8.4**	**4,797**	**7.3**	**40**	**5.6**	**235**	**10.8**
KY,E	536	6.2	49	13.6	462	5.9	1	-	24	8.2
KY,W	704	5.2	123	2.3	542	5.5	17	4.6	22	10.9
MI,E	876	10.7	87	18.9	723	10.1	9	-	57	15.1
MI,W	425	6.2	25	8.6	377	6.1	-	-	23	9.9
OH,N	930	6.6	46	5.5	851	6.6	3	-	30	11.9
OH,S	468	7.2	33	8.0	423	7.1	1	-	11	8.6
TN,E	699	7.6	50	4.8	619	7.6	4	-	26	8.9
TN,M	409	10.9	66	15.5	322	10.7	2	-	19	15.2
TN,W	565	8.4	61	10.0	478	8.3	3	-	23	10.8
7TH	**3,142**	**7.8**	**207**	**4.6**	**2,779**	**7.7**	**5**	**-**	**151**	**15.1**
IL,N	1,144	10.1	41	10.0	1,040	9.8	-	-	63	20.7
IL,C	519	6.3	83	2.5	426	6.9	-	-	10	12.4
IL,S	318	7.2	9	-	300	7.2	2	-	7	-
IN,N	461	7.5	29	6.3	391	7.3	1	-	40	11.9
IN,S	267	6.8	26	5.0	226	6.4	2	-	13	13.7
WI,E	298	7.1	13	7.6	270	6.9	-	-	15	12.2
WI,W	135	5.4	6	-	126	5.3	-	-	3	-
8TH	**4,264**	**7.3**	**258**	**6.1**	**3,776**	**7.2**	**20**	**7.1**	**210**	**11.3**
AR,E	296	10.0	33	11.6	238	9.6	1	-	24	21.2
AR,W	155	6.5	9	-	140	6.3	-	-	6	-
IA,N	387	8.4	12	6.6	337	8.2	5	-	33	12.2
IA,S	323	7.1	10	5.2	281	6.9	2	-	30	9.0
MN	465	8.3	34	5.0	402	8.3	2	-	27	11.7
MO,E	742	5.7	40	4.3	680	5.7	1	-	21	9.8
MO,W	721	8.9	36	7.0	670	8.9	2	-	13	11.7
NE	586	7.5	44	6.1	528	7.5	2	-	12	15.8
ND	197	4.9	10	4.5	177	4.8	-	-	10	6.3
SD	392	6.6	30	5.6	323	6.7	5	-	34	7.6

Table D-6. (September 30, 2002—Continued)

Circuit and District	Total		Dismissed		Plea of Guilty		Court Trial		Jury Trial	
	Number	Median (in Months)*	Number	Median (in Months)*	Number	Median (in Months)*	Number	Median (in Months)*	Number	Median (in Months)*
9TH	**17,020**	**5.5**	**1,735**	**5.9**	**14,923**	**5.4**	**52**	**7.4**	**310**	**12.8**
AK	214	5.9	27	3.4	166	5.8	5	-	16	8.7
AZ	4,103	4.6	204	10.1	3,869	4.5	2	-	28	10.9
CA,N	960	10.4	148	18.0	783	9.7	6	-	23	28.6
CA,E	1,042	7.4	127	11.7	902	7.0	-	-	13	18.4
CA,C	1,980	8.5	152	10.0	1,756	8.2	6	-	66	16.0
CA,S	3,940	3.8	183	3.9	3,714	3.7	7	-	36	8.7
HI	627	9.8	119	4.5	487	10.5	3	-	18	24.4
ID	265	6.5	37	3.9	211	6.4	5	-	12	8.3
MT	540	6.5	132	2.0	379	6.8	3	-	26	9.0
NV	740	9.1	74	15.1	638	8.9	3	-	25	10.0
OR	705	7.9	63	8.4	622	7.6	6	-	14	14.6
WA,E	384	6.2	53	4.9	315	6.3	3	-	13	12.1
WA,W	1,340	4.2	371	3.7	952	4.3	3	-	14	14.0
GUAM	152	7.7	37	18.0	110	6.1	-	-	5	-
NMI	28	6.8	8	-	19	8.9	-	-	1	-
10TH	**5,615**	**5.4**	**735**	**4.3**	**4,754**	**5.4**	**12**	**3.8**	**114**	**11.2**
CO	720	8.4	70	11.1	628	8.1	3	-	19	12.4
KS	590	7.7	75	5.4	499	8.0	5	-	11	10.1
NM	2,289	4.1	235	4.3	2,027	4.0	1	-	26	12.6
OK,N	215	8.0	47	4.8	161	8.2	-	-	7	-
OK,E	98	4.7	12	1.5	84	4.9	-	-	2	-
OK,W	613	1.3	121	.4	473	2.0	1	-	18	9.0
UT	939	5.7	166	6.8	755	5.5	1	-	17	14.4
WY	151	5.5	9	-	127	5.4	1	-	14	7.0
11TH	**8,818**	**5.9**	**591**	**4.7**	**7,482**	**5.9**	**320**	**.1**	**425**	**10.0**
AL,N	661	5.2	97	3.4	535	5.3	5	-	24	6.9
AL,M	224	7.4	30	5.4	170	7.8	3	-	21	10.3
AL,S	349	6.8	20	4.3	314	6.7	2	-	13	9.6
FL,N	561	4.6	42	2.5	467	4.4	8	-	44	8.0
FL,M	1,533	7.0	41	8.2	1,391	6.8	10	6.5	91	9.4
FL,S	2,683	6.5	83	12.0	2,419	6.3	14	5.5	167	11.0
GA,N	1,114	6.8	102	9.4	956	6.3	18	9.0	38	14.4
GA,M	1,249	.1	70	5.8	904	.1	258	.1	17	11.5
GA,S	444	4.7	106	2.7	326	5.0	2	-	10	6.7

NOTE: DEFENDANTS CHARGED IN TWO OR MORE CASES THAT WERE TERMINATED DURING THIS YEAR ARE REPORTED ONLY ONCE; THEREFORE, THIS TABLE'S FIGURES FOR TOTAL DEFENDANTS DISPOSED OF ARE LESS THAN THE FIGURES IN TABLES D AND D-1 FOR TOTAL DEFENDANTS TERMINATED. THIS TABLE'S FIGURES FOR TOTAL DEFENDANTS EXCLUDE 703 TRANSFERS AND 1,282 TERMINATIONS FOR DEFENDANTS CHARGED IN MORE THAN ONE CASE DURING THIS YEAR. THIS TABLE INCLUDES DEFENDANTS IN ALL FELONY AND CLASS A MISDEMEANOR CASES, BUT INCLUDES ONLY THOSE PETTY OFFENSE DEFENDANTS WHOSE CASES HAVE BEEN ASSIGNED TO DISTRICT JUDGES.

* MEDIAN COMPUTED ONLY FOR 10 OR MORE DEFENDANTS

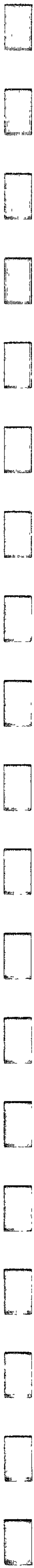


Table D-7. Defendants
U.S. District Courts—Criminal Defendants Disposed of, by Type of Disposition and District, During the 12-Month Period Ending September 30, 2002

Circuit and District	Total Defendants	Not Convicted		Acquitted by		Convicted and Sentenced			Convicted by		Type of Sentence	
		Total	Dismissed	Court	Jury	Total	Plea of Guilty	Nolo Contendere	Court	Jury	Fine Only	Imprisonment
TOTAL	78,835	7,953	7,217	336	400	70,882	67,856	332	423	2,271	2,427	56,686
DC	436	48	46	-	2	388	369	-	1	18	-	300
1ST	2,404	303	283	4	16	2,101	1,968	-	50	83	7	1,722
ME	230	13	11	-	2	217	208	-	2	7	3	175
MA	620	32	26	2	4	588	573	-	3	12	-	453
NH	154	19	16	-	3	135	127	-	1	7	2	100
RI	177	12	9	1	2	165	151	-	-	14	1	144
PR	1,223	227	221	1	5	996	909	-	44	43	1	850
2ND	4,968	215	166	5	44	4,753	4,542	1	7	203	26	3,636
CT	367	23	20	1	2	344	329	-	-	15	1	236
NY,N	445	7	5	2	-	438	422	-	1	15	13	324
NY,E	1,700	64	50	-	14	1,636	1,587	1	2	46	3	1,321
NY,S	1,785	102	75	1	26	1,683	1,576	-	4	103	7	1,289
NY,W	483	11	9	-	2	472	448	-	-	24	2	336
VT	188	8	7	1	-	180	180	-	-	-	-	130
3RD	3,419	331	307	10	14	3,088	2,958	1	5	124	14	2,407
DE	101	18	18	-	-	83	81	-	1	1	2	58
NJ	976	100	99	-	1	876	851	-	1	24	3	617
PA,E	1,055	48	36	3	9	1,007	947	-	1	59	6	794
PA,M	481	51	48	2	1	430	418	-	-	12	3	359
PA,W	406	53	52	-	1	353	338	1	1	13	-	248
VI	400	61	54	5	2	339	323	-	1	15	-	331

Table D-7. (September 30, 2002—Continued)

Circuit and District	Total Defendants	Not Convicted				Convicted and Sentenced					Type of Sentence	
		Total	Dismissed	Acquitted by		Total	Plea of Guilty	Nolo Contendere	Convicted by		Fine Only	Imprisonment
				Court	Jury				Court	Jury		
4TH	**8,937**	**1,618**	**1,540**	**42**	**36**	**7,319**	**6,922**	**2**	**115**	**280**	**839**	**4,832**
MD	1,171	340	332	4	4	831	788	1	5	37	127	477
NC,E	992	121	112	5	4	871	845	-	11	15	121	484
NC,M	504	38	33	1	4	466	429	-	1	36	1	424
NC,W	651	46	42	-	4	605	573	-	-	32	2	544
SC	1,256	184	178	3	3	1,072	1,042	-	1	29	6	816
VA,E	3,313	807	773	24	10	2,506	2,346	-	92	68	581	1,266
VA,W	468	24	16	4	4	444	406	-	2	36	1	353
WV,N	291	27	24	-	3	264	249	1	1	13	-	238
WV,S	291	31	30	1	-	260	244	-	2	14	-	230
5TH	**14,200**	**911**	**809**	**28**	**74**	**13,289**	**12,909**	**5**	**43**	**332**	**58**	**11,724**
LA,E	477	24	23	-	1	453	434	1	-	18	36	324
LA,M	146	31	29	-	2	115	106	-	-	9	-	82
LA,W	462	59	48	5	6	403	386	-	2	15	3	284
MS,N	188	13	11	-	2	175	170	-	-	5	-	138
MS,S	454	42	39	1	2	412	393	-	-	19	-	320
TX,N	1,244	110	93	5	12	1,134	1,090	-	-	44	8	912
TX,E	689	54	51	2	1	635	611	-	1	23	2	560
TX,S	5,070	282	257	2	23	4,788	4,668	-	19	101	6	4,405
TX,W	5,470	296	258	13	25	5,174	5,051	4	21	98	3	4,699
6TH	**5,612**	**583**	**540**	**11**	**32**	**5,029**	**4,792**	**5**	**29**	**203**	**116**	**3,903**
KY,E	536	57	49	1	7	479	462	-	-	17	-	387
KY,W	704	133	123	6	4	571	540	2	11	18	87	268
MI,E	876	96	87	1	8	780	723	-	8	49	3	614
MI,W	425	25	25	-	-	400	376	1	-	23	9	349
OH,N	930	49	46	-	3	881	850	1	3	27	5	702
OH,S	468	35	33	1	1	433	422	1	-	10	8	300
TN,E	699	52	50	1	1	647	619	-	3	25	4	592
TN,M	409	70	66	1	3	339	322	-	1	16	-	302
TN,W	565	66	61	-	5	499	478	-	3	18	-	389

Table D-7. (September 30, 2002—Continued)

Circuit and District	Total Defendants	Not Convicted		Acquitted by		Convicted and Sentenced			Convicted by		Type of Sentence	
		Total	Dismissed	Court	Jury	Total	Plea of Guilty	Nolo Contendere	Court	Jury	Fine Only	Imprisonment
7TH	**3,142**	**220**	**207**	**2**	**11**	**2,922**	**2,777**	**2**	**3**	**140**	**12**	**2,456**
IL,N	1,144	41	41	-	-	1,103	1,038	2	-	63	-	888
IL,C	519	83	83	-	-	436	426	-	-	10	7	336
IL,S	318	11	9	1	1	307	300	-	1	6	2	278
IN,N	461	38	29	1	8	423	391	-	-	32	-	376
IN,S	267	26	26	-	-	241	226	-	2	13	1	214
WI,E	298	15	13	-	2	283	270	-	-	13	-	247
WI,W	135	6	6	-	-	129	126	-	-	3	2	117
8TH	**4,264**	**300**	**258**	**8**	**34**	**3,964**	**3,772**	**4**	**12**	**176**	**55**	**3,300**
AR,E	296	36	33	1	2	260	238	-	-	22	1	206
AR,W	155	9	9	-	-	146	139	1	-	6	-	121
IA,N	387	21	12	3	6	366	337	-	2	27	1	335
IA,S	323	13	10	1	2	310	281	-	1	28	-	277
MN	465	36	34	-	2	429	402	-	2	25	3	376
MO,E	742	46	40	-	6	696	679	1	1	15	24	558
MO,W	721	39	36	-	3	682	670	-	2	10	11	569
NE	586	46	44	-	2	540	527	1	2	10	2	490
ND	197	11	10	-	1	186	176	1	-	9	2	129
SD	392	43	30	3	10	349	323	-	2	24	11	239
9TH	**17,020**	**1,798**	**1,735**	**21**	**42**	**15,222**	**14,915**	**8**	**31**	**268**	**412**	**12,641**
AK	214	27	27	-	-	187	166	-	5	16	-	134
AZ	4,103	206	204	-	2	3,897	3,868	1	2	26	19	3,347
CA,N	960	150	148	1	1	810	782	1	5	22	5	556
CA,E	1,042	129	127	-	2	913	902	-	-	11	7	747
CA,C	1,980	164	152	3	9	1,816	1,756	-	3	57	1	1,430
CA,S	3,940	189	183	4	2	3,751	3,713	1	3	34	2	3,559
HI	627	123	119	1	3	504	483	4	2	15	111	310
ID	265	40	37	-	3	225	211	-	5	9	2	173
MT	540	139	132	3	4	401	379	-	-	22	12	291
NV	740	86	74	2	10	654	638	-	1	15	-	553

Table D-7. (September 30, 2002—Continued)

Circuit and District	Total Defendants	Not Convicted				Convicted and Sentenced					Type of Sentence	
		Total	Dismissed	Acquitted by		Total	Plea of Guilty	Nolo Contendere	Convicted by		Fine Only	Imprisonment
				Court	Jury				Court	Jury		
9TH (Continued)												
WA,E	384	58	53	3	2	326	315	-	-	11	-	291
WA,W	1,340	373	371	2	-	967	952	-	1	14	253	580
GUAM	152	38	37	-	1	114	110	-	-	4	-	92
NMI	28	8	8	-	-	20	19	-	-	1	-	15
10TH	**5,615**	**756**	**735**	**7**	**14**	**4,859**	**4,530**	**224**	**5**	**100**	**250**	**3,820**
CO	720	77	70	2	5	643	626	2	1	14	37	482
KS	590	79	75	3	1	511	495	4	2	10	6	429
NM	2,289	240	235	1	4	2,049	2,027	-	-	22	3	1,909
OK,N	215	48	47	-	1	167	161	-	-	6	2	129
OK,E	98	13	12	-	1	85	84	-	-	1	-	63
OK,W	613	122	121	-	1	491	255	218	1	17	144	188
UT	939	167	166	-	1	772	755	-	1	16	57	495
WY	151	10	9	1	-	141	127	-	-	14	1	125
11TH	**8,818**	**870**	**591**	**198**	**81**	**7,948**	**7,402**	**80**	**122**	**344**	**638**	**5,945**
AL,N	661	104	97	2	5	557	535	-	3	19	22	417
AL,M	224	39	30	1	8	185	170	-	2	13	7	131
AL,S	349	21	20	-	1	328	314	-	2	12	2	267
FL,N	561	59	42	8	9	502	467	-	-	35	100	336
FL,M	1,533	55	41	3	11	1,478	1,390	1	7	80	5	1,275
FL,S	2,683	134	83	12	39	2,549	2,418	1	2	128	-	2,232
GA,N	1,114	107	102	2	3	1,007	926	30	16	35	72	732
GA,M	1,249	240	70	168	2	1,009	856	48	90	15	426	311
GA,S	444	111	106	2	3	333	326	-	-	7	4	244

NOTE: DEFENDANTS CHARGED IN TWO OR MORE CASES THAT WERE TERMINATED DURING THIS YEAR ARE REPORTED ONLY ONCE; THEREFORE, THIS TABLE'S FIGURES FOR TOTAL DEFENDANTS DISPOSED OF ARE LESS THAN THE FIGURES IN TABLES D AND D-1 FOR TOTAL DEFENDANTS TERMINATED. THIS TABLE'S FIGURES FOR TOTAL DEFENDANTS EXCLUDE 703 TRANSFERS AND 1,282 TERMINATIONS FOR DEFENDANTS CHARGED IN MORE THAN ONE CASE DURING THIS YEAR. THIS TABLE INCLUDES DEFENDANTS IN ALL FELONY AND CLASS A MISDEMEANOR CASES, BUT INCLUDES ONLY THOSE PETTY OFFENSE DEFENDANTS WHOSE CASES HAVE BEEN ASSIGNED TO DISTRICT JUDGES.

Item II C 1a

U.S. Department of Justice

Criminal Division

Assistant Attorney General — *Washington, D.C. 20530*

March 31, 2003

MEMORANDUM

TO: Hon. Edward E. Carnes
Chairman, Advisory Committee on Criminal Rules

FROM: Eric H. Jaso
Counselor to the Assistant Attorney General & Ex Officio

SUBJECT: Proposed Amendment to Criminal Rule 29

The Department of Justice requests that the Criminal Rules Advisory Committee amend Rule 29 of the Federal Rules of Criminal Procedure to preserve the government's right to appeal a trial court's decision to grant a motion for judgment of acquittal. Although the Department recognizes and supports the longstanding discretion of the district court to dismiss criminal counts as insufficiently supported by evidence introduced at trial, we do not believe that the Rules should continue to permit such discretion to be exercised without judicial review. Similarly, we recognize that most judges exercise this discretion with appropriate deference to the government's charging decisions and evidentiary burden, and to the province of the jury to weigh the sufficiency of evidence. However, we are concerned that some judges have exercised this discretion improperly, and granted dismissal motions pre-verdict expressly to avoid the possibility of appellate review. The Department urges the Committee to consider its concerns, including the examples of improper dismissals we note herein, and adopt the proposed amendment, which will preserve judicial discretion while ensuring that it is properly exercised in the vitally important area of criminal law enforcement.

The Current Version of Rule 29

Currently, Rule 29(a) permits the defendant to make a motion for judgment of acquittal "after the government closes its evidence or after the close of all the evidence," and permits the district court, in response to such a motion or on its own, to grant a judgment of acquittal if the evidence is insufficient to support a conviction. Rule 29(b) permits, but does not require, the court to reserve decision on an acquittal motion until the jury has reached a verdict. Rule 29(b) also permits a court to grant a judgment of acquittal if the jury is discharged without a verdict. Such rulings, made before the jury enters a verdict, can not be appealed under the Double Jeopardy Clause, no matter how erroneous. *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977).

The Need for The Proposed Amendment to Rule 29

The proposed amendment would correct an anomaly in the Rules -- the ability of a district court to grant an unappealable judgment of acquittal. As commentators have recognized,

> [i]n all of federal jurisprudence there is only one district court ruling that is both absolutely dispositive and entirely unappealable. Federal Rule of Criminal Procedure 29 enables the trial judge upon her own initiative or motion of the defense to direct a judgment of acquittal in a criminal trial at any time prior to the submission of the case to the jury. Once the judgment of acquittal is entered, the government's right of appeal is effectively blocked by the Double Jeopardy Clause of the U.S. Constitution, as the only remedy available to the Court of Appeals would be to order a retrial. No matter how irrational or capricious, the district judge's ruling terminating the prosecution cannot be appealed.

Richard Sauber & Michael Waldman, *Unlimited Power: Rule 29(a) and the Unreviewability of Directed Judgments of Acquittal*, 44 Am. U. L. Rev. 433, 433-34 (1994) (footnotes omitted). These commentators noted that "[t]hough there is only one such rule in federal jurisprudence, it is one too many." *Id.*

This is not merely an academic issue. The Department has observed repeated instances in which district court judges have granted Rule 29 motions and dismissed criminal counts – and even entire cases -- after jeopardy has attached but before a jury verdict has issued, thus preventing the government from seeking appellate review. Nor is this a phenomenon involving a handful of extraordinary cases. District courts grant hundreds of judgments of acquittal each year, many of which are granted before the jury reaches a verdict. To an extent rarely equaled in our history, citizens look to the federal criminal justice system to play a leading role in ensuring the national security, policing financial markets and corporate suites, and ensuring the consistent enforcement of a host of important laws. Particularly in these times, the societal costs suffered when even a small number of meritorious criminal cases are irretrievably abrogated far outweigh the burdens placed on the court, the parties and the jurors to await the deliberation of the defendant's peers – whose verdict may moot the issue in any event – before allowing the court to render judgment. The Rules should ensure a just result for all parties to a criminal case. The proposed amendment would not restrict diminish judicial discretion; rather only permit the appellate courts to provide the same checks and balances against judicial *indiscretion* they do in virtually every other context.

Examples of Problems Encountered By the Current Version of Rule 29

The reasons given by judges granting pre-verdict judgments of acquittal are in many cases erroneous or insupportable. The examples we have gathered confirm that the authority to dismiss a case in a manner precluding appellate review has been employed unfairly to terminate prosecutions under circumstances in which the court has an unreasonable view of the sufficiency of the evidence.

Recently, the Department conducted a survey of all United States Attorney's Offices asking for empirical data regarding their experiences with either pre-verdict or post-verdict dismissals over the past three years. We received responses from 74 districts. A total of 240 cases were reported. Of that number, 159 cases were completely or partially dismissed before verdict.[1] Sixty-eight cases were dismissed after a verdict was entered. In a number of these post-verdict dismissals, the government appealed and was successful in reinstating the verdict. What follows are some particularly egregious examples of pre-verdict dismissals being granted.

In one district, a judge dismissed three counts of money laundering against two defendants pursuant to Rule 29 based upon an erroneous understanding of the law. The allegation was that the one defendant took proceeds from a mail fraud scheme and transferred it to a dummy corporation set up overseas. The other defendant helped him set up the overseas corporation and bank accounts. The court opined that where the money takes a "circuitous route" and never goes to a third party, the court did not believe it constituted money laundering. As a result, the court dismissed these money laundering counts pursuant to Rule 29.

In a case in another district, a judge granted a judgment of acquittal for the sole reason that he was scheduled to attend a conference. During the trial, when it appeared that the case would continue longer than the judge expected, he invited defense counsel to move for dismissal at the close of the government's case. The defense attorney told the judge he thought it was unethical to make the motion because he did not believe it was well founded. The judge dismissed the case and attended the conference.

This power also has been used to terminate cases a judge simply does not like, for reasons unrelated to the sufficiency of the evidence. A third district, which has experienced an exceptionally high number of pre-verdict dismissals, reported that in a prosecution for failure to pay child support the judge dismissed the case based upon his finding that there was insufficient evidence that the defendant lived in a different state than the child, despite sufficient prima facie (indeed, overwhelming) evidence (sworn statements, utility records, etc.) that the defendant had established residence elsewhere. The United States Attorney from that district is of the view that the judge in question viewed the case as a dispute better resolved in state court.

---

[1] A number of the cases involved the pre-verdict dismissal of a defendant in a multi-defendant case or the dismissal of counts. Nevertheless, it appears approximately 100 cases were dismissed pre-verdict in their entirety.

A fourth district reported that one judge has exhibited great hostility towards firearms prosecutions. This judge apparently has commented that these cases are a waste of time and resources. In one case the judge dismissed the case pre-verdict based upon the government's failure to establish that the firearm traveled in interstate commerce. However, there are no gun manufacturers in that state and the precedent in that circuit holds that when a gun is stamped with the name of an out-of-state manufacturer, such evidence is sufficient to establish the interstate nexus without the need for the testimony of an ATF agent.

Two additional districts reported that following successful government appeals of post-verdict dismissals, the respective judges announced that in the future they would dismiss such cases *before* submission to the jury.

Summary of the Proposed Amendment to Rule 29

The proposed amendment is straightforward, and does not alter the basic purpose of the Rule. As amended, the Rule would require the district court to reserve decision on whether to grant a judgment of acquittal (unless the court simply denies the motion) until after the jury returns a verdict. It thus would preclude the entry of a judgment of acquittal before the jury returns a verdict, or if the jury is discharged without having returned a verdict. Accordingly, the proposed rule preserves the government's appellate rights and ensures that erroneous rulings will be corrected by the Courts of Appeals. Meritless or erroneous dismissals can be reversed and verdicts of guilt reinstated without offending the Double Jeopardy Clause. *See United States v. Scott*, 437 U.S. 82 (1978). Attached is a red-lined copy of the proposed rule change (Attachment "A") and a "clean" version of the amended rule (Attachment "B").

Conclusion

The Department of Justice has considered this issue at great length and does not lightly urge substantive amendments to the Criminal Rules, as this Committee is well aware. Nonetheless we believe that Rule 29 as currently constituted represents an anomaly within the Rules and indeed within the judicial system. Throughout the legal system – even in federal administrative proceedings far removed in jurisdiction and importance from the Article III courts – nearly every ruling made by the judge or decisionmaker can at some point be substantively appealed. For the Rules to preserve an unreviewable discretion to dismiss in its entirety a criminal case, perhaps the most fundamental and grave proceeding in any system of laws, is wrong as a matter of policy and of justice. Certainly the invocation of tradition alone should not suffice to preserve what is demonstrably improper. The proposed amendment to Rule 29 would help "provide for the just determination of every criminal proceeding," Fed. R. Crim. P. 2, and allow the Department of Justice to do a better job vindicating the interests of both the United States and the victims of crime. We know the Committee will seriously consider our views, and we urge the Committee to adopt the proposed amendment.

cc: Prof. David Schlueter, Secretary

ATTACHMENT "A"

PROPOSED AMENDMENTS TO 2002 VERSION OF RULE 29

Rule 29. Motion for a Judgment of Acquittal

(a) Before Submission to the Jury.

After the government closes its evidence or after the close of all the evidence, the ~~court on the~~ defendant ~~'s motion must enter~~may move for a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may ~~on its own consider whether the evidence is insufficient to sustain a conviction~~deny the motion, or reserve decision on the motion, but the court may not grant the motion prior to the jury's return of a verdict of guilty. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.

(b) Reserving Decision.

~~The~~If the court ~~may~~ reserves decision on the motion, the court must proceed with the trial ~~(where the motion is made before the close of all the evidence)~~, submit the case to the jury, and decide the motion ~~either before~~after the jury returns a verdict ~~or after it returns a verdict~~ of guilty ~~or is discharged without having returned a verdict~~. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

(c) After Jury Verdict ~~or Discharge~~.

(1) *Time for a Motion.* ~~A~~Within 7 days after a guilty verdict, or within any other time the court sets during the 7-day period, a defendant may move for a judgment of acquittal, or renew such a motion, ~~within 7 days after a guilty verdict or after~~ the court ~~discharges the jury, whichever is later, or within any other time the court sets during the 7-day period.~~ may on its own consider whether the evidence is insufficient to sustain a conviction.

(2) *Ruling on the Motion.* ~~If~~After the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal. ~~If the jury has failed to return a verdict, the court may enter a judgment of acquittal.~~

(3) ***No Prior Motion Required.*** A defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury ~~discharge~~verdict.

(d) Conditional Ruling on a Motion for a New Trial.

(1) ***Motion for a New Trial.*** If the court enters a judgment of acquittal after a guilty verdict, the court must also conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or
reversed. The court must specify the reasons for that determination.

(2) ***Finality.*** The court 's order conditionally granting a motion for a new trial does not affect the finality of the judgment of acquittal.

(3) ***Appeal.***
(A) *Grant of a Motion for a New Trial.* If the court conditionally grants a motion for a new trial and an appellate court later
reverses the judgment of acquittal, the trial court must proceed with the new trial unless the appellate court orders otherwise.
(B) *Denial of a Motion for a New Trial.* If the court conditionally denies a motion for a new trial, an appellee may assert that the denial was erroneous. If the appellate court later reverses the judgment of acquittal, the trial court must proceed as the appellate court directs.

ATTACHMENT "B"

PROPOSED AMENDMENT TO 2002 VERSION OF RULE 29

Rule 29. Motion for a Judgment of Acquittal

(a) Before Submission to the Jury. After the government closes its evidence or after the close of all the evidence, the defendant may move for a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may deny the motion or reserve decision on the motion, but the court may not grant the motion prior to the jury's return of a verdict of guilty. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.

(b) Reserving Decision. If the court reserves decision on the motion, the court must proceed with the trial, submit the case to the jury, and decide the motion after the jury returns a verdict of guilty. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

(c) After Jury Verdict.

(1) *Time for a Motion.* Within 7 days after a guilty verdict, or within any other time the court sets during the 7-day period, a defendant may move for a judgment of acquittal, or renew such a motion, or the court may on its own consider whether the evidence is insufficient to sustain a conviction.

(2) *Ruling on the Motion.* After the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal.

(3) *No Prior Motion Required.* A defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury verdict.

(d) Conditional Ruling on a Motion for a New Trial.

(1) *Motion for a New Trial.* If the court enters a judgment of acquittal after a guilty verdict, the court must also conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or
reversed. The court must specify the reasons for that

determination.

(2)*Finality*. The court 's order conditionally granting a motion for a new trial does not affect the finality of the judgment of acquittal.

(3)*Appeal*.
(A)*Grant of a Motion for a New Trial*. If the court conditionally grants a motion for a new trial and an appellate court later
reverses the judgment of acquittal, the trial court must proceed with the new trial unless the appellate court orders otherwise.
(B)*Denial of a Motion for a New Trial*. If the court conditionally denies a motion for a new trial, an appellee may assert that the denial was erroneous. If the appellate court later reverses the judgment of acquittal, the trial court must proceed as the appellate court directs.

Item IIC1b

REPORT OF THE FEDERAL JUDICIAL CENTER

WILL BE DISTRIBUTED IN A SUBSEQUENT MAILING

Item II C 1c

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Proposed Amendment to Rule 29(b), Motion for Judgment of Acquittal

DATE: September 12, 1991

The Department of Justice has proposed an amendment to Rule 29(b) which would permit trial judges to defer ruling on motions for judgment of acquittal until after the verdict. The attached letter from Mr. Robert S. Mueller, III explains the need for the amendment.

As noted by Mr. Mueller, this amendment was proposed by the Criminal Rules Committee in 1983 and circulated for public comment. The Committee ultimately decided that there was not much a need for the amendment and did not pursue the matter. In reviewing the notes and materials I inherited from Professors LaFave and Saltzburg I located some statements made by the bench and bar on that proposed amendment. Those written comments are attached.

Mr. Mueller recommends that an amendment is now appropriate, in part, because trial judges have continued to ignore the current rule. He suggests that the language proposed in 1983 (attached) serve as the model for an amendment.

This matter will be on the agenda for the November 1991 meeting.

U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General

Washington, D.C. 20530

JUN 24 1991

Honorable William Terrell Hodges
Chairman
Advisory Committee on Criminal Rules
United States Courthouse, Suite 108
611 North Florida Avenue
Tampa, Florida 33602

Dear Judge Hodges:

I am writing on behalf of the Department of Justice to request that the Advisory Committee consider at its next meeting a proposal to amend Rule 29(b) to permit a trial judge to reserve decision, until after verdict, on a motion for acquittal at the close of the government's case. In our view, adoption of the amendment, while not affecting a large number of cases, would improve the justice system by giving courts added discretion to deal with motions for acquittal. Another reason for the amendment is to authorize the courts, in deciding whether or not to reserve decision, to balance the defendant's interest in an immediate resolution with the interest of the government in being able, in the event of a guilty verdict, to appeal a subsequent unfavorable ruling, and, if successful, to have the verdict reinstated.

By way of background, this proposal was considered approximately eight years ago. The Advisory Committee and the Standing Committee in 1983 initially voted in favor of circulating the amendment to bench and bar, see 98 F.R.D. 403-405 (copy enclosed), but after comment was received the Advisory Committee did not adopt the proposal, stating it was "not convinced there was sufficient need for such a change to protect the government's right to appeal." See July 18, 1984 report to the Standing Committee (enclosed). Because, however, judges since then have continued to violate Rule 29(b), see, e.g., United States v. Bruno, 873 F.2d 555, 562 (2d Cir.), cert. denied, 110 S. Ct. 125 (1989); United States v. Reifsteck, 841 F.2d 701 (6th Cir. 1988), we believe the matter is worthy of reconsideration.

Briefly to recapitulate the law, as you know Rule 29(b) now permits reservation of decision on a motion for a judgment of acquittal only if the motion is made "at the close of all the evidence". The courts of appeals have uniformly construed this

to mean that it is forbidden to reserve decision on a motion for acquittal made at the close of the government's case, although such error is deemed harmless if, upon later review, the government's evidence is found sufficient. E.g., United States v. Reifsteck, supra.

The current Rule, in our view, and as supported by the persistent phenomenon of judges who decline to follow it, lacks sufficient flexibility. Consider the situation of a trial judge who is presented, at the end of the government's case, with a motion for acquittal and who believes that the question is a close one, on which he or she would like to have more time for reflection or for research if the issue is dependent on whether or not a particular, disputed element must be proved. See e.g., United States v. Roberts, 735 F. Supp. 537 (S.D.N.Y. 1990) (judge deliberately delayed ruling on motion for acquittal at close of government's case until after verdict, in order to allow time for "careful consideration" of novel issue of statutory construction).

Since the present Rule forbids a reservation of decision, the Rule-abiding judge must act precipitately on the motion, either to grant or deny it. We suspect that most judges, faced with this situation, would opt to deny the motion. They know that to grant it effectively terminates the case since the government constitutionally cannot appeal from an acquittal, while to deny the motion does not foreclose the issue from being raised again, in the event the jury returns a guilty verdict. Some judges, however, being pressured by the Rule into making a hasty decision, will erroneously grant the motion, thereby costing the government, and society, the right to have the jury determine guilt or innocence when in fact the evidence was sufficient for jury consideration. Moreover, a few judges, aware of the requirements of the Rule, will nevertheless choose to violate it, reserving decision until after verdict, cognizant that their error in doing so will be moot if it is later determined that the evidence was sufficient.

Rather than either coercing a premature decision or encouraging well-intentioned Rule breaking, in cases such as the one posited, where the sufficiency question is close and the judge is genuinely undecided, we believe the court should have the lawful option to reserve decision; and in determining whether to do so, should be able to take into account the government's interest in a possible appeal.

We emphasize that the change to Rule 29(b) we are proposing will likely affect only a small proportion of motions. A judge who believes, at the close of the government's case, that the issue of sufficiency or insufficiency of the evidence is clear will not reserve decision. Moreover, even in harder cases, it is a legitimate factor weighing against reservation of decision that

the defendant has a stronger interest in an immediate determination of his motion at the close of the government's proof than he does at the close of all the evidence since a favorable ruling at the earlier juncture will relieve the defendant of the risk that by putting on a defense he may unintentionally cure a deficiency in the government's case. See United States v. Neary, 733 F.2d 210 (2d Cir. 1984). Nevertheless, there will remain, we believe, a class of cases in which courts will properly conclude, after considering all the relevant factors, that reservation of decision is the most appropriate course. The Rule should be amended so as explicitly to permit this choice.

The specific language we suggest is that contained in the 1983 proposal (98 F.R.D., at 403-404).

Sincerely,

Robert S. Mueller, III
Assistant Attorney General

Enclosure

COMMITTEE NOTE

Rule 12.1(f)

This clarifying amendment is intended to serve the same purpose as a comparable change made in 1979 to similar language in rule 11(e)(6). The change makes it clear that evidence of a withdrawn intent or of statements made in connection therewith is thereafter inadmissible against the person who gave the notice in any civil or criminal proceeding, without regard to whether the proceeding is against that person.

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

1 * * *

2 (e) INADMISSIBILITY OF WITHDRAWN INTENTION. Evidence

3 of an intention as to which notice was given under subdivision (a) or

4 (b), later withdrawn, is not, ~~admissible~~ in any civil or criminal

5 proceeding, admissible against the person who gave notice of the

6 intention.

COMMITTEE NOTE

Rule 12.2(e)

This clarifying amendment is intended to serve the same purpose as a comparable change made in 1979 to similar language in rule 11(e)(6). The change makes it clear that evidence of a withdrawn intent is thereafter inadmissible against the person who gave the notice in any civil or criminal proceeding, without regard to whether the proceeding is against that person.

Rule 29. Motion for Judgment of Acquittal

1 * * *

2 (b) RESERVATION OF DECISION ON MOTION. ~~If a motion for~~

3 ~~judgment of acquittal is made at the close of all the evidence,~~ the

4 The court may reserve decision on the a motion for judgment of
5 acquittal, proceed with the trial (where the motion is made before
6 the close of all the evidence), submit the case to the jury and decide
7 the motion either before the jury returns a verdict or after it
8 returns verdict of guilty or is discharged without having returned a
9 verdict.
10 * * *

COMMITTEE NOTE

Rule 29(b)

At present, subdivision (b) of this rule permits reservation of decision on a motion for judgment of acquittal only if the motion was made "at the close of all the evidence." It has thus understandably been construed as prohibiting similar reservation of decision where the motion is made at the close of the government's case-in-chief. See, e.g., United States v. Conway, 632 F.2d 641 (5th Cir. 1980). The amendment would permit reservation of a decision on a motion for judgment of acquittal made at the close of the government's case in the same manner as is now allowed for motions made at the close of all the evidence.

The intent of Congress in enacting the government appeal statute, 18 U.S.C. § 3731, was "to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution permits." United States v. Wilson, 420 U.S. 332, 337 (1975). But under the double jeopardy clause the government may appeal the granting of a motion for judgment of acquittal only if there would be no necessity for another trial, that is, only if the jury had returned a guilty verdict. United States v. Martin Linen Supply Co., 430 U.S. 564 (1977). This means that it is only by reserving until after verdict the granting of a rule 29 motion that the trial court may preserve the government's right to seek appellate review of its decision. The amendment would extend to those cases in which the motion is made at the close of the government's evidence the court's opportunity to so preserve the government's right.

Admittedly, the defendant has a greater interest in an immediate decision on a motion for acquittal made at the close of the government's evidence than he does when the motion is made at the conclusion of all the evidence, for a favorable ruling at this earlier juncture will relieve him of

the need to proceed with the presentation of his defense. But this interest is not one of constitutional dimension, United States v. Conway, supra, nor is it so compelling that it must in every case be said to outweigh the government's and the public's equally legitimate interest in preserving an opportunity for appeal and, if the appeal is successful, reinstatement of a valid guilty verdict.

Even when the nature of a midtrial ruling is such that government appeal and retrial would e permissible, the Supreme Court has looked favorably upon the practice of the trial court reserving its decision until after verdict:

> We should point out that it is entirely possible for a trial court to reconcile the public interest in the Government's right to appeal from an erroneous conclusion of law with the defendant's interest in avoiding a second prosecution. In United States v. Wilson, 420 U.S. 332 (1975), the court permitted the case to go to the jury, which returned a verdict of guilty, but it subsequently dismissed the indictment for preindictment delay on the basis of evidence adduced at trial. Most recently in United States v. Ceccolini, 435 U.S. 168 (1978), we described similar action with approval: "The District Court had sensibly first made its finding on the factual question of guilt or innocence, and then ruled on the motion to suppress; a reversal of these rulings would require no further proceeding in the District Court, but merely a reinstatement of the finding of guilt." Id. at 271.

United States v. Scott, 437 U.S. 82, 100 n.13 (1978). If it is appropriate for the trial court to reserve ruling where the interest to be served is the avoidance of unnecessary further proceedings to correct the ruling if erroneous, it may be all the more appropriate to follow this course of action in the case of a motion for acquittal where the more compelling interest of preserving any opportunity for correction of a dispositive trial court error is at stake.

Rule 30. Instructions

1 At the close of the evidence or at such earlier time during the
2 trial as the court reasonably directs, any party may file written
3 requests that the court instruct the jury on the law as set forth in
4 the requests. At the same time copies of such requests shall be

isory Committee was not convinced there was a need for such a provision.

Rule 29

Rule 29(c). The proposed amendment allowing reservation of decision on a motion for judgment of acquittal made at the close of the government's case was not adopted. The Advisory Committee was not convinced there was sufficient need for such a change to protect the government's right to appeal.

Rule 30

The proposed amendment, which would allow the court to instruct the jury either before or after final arguments, has been tabled pending circulation of a similar proposal by the civil rules committee.

III. RULES 9(a) FOR SECTION 2254 CASES AND SECTION 2255 PROCEEDINGS IN THE DISTRICT COURTS

Upon the advice of the Standing Committee, the proposals to amend Rules 9(a) of the Rules Governing Section 2254 Cases and the Rules Governing Section 2255 Proceedings in the District Courts, which were originally circulated, have been withdrawn. A new proposal will be submitted for circulation to the bench and bar.

Respectfully submitted,

Walter E. Hoffman
Chairman, Advisory Committee on Criminal Rules

July 18, 1984

MEMORANDUM

May 23, 1983

SUBJECT: Proposed Amendment of Rule 29 Permitting Deferral of Acquittal Motion Even if Made at End of Government's Case

TO: Advisory Committee on Criminal Rules

FROM: Wayne R. LaFave

In a letter dated January 13, 1983, Lowell Jensen has proposed an amendment of rule 29 authorizing the judge to defer a ruling on defendant's motion for acquittal even if the motion is made at the end of the government's case. As the letter indicates, a defendant certainly has a stronger interest in an immediate ruling when the motion comes at that time, but it is argued the prosecution (and the public) has an even greater interest in not having the ruling come at a time when government appeal would be barred as a matter of double jeopardy.

The Jensen letter is attached. Because it specifies exactly what change in the wording of subdivision (b) would be needed and because the letter also sets out support of the type which would appear in an Advisory Committee Note, it seemed unnecessary for me to do any further drafting at this time.

COPY

U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General

Washington, D.C. 20530

13 JAN 1983

Honorable Walter E. Hoffman
Chairman, Advisory Committee
on Criminal Rules
Room 425, United States Courthouse
Norfolk, Virginia 23510

Dear Judge Hoffman:

I am writing to request that a proposed amendment of Rule 29 of the Federal Rules of Criminal Procedure be placed on the agenda of the Advisory Committee. The proposed amendment would permit the court to reserve until after verdict its decision on a motion for judgment of acquittal made at the close of the Government's case.

Presently, subdivision (b) of Rule 29 permits such a reservation of decision where the motion for judgment of acquittal is made "at the close of all the evidence." However, since motions for acquittal made at the close of the Government's case-in-chief are not specifically included in this provision, several courts have held that the Rule prohibits similar reservation of decision where the motion for acquittal is made at this earlier stage of the trial.[1]

We propose amending subdivision (b) [2] of the Rule in the following manner to allow reservation of a decision on a motion for judgment of acquittal made at the close of the Government's case in the same manner as the Rule now provides for motions made at the close of all the evidence:

1/ See, e.g., United States v. Conway, 632 F.2d 641, 643 (5th Cir. 1980); United States v. Rhodes, 631 F.2d 43, 45 (5th Cir. 1980); United States v. House, 551 F.2d 756, 757-8 (8th Cir. 1977); Sullivan v. United States, 414 F.2d 714 (9th Cir. 1969.

2/ We do not deem an amendment to subdivision (a) of the Rule to be necessary. Reservation of decision is now clearly permitted under subdivision (b) despite the fact that subdivision (a) appears to mandate entry of judgment of acquittal upon the court's determination that the evidence is insufficient. Our proposal would simply extend the reservation authority now set out in subdivision (b), and this provision, as amended, should be read to qualify the ostensibly mandatory language of subdivision (a) in the same manner as it currently does.

(b)~~If a motion for judgment of acquittal is made at the close of all the evidence,~~ [T]he court may reserve decision on ~~the motion~~ a motion for judgment of acquittal, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict." (deleted matter struck through and new matter underscored)

As has been repeatedly emphasized by the Supreme Court, it was the intent of the Congress in enacting the government criminal appeals statute, 18 U.S.C. 3731, "to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution permits," 3/ and the right of the government to appeal post-guilty-verdict judgments of acquittal under this statute is well established. 4/ However, where a Rule 29 acquittal motion is granted prior to verdict, no matter how egregious an error this may be, government appeal of the trial court's decision will ordinarily be barred because correction of the error would necessitate a new trial, a result barred by the Double Jeopardy Clause.

Thus, it is only by reserving until after verdict the granting of a Rule 29 motion that the trial court may preserve the government's right to seek appellate review of its decision. Where the opportunity for proceeding in this manner is not present, such as where the motion is made at the close of the government's evidence, trial court error in granting a judgment of acquittal is irredeemable and the government will be forever barred from bringing the offender to justice.

Clearly, there is a strong public interest in allowing appellate redress of trial court errors that would otherwise unjustifiably allow a defendant to escape conviction. The amendment we propose would simply permit the trial court, in the exercise of its discretion, to reserve until after verdict its decision on a motion for acquittal made at the close of the government's case-in-chief and thereby adopt the one course of action that would safeguard the opportunity to vindicate this interest -- a course of action which we stress is now specifically permitted under Rule 29 where the motion for acquittal is made at the close of all the evidence.

3/ United States v. Wilson, 420 U.S. 332, 337 (1975).

4/ United States v. Martin Linen Supply Co., 430 U.S. 564, 568 (1977).

Admittedly, the defendant has a greater interest in an immediate decision on a motion for acquittal made at the close of the Government's evidence than he does when the motion is made at the conclusion of all the evidence, for a favorable ruling at this earlier juncture will relieve him of the need to proceed with presentation of his defense, or indeed, of the decision whether to proceed at all. But this interest is not one of the constitutional dimension, nor is it so compelling that it must in every case be said to outweigh the government's and the public's equally legitimate interest in preserving an opportunity for appeal, and, if the appeal is successful, reinstatement of a valid guilty verdict.

The defendant's burden of defending against the charges at trial "is a detriment which the law does not recognize." Heike v. United States, 217 U.S. 432, 430 (1910). Accordingly, in cases in which trial courts have, as would be specifically authorized in our proposed amendment, reserved until after verdict ruling on a mid-trial motion for acquittal, this action, although deemed to be prohibited by Rule 29, has nonetheless been characterized as non-constitutional, harmless error where there was indeed sufficient evidence to send the case to the jury. 5/ Moreover, even in instances in which the nature of a mid-trial ruling is such that it could be corrected by a second trial and thus would be subject to government appeal, the Supreme Court has endorsed the approach of the trial court's reserving its decision until after verdict:

> We should point out that it is entirely possible for a trial court to reconcile the public interest in the Government's right to appeal from an erroneous conclusion of law with the defendant's interest in avoiding a second prosecution. In United States v. Wilson, 420 U.S. 332 (19075), the court permitted the case to go to the jury, which returned a verdict of guilty, but it subsequently dismissed the indictment for preindictment delay on the basis of evidence adduced at trial. Most recently in United States, v. Ceccolini, 435 U.S. 168 (1978), we described similar action with approval: "The District Court had sensibly first made its finding on the factual question of guilt or innocence, and then ruled on the motion to suppress; a

5/ See, e.g., United States v. Conway supra n. 1; United States v. Dreitzler, 577 F.2d 539, 552 (9th Cir. 1978; United States v. Braverman, 522 F.2d 218 (7th Cir.), cert. denied 423 U.S. 985 (1978); United States v. Brown, 456 F.2d 2[illegible] (2d Cir.), cert. denied 407 U.S. 910 (1972).

> reversal of these rulings would require no further proceedings in the District Court, but merely a reinstatement of the finding of guilt." Id. at 271. Accord, United States v. Kopp, 429 U.S. 121 (1976); United States v. Rose, 429 U.S. 5 (1976); United States v. Morrison, 429 U.S. 1 (1976).

United States v. Scott, 437 U.S. 82, 100 n.13 (1978). Certainly, if it is appropriate for the trial court to reserve ruling where the interest to be served is the avoidance of unnecessary further proceedings to correct the ruling if erroneous, it may be all the more appropriate to follow this course of action in the case of a motion for acquittal where the more compelling interest of preserving any opportunity for correction of a dispositive trial court error is at stake.

Increasingly, the Government has been frustrated in its prosecution of important criminal cases by what we believe is the unfounded granting of motions for acquittal at the close of our presentation of extensive evidence of the defendant's guilt. For example, in a recent prosecution involving a massive fraudulent scheme and a potential criminal forfeiture of $200 million, judgments of acquittal on 15 of 17 counts of the indictment (all of the counts directly related to the fraud) were entered at the close of the government's production of numerous witnesses and documents over the course of 15 days of trial. Serious doubts about the propriety of the trial court's action led a panel of the Tenth Circuit to direct the trial court to conclude the trial on all 17 counts, but without prejudice to the right of the defense to renew its motion after verdict. United States v. Ellison, 684 F.2d 664 (1982).6/ The decision of the panel, which contemplated the very sort of reservation of ruling that we propose to permit under the Rule, was reversed in an unpublished en banc opinion.

The amendment to rule 29 that we propose is a modest one in that it would not compel reservation of decision on the defendant's motion so as to preserve the government's right to appeal, as is presently mandated with respect to pretrial suppression motions. See rule 12(e), F.R. Crim.P. Rather, reservation of decision would remain a matter within the discretion of the court. We think this approach is in the context of the competing interests at state under Rule 29 a fair one; it would give the courts the latitude to reserve ruling on a pre-verdict acquittal motion and thereby safeguard the government's right to appeal where, in consideration of both the defendant and government's interests, this course is on balance deemed appropriate.

6/ To our knowledge, this was the first time that the government has sought an emergency mid-trial appeal of a Rule 29 judgment of acquittal.

For example, where the ruling on the sufficiency of the Government's case is a close call or where the judge's assessment of the evidence turns on an unsettled question of law, there is no reason to bar the trial court from taking the one course of action that will preserve an opportunity for appellate review when the motion comes at the close of the Government's evidence rather than at the close of all the evidence. Error in granting a pre-verdict judgment of acquittal cannot be corrected. By extending Rule 29's authorization of reservation on motions for acquittal in the manner we propose, this unjustifiable result may be avoided where the court, in its discretion, determines that the interests of justice would be better served by delaying ruling until after verdict.

Your and the Committee's consideration of this matter will be very much appreciated.

Sincerely,

D. Lowell Jensen
Assistant Attorney General
Criminal Division

cc: Professor Wayne LaFave

The Association of the Bar of the City of New York, by its Committee on Federal Courts, respectfully submits the following comments with respect to the proposed change in Rule 29(b) to the Federal Rules of Criminal Procedure.

Comments as to the other proposed Rule changes are to be prepared by the Committee on Federal Courts and the Committee on Criminal Law. These will be submitted in writing at a later date.

Under existing Rule 29(a), the defense may move for a judgment of acquittal on the ground that the evidence is insufficient at the end of the Government's case as well as at the end of the entire case (i.e., after any defense case).

With respect to motions made at the conclusion of the Government's case, defense counsel need not reserve the right to present a defense prior to making his motion, and the District Judge is obliged to decide, then and there and without any consideration of any defense case that might be proffered, whether the Government has established each required element of each charge in question. Should the Government be found to have failed to have sustained this burden, the defendant is entitled to a judgment of acquittal before presenting any defense evidence. The Court cannot reserve decision on the motion. United States v. Conway, 632 F.2d 641 (5th Cir. 1980); United States v. House, 551 F.2d 756 (8th Cir.),

cert. denied, 434 U.S. 850 (1977). If the Court grants the motion, the double jeopardy clause precludes appeal by the government; there is no jury verdict to "reinstate" if the appeal is successful. See United States v. Martin Linen Supply Co., 430 U.S. 564 (1977).

With respect to Rule 29 motions for judgment of acquittal at the close of all the evidence, existing Rule 29(b) provides that the Court may, instead of ruling on the defense motion at that time, reserve decision on the motion and render its decision at any time after the case is submitted to the jury, either before or after the jury returns a verdict. If the Court renders a decision granting the motion after the jury's verdict, the Government may appeal because the jury verdict could be reinstated without new fact finding procedures. See United States v. Martin Linen Supply Co., supra, 430 U.S. 564 (1977).

The key feature of proposed Rule 29(b) is that reservation of decision, now permitted only with respect to Rule 29 motions made at the conclusion of all the evidence, is extended to motions made at the close of the Government's case. In the Note in the Preliminary Draft accompanying proposed Rule 29(b), the rationale for the change is described as creating a mechanism for appeal by the Government from Rule 29 motions made at the conclusion of the Government's case. The Note expresses the view that the interest in preserving

this opportunity for appeal outweighs the defendant's interest in a ruling on the sufficiency of the Government's evidence at the conclusion of the Government's case.

Neither the proposed Rule nor the accompanying Note makes mention of whether, in deciding such a motion after jury verdict, the judge would be permitted to consider any defense evidence in assessing sufficiency or whether the judge would be obliged to disregard the defense evidence and examine only the Government's evidence. This matter is important because the defense evidence may provide proof on a particular element absent from the Government's case.

Comments and Recommendations

The Committee, while cognizant of the expanded appellate review that the amendment attempts to create, nonetheless is constrained to oppose the amendment to Rule 29(b). As drafted, it will confuse the legal standards governing Rule 29, and may eviscerate the well-established principle that the Government must first establish a *prima facie* case before putting the defendant to his proof.

The existing procedure recognizes an important principle -- that a ruling on the sufficiency of the Government's evidence at the end of the Government's case is part and parcel of the Government's burden of proving guilt and the presumptively innocent defendant's

right to be shielded by that burden (see In Re Winship, 397 U.S. 358 (1972)). The obligation to render a decision on a Rule 29 motion made at the conclusion of the Government's case before any defense evidence is presented distinguishes the motion from a Rule 29 motion made at the conclusion of all the evidence. But for this distinction, there is no reason to authorize the motion at the different times. Because of this distinction, two separate and important functions are served by Rule 29.

One function, served by the motion made at the conclusion of all of the evidence, is to confer upon the District Judge the power to assess the entire case and to enter judgment notwithstanding the verdict. See Advisory Committee Note to Rule 29(b). This function necessitates examination of all of the evidence and is fully served under the existing rule.

A second function, served by the motion made at the close of the Government's case, is to impose upon the District Judge the duty to decide whether the Government has established a prima facie case independently from any defense evidence. It follows that the decision cannot be reserved until after the defense has presented its case, but must be rendered before that time. Thus, under the present rule, when a defendant moves for judgment of acquittal at the close of the Government's case, the trial court is required to determine whether the Government has met its burden of proving

every element of the crime charged. The Government's initial burden is closely tied to Fifth Amendment concerns; as the Court of Appeals for the District of Columbia has commented:

> One of the greatest safeguards for the individual under our system of criminal justice is the requirement that the prosecution must establish a prima facie case by its own evidence before the defendant may be put to his defense.
>
> "Ours is the accusatorial as opposed to the inquisitorial system. *** Under our system society carries the burden of proving its charge against the accused not out of his own mouth. It must establish its case, not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skillful investigation." [Watts v. Indiana, 338 U.S. 49, 54, 69 S.Ct. 1347, 1350, 93 L.Ed. 1801 (1949) (Frankfurter, J.)]

Cephus v. United States, 324 F.2d 893, 895 (D.C. Cir. 1963). See generally, Comment, The Motion for Acquittal: A Neglected Safeguard, 70 Yale L.J. 1151 (1961).

Often, the District Court is the only forum to rule on whether the Government has met this initial burden. If the Trial Court denies the defendant's motion, and the defendant chooses to present evidence in his defense, the Appellate Courts hold almost universally that he has "waived" the motion he made at the close of the government's case. United States v. Fusaro, F.2d , No. 82-1024 (1st Cir. May 26, 1983); United States v. Douglas, 688 F.2d 459 (10th Cir. 1982); United States v. Rhodes, 631 F.2d 43 (5th Cir. 1980); United States v. Goldstein, 168 F.2d 666 (2d Cir. 1948); United States v. Brown, 456 F.2d 293 (2d Cir. 1972); but see United States v. Watkins, 519 F.2d 294 (D.C. Cir. 1975); Cephus v. United States, supra. Even if the motion was meritorious when made, and wrongly denied by the District Court, the Appellate Court will review all the evidence; if the defense proved a missing element while presenting its own case, the conviction will be sustained.* Thus, if a defendant presents evidence, the

---

* The "waiver rule" has been subjected, in the words of the Court of Appeals for the Tenth Circuit, to "growing criticism and attack":

[footnote continued on page 7]

District Court's ruling on his motion is the only opportunity he has to enforce the Government's initial burden.

If the proposed changes to Rule 29(b) are adopted, the requirement of the Government's case being subjected to prima facie scrutiny may be eliminated. The proposed amendment breeds uncertainty and outright conflict with the Appellate "waiver rule". Assume that the District Court reserves decision on a meritorious motion for acquittal at the close of the Government's case, and that the defense then provides the missing element of

---

* footnote continued from page 6

> "The waiver rule thus places the defendant on the horns of a dilemma if he believes his motion for acquittal made at the close of the government's case, was erroneously denied. He can rest his case, thereby preserving his appeal, and face the risk of a conviction which may not be reversed, or he can present evidence of his innocence thereby waiving his appeal from the original ruling, and assume the risk that this evidence may provide the missing elements in the prosecution's case."

United States v. Lopez, 576 F.2d 840, 843 (10th Cir. 1978).

The "waiver rule" has long been rejected by the United States Court of Appeals for the District of Columbia. See United States v. Watkins, supra; Cephus v. United States, supra. Along with the Court of Appeals for the Tenth Circuit in Lopez, several other circuits have questioned but not rejected it. See United States v. Burton, 472 F.2d 757 (8th Cir. 1973); United States v. Rizzo, 416 F.2d 734 (7th Cir. 1969). Nonetheless, the rule currently enjoys application in the wide majority of the circuits, and for our purposes, it must be regarded as settled law.

proof in its own case. After a jury conviction, how should the District Court rule? If it considers only the evidence presented by the close of the Government's case, and grants the motion, its standard will conflict with the traditional rule of the Appellate Courts, which considers all the evidence and treats the motion made at the close of the Government's case to have been "waived". If, on the other hand, the District Court considers all the evidence presented, and denies the motion, it will have failed to apply the legal standard to which the defendant was entitled when he made the motion. Rather than simply preserving the Government's opportunity to appeal, the judge's reservation of decision will have reversed the case's outcome. It will also have deprived the defendant of his opportunity under existing Rule 29 to require the prosecution to establish its _prima facie_ case.

The extension of the Government's right to appeal would be achieved at what seems a disproportionate price of sacrificing a long recognized and constitutionally based right to a ruling on the sufficiency of the Government's case before electing to present a defense case. Because such fundamental changes in the standards governing Rule 29 should not be rendered _sub silentio_ and without full exploration by the Standing Committee of the Judicial Conference, and because we strongly

believe that the Government must be held to proof of a *prima facie* case on the threat of dismissal, we oppose the amendment of Rule 29(b).

CRIMINAL JUSTICE SECTION

American Bar Association

STATEMENT OF
PROFESSOR PAUL F. ROTHSTEIN, CHAIRPERSON
CRIMINAL JUSTICE SECTION COMMITTEE ON
RULES OF CRIMINAL PROCEDURE AND EVIDENCE

ON BEHALF OF THE
AMERICAN BAR ASSOCIATION
CRIMINAL JUSTICE SECTION

CONCERNING
PRELIMINARY DRAFT OF AMENDMENTS TO THE
FEDERAL RULES OF CRIMINAL PROCEDURE
(AUGUST 1983)

BEFORE THE
STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C.
FEBRUARY 14, 1984

STATEMENT OF
ABA CRIMINAL JUSTICE SECTION
CONCERNING
PRELIMINARY DRAFT (AUGUST 1983) OF PROPOSED AMENDMENTS
TO THE
FEDERAL RULES OF CRIMINAL PROCEDURE

> These views are being presented only on behalf of the Section of Criminal Justice and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association, and should not be construed as representing the position of the ABA.

Introduction

Mr. Chairman and members of the Committee:

My name is Paul F. Rothstein. I am Chairperson of the ABA Criminal Justice Section's Committee on Criminal Rules of Procedure and Evidence. I appear before you as the representative of the Section. I would like to say preliminarily that the entire Section joins me in commending you on the fine public service you have been providing with respect to oversight and amendment of the Federal Rules. Our suggestions for improvement are in no way meant to detract from the splendid work your Advisory Committee has done over the years and continues to do.

The Criminal Justice Section appreciates the opportunity to appear today and present its views on the Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure. In the spirit of the continual efforts to improve the procedures of the law that have always characterized your committee, we note you have further perfected the Advisory Committee mechanism by recently promulgating a set of new procedures to be followed in the rules amendment process, including these hearings.

The views contained in our statement today were formulated by the Section's Committee on Rules of Criminal Procedure and Evidence. They were subsequently reviewed by the Section's Executive Committee and governing Council. Having been approved by the Executive Committee, they represent the position of the Criminal Justice Section. They have not been approved by the ABA House of Delegates or Board of Governors and do not constitute the position of the American Bar Association.

The Criminal Justice Section has approximately 9,000 members. Its membership includes judges, defense attorneys, prosecutors, law professors, justice system administrators, and various other professional disciplines within our justice system. This diverse membership lends balance to the Section's perspective. This balance is achieved as a result of compromise. Therefore, the views presented in the following statement should be seen as the product of compromise. They are not intended to reflect the bias of any one constituency within the justice system.

The Criminal Justice Section agrees with the substance of the proposed change to Rule 11(c)(i)(Pleas) and with the clarifying nature of te proposed changes to Rule 12.1(f) (Notice of Alibi) and Rule 12.2(e)(Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition). Therefore, we have no comments or suggestions on them for your consideration. However, there are some points we would like to raise on the proposed amendments to other Rules.

Rule 6(a)(2) - Designating and Impanelling Alternate Grand Jurors

The Criminal Justice Section believes that the purpose of

the Committee Note be clarified. The last paragraph of the Note contains a sentence that reads, in part, "....--constitutes an unreasonable barrier to the effective enforcement of our two-tiered system of criminal laws." Although this is apparently a reference to the existence of distinct state and federal systems, the language gives the impression that we have a single system with two tiers or levels. Recognition that the states and the federal government are quite distinct sovereignties requires that the language be modified.

Rule 29(b) - Motion for Judgment of Acquittal

The Criminal Justice Section sees little justification for the new procedure created by this amendment. The judge already has options at his or her disposal which can accomplish the desired objective. The new procedure merely presents the specter of putting the defendant and the system to the expense of a defense and prolonged trial even though the judge may feel prior to the defense case that a directed acquittal is quite certain.

We believe the objections rise to constitutional proportions implicating the right of the defendant to have the government prove at least a prima facie case before being put to the burden of defending. The defendant should not be required to, perhaps himself, supply lacks in the government's proof, unless the government has a substantial case. We do not believe the Conway case cited by the Advisory Committee lays the constitutional problem to rest.

ANALYSIS OF PROPOSED CHANGES

TO THE

FEDERAL RULES OF CRIMINAL PROCEDURE

AND

TO THE

RULES GOVERNING SECTION 2254 AND SECTION 2255 CASES

AMERICAN COLLEGE OF TRIAL LAWYERS

FEDERAL RULES OF CRIMINAL PROCEDURE

COMMITTEE

NOVEMBER, 1983

Chairman

HARVEY M. SILETS, ESQUIRE
Silets and Martin, Ltd.
140 South Dearborn Street
Suite 1510
Chicago, Illinois 60603

COMMITTEE
ON
CRIMINAL RULES

As Constituted January 1, 1983

Chairman

HARVEY M. SILETS, ESQUIRE
Silets and Martin, Ltd.
140 South Dearborn Street - Suite 1510
Chicago, Illinois 60603

JAMES T. BROSNAHAN, ESQ.
Morris & Foerster
One Market Plaza
Spear Street Tower
San Francisco, CA 94105

THOMAS D. CLIFFORD, ESQ.
Skelley, Clifford, Vinkels,
Williams & Rottner, P.C.
12 Charter Oak Place
Hartford, CT 06106

HON. WILLIAM H. ERICKSON
Supreme Court of Colorado
465 State Judicial Bldg.
Denver, CO 80203

ROBERT B. FISKE, JR., ESQ.
Davis, Polk and Wardwell
One Chase Manhattan Plaza
New York, NY 10005

FRANK E. HADDAD, JR., ESQ.
529 Kentucky Home Life Bldg.
Louisville, KY 40202

ARNOLD MORELLI, ESQ.
Bauer, Morelli & Heyd
Co., L.P.A.
1029 Main Street
Cincinnati, OH 45202

JULES RITHOLZ, ESQ.
Kostelanetz & Ritholz
80 Pine Street
New York, NY 10005

ROBERT J. ROTATORI, ESQ.
Gold, Rotatori, Schwartz
& Gibbons Co., L.P.A.
100 Ohio Savings Plaza
1801 E. 9th Street
Cleveland, OH 44114

JAMES M. RUSS, ESQ.
Tinker Building
18 W. Pine Street
Orlando, FL 32801

LAWRENCE F. SCALISE, ESQ.
Scalise, Scism, Sandre & Uhl
2910 Grand Avenue
Des Moines, IA 50312

PETER J. HUGHES, ESQ.
1010 Second Avenue
Suite 1917
San Diego, CA 92101

EARL J. SILBERT, ESQ.
Schwalb, Donnenfeld, Bray & Silbert
2828 Pennsylvania Ave., N.W.
Suite 400
Washington, DC 20007

ROBERT KASANOF, ESQ.
Kasanof, Schwarts, Iason
767 Third Avenue
New York, NY 10017

Regent Liaison

ALSTON JENNINGS, ESQ.
Wright, Lindsey & Jennings
2200 Worthen Bank Bldg.
Little Rock, AR 72201

TO THE COMMITTEE ON
FEDERAL RULES OF CRIMINAL PROCEDURE:

Under guidelines promulgated by the American College of Trial Lawyers, it is the responsibility of the Federal Rules of Criminal Procedure Committee1/ to submit its comments concerning the changes in federal rules proposed by the United States Judicial Conference Committee on Federal Rules of Practice and Procedure.

This report represents a preliminary analysis of the proposed rule changes and may serve as a point of departure for further commentary from members of our committee.

A summary of the proposed rule changes follows below:

(1)(a) The addition of Rule 6(a)(2) - providing a method for the selection of alternate grand jurors.

(b) Rule 6(e)(3)(A)(ii) - to allow the attorney for the government to disclose matters occurring before the grand jury to "government personnel (including personnel of a state or subdivision of a state)" as are deemed necessary by the attorney for the government in the performance of that attorney's duties to enforce federal criminal law.

(c) Rule 6(e)(3)(C) - giving authority to the district court, upon request of an attorney for the government, to order

---

1/ The American College of Trial Lawyers, Federal Rules of Criminal Procedure Committee shall hereinafter be referred to as "the Committee."

The amendment to Rule 12.2(e) as proposed is outlined below:

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

* * *

(e) INADMISSIBILITY OF WITHDRAWN INTENTION. Evidence of an intention as to which notice was given under subdivision (a) or (b), later withdrawn, is not, ~~admissible~~ in any civil or criminal proceeding, admissible against the person who gave notice of the intention.15/

The American College of Trial Lawyers approves the amendments to Rules 12.1(f) and 12.2(e) as a change in language so as to conform the language of this Rule to the language of Rule 11(c)(6) and not as constituting any substantive meaning. It is the recommendation of the American College of Trial Lawyers that the advisory committee more clearly define that these are only language changes and not intended to have any substantive significance.

RULE 29(b)

The proposed amendment to Rule 29(b) provides a court with additional force with which to proceed with a trial before rendering a decision on a motion for judgment of acquittal. The proposed changes to subdivision (b) are as follows:

Rule 29. Motion for Judgment of Acquittal

* * *

(f) RESERVATION OF DECISION ON MOTION. ~~If a motion for judgment of acquittal is made at the close of all the evidence, the~~ The court may

15/ Proposed Amendments, p. 7.

reserve decision on the a motion for judgment of acquittal, proceeding with the trial (where the motion is made before the close of all the evidence), submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.

* * *16/

The proposed amendment to Rule 29(b) seeks to strengthen the Government's opportunities to appeal a judgment of acquittal by allowing the court to submit the case to the jury before rendering its decision on such a motion. Under the double jeopardy clause, the Government may appeal the granting of a motion for judgment of acquittal only if there would be no necessity for another trial, that is, only if the jury has returned a guilty verdict. United States v. Martin Linen Supply Co., 430 U.S. 564 (1977). This means that it is only by reserving until after verdict the granting of a Rule 29 motion that the trial court may preserve the Government's right to seek appellate review of its decision. The objectives of proposed Rule 29(b) seem laudable; however, two specific problems might arise.

Proposed Rule 29(b) makes it clear that a court does not have to render judgment on a motion of acquittal at the close of the Government's case-in-chief. Moreover, the court is given the option to proceed with the trial so that the jury can return a verdict. These changes increase the likelihood of prejudice to

16/ Proposed Amendments, p. 8.

the defendant in two ways: First, if the defendant has a strong interest in obtaining a rapid decision on a motion for judgment of acquittal, his only option is to rest his case upon the close of the Government's case-in-chief. However, the defendant may also be prejudiced if he presents his defense since this might have the effect of filling in essential gaps formerly missing from the Government's case. Notwithstanding these problems, the course of action proposed under amended Rule 29(b) might be more compelling in light of the interest in affording the Government some opportunity to correct a dispositive trial court error.

The American College of Trial Lawyers expresses particular concern over this amendment to Rule 29 because it provides no guidance to the court of the circumstances under which it should so reserve. Such discretion could result in a court tacking its own interest, in avoiding the embarassment of an improper ruling, onto those interests of the government. This consequently could create a situation in which courts consistently reserve judgment at the defendants' expense.

In order to offset these concerns, the proposed rule should be altered by stating that if the court did reserve its ruling, the ultimate decision of the motion could be predicated only upon the status of the record at the time of the motion and could in no way be based on evidence received thereafter.

Subject to the above proposed change to the proposed rule, the American College of Trial Lawyers recommends adoption of the proposed amendment to Rule 29(b).

THE LEGAL AID SOCIETY

Criminal Appeals Bureau

Federal Defender Services Unit
United States Court House
Foley Square — Room 531
New York, N.Y. 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER, Attorney-in-Charge

ALEXANDER D. FORGER
Chairman of the Board

MICHAEL A. COOPER
President

ARCHIBALD R. MURRAY
Executive Director
& Attorney-in-Chief

WILLIAM E. HELLERSTEIN
Attorney-in-Charge
Criminal Appeals Bureau

COMMENTS
OF THE
FEDERAL DEFENDER SERVICES UNIT
OF
THE LEGAL AID SOCIETY
OF THE CITY OF NEW YORK
ON THE
PRELIMINARY DRAFT OF PROPOSED AMENDMENTS
TO THE
FEDERAL RULES OF CRIMINAL PROCEDURE,
RULES GOVERNING §2254 CASES
IN THE UNITED STATES DISTRICT COURTS, AND
RULES GOVERNING §2255 PROCEEDINGS
IN THE UNITED STATES DISTRICT COURTS

— • —

These Comments have been prepared by experienced defense attorneys having a daily presence in the Federal District Courts of New York and the United States Court of Appeals for the Second Circuit.

— February 14, 1984

The purpose of the Society is to render legal aid in the City of New York to persons who are without adequate means to employ other counsel.—By-laws of The Legal Aid Society.

witnessess concerning the use of the testimony before the grand jury. If the witness testifies believing his testimony will remain confidential, he should not then be subjected to revelation of the information.

PROPOSED RULE 6(e)(c)(iv)

The proposed addition to Rule 6(e)(3)(c)(iv) permits the court, at the request of the Government on a showing that there may be a violation of state criminal law, to disclose matters before the grand jury to state prosecutors. The questions raised in the previous section also apply here. The delivery may result in an ability to evade state policies for immunity and grand jury procedure, while leaving the witness in ignorance of the use to which the testimony will be used.

PROPOSED RULE 29

The proposed change allows the district judge to delay until the completion of the case a decision on a Rule 29 motion made at the close of the prosecutor's case. The Advisors' Note states that the purpose of the proposal is to allow the government to appeal from a judgment of acquittal entered by the court, because an appeal is generally not permissible if such a judgment is entered prior to the jury verdict. The proposal should not be adopted because:

1. It is inconsistent with the constitutional safeguard requiring that the prosecutor prove the defendant's guilt beyond a reasonable doubt, and creates a constitutionally unacceptable conflict between the government's constitutional burden of proof and the defendant's Fifth Amendment right to remain silent on the one hand and the defendant's Sixth Amendment right to present a defense on the other.

2. It fails to give any consideration to the impact of the "waiver" rule. If the waiver rule is applicable to the delayed decision on a Rule 29 motion, the sufficiency of proof of guilt will not be evaluated on the prosecutor's case alone but on the case as a whole. The defendant's position would be substantially worse than it is at present.

3. The Advisors' Note justifying the proposal does not consider the constitutional and institutional need for the immediate decision on the Rule 29 motion. The Note casts the defendant's interest in having the motion decided immediately as a mere desire to know whether to proceed with a defense. This interest, says the Note, is not of constitutional magnitude and is not compelling enough to deny the government and the public the right to appeal. We dispute the Note's assumption that there is no constitutional and highly significant right of the defendant implicated here. We also take issue with the notion that the public interest is aligned with the prosecutor's statutory right to appeal rather than with the procedures that protect the constitu-

tional principle that the burden of proof in criminal cases is on the prosecution. Further, it must be noted that the cases referred to in the Note to support the theoretical underpinnings of the proposal are inaccurately cited.

1. The constitution requires that the prosecutor prove the guilt of the accused beyond a reasonable doubt, (In Re Winship, 397 U.S. 358 (1970)). Further, the government may not use the defendant's own words to convict him as the accused is protected by the Fifth Amendment and has no obligation to prove innocence or to disprove the elements of the crime. However the defendant also has a Sixth Amendment constitutional right to present a defense and to present evidence in his own behalf including his own testimony. See, e.g., Faretta v. California, 422 U.S. 806, 818 (1975); Washington v. Texas, 388 U.S. 14 (1967). There is, of course, risk inherent when presenting the defense: the evidence in the defense case can be used to make up defects in the prosecutor's case and to determine guilt. See, e.g., McGautha v. California, 402 U.S. 183, 215 (1971); United States v. Beck, 615 F.2d 441, 448 (7th Cir. 1980); Wright, 2 Federal Practice and Procedure, §463 at 644-5 (1982) and cases cited. (See post at 7.) Thus, the exercise of the Sixth Amendment right diminishes the protection afforded by the government's constitutional burden of proof and the right to remain silent.

The Rule 29 motion made at the end of the government's case safeguards this continuum of constitutional protection. It is the vehicle which allows judicial evaluation of the prosecution's proof before the defendant must choose whether to present a defense, thereby assuming the consequent risk of aiding the prosecution's case.

Though the decision on the Rule 29 motion protects the defendant, the standard for deciding the motion also protects the government from improvident dismissals. The relevant evidence produced by the government is sufficient if the jury could possibly infer guilt beyond a reasonable doubt. In making this decision the court must resolve all credibility issues, view all the evidence, and draw all inferences most favorably to the government. Thus, the standard for deciding the Rule 29 motion is less stringent than the burden imposed on the government when the case goes to the trier of fact which need not determine credibility and inferences favorably to the prosecution.

The proposal permitting the district court to delay a decision on the motion until after the defense case is presented improperly allows the prosecution to escape the constitutional burden of proof and to rely upon the defendant's evidence to meet its burden. Further, it requires the defendant to sacrifice the constitutional protections of the burden of proof and the Fifth Amendment in order to avail himself of the benefits of the Sixth Amend-

ment, although all of those rights can be protected by a ruling on the Rule 29 motion. Simmons v. United States, 390 U.S. 377 (1968). Indeed, the Supreme Court, in McGautha v. California, 402 U.S. 183, 215 (1971), specifically noted that the defendant is required to choose after the Rule 29 motion is denied. Finally, if this surrender of rights is made without knowing whether the government's case can go to the jury, there is not a knowing and intelligent waiver. Faretta v. California, 422 U.S. 806, 835 (1975); Johnson v. Zerbst, 304 U.S. 458 (1937). The conflicts are all capable of resolution, for once the government's case is completed nothing further is needed to make the decision on the motion.

The teaching of Simmons, Johnson, and Faretta is that constitutional rights in conflict are to be protected to the fullest extent possible. The reconciliation of the rights protects them and here of course, the decision on the Rule 29 motion is the vehicle of reconciliation.

2. Under the existing procedure if a post-government case Rule 29 motion is granted, the case is terminated; the government cannot appeal. As noted earlier, if the motion is denied and the defendant introduces no case, the defendant can, on a renewed motion and on appeal, argue the insufficiency of the evidence of guilt based solely on the government's evidence. However, if the motion is denied and the defendant presents a case, the accused is deemed to have

waived the challenge to the sufficiency of the evidence based solely on the prosecution case, and the appeals court as well as a district court considering a renewed motion will use the defense evidence and the prosecution's case to determine the sufficiency of proof of guilt, drawing all inferences against the defendant.

The proposed change in Rule 29 makes no mention of whether the district judge's delayed decision on the motion is to be based solely on the government's case if the defendant presents evidence or whether the waiver rule is to be invoked. If the latter situation applies, no district court's decision on the issue of sufficiency will be based solely on the government's case. Further, although the proposed amendment is concerned with creating the government's right to appeal from the grant of the motion, no attention is given to whether the review of the denial of the motion is to be based solely on the government's case or whether the waiver rule is to require an examination of sufficiency based on the entire case.

If, under the proposed rule, both the decision on the motion by the district court and the review by the court of appeals are to be premised on the totality of the case, the defendant's position would be materially worse under the proposal than it is under the present rule. The rule as it now exists guarantees the defendant at least one opportunity to have the prosecution case evaluated solely on its own

merits. However, if the waiver rule applies to the delayed decision permitted by the proposal, all opportunity for consideration of sufficiency based solely on the government's case is foreclosed. The impact, of course, is to deny the defendant the opportunity to put the government to its test and to allow the government to rely on the defense case. Thus the defense is denied a basic feature of the accusatory system of criminal justice, an effect not discussed in the Notes. The proposal not only gives the Government a new right to appeal, but it substantially reduces the protections a defendant now has.

The proposal should not be adopted without study of its implications in the context of the waiver rule. However, a review of the context will justify rejection of the proposal.

3. The Advisors' Note to the proposal does not consider the constitutionally necessary role of a Rule 29 decision. Rather it explains the defendant's interest as strategic rather than constitutionally based. In accord with the approach taken, the Advisors' Note finds a paramount interest in the government's right to appeal. The constitutional interest, however, should be considered. As the right to appeal is statutory it cannot take precedence over the basic constitutional protections which a decision on the Rule 29 motion safeguards. In addition, because a Rule 29 motion is determined by resolving all

issues in the government's favor, the risk of error in the grant of a motion made at the close of the prosecutor's case is at an irreducible minimum and the interest of the prosecutor is thus not comparable to the interest of the defendant in having constitutional rights protected.

The authorities referred to in the Note as supporting the proposal are inapposite. United States v. Conway, 632 F.2d 641 (5th Cir. 1980), is cited for the proposition that the defendant's interest is not of constitutional dimension and, by implication, the government's right of appeal has a priority status. However, Conway does not address the question of a defendant's constitutional rights. Rather, it discusses whether the judge's erroneous failure to decide the Rule 29 motion made at the close of the prosecutor's case was harmless error because the government had, in fact, met its burden of proof at that point in the trial.

The Note also expreses the view that the government's appellate rights have priority over the defendant's right to a decision on a Rule 29 motion made at the end of the government's case and refers to United States v. Wilson, 420 U.S. 332 (1975), and United States v. Ceccolini, 435 U.S. 268 (1978), as cited in United States v. Scott, 437 U.S. 82 100 n.13 (1978). However, neither Wilson nor Ceccolini, deals with Rule 29 motions made at the close of the government's case. In Ceccolini that motion was denied in proper time and the court later considered a motion at the close of

all evidence (542 F.2d 136, 139 (2d Cir. 1976)) which then became the subject of the Supreme Court decision. In Wilson, the judge's decision to dismiss was based on a post-verdict motion and the Rule 29 issue was never involved. The citation to Wilson and Ceccolini in Scott does not add anything to the discussion of a Rule 29 motion made at the end of the government's case, and none of the cases discussed the constitutional issues implicated here. The post-verdict Rule 29 motion raises none of the problems that we discuss and does not provide an analogy.

Finally, the commentary makes no mention of the extremely adverse impact of the waiver rule and in light of that rule no change should be made.

PROPOSED RULE 30

The proposal permits the judge to instruct the jurors before counsel give their summations, modifying the rule which now requires the charge to follow summations. The Note indicates that this change is proposed because in some federal districts, counsel stipulate to having the summations last in accord with the state practice. The change should not be adopted; at least further study is required.

1. The change is contrary to the goal of uniformity of procedure in federal courts, which goal is articulated in the Advisory Committee Notes to Rule 29.1 and to the present Rule 30. The Note to Rule 29.1 states that uniformity in

RECEIVED 3/4/03

03-CR-B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
UNITED STATES COURTHOUSE
1100 COMMERCE STREET, ROOM 1376
DALLAS, TEXAS 75242

WM. F. SANDERSON JR.
U.S. MAGISTRATE JUDGE

PHONE: (214) 753-2385
FAX: (214) 753-2390

February 24, 2003

Peter G. McCabe
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
OJP AD/4-180
One Columbus Circle, NE
Washington, D.C. 20544

Dear Mr. McCabe:

I am writing to request that the Advisory Committee on Criminal Rules consider amending Federal Rule of Criminal Procedure 32.1(a)(5)(B)(i) which requires that the government produce certified copies of the judgment, warrant and warrant application relating to a probation or supervised release arrestee charged in another district.

The provisions of Rule 32.1 apply to such an individual by virtue of the provisions of amended Rule 5(a)(2)(B).

In the case of a person arrested on an out-of-district criminal complaint, facsimiles of the underlying charging documents are permitted. See Rule 5(c)(3)(D)(i). It is indeed anomalous that the authentication of documents with reference to a person who has already been convicted of a federal crime must satisfy a higher standard than those supporting a pending charge against an arrestee.

I can perceive of no rational reason for such a higher standard and apprehend that it is based on a mere oversight based upon the vast amount of material the Committee had to review in drafting the amendments which became effective December 1, 2002.

On a purely pragmatic level I would make the following observations:

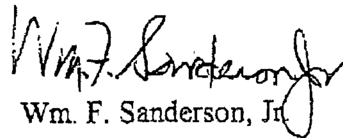
1. More often than not an out-of-district probation (supervised release) violator is an absconder from jurisdiction of the distant district and is apprehended as a result of an NCIC "hit" following a local arrest. Therefore it is unlikely in the extreme that the clerk or the United States Marshal in the district of arrest has certified copies at the time of arrest.

2. Since the arresting district court has no jurisdiction over such an offender the delay in obtaining certified copies simply impedes the ultimate return of the offender to the issuing court, which benefits no one including the arrestee. Although Rule 32.1(a)(6) permits release on bond, it is highly unlikely that an absconder can discharge the burden imposed.

3. The standard in Rule 5(c)(3)(D)(i) is sufficient to protect the interests of an out-of-district probation (supervised release) violator - assuming no issue regarding identity. In nearly 24 years I have never confronted a situation in which facsimile copies of documents differed one iota from the original or certified copies.

Thank you for your consideration and that of the Advisory Committee.

Very truly yours,



Wm. F. Sanderson, Jr.

Item II C 3a

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Rule 41: Status of Proposed Amendment re Tracking Devices**

DATE: **September 3, 2003**

Over the last several years, the Committee, at the recommendation of the Department of Justice, drafted and circulated for public comment, an amendment to Rule 41 that would address the topic of tracking-devices warrants. At its Spring 2003 meeting in Santa Barbara, the Committee considered the public comments that it had received on the amendment, made several minor changes to the rule, and voted to forward the proposal to the Standing Committee, with a recommendation to forward it to the Judicial Conference.

At the Standing Committee meeting in June, the Committee initially voted to approve and forward the amendment. But, after the meeting, the Deputy Attorney General (who had abstained on the vote) asked the Committee to defer forwarding the proposal to the Judicial Conference, in order to permit the Department to consider and present its concerns to the Standing Committee. In light of that request, and in recognition that the Department had proposed the rule, the proposed amendment was deferred.

Although technically, the Committee has not been asked to consider any additional changes to the amendment, this item is listed on the agenda — at least as an item of information.

I have attached the Rule 41 amendment as it was presented to the Standing Committee.

1 **Rule 41. Search and Seizure**

2 **(a) Scope and Definitions.**

3 * * * * *

4 *(2) Definitions.* The following definitions apply under this rule:

5 * * * * *

6 (D) "Domestic terrorism" and "international terrorism" have the
7 meanings set out in 18 U.S.C. § 2331.

8 (E) "Tracking device" has the meaning set out in 18 U.S.C. §
9 3117(b).

10 **(b) Authority to Issue a Warrant.** At the request of a federal law
11 enforcement officer or an attorney for the government:

12 **(1)** a magistrate judge with authority in the district—or if none is
13 reasonably available, a judge of a state court of record in the
14 district—has authority to issue a warrant to search for and seize a
15 person or property located within the district;

16 **(2)** a magistrate judge with authority in the district has authority to
17 issue a warrant for a person or property outside the district if the
18 person or property is located within the district when the warrant is

19 issued but might move or be moved outside the district before the
20 warrant is executed; ~~and~~
21 **(3)** a magistrate judge—in an investigation of domestic terrorism or
22 international terrorism ~~(as defined in 18 U.S.C. § 2331) having~~
23 with authority in any district in which activities related to the
24 terrorism may have occurred, ~~may~~ has authority to issue a warrant
25 for a person or property within or outside that district~~.~~; and
26 (4) a magistrate judge with authority in the district has authority to
27 issue a warrant to install within the district a tracking device; the
28 warrant may authorize use of the device to track the movement of a
29 person or property located within the district, outside the district,
30 or both.
31 * * * * *
32 **(d) Obtaining a Warrant.**
33 **(1)** ***~~Probable Cause~~ In General.*** After receiving an affidavit or other
34 information, a magistrate judge—or if authorized by Rule 41(b),
35 ~~or~~ a judge of a state court of record—must issue the warrant if

36 there is probable cause to search for and seize a person or property
37 or to install and use a tracking device ~~under Rule 41(c)~~.
38 * * * * *
39 **(e) Issuing the Warrant.**
40 **(1)** ***In General.*** The magistrate judge or a judge of a state court of
41 record must issue the warrant to an officer authorized to execute it.
42 **(2)** ***Contents of the Warrant.***
43 (A) *Warrant to Search for and Seize a Person or Property.*
44 Except for a tracking-device warrant, ~~T~~ the warrant must
45 identify the person or property to be searched, identify any
46 person or property to be seized, and designate the
47 magistrate judge to whom it must be returned. The warrant
48 must command the officer to:
49 ~~(A)~~(i) execute the warrant within a specified time no
50 longer than 10 days;
51 ~~(B)~~(ii) execute the warrant during the daytime, unless the
52 judge for good cause expressly authorizes execution

53 at another time; and

54 ~~(C)~~(iii) return the warrant to the magistrate judge
55 designated in the warrant.

56 (B) *Warrant for a Tracking Device.* A tracking-device warrant
57 must identify the person or property to be tracked,
58 designate the magistrate judge to whom it must be returned,
59 and specify a reasonable length of time that the device may
60 be used. The time must not exceed 45 days from the date
61 the warrant was issued. The court may, for good cause,
62 grant one or more extensions for a reasonable period not to
63 exceed 45 days each. The warrant must command the
64 officer to:

65 (i) complete any installation authorized by the warrant
66 within a specified time no longer than 10 calendar
67 days;

68 (ii) perform any installation authorized by the warrant
69 during the daytime, unless the judge for good cause

70 expressly authorizes installation at another time;
71 and
72 (iii) return the warrant to the magistrate judge
73 designated in the warrant.
74 **(3)** ***Warrant by Telephonic or Other Means.***
75 * * * * *
76 **(f) Executing and Returning the Warrant.**
77 **(1) Warrant to Search for and Seize a Person or Property.**
78 ~~(1)~~(A) *Noting the Time.* The officer executing the warrant must
79 enter on ~~its face~~ the exact date and time it is was executed.
80 ~~(2)~~(B) *Inventory.* An officer present during the execution of the
81 warrant must prepare and verify an inventory of any
82 property seized. The officer must do so in the presence of
83 another officer and the person from whom, or from whose
84 premises, the property was taken. If either one is not
85 present, the officer must prepare and verify the inventory in

86 the presence of at least one other credible person.

87 ~~(3)~~(C) *Receipt*. The officer executing the warrant must~~: (A)~~ give a

88 copy of the warrant and a receipt for the property taken to

89 the person from whom, or from whose premises, the

90 property was taken~~;~~ or ~~(B)~~ leave a copy of the warrant and

91 receipt at the place where the officer took the property.

92 ~~(4)~~(D) *Return*. The officer executing the warrant must promptly

93 return it—together with the copy of the inventory —to the

94 magistrate judge designated on the warrant. The judge

95 must, on request, give a copy of the inventory to the person

96 from whom, or from whose premises, the property was

97 taken and to the applicant for the warrant.

98 <u>**(2) *Warrant for a Tracking Device.***</u>

99 <u>(A) *Noting the Time.* The officer executing a tracking-device</u>

100 <u>warrant must enter on it the date and time the device was</u>

101 installed and the period during which it was used.

102 (B) *Return.* Within 10 calendar days after the use of the
103 tracking device has ended, the officer executing the warrant
104 must return it to the magistrate judge designated in the
105 warrant.

106 (C) *Service.* Within 10 calendar days after the use of the
107 tracking device has ended, the officer executing a tracking
108 must serve a copy of the warrant on the person who was
109 tracked or whose property was tracked. Service may be
110 accomplished by delivering a copy to the person who, or
111 whose property, was tracked; or by leaving a copy at the
112 person's residence or usual place of abode with an
113 individual of suitable age and discretion who resides at that
114 location and by mailing a copy to the person's last known
115 address. Upon request of the government, the magistrate

116 judge may delay notice as provided in 41(f)(3).

117 (3) *Delayed Notice.* Upon request of the government, a magistrate

118 judge—or if authorized by Rule 41(b), a judge of a state court of

119 record—may delay any notice required by this rule if the delay is

120 authorized by statute.

121 * * * * *

COMMITTEE NOTE

The amendments to Rule 41 address two issues: first, procedures for issuing tracking device warrants and second, a provision for delaying any notice required by the rule.

Amended Rule 41(a)(2) includes two new definitional provisions. The first, in Rule 41(a)(2)(D), addresses the definitions of "domestic terrorism" and "international terrorism," terms used in Rule 41(b)(2). The second, in Rule 41(a)(2)(E), addresses the definition of "tracking device."

Amended Rule 41(b)(4) is a new provision, designed to address the use of tracking devices. Such searches are recognized both by statute, *see* 18 U.S.C. § 3117(b) and by caselaw, *see, e.g., United States v. Karo*, 468 U.S. 705 (1984); *United States v. Knotts*, 460 U.S. 276 (1983). Warrants may be required to monitor tracking devices when they are used to monitor persons or property in areas where there is a reasonable expectation of privacy. *See, e.g., United States v. Karo, supra* (although no probable cause was required to install beeper, officers' monitoring of its location in defendant's

home raised Fourth Amendment concerns). Nonetheless, there is no procedural guidance in current Rule 41 for those judicial officers who are asked to issue tracking device warrants. As with traditional search warrants for persons or property, tracking device warrants may implicate law enforcement interests in multiple districts.

The amendment provides that a magistrate judge may issue a warrant, if he or she has the authority to do so in the district, to install and use a tracking device, as that term is defined in 18 U.S.C. § 3117(b). The magistrate judge's authority under this rule includes the authority to permit entry into a area where there is a reasonable expectation of privacy, installation of the tracking device, and maintenance and removal of the device. The Committee did not intend by this amendment to expand or contract the definition of what might constitute a tracking device. The amendment is based on the understanding that the device will assist officers only in tracking the movements of a person or property. The warrant may authorize officers to track the person or property within the district of issuance, or outside the district.

Because the authorized tracking may involve more than one district or state, the Committee believes that only federal judicial officers should be authorized to issue this type of warrant. Even where officers have no reason to believe initially that a person or property will move outside the district of issuance, issuing a warrant to authorize tracking both inside and outside the district avoids the necessity of obtaining multiple warrants if the property or person later crosses district or state lines.

The amendment reflects the view that if the officers intend to install or use the device in a constitutionally protected area, they must obtain judicial approval to do so. If, on the other hand, the officers intend to install and use the device without implicating any Fourth Amendment rights, there is no need to obtain the warrant. *See, e.g. United States v. Knotts, supra*, where the officers' actions in installing and following tracking device did not amount to a search under the Fourth Amendment.

Amended Rule 41(d) includes new language on tracking devices. The tracking device statute, 18 U.S.C. § 3117, does not specify the standard an applicant must meet to install a tracking device. The Supreme Court has acknowledged that the standard for installation of a tracking device is unresolved, but has reserved ruling on the issue until it is squarely presented by the facts of a case. *See United States v. Karo*, 468 U.S. 705, 718 n. 5 (1984). The amendment to Rule 41 does not resolve this issue or hold that such warrants may issue only on a showing of probable cause. Instead, it simply provides that if probable cause is shown, the magistrate must issue the warrant. And the warrant is only needed if the device is installed (for example in the trunk of the defendant's car) or monitored (for example, while the car is in the defendant's garage) in an area in which the person being monitored has a reasonable expectation of privacy.

Amended Rule 41(e)(2)(B) is a new provision intended to address the contents of tracking device warrants. To avoid open-ended monitoring of tracking devices, the revised rule requires the magistrate judge to specify in the warrant the length of time for using the device. Although the initial time stated in the warrant may not exceed 45 days, extensions of time may be granted for good cause. The rule further specifies that any installation of a tracking device authorized by the warrant must be made within ten calendar days and, unless otherwise provided, that any installation occur during daylight hours.

Current Rule 41(f) has been completely revised to accommodate new provisions dealing with tracking device warrants. First, current Rule 41(f)(1) has been revised to address execution and delivery of warrants to search for and seize a person or property; no substantive change has been made to that provision. New Rule 41(f)(2) addresses execution and delivery of tracking device warrants. That provision generally tracks the structure of revised Rule 41(f)(1), with appropriate adjustments for the particular requirements of tracking device warrants. Under Rule 41(f)(2)(A) the officer must note on the warrant the time the device was installed and the period during which the device was used. And under new Rule 41(f)(2)(B), the officer must return the tracking device warrant to the magistrate designated in the warrant, within 10 calendar days after use of

the device has ended.

Amended Rule 41(f)(2)(C) addresses the particular problems of serving a copy of a tracking device warrant on the person who has been tracked, or whose property has been tracked. In the case of other warrants, current Rule 41 envisions that the subjects of the search typically know that they have been searched, usually within a short period of time after the search has taken place. Tracking device warrants, on the other hand, are by their nature covert intrusions and can be successfully used only when the person being investigated is unaware that a tracking device is being used. The amendment requires that the officer must serve a copy of the tracking device warrant on the person within 10 calendar days after the tracking has ended. That service may be accomplished by either personally serving the person or by leaving a copy at the person's residence or usual abode and by sending a copy by mail. The Rule also provides, however, that the officer may (for good cause) obtain the court's permission to delay further the delivery of the warrant. That might be appropriate, for example, where the owner of the tracked property is undetermined, or where the officer establishes that the investigation is ongoing and that disclosure of the warrant will compromise that investigation.

Use of a tracking device is to be distinguished from other continuous monitoring or observations that are governed by statutory provisions or caselaw. *See* Title III, Omnibus Crime Control and Safe Streets Act of 1968, *as amended* by Title I of the 1968 Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2520; *United States v. Biasucci*, 786 F.2d 504 (2d Cir. 1986) (use of video camera); *United States v. Torres*, 751 F.2d 875 (7th Cir. 1984) (television surveillance).

Finally, amended Rule 41(f)(3) is a new provision that permits the government to request, and the magistrate judge to grant, a delay in any notice required in Rule 41. The amendment is co-extensive with 18 U.S.C. § 3103a(b). That new provision, added as part of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, authorizes a court to

delay any notice required in conjunction with the issuance of any search warrants.

Item II C 3b

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Rule 41: Proposal to Amend Rule to Conform to Changes to § 2703(a) of USA Patriot Act**

DATE: **September 3, 2003**

Attached is a proposal from Magistrate Judge B. Janice Ellington to amend Rule 41. As noted in her letter, she believes that there is a conflict between § 2703 and Rule 41. Although the statute permits court, with jurisdiction over the offense, to issue warrants for electronic files; but the Rule 41 procedures apply. The rule, she points out, only permits out-of-state warrants in conjunction with terrorism cases.

To "align" the two provisions, she suggests that the Committee amend Rule 41 by adding another subdivision that would expressly address out-of-state search warrants for electronic files.

At its April 2002 meeting in Washington, the Committee considered a number of amendments to Rule 41, including the question of whether to incorporate in the rule various provisions in the USA Patriot Act. As noted in the copy of the attached minutes, Judge Miller's Rule 41 Subcommittee had discussed whether to address the issue of electronic file search warrants in the rule. The Committee concurred in the Subcommittee's recommendation to not address that provision, and several others, in Rule 41.

Assuming the Committee is inclined to consider this specific proposal, I do not read the statue and rule as being inconsistent. Congress may indicate the scope of a district court's authority to search and in the § 2703, Congress appears to have done that by extending the boundaries for the court's search authority when issuing warrants to search the contents of electronic files. I do not read the statute to say that the court's authority (notwithstanding the clear language of the statute) is somehow limited by the nonexhaustive "authority" provisions of Rule 41. The statute requires that the "procedures" of Rule 41 will apply. I read that to mean the process and procedures for obtaining the warrant, executing the warrant, etc.

RECEIVED 7/24/03

03-CR-

UNITED STATES MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION
(361) 888-3291
Fax: (361) 888-3269

B. JANICE ELLINGTON
U.S. MAGISTRATE JUDGE

1133 N. Shoreline Blvd. Room 317
CORPUS CHRISTI, TX 78

July 14, 2003

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: Federal Rule of Criminal Procedure 41

Dear Mr. McCabe:

As a magistrate judge, I am routinely asked to issue out-of-district search warrants for electronic information (typically in child pornography cases). Many of my colleagues believe that authority to issue such warrants is found in 18 U.S.C. § 2703(a). I do not agree because the statute requires compliance with the Federal Rules of Criminal Procedure, and Rule 41(b) permits the issuance of out of district search warrants only in terrorism cases. I am writing to request that the Committee consider an additional amendment to Fed. R. Crim. P. 41 to align it with the changes made to § 2703(a) by the USA Patriot Act.

Title 18, United States Code, Section 2703(a), requires a search warrant for the contents of electronic communications in storage for 180 days or less:

> **(a) Contents of wire or electronic communications in electronic storage.–** A governmental entity may require the disclosure by a provider of electronic communication service of the contents of a wire or electronic communication, that is in electronic storage in an electronic communications

system for one hundred and eighty days or less, only pursuant to a search warrant using the procedures described in the Federal Rules of Criminal Procedure *by a court with jurisdiction over the offense under investigation* or equivalent State warrant. . . . (emphasis added).

The statute purports to permit the issuance of out-of-district warrants for electronic information in *any* case–not just in a terrorism investigation–but also requires compliance with the Federal Rules of Criminal Procedure. Rule 41(b) is not worded as broadly:

> **(b) Authority to Issue a Warrant.** At the request of a federal law enforcement officer or an attorney for the government:
>
> (1) a magistrate judge with authority in the district–or if none is reasonably available, a judge of a state court of record in the district – has authority to issue a warrant to search for and seize a person or property located within the district;
>
> (2) a magistrate judge with authority in the district has authority to issue a warrant for a person or property outside the district if the person or property is located within the district when the warrant is issued but might move or be moved outside the district before the warrant is executed; and
>
> (3) a magistrate judge – *in an investigation of domestic terrorism or international terrorism (as defined in 18 U.S.C. § 2331) – having authority in any district in which activities related to the terrorism may have occurred, may issue a warrant for a person or property within or outside that district* (emphasis supplied).

The Rule is silent as to electronic communications. Rather than having to debate (1) whether an electronic communication is property, and if so (2) how its location is determined, I suggest that a fourth subsection, pertaining only to electronic communications, be added to the Rule 41(b):

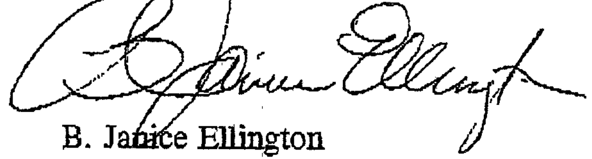
> (4) a magistrate judge in a district with jurisdiction over an offense under investigation may issue a search warrant pursuant to 18 U.S.C. § 2703(a) to a provider of electronic communications inside or outside that district requiring the disclosure by such provider of electronic communications of the contents of a wire or electronic communication that is in

> electronic storage in an electronic communications system for one hundred and eighty days or less.

The language of the proposed amendment is suggestive only. I expect that members of the Committee may be able to improve upon it. Because 18 U.S.C. § 2703(a) is subject to expire December 31, 2005, the reference in the amendment to § 2703(a) would automatically subject the amended rule to the Sunset provision.

Thank you for your consideration. If you or other members of the Committee have any questions or comments, please feel free to contact me.

Yours very truly,



B. Janice Ellington

MINUTES
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

April 25-26, 2002
Washington, D.C.

The Advisory Committee on the Federal Rules of Criminal Procedure met at Washington, D.C. on April 25 and 26, 2002. These minutes reflect the discussion and actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Carnes, Chair of the Committee, called the meeting to order at 8:30 a.m. on Thursday, April 25, 2002. The following persons were present for all or a part of the Committee's meeting:

Hon. Edward E. Carnes, Chair
Hon. John M. Roll
Hon. Susan C. Bucklew
Hon. Paul L. Friedman
Hon. David G. Trager
Hon. Harvey Bartle III
Hon. Tommy E. Miller
Hon. Reta M. Strubhar
Prof. Nancy J. King
Mr. Robert B. Fiske, Esq.
Mr. Donald J. Goldberg, Esq.
Mr. Lucien B. Campbell
Mr. John P. Elwood, designate of the Asst. Attorney General for the Criminal Division, Department of Justice
Prof. David A. Schlueter, Reporter

Also present at the meeting were: Hon. A. Wallace Tashima, member of the Standing Committee and liaison to the Criminal Rules Committee; Hon. Roger Pauley of the Board of Immigration Appeals; Prof. Kate Stith, former member of the Committee; Mr. Peter McCabe, Ms. Nancy Miller, and Mr. James Ishida of the Administrative Office of the United States Courts, Mr. John Rabiej Chief of the Rules Committee Support Office of the Administrative Office of the United States Courts; Mr. Joseph Spaniol, consultant to the Standing Committee; Ms. Laurel Hooper, of the Federal Judicial Center; and Mr. Christopher Jennings, briefing attorney for Judge Scirica.

The Reporter pointed out that, as reflected in the comment submitted by the Department of Justice, the Circuits are split on the question of what the term "sentencing" means in relation to the 7-day rule in Rule 35. The majority view (six circuits) is that the 7-day period is triggered by the oral pronouncement of the sentence. The minority view (one circuit), and the one adopted in the proposed amendment, is that the period commences with the entry of the judgment. He noted that the Committee had opted for the latter position in order to make the rule more consistent with Appellate Rule 4 and any other rules that might specify when the right to appeal is triggered.

Mr. Campbell indicated that he favored a change to the proposed amendment that would substitute the words "entry of judgment" in place "sentencing" throughout the rule. That option, he stated, would avoid the necessity of a separate definitional provision in the Rule. Mr. Elwood stated that the Department of Justice was opposed to the proposed amendment because it interjects yet another delay in the finality of the sentence for purposes of triggering the Rule 35 provisions. He noted that he favored substituting the words "oral announcement" or "oral pronouncement" of the sentence as the preferred language in place of entry of the judgment, which might not actually take place until weeks or perhaps months after the court announces the sentence.

Judges Bucklew and Roll, and Mr. Goldberg indicated that in their experience the entry of judgment usually follows the oral announcement of sentence within a short period of time.

Following additional discussion on whether to use the term "oral announcement" or "oral pronouncement," Mr. Campbell moved that the proposed amendment be changed to the effect that the proposed definitional provision in Rule 35(a) be dropped and that the term "entry of judgment" be used throughout the rule. Mr. Goldberg seconded the motion, which failed by a vote of 4 to 6.

Judge Roll moved that the amendment be revised by dropping the definitional provision in proposed Rule 35(a), and the term "oral announcement" be used throughout the rule and that the rule be forwarded to the Standing Committee for action. Judge Bucklew seconded the motion. Following additional brief discussion, the Committee approved the motion by a vote of 6 to 4. The Reporter responded that he would make the necessary changes in the Rule and the Committee Note and circulate the draft for the Committee's consideration.

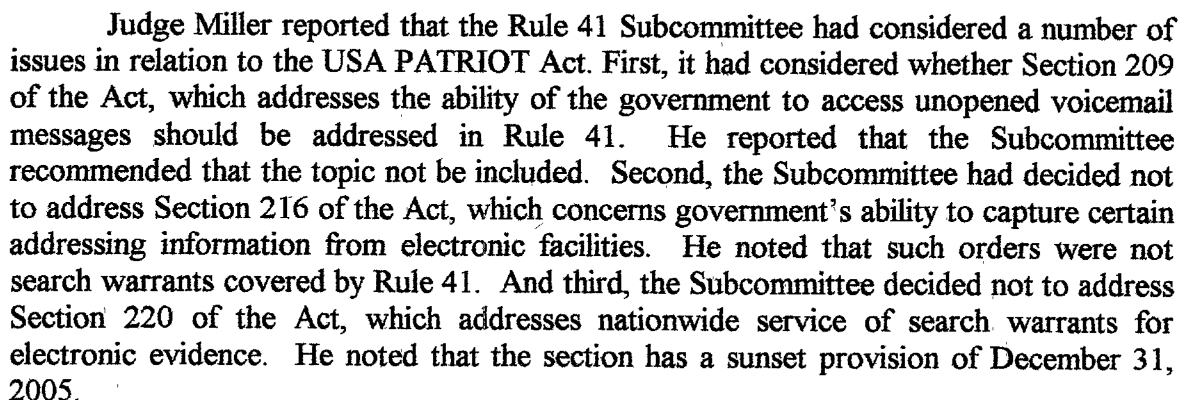
V. PENDING PROPOSED AMENDMENTS TO RULES

A. Rule 41. Tracking Device Warrants

Judge Miller, as chair of the Rule 41 Subcommittee, reported that the Subcommittee had agreed on a number of proposed changes to Rule 41 that would

address first, the issue of tracking-device warrants and second, delayed notification that a search warrant has been executed.

He provided a brief overview of the proposed changes, noting that the Department of Justice had raised the issue of tracking-device warrants in 1998 and that as a result of that proposal, he had polled magistrate judges on how they were handling those types of searches, in the absence of any guidance in Rule 41 itself. The response indicated that the practice varied throughout the districts. Any proposals to address the issue, however, were held pending the restyling project. He further noted that the issue of delayed notification that warrants had been executed had been addressed in Section 213 of the USA PATRIOT Act and that some amendment to Rule 41 would be appropriate.

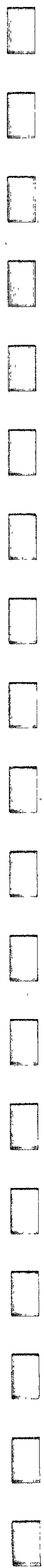


Judge Miller reported that the Rule 41 Subcommittee had considered a number of issues in relation to the USA PATRIOT Act. First, it had considered whether Section 209 of the Act, which addresses the ability of the government to access unopened voicemail messages should be addressed in Rule 41. He reported that the Subcommittee recommended that the topic not be included. Second, the Subcommittee had decided not to address Section 216 of the Act, which concerns government's ability to capture certain addressing information from electronic facilities. He noted that such orders were not search warrants covered by Rule 41. And third, the Subcommittee decided not to address Section 220 of the Act, which addresses nationwide service of search warrants for electronic evidence. He noted that the section has a sunset provision of December 31, 2005.

The Committee concurred in the Subcommittee's recommendations not to amend Rule 41 to account for those three new statutory provisions.

Judge Miller also reported that Judge D. Brock Hornby (Chief Judge, D. Maine) had recommended that Rule 41 be amended to permit law enforcement officers to return executed search warrants to the clerk of the court, and not necessarily the issuing judge or magistrate. Judge Miller noted that the issue had been addressed during the restyling project and that the Committee had determined that it was preferable to have the returns made to the magistrate judge designated in the warrant. He also noted that the sense of the Subcommittee was that it would be better to maintain judicial monitoring of the warrants and that requiring the warrant to be returned to a judicial officer would further that interest. Judge Bartle spoke in favor of the proposed change, noting that in practice, warrants are returned to the clerk of the court and not to the issuing magistrate. Following additional discussion by the Committee, it voted 8 to 1 to reject the proposal to amend Rule 41 by requiring the return to be made to the clerk.

Turning to the Subcommittee's proposed amendments to Rule 41, Judge Miller noted that the Subcommittee had proposed that two new definitions for "domestic terrorism," "international terrorism," and "tracking device" be added to Rule 41(a)(2). He also pointed out the proposed language in revised Rule 41(b)(4) that would explicitly address the authority of a magistrate judge to issue a tracking device warrant. He noted



Item II D

CRIMINAL RULES DOCKET

ADVISORY COMMITTEE ON CRIMINAL RULES

The docket sets forth suggested changes to the Federal Rules of Criminal Procedure considered by the Advisory Committee since 1991. The suggestions are set forth in order by (1) criminal rule number; or (2) where there is no rule number, or several rules may be affected — alphabetically by subject matter.

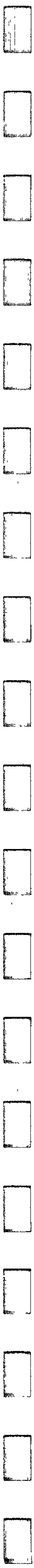
Suggestion	Docket Number, Source, and Date	Status
	CRIMINAL RULES	
Rule 4 Clarify the ability of judges to issue warrants via facsimile transmission	01-CR-A Magistrate Judge Bernard Zimmerman 1/29/01	1/01 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 6 Allow grand jury witness to be accompanied by counsel (see Rule 6(d) below)	01-CR-B Robert D. Evans, Director, American Bar Association 3/2/01	3/01 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 7(b) Effect of tardy indictment	00-CR-B Congressional constituent 3/21/00	5/00 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 10 Guilty plea at an arraignment	Judge B. Waugh Crigler 10/94	10/94 - Committee considered **DEFERRED INDEFINITELY**
Rule 11 To expressly inquire prior to trial whether prosecution's proposed guilty plea agreement was communicated to defendant	02-CR-C Judge David D. Dowd, Jr. 5/20/02	6/02 - Referred to reporter & chair **PENDING FURTHER ACTION**
Rule 11 To direct a random number of plea-bargained cases be tried	03-CR-C Carl E. Person, Esq. 4/1/03	4/03 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 12.2(d) Sanction for defendant's failure to disclose results of mental examination	Roger Pauley 7/5/01	4/02 - Committee considered 9/02 - Committee considered 4/03 - Committee considered and approved for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 16(a) and (b) Disclosure of witness names and statements before trial	99-CR-D William R. Wilson, Jr., Esq. 2/92 & 5/18/99	2/92 - Committee considered 10/92 - Committee considered 4/93 - Committee deferred action until 10/93 10/93 - Committee considered 4/94 - Committee considered and approved for amendment 6/94 - Standing Committee approved for publication 9/94 - Published for public comment 4/95 - Committee considered and approved 7/95 - Standing Committee approved 9/95 - Judicial Conference declined to take action **COMPLETED** 5/99 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 23(a) Address the issue of when a jury trial is authorized	00-CR-D Jeremy A. Bell 11/00	11/00 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 29 Extension of time for filing motion	02-CR-B Judge Paul L. Friedman 3/02	4/02 - Sent directly to chair and reporter 4/02 - Committee considered 9/02 - Committee deferred consideration until 4/03 meeting 4/03 - Committee considered and approved, with amendments, for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment **PENDING FURTHER ACTION**
Rule 29 Preserve the government's right to appeal a trial court's decision to grant a motion for judgment of acquittal	Department of Justice 3/31/03	3/03 - Sent directly to chair and reporter 4/02 - Committee considered and deferred consideration pending additional research by the FJC **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 32 Victim allocution at sentencing	Judge Hodges Prior to 4/92 Pending legislation reactivated issue in 1997/98.	10/92 - Standing Committee approved for publication 12/92 - Published for public comment 4/93 - Committee considered 6/93 - Standing Committee approved 9/93 - Judicial Conference approved 4/94 - Supreme Court approved 12/94 - Effective **COMPLETED** 10/97 - Committee indicated that it was not opposed to addressing the legislation. Committee resolved to maintain Subcommittee to monitor/respond to the legislation. **PENDING FURTHER ACTION**
Rule 32(c)(3)(E) Provide for victim allocution in all felony cases	Professor Jayne Barnard	8/02 - Referred to chair and reporter 9/02 - Committee considered 4/03 - Committee considered and approved, with amendments, for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment **PENDING FURTHER ACTION**
Rule 32(c)(5) Clerk required to file notice of appeal	00-CR-A Gino J. Agnello Clerk of Court, 7th Circuit 4/11/00	3/00 - Sent directly to chair 5/00 - Referred to reporter **PENDING FURTHER ACTION**
Rule 32.1(a)(5)(B)(i) Eliminate requirement that the government produce *certified* copies of the judgment, warrant, and warrant application	03-CR-B Judge Wm. F. Sanderson, Jr. 2/24/03	3/03 - Referred to reporter and chair 4/03 - Committee considered **PENDING FURTHER ACTION**
Rule 32.1 Pending victims rights/allocution litigation	Pending litigation 1997/98	10/97 - Committee indicated that it did not take a position on the litigation and resolved to maintain Subcommittee to monitor litigation **PENDING FURTHER ACTION**
Rule 32.1 Right of allocution before sentencing at revocation hearing	02-CR-D U.S. v. Frazier 2/25/02	3/02 - Referred to chair and reporter 4/02 - Committee considered 9/02 - Committee considered 4/03 - Committee considered and approved, with amendments, for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 33 Extension of time to file motion for new trial	02-CR-B Judge Paul L. Friedman 3/02	4/02 - Sent directly to chair and reporter 4/02 - Committee considered 9/02 - Committee deferred consideration until 4/03 meeting 4/03 - Committee considered and approved, with amendments, for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment **PENDING FURTHER ACTION**
Rule 34 Extension of time to file motion	02-CR-B Judge Paul L. Friedman 3/02	4/02 - Sent directly to chair and reporter 4/02 - Committee considered 9/02 - Committee deferred consideration until 4/03 meeting 4/03 - Committee considered and approved, with amendments, for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment **PENDING FURTHER ACTION**
Rule 35 Allow defendants to move for reduction of sentence	01-CR-B Robert D. Evans, American Bar Association 3/2/01	3/01 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 40(a) Authorize magistrate judge to set new conditions of release	03-CR-A Magistrate Judge Robert B. Collings 1/03	1/03 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 41 Additional amendment to align it with the changes made to § 2703(a) by the U.S. Patriot Act	03-CR-D Magistrate Judge B. Janice Ellington 7/03	7/03 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 41(c)(2)(D) Recording of oral search warrant	Judge Dowd 2/98	4/98 - Committee deferred until study reveals need for change **DEFERRED INDEFINITELY**
Rule 57 Uniform effective date for local rules	Standing Committee Meeting 12/97	4/98 - Committee considered and deferred action **DEFERRED INDEFINITELY**
New Rule 59 To provide counterpart to Civil Rule 72	U.S. v. Abonce-Barerra 7/20/01	4/02 - Committee considered 9/02 - Committee approved proposed amendment in principle 4/03 - Committee considered and approved, with amendments, for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
	SUBJECT MATTER	
Habeas Corpus Rule 8(c) Correct apparent mistakes in Rules Governing Section 2254 Cases and Section 2255 Proceedings	97-CR-F Judge Peter Dorsey 7/9/97	8/97 - Referred to chair and reporter 10/97 - Referred to Subcommittee 4/98 - Committee considered 10/98 - Committee considered 4/00 - Committee considered and approved for publication 6/00 - Standing Committee approved for publication 8/00 - Published for public comment 4/01 - Committee deferred pending further study 4/02 - Committee considered and approved for publication 6/02 - Standing Committee approved for publication 8/02 - Published for public comment 4/03 - Committee considered and approved, with amendments 6/03 - Standing Committee approved 9/03 - Judicial Conference approved **PENDING FURTHER ACTION**
Model form for motions under 28 U.S.C. § 2255	00-CR-C Robert L. Byer, Esq. & David R. Fine, Esq. 8/11/00	8/00 - Referred to chair and reporter 4/02 - Committee approved 6/02 - Standing Committee approved for publication 8/02 - Published for public comment 4/03 - Committee considered and approved, with amendments 6/03 - Standing Committee approved 9/03 - Judicial Conference approved **PENDING FURTHER ACTION**
Restyle Habeas Corpus Rules		10/00 - Committee considered 1/01 - Standing Committee authorizes restyle project to proceed 4/02 - Committee approved for publication 6/02 - Standing Committee approved for publication 8/02 - Published for public comment 4/03 - Committee considered and approved, with amendments 6/03 - Standing Committee approved 9/03 - Judicial Conference approved **PENDING FURTHER ACTION**



Item II D1

TO Criminal Rules Committee

FROM: Dave Schlueter

RE: Amendment to Rule 4 to Permit Issuing of Warrants by FAX

DATE: September 2, 2003

Attached is an e-mail the Committee received in 2001 from Magistrate Judge Zimmerman, as part of the comment period on video teleoconferencing. In his e-mail he recommends that the Committee consider amending Rule 4 to permit judges to issue warrants by facsimilie.

Although this comment would have been considered along with all of the other written comments on the rules, it does not appear that the Committee ever directly addressed his proposal.

The issue has been discussed in the past, however. I am also attaching a memo I prepared in 1990 on a similar proposal and copies of pages from the pertinent Minutes of three different meetings of the Committee. A subcommittee was appointed at the May 1991 meeting to study the issue but after discussing the issue for several meetings, at the Spring 1992 meeting the Committee decided to drop the proposal.

This item is on the agenda for the October meeting.

Author: "Netscape SuiteSpot" <nsuser@host3.uscourts.gov> at ~Internet
Date: 1/26/01 7:13 PM
Normal
TO: Rules Comments at AO-OJPPO
Subject: Submission from http://www.uscourts.gov/rules/comment2001/we

RECEIVED 1/29/01
Via Internet

00-CR-015
Substantive

01-CR-A

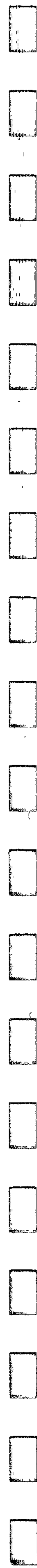
------------------------------------ Message Contents

Salutation:
First: Bernard
MI:
Last: Zimmerman
Org: US District Court
MailingAddress1:
MailingAddress2:
City:
State: default
ZIP:
EmailAddress: bernie@youbetvin.com
Phone: 415-522-4093
Fax:
CriminalRules: Yes
Comments:

I am a magistrate judge in the Northern District of California. I support the amendments to allow videoconferencing and think they are long overdue. I urge the Committee to consider amending Rule 4 to clarify the ability of judges to issue warrants via facsimile transmission.

submit: Submit Comment

HTTP Referer: http://www.uscourts.gov/rules/comment2001/webform.htm
HTTP User Agent: Mozilla/4.08 [en] (Win95; U ;Nav)
Remote Host: 207.41.18.130
Remote Address: 207.41.18.130



MINUTES
ADVISORY COMMITTEE
FEDERAL RULES OF CRIMINAL PROCEDURE

May 13-14, 1991
San Francisco, California

The Advisory Committee on the Federal Rules of Criminal Procedure met in San Francisco, California on May 13 and 14, 1991. These minutes reflect the actions taken at that meeting.

CALL TO ORDER

Judge Hodges called the meeting to order at 9:00 a.m. on Monday, May 13, 1991 at the United States Courthouse in San Francisco, California. The following persons were present for all or a part of the meeting:

Hon. Wm. Terrell Hodges, Chairman
Hon. James DeAnda
Hon. Sam A. Crow
Hon. Robinson O. Everett
Hon. Daniel H. Huyett, III
Hon. John F. Keenan
Hon. Harvey E. Schlesinger
Prof. Stephen A. Saltzburg
Mr. John Doar, Esq.
Mr. Tom Karas, Esq.
Mr. Edward Marek, Esq.
Mr. Roger Pauley, Jr., designee of Mr. Robert S. Mueller, III, Assistant Attorney General

David A. Schlueter

Also present were Hon. Robert Keeton, Chairman of the Standing Committee on Rules of Practice and Procedure, Hon. Charles Wiggins of the Standing Committee, Mr. William Wilson, Standing Committee member acting as liaison to the Advisory Committee, Mr. Joseph Spaniol, Secretary to the Standing Committee, Mr. David Adair, of the Administrative Office, and Mr. James Eaglin from the Federal Judicial Center.

I. INTRODUCTIONS AND COMMENTS

Judge Hodges noted that all members were present and welcomed the guests attending the meeting. He pointed out that he had spoken with the Administrative Office about the problems associated with distributing the agenda book at least 30 days prior to the meeting and hoped that in the future, that goal would be met.

would be appropriate for the entire Committee to consider the possibility. He noted that in cases where the defendant does not waive removal it may be necessary to await production of the arrest warrant, or a certified copy of the warrant. In those instances, use of facsimile transmission could save time. Following brief discussion, Judge Schlesinger moved that the last sentence of Rule 40(a) be amended to permit the federal magistrate to consider facsimile transmissions of the arrest warrant or a certified copy of the warrant. Mr. Pauley seconded the motion which carried by a unanimous vote.

d. Rule 3, Complaint and Rule 4, Arrest Warrant or Summons Upon Complaint. Judge Schlesinger indicated that the Subcommittee by a vote of 2 to 1 had voted to oppose any changes in Rules 3 and 4 which would permit use of electronic transmission of information in obtaining arrest warrants. Judge Keenan noted that it would make sense to conform the procedures available for obtaining an arrest warrant to those which could be used for search warrants. Mr. Karas also voiced support for an amendment. Mr. Pauley responded that he could not support the change; he was concerned about defense attacks on an arrest because police had not used electronic means to obtain an arrest warrant. Professor Saltzburg noted that the Supreme Court had not required arrest warrants and noted that the opposition in the past to permitting electronic or oral requests for arrest warrants had rested on concerns about access to warrants. An alternative might be, he observed, to authorize, but not require, arrest warrants.

Mr. Marek moved that language be drafted for the Committee's November 1991 meeting which would amend Rules 3 and 4 to permit submission of complaints and requests for arrest warrants by facsimile transmission. Professor Saltzburg seconded the motion. The motion carried by a 9 to 2 vote. The Chairman appointed a subcommittee consisting of Judge Schlesinger (Chair), Mr. Pauley, and Mr. Marek to draft the necessary language.

2. Rule 6(e)(2), General Rule of Secrecy. The Reporter noted that Judge Keeton had forwarded to the Committee a letter from Judge Pratt concerning the lack of secrecy of grand jury proceedings. In his letter, Judge Pratt suggested that the Committee consider investigating compliance by prosecutors. During an extensive discussion of Judge Pratt's proposal, Mr. Pauley noted that the Attorney General believes that leaks in grand jury proceedings are abhorrent and that if a leak is identified, severe administrative sanctions will follow. He added that he had spoken with the Department of Professional

MINUTES
ADVISORY COMMITTEE
FEDERAL RULES OF CRIMINAL PROCEDURE

November 7, 1991
Tampa, Florida

The Advisory Committee on the Federal Rules of Criminal Procedure met in Tampa, Florida on November 7, 1991. These minutes reflect the actions taken at that meeting.

CALL TO ORDER

Judge Hodges called the meeting to order at 9:00 a.m. on Thursday, November 7, 1991 at the United States Courthouse in Tampa, Florida. The following persons were present for all or a part of the Committee's meeting:

Hon. Wm. Terrell Hodges, Chairman
Hon. Sam A. Crow
Hon. James DeAnda
Hon. Robinson O. Everett
Hon. Daniel J. Huyett, III
Hon. John F. Keenan
Hon. Harvey E. Schlesinger
Prof. Stephen A. Saltzburg
Mr. John Doar, Esq.
Mr. Tom Karas, Esq.
Mr. Edward Marek, Esq.
Mr. Roger Pauley, Jr., designee of Mr. Robert S. Mueller III, Assistant Attorney General

Professor David A. Schlueter
Reporter

Also present at the meeting were Judge Robert Keeton, Chairman of the Standing Committee on Rules of Practice and Procedure, Mr. William Wilson, Standing Committee member acting as liaison to the Advisory Committee, Mr. David Adair, Ms. Ann Gardner, and Mr. John Robiej of the Administrative Office of the United States Courts, and Mr. James Eaglin from the Federal Judicial Center. Judge D. Lowell Jensen, a newly appointed member of the Committee, was not able to attend.

I. INTRODUCTIONS AND COMMENTS

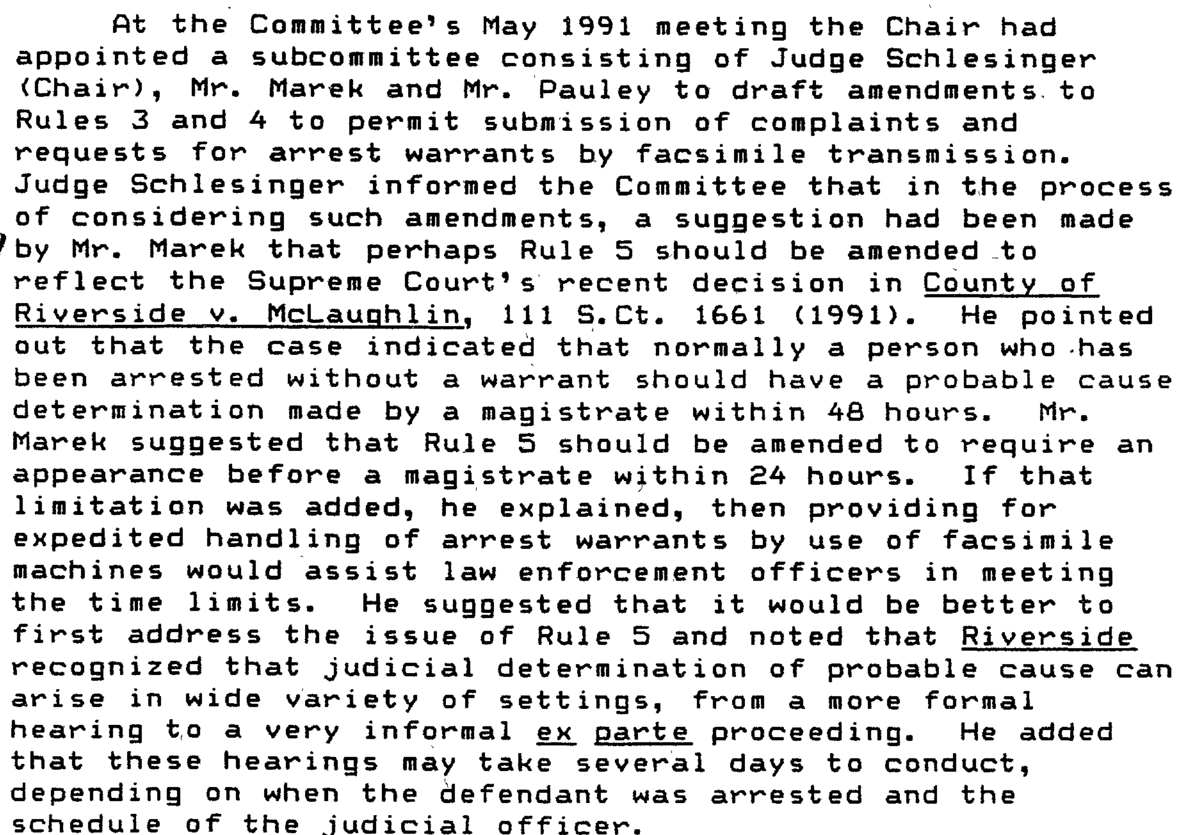
Judge Hodges welcomed the attendees and noted that all of the members were present with the exception of a new member, Judge D. Lowell Jensen, who had just been appointed to the Committee but was not able to attend due to previously scheduled commitments. Judge Hodges also noted

technical amendments in Rules 32, 32.1, 46, 54(a), and 58. All of these amendments were scheduled to take effect on December 1, 1991 unless Congress took affirmative action to amend or delay them.

B. Rules Approved by the Standing Committee and Circulated for Public Comment

[This matter was discussed in conjunction with the scheduled Public Hearings on the proposed amendments, as noted supra.]

C. Reports by Subcommittees on Rules of Criminal Procedure



1. Rules 3, 4, and 5, Oral Arrest Warrants and Time Limit for Hearing by Magistrate.

At the Committee's May 1991 meeting the Chair had appointed a subcommittee consisting of Judge Schlesinger (Chair), Mr. Marek and Mr. Pauley to draft amendments to Rules 3 and 4 to permit submission of complaints and requests for arrest warrants by facsimile transmission. Judge Schlesinger informed the Committee that in the process of considering such amendments, a suggestion had been made by Mr. Marek that perhaps Rule 5 should be amended to reflect the Supreme Court's recent decision in County of Riverside v. McLaughlin, 111 S.Ct. 1661 (1991). He pointed out that the case indicated that normally a person who has been arrested without a warrant should have a probable cause determination made by a magistrate within 48 hours. Mr. Marek suggested that Rule 5 should be amended to require an appearance before a magistrate within 24 hours. If that limitation was added, he explained, then providing for expedited handling of arrest warrants by use of facsimile machines would assist law enforcement officers in meeting the time limits. He suggested that it would be better to first address the issue of Rule 5 and noted that Riverside recognized that judicial determination of probable cause can arise in wide variety of settings, from a more formal hearing to a very informal ex parte proceeding. He added that these hearings may take several days to conduct, depending on when the defendant was arrested and the schedule of the judicial officer.

Mr. Pauley urged that the Committee defer any action on Rule 5. He explained that United States Attorneys were working on procedural rules to implement Riverside and that it would be better to await application of those rules and further caselaw refinement of the rule announced in

Riverside. He added that Rule 41, as written, could support telephonic arrest warrants. Mr. Marek disagreed with that assessment and concluded that Rule 41 would be distorted if it applied to the typical arrests.

During an ensuing discussion on possible remedies or sanctions for violation of Rule 5, several members noted that potential civil liabilities would be implicated. Professor Saltzburg observed that the lack of any real sanctions made discussion of Rule 5 important. He agreed with Mr. Pauley that it would be better not to be too quick to amend Rule 5 because it apparently was more protective than the Constitution. He moved that the Subcommittee be continued and that it study the possible amendments of Rules 3, 4, and 5 and report to the Committee at its Spring 1992 meeting. The motion, which was seconded by Mr. Marek, carried by a unanimous vote.

2. Rule 6(e), Secrecy of Grand Jury Proceedings.

At its May 1991 meeting, the Committee had considered a letter from Judge Pratt raising concerns about whether Rule 6(e) should be amended to better protect grand jury secrecy. As a result of the discussion, Judge Hodges had appointed a subcommittee consisting of Judge Keenan (chair), Judge Crow, Mr. Doar, and Mr. Pauley. Judge Keenan reported that the subcommittee had conducted an exhaustive review of pertinent Department of Justice guidelines on grand jury secrecy and a report of the New York Bar Association on the same subject. It was the unanimous view of the subcommittee that no amendment to Rule 6(e) was required. It also believed that the current guidelines and directives were sufficient and that a court could rely upon its contempt powers if it learned that the Rule had been violated. Mr. Pauley added that the Department of Justice finds grand jury leaks to be abhorrent and that an office in the Department handles these matters. He also pointed out that the Department did have some other legitimate interests at stake in divulging certain grand jury information to other offices and noted that at some point the Department might suggest amendments to Rule 6. Judge Crow noted his concurrence in Judge Keenan's observations. Judge Hodges indicated that the report of the subcommittee would be treated as a motion which had been seconded. It was thereafter adopted by unanimous vote. Judge Hodges observed that it would be appropriate for the Administrative Office to inform Judge Pratt of the Committee's action.

MINUTES
ADVISORY COMMITTEE
FEDERAL RULES OF CRIMINAL PROCEDURE

April 23, 24, 1992
Washington, D.C

The Advisory Committee on the Federal Rules of Criminal Procedure met in Washington, D.C. on April 23 and 24, 1992. These minutes reflect the actions taken at that meeting.

CALL TO ORDER

Judge Keenan, acting chair, called the meeting to order at 9:00 a.m. on Thursday, April 23, 1992 at the Administrative Office of the United States Courts. The following persons were present for all or a part of the Committee's meeting:

Hon. Wm. Terrell Hodges, Chairman
Hon. James DeAnda
Hon. John F. Keenan
Hon. Sam A. Crow
Hon. D. Lowell Jensen
Hon. B. Waugh Crigler
Prof. Stephen A. Saltzburg
Mr. John Doar, Esq.
Mr. Tom Karas, Esq.
Mr. Edward Marek, Esq.
Mr. Roger Pauley, Jr., designee of Mr. Robert S. Mueller III, Assistant Attorney General

Professor David A. Schlueter
Reporter

Also present at the meeting were: Judge Robert Keeton, Chairman of the Standing Committee on Rules of Practice and Procedure, Mr. Joe Spaniol, Mr. Peter McCabe, Mr. David Adair, Ms. Judith Krivit, and Mr. John Robiej of the Administrative Office of the United States Courts, and Mr. William Eldridge of the Federal Judicial Center. Judge Harvey Schlesinger was not able to attend.

I. INTRODUCTIONS AND COMMENTS

Due to the temporary absence of Judge Hodges, Judge Keenan welcomed the attendees and noted that all of the members were present with the exception of Judge Hodges, who was expected shortly and Judge Schlesinger whose docket prevented him from attending the meeting. Judge Keenan extended a welcome to the two new members, Judge Jensen and Magistrate Judge Crigler. He noted that Mr. William

that the Committee Note should refer to the decision not to include provision for other electronic transmissions. Magistrate Crigler moved that Rule 40 be approved and forwarded to the Standing Committee with the recommendation that it be sent to the Judicial Conference. Professor Saltzburg seconded the motion which carried by a unanimous vote.

8. Rule 41. Search and Seizure.

The Committee was informed that only one comment was received on this proposed amendment and it, as with the comment on Rule 40, supra., suggested that the rule require prompt transmission of the original documents to the court. Although no action was taken on that suggestion it was suggested that the Committee Note could observe that the issuing magistrate could require that the original written affidavit be filed. After additional discussion it was agreed that the word "judge" following the words, "Federal magistrate" should be removed. Professor Saltzburg moved that the proposed amendment be approved and fowarded to the Standing Committee for its approval. Mr. Pauley seconded the motion which carried by a unanimous vote.

9. Rule 46. Production of Statements.

[This proposed amendment was discussed, and approved, in conjunction with the proposed amendment to Rule 26.2, discussed supra].

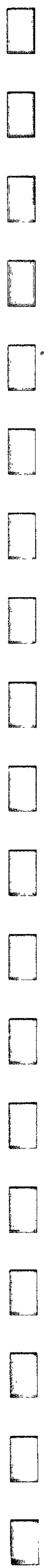
10. Rule 8. Rules Governing Section 2255 Hearings.

The Reporter indicated that the only written comment received on this proposed amendment reflected concerns about the difficulty of obtaining statements from witnesses which had been made perhaps years earlier. Mr. Marek moved that the Rule be approved and forwarded to the Standing Committee for its approval. Mr. Karas seconded the motion which carried by a margin of 9 to 0 with one absention.

D. Reports by Subcommittees on Rules of Criminal Procedure

1. Report of Subcommittee on Rules 3, 4, and 5, Oral Arrest Warrants and Time Limit for Hearing by Magistrate.

Judge Hodges reported that after additional discussion and study the Subcommittee on Rules 3, 4, and 5 had determined that no changes should be made at this time to those rules.



Item II D2

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **ABA Proposed Amendment to Rule 6 to Permit Counsel to Accompany Witness Into Grand Jury Proceedings**

DATE: **September 2, 2003**

Attached is a letter the Committee received in 2001 from Mr. Robert Evans of the American Bar Association. In the letter, which was apparently submitted during the comment period on the proposed re-styled rules, he recommended that the Committee consider current ABA Policies concerning grand jury proceedings.

Although the question of amending Rule 6 to permit counsel to attend has been raised informally on occasion, the Committee to the best of my memory, has never voted up or down on the subject.

This matter is on the agenda for the October 2003 meeting. I recommend that the Committee reject this proposal.

Defending Liberty
Pursuing Justice

AMERICAN BAR ASSOCIATION

Governmental Affairs Office
740 Fifteenth Street, NW
Washington, DC 20005-1022
(202) 662-1760
FAX (202) 662-1762
(202) 662-1032

GOVERNMENTAL AFFAIRS OFFICE

DIRECTOR
Robert D Evans
(202) 662-1765
rdevans@staff abanet org

SENIOR LEGISLATIVE COUNSEL
Denise A Cardman
(202) 662-1761
cardmand@staff abanet org

Kevin J Driscoll
(202) 662-1766
driscollk@staff abanet org

Lillian B Gaskin
(202) 662-1768
gaskinl@staff abanet org

LEGISLATIVE COUNSEL
R Larson Frisby
(202) 662-1098
frisbyr@staff abanet org

Kristi Gaines
(202) 662-1763
gainesk@staff abanet org

Mondi Kumbula-Fraser
(202) 662-1789
kumbulam@staff abanet org

Ellen McBarnette
(202) 662-1767
mcbarnee@staff abanet org

E Bruce Nicholson
(202) 662-1769
nicholsonb@staff abanet org

DIRECTOR GRASSROOTS OPERATIONS
Julie M Strandlie
(202) 662-1764
strandlj@staff abanet org

EXECUTIVE ASSISTANT
Diane Crocker-McBrayer
(202) 662-1777
dcrocker@staff abanet org

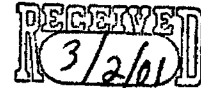
INTELLECTUAL PROPERTY LAW CONSULTANT
Hayden Gregory
(202) 662-1772
gregoryh@staff abanet org

STAFF DIRECTOR FOR STATE LEGISLATION
Kenneth Goldsmith
(202) 662-1780
goldsmithk@staff abanet org

STAFF DIRECTOR FOR INFORMATION SERVICES
Sharon Greene
(202) 662-1014
greenes@staff abanet org

EDITOR WASHINGTON LETTER
Rhonda J McMillion
(202) 662-1017
mcmillionr@staff abanet org

March 2, 2001



01-CR-B

Peter G. McCabe
Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Administrative Office of the United States Courts
Washington, DC 20544

Dear Mr. McCabe:

The Advisory Committee on Criminal Rules has published for comment amendments to Rules 6 and 35 of the Federal Rules of Criminal Procedure.

On behalf of the American Bar Association, it is requested that the Committee consider the following Association views related to these Rules.

Rule 6

While the Advisory Committee has proposed only stylistic changes to Rule 6, the American Bar Association asks that the Committee consider the Association's long standing policy related to this Rule. This policy supports allowing any witness who appears before a grand jury and testifies to be accompanied by counsel. The ABA policy provides that the attorney may only be present when the witness is present. Furthermore, the attorney would be present only to advise the client, not to address the grand jury or otherwise take part in the proceedings before it.

Since the Advisory Committee is making some much-needed changes to the Federal Rules of Criminal Procedure, the Association suggests that the Committee add a provision allowing the presence of a witness' counsel when the witness appears before the grand jury. This change would bring the Federal Rules of Criminal Procedure in line with those States that have already allowed witnesses to appear with counsel during grand jury proceedings. Further, this would enhance the fairness of the grand jury process without injury to the prosecution's case.

A copy of the relevant Association policy is enclosed.

Rule 35

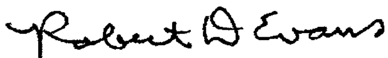
The Advisory Committee recommends certain clarifying, yet substantive amendments to Rule 35.

The Association recommends that the Committee consider making further amendments to allow defense counsel to move for reduction and corrections of sentence. Prior to passage of the Comprehensive Crime Control Act of 1984, the Rule provided that defense counsel could make such a motion for the court's consideration.

Enclosed is the relevant American Bar Association policy on this matter. Although adopted in 1987, the principles it espouses are still valid. The accompanying report, which is not a part of the official ABA policy, may be useful to the Committee in considering this matter.

The American Bar Association appreciates the opportunity to transmit its views on these matters being considered by the Advisory Committee.

Sincerely,



Robert D. Evans

/RE

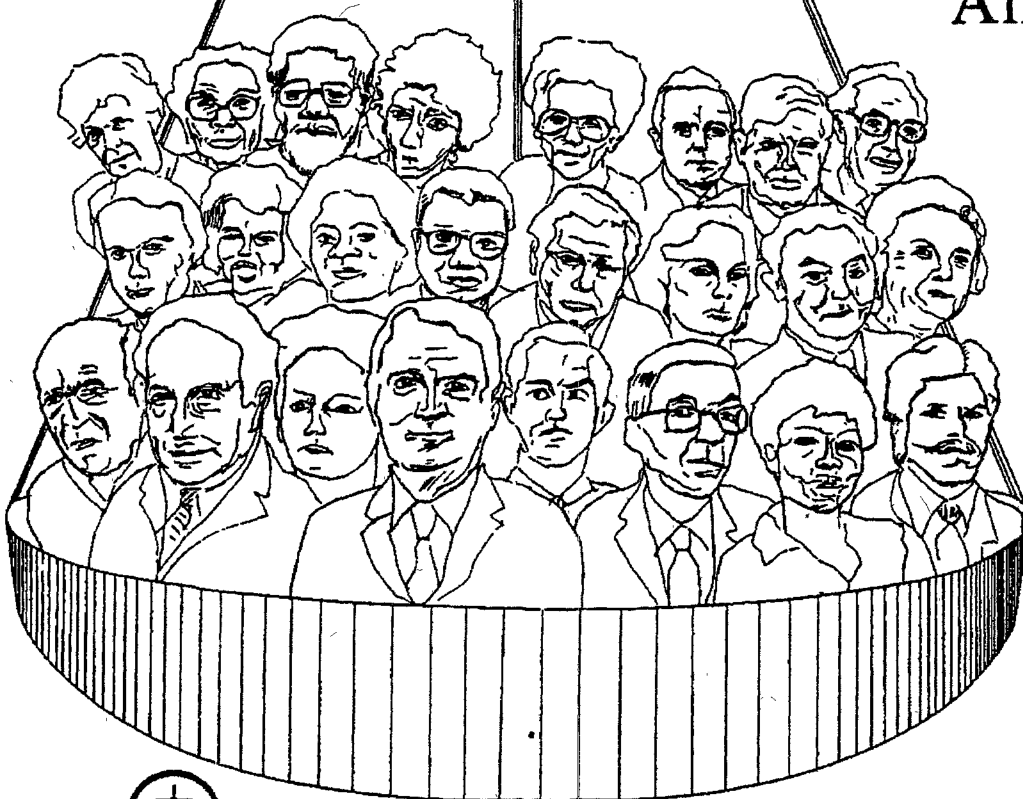
Enclosures

0892 wpd

American Bar Association

Grand Jury Policy

And Model Act (1977-1982)



Published by the Section of Criminal Justice — 1982

Item II D3

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

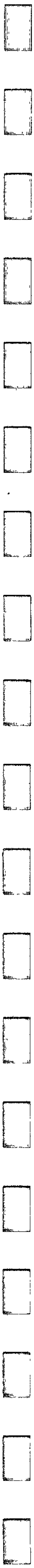
FROM: **Professor Dave Schlueter, Reporter**

RE: **Rule 7(b). Waiving Indictment**

DATE: **September 2, 2003**

In 2000, the Committee received a copy of a letter from Representative Jim Gibbons on behalf of a constituent, Mr. Thomas Kummer, who in turn had expressed some concern about the statute of limitations vis a vis felony offenses and Rule 7.

This item will be on the agenda for the October meeting.



JIM GIBBONS
2ND DISTRICT, NEVADA

COMMITTEE ON RESOURCES
SUBCOMMITTEE ON NATIONAL PARKS AND PUBLIC LANDS
SUBCOMMITTEE ON ENERGY AND MINERAL RESOURCES

COMMITTEE ON ARMED SERVICES
SUBCOMMITTEE ON MILITARY PROCUREMENT
SUBCOMMITTEE ON MILITARY READINESS

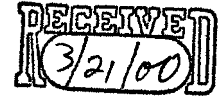
Congress of the United States
House of Representatives

SELECT COMMITTEE ON INTELLIGENCE
SUBCOMMITTEE ON TECHNICAL AND TACTICAL INTELLIGENCE

COMMITTEE ON VETERANS' AFFAIRS
SUBCOMMITTEE ON BENEFITS

MINING CAUCUS, Co-Chairman
GAMING CAUCUS, Vice Chairman
SPORTSMEN'S CAUCUS
AIR POWER CAUCUS
NATIONAL GUARD AND RESERVE COMPONENTS CAUCUS

March 17, 2000



00-CR-B

Honorable Anthony J. Scirica, Chairman
Committee On Rules of Practice and Procedure
Judicial Conference of the United States
Administrative Offices
One Columbus Circle NE
Washington, D.C. 20544

Dear Honorable Anthony J. Scirica:

I am writing on behalf of my constituent, Mr. Thomas Kummer. Mr. Kummer had some concerns with the federal law regarding the Statute of Limitations on felony offenses. He specifically proposed some changes to the title 18 of the U.S. Code.

After reviewing his proposals, I respectfully submit his ideas to the Standing Committee on Rules of Practice and Procedure for its consideration as possible changes to Rule 7b of the Federal Rules of Criminal Procedure. Enclosed, please find his correspondence and supporting documentation. I respectfully request that the Committee consider his proposals and respond to him directly regarding this matter.

I appreciate your time and consideration on this matter. If I can be of assistance to you on this or any other matter of interest, please feel free to contact me.

Sincerely,

Jim

JIM GIBBONS
Member of Congress

JG/as
Enc.

CONGRESSIONAL OFFICES:

100 Cannon House Office Building
Washington, DC 20515
(202) 225-6155
Fax: (202) 225-5679

400 South Virginia Street, Suite 502
Reno, Nevada 89501
(775) 686-5760
Fax: (775) 686-5711

850 South Durango Drive, Suite 107
Las Vegas, Nevada 89145
(702) 255-1651
Fax: (702) 255-1927

Western Folklife Center
501 Railroad Street, Suite 202
Elko, Nevada 89801
(775) 777-7920
Fax: (775) 777-7922

Website: http://www.house.gov/gibbons/
E-mail: mail.gibbons@mail.house.gov

Memorandum

To: The Honorable James Gibbons
United States House of Representatives

From: Thomas L. Kummer

Date: December 28, 1999

Re: 18 U.S.C. §3282 and 18 U.S.C. §3288

Introduction

I have been involved in a case in the Federal District Court For The Southern District Of Georgia in which the Court granted summary judgment to the defendants on the sole basis that 18 U.S.C. §3288 applies to allow the United States six months to reindict a criminal defendant after either a voluntary dismissal of an information or dismissal of an information under Rule 7 Federal Rules of Criminal Procedure. ("F.R.C.P.")

There was no question that the statute would not apply in such instances before it was amended in 1988. Although there was no apparent intent to change the application of 18 U.S.C. §3288 or its companion statute 18 U.S.C. §3289, the amendment left the statutes open to misinterpretation and abuse.

The case is now pending before the Eleventh Circuit Court of Appeals.

The Statute Of Limitations, The Fifth And Sixth Amendments, The Speedy Trial Act And Rule 7 Federal Rules Criminal Procedure

The recognition that delay denies justice goes back to the Magna Carta and its interpretation by Sir Edward Coke. See Klopfer v. North Carolina, 386 U.S. 213, 18 L.Ed. 2d 1, 87 S.Ct. 988 (1967). At common law no distinction was made between pre-accusation and post-accusation delay. In modern jurisprudence the fundamental concept that unnecessary delay should not be permitted has been addressed by the Constitution and various legislation, often differentiating between delay before and after indictment. Together, a mosaic of protections. working together, assure a defendant will not indefinitely suffer under the pall of accusation or be forced to face charges after evidence has faded:

a. The Statute of Limitations. The purpose of statutes of limitation was articulated in Toussie v. United States, 397 U.S. 112, 114-115, 90 S.Ct. 858, 860, 25 L.Ed.2d 156 (1970):

> The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials to investigate suspected criminal activity...for these reasons and otherwise, we have stated before 'the principal that criminal limitations statutes are to be liberally interpreted in favor of repose'.

Statutes of limitations "provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced".

Unwarranted delay in bringing charges against a defendant may result in the denial of a fair trial under the Due Process Clause of the Constitution. United States v. Jeffery R. McDonald, 456 U.S. 1, 71 L.Ed.2d 696, 102 S.Ct. 1497 (1982). However, the statute of limitations contained in 18 U.S.C. §3282 and other federal statutes is the most important safeguard for a defendant against the prejudice inherent in delay between the alleged criminal activity and the charges:

> The law, however, has provided other mechanisms to guard against possible as distinguished from actual prejudice resulting from the passage of time between crime and arrest or charge. As we said in United States v. Ewell..."*the applicable statute of limitations...is...the primary guarantee against bringing overly stale criminal charges.*" Such statutes represent legislative assessments of relative interests of the State and the defendant in administering and receiving justice; they "*are made for the repose of society and the protection of those who may [during the limitation]...have lost their means of defense.*" Public Schools v. Walker...*These statutes provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced...Such a limitation is designed to protect individuals from having to defend themselves against charges*

when the basic facts may have become obscured by the passage of time...Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity..." United States v. Marion, 404 U.S. 307, 322, 92 S.Ct. 455, 464, 30 L.Ed.2d 468 (1971). [Emphasis added]

The statute of limitations is, thus, an important aspect of the overall mechanism because it protects against pre-indictment delay along with the Due Process Clause of the Fifth Amendment in a fashion similar to the protection against post-accusation delay provided by the Sixth Amendment and the Speedy Trial Act.

b. The Fifth Amendment To The Constitution And Rule 7 Federal Rules Of Criminal Procedure.

Rule 7 Federal Rules Of Criminal Procedure ("F.R.C.P."), the predecessor of which was adopted in 1946, implements the Fifth Amendment of the Constitution by requiring a felony be prosecuted by indictment unless the right to indictment is properly waived. The Rule has been amended four times since 1946 (1966. 1972, 1979, and 1987) but the amendments have not changed the fundamental principal that to charge a serious offense the defendant has the right to the determination by a grand jury that the charges are warranted.

The difference between an indictment and an information is clear and simple. An information is an accusatory pleading which comes directly from the United States Attorney without the safeguard of a grand jury. It can be filed at any time without sufficient evidence to support the charges, and for that reason is limited to those crimes considered minor in nature. An indictment requires an independent determination by a grand jury that sufficient evidence exists for a prosecution to commence. Because the filing of an information where an indictment is required circumvents the Rules of Criminal Procedure and the Constitution, it has long been held that failure to obtain an indictment where one is required denies the Court jurisdiction. Ex parte Bain, 7 S.Ct. 781, 121 U.S. 1, 30 L.Ed. 849 (1887); Smith v. US., 79 S.Ct. 991, 360 U.S. 1, 3 L.Ed.2d 1041 (1959); U.S. v. Montgomery, 628 F.2d 414, 416 (5th Cir. 1980); U.S. v. Choate, 276 F.2d. 724, 728 (5th Cir. 1960).

Rule 7(b) F.R.C.P. permits proceeding on an information only upon a waiver of indictment in open court following an explanation of the nature of the charge and the right to indictment. It is inconsequential whether the waiver is

made before or after the information is filed, but a waiver is an essential element in prosecution of a felony by information. Without it, the Court has no jurisdiction. Ornelas v. U.S., 840 R.2d 890 (11th Cir. 1988); Cf. Wright, Federal Practice and Procedure 2d, Indictment and Information Paragraph 122.

Thus, the combination of Rule 7 implementing the Fifth Amendment and the statute of limitations protects a potential defendant against spurious charges and delay presumed to harm his ability to defend against the charges whether spurious or warranted.

c. The Sixth Amendment And The Speedy Trial Act.

The Sixth Amendment to the Constitution establishes the right to a speedy trial and that right is as fundamental as any in the Constitution. Klopfer v. North Carolina, supra. The history of the Sixth Amendment underscores that the drafters sought to protect the accused against the hardship of public accusation without the opportunity to quickly resolve the charges against him. The right to a speedy trial begins upon arrest or formal charge. It is clear that filing of an information publicly sets forth charges against the defendant and can be the basis for arrest, even if the crime charged requires indictment. It is thus from the time an information is filed that the Constitutional speedy trial protection begins. See United States v. Marion, 404 U.S. 307, 320, 30 L.Ed.2d 468, 92 S.Ct. 455 (1971). Cf. Barker v. Wingo, 407 U.S. 514, 533, 33 L.Ed.2d 101, 92 S.Ct. 2182 (1972): Doggett v United States, 505 U.S. 647, 120 L.Ed. 2d 520, 112 S.Ct. 2686 (1992): United States v. Loud Hawk, 474 U.S. 302, 88 L.Ed.2d 640, 106 S.Ct. 648 (1986); United States v. MacDonald, supra.; Moore v. Arizona, 414 U.S. 25. 38 L.Ed.2d 183, 94 S.Ct. 188 (1973); Strunk v. United States, 412 U.S. 434, 37 L.Ed.2d 56. 93 S,.Ct. 2260 (1973).

Congress enacted the Speedy Trial Act of 1974 (18 U.S.C. §3161 et. seq.) to legislatively address the prejudice which can be presumed from lengthy delay in bringing a defendant to trial. The Speedy Trial Act quantifies the extent of delay after indictment, information or arrest irrefutably presumed to impair a defendant's ability to defend himself. Although the Speedy Trial Act is more detailed, and perhaps more stringent, than the Constitutional guarantee of a speedy trial. both are directed at the same prejudice and together form a framework for protecting a defendant from extended delay after the charges have been made.

Recent Developments Undermining The Protections Of The Fifth Amendment And The Statute Of Limitations

There have been two developments arising from judicial interpretation of 18 U.S.C. §3282. 18 U.S.C. §3288 and 18 U.S.C. §3289 which threaten to undermine the Constitutional and legislative protections above described. These developments arise directly from ambiguity in the two statutes found by the Courts and the Government to the detriment of criminal defendants. These "ambiguities" should be clarified legislatively where the policy issues can be considered instead of judicially.

a. Ambiguity Found In 18 U.S.C. §3282.

In United States v. Burdix-Dana, 149 F.3d 741 (7th Cir. 1998) the United States filed an information within the statute of limitations for a crime which required indictment under Rule 7 F.R.C.P. The Seventh Circuit found that filing the information within the statute of limitations met the requirements of 18 U.S.C. §3282 by seizing upon an "ambiguity" in the statutory language and ignoring the Constitutional mandate for indictment in certain cases and the provisions of Rule 7 F.R.C.P.

18 U.S.C. §3282 reads in relevant part:

> Except as otherwise expressly provided by law, no person shall be prosecuted. tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

Citing United States v. Cooper, 956 F.2d 960 (10th Cir. 1992) and United States v/ Watson. 941 F.Supp. 601 (N.D.W.Va. 1996), the Seventh Circuit found that the language of 18 U.S.C. §3282 gives the United States the option of "instituting" the prosecution by either seeking an indictment in conformity with Rule 7 and the Constitution or, at the option of the United States, by filing an information even though to do so directly disregards Rule 7 and the Constitutional mandate that the prosecution can only proceed on indictment. (The Court went further and in dicta indicated the statute of limitations could be extended by the intentional violation of Rule 7 as addressed below.)

The Cooper and Watson cases both involved situations where an information was filed pursuant to a plea bargain which was later nullified for some reason. The interaction of Rule 7(b) was important in those cases. Under Rule 7(b) a defendant may waive in open court his right to indictment. When such a waiver has been knowingly made there is no need for an indictment. In

effect, the entry of an effective waiver of indictment elevates an information to the equivalence of an indictment. Of what effect is an information before the waiver of indictment has been entered in open court? Both Cooper and Watson found the information, even without a waiver, was effective to "institute" the prosecution for statute of limitations purposes.

The case of United States v. Podde, 105 F.3d 813 (2d Cir. 1997) suggests that this contortion of the statute of limitations is unnecessary to protect the Government. The Podde Court found that the United States could not reinstate charges dropped as part of a plea bargain because the statute of limitations had expired. The Court, however, noted that by merely obtaining a waiver of the statute of limitations as part of the plea agreement the Government could have protected itself against any future eventuality such as the withdrawal of the plea, violation of the plea agreement, or rejection of the plea agreement by the Court. The procedure of seeking a waiver of the statute of limitations is routinely utilized by the Internal Revenue and other administrative agencies and presents no undue burden on the United States.

In instances where there is a plea bargain giving rise to the filing of an information where the statute of limitations will run before the entry of a waiver of indictment in open court or the acceptance of the plea agreement by the Court, the United States need only require as a condition of the plea bargain a waiver of the statute of limitations to protect the prosecution. There is no need to read 18 U.S.C. §3282 as giving effect to an invalid charging instrument for statute of limitations purposes.

The logical extension of this line of cases is Burdix-Dana. According to Burdix-Dana the United States need do nothing more than bring an information within the statute of limitations even though there is no expectation that the defendant will waive indictment. Thereafter, according to the Seventh Circuit, as long as the information has not yet been dismissed, the Government can at its leisure seek an indictment. (Furthermore, according to Burdix-Dana, if the defendant is successful in a motion to dismiss the information as violative of Rule 7 F.R.C.P. and the Constitution, the United States has six months from the time of the dismissal to bring an indictment under 18 U.S.C. § 3288 as discussed below).

It is hard to discern the ambiguity upon which the Courts have seized in applying 18 U.S.C. §3282. The language seems to clearly indicate that an appropriate charging instrument must be filed within the time specified. Thus, if Rule 7 and the Constitution allow proceeding by information, the filing of an information within the limitations period is sufficient. On the other had, if an indictment is required. the plain language of the statute would seem to require

that the indictment must be obtained within the limitations period. Yet, the Courts in the cases above cited have not so construed the statute of limitations provisions.

The ambiguity perceived by the Courts is easy to remove. 18 U.S.C. §3282 should be amended to read as follows with a legislative history sufficient to assure the amendment is not subject to misinterpretation:

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted if an information is permitted by the Federal Rules of Criminal Procedure within five years next after such offense shall have been committed. (Proposed additional language highlighted)

b. Ambiguity In 18 U.S.C. §3288 and §3289.

18 U.S.C. §3288 and its predecessors have been a part of the statutory and Constitutional scheme to balance the interests of criminal defendants against prejudicial delay and the interests of society since 1934. The purpose of the statute is to protect society against a defendant waiting until the statute of limitations has expired before raising previously undetected procedural defects thereby defeating the prosecution. United States v. Strewl, 99 F.2d 474 (2nd Cir. 1938), cert. denied 306 U.S. 638, 59 S.Ct. 489, 83 L.Ed. 1039 (1939); United States v. Clawson, 104 F.3d 250 (9th Cir. 1996). (18 U.S.C. §3288 has a companion statute, 18 U.S.C. §3289. One applies when the defects are discovered after the expiration of the statute of limitations. The other applies when the defects are discovered and raised by the defendant within six months of the expiration of the statute of limitations.)

The statute has been amended several times without changing its essential purpose or application. Before 1964 the statute did not apply to the dismissal of informations. By amendment in that year the statute was extended to allow indictment after dismissal of an information, but only if there had been a valid waiver of indictment making the information equivalent to an indictment under Rule 7 F.R.C.P. (Senate Report No. 1414, P.L. 88-520, 78 Stat. 699). The 1964 amendment was prompted by the case of Hattaway v. United States, 304 F.2d 5 (5th Cir. 1962) holding that the savings statute did not apply to dismissed informations. even when there had been a valid waiver of indictment. The 1964 Amendment. therefore, was aimed at including only those situations where an information was dismissed for some defect after a valid waiver of indictment had taken place. The amendment put informations where a valid waiver of indictment had been properly entered on the same footing as indictments. similar to the equivalence found in Rule 7 F.R.C.P.

The language of the statute prior to amendment in 1988 made it clear that it was permissible for the United States to seek indictment after the expiration of the statute of limitations only if the initial indictment was dismissed for an "error, defect, or irregularity with respect to the grand jury, or was otherwise defective or insufficient." Pursuant to this language it was universally held that an indictment dismissed because of a violation of the Speedy Trial Act could not be reinstituted pursuant to 18 U.S.C. §3288. See United States v. Peloquin, 810 F.2d 911 (9th Cir. 1987)

The obvious reason 18 U.S.C. §3288 and §3289 cannot be permitted to apply where the United States violates the Speedy Trial Act is that its application would permit the Government to benefit from its intentional violation of a defendant's fundamental rights and allow it to do so with impunity. Because the dismissal arises not because of "an error or defect" subsequently discovered as contemplated in 18 U.S.C. §3288 but rather is attributable to a flaw in substance known to exist by the Government from its inception and intentionally perpetrated, there is no savings statute.

Similarly, no case prior to the 1988 Amendment can be found where the United States was permitted to gain additional time to seek an indictment by filing an information in violation of Rule 7 F.R.C.P. and then utilizing 18 U.S.C. §3288 or §3289 to justify an indictment after the statute of limitations would have otherwise expired.

Furthermore, there had never been a case until Burdix-Dana where the voluntary dismissal of a charging instrument was construed to give rise to the application of 18 U.S.C. §3288 or §3289. Obviously, if the Government violates the Speedy Trial Act and cannot reinstitute a prosecution if dismissal is sought by the defendant, it is inconsistent with the intent of the statute to allow the United States to voluntarily dismiss the charge and by doing so gain an additional six months to start the prosecution over again. In every case where there is a voluntary dismissal, the purposes and intent of 18 U.S.C. §3288 and §3289 precludes their application. This is particularly true when the Government intentionally violates Rule 7 by bringing an information when indictment is required and then voluntarily dismisses the information to gain an additional six months to seek indictment.

In 1988 Congress "simplified" the statute by providing a six month grace period for re-indictment "whenever an indictment or information...is dismissed for any reason". Anti-Drug Abuse Act of 1988, Pub. L. No 100-690, tit. VII, §7081, 102 Stat. (1988 U.S.C.C.A.N.) 4181, 4407. Congress also added a final sentence to the new §3288 and new §3289 stating that it does "not permit the filing of a new indictment...where the reason for the dismissal was the failure to

file the indictment or information within the period prescribed by the applicable statute of limitations, *or some other reason that would bar a new prosecution*." Id. [Emphasis Added]

There is no indication in the legislative history that the 1988 amendment was intended to broaden the application of 18 U.S.C. §3288 and §3289. There was no comment on the amendment in the Conference Committee Report or the Reports of the House or Senate. If Congress intended the 1988 amendment to expand the application of the "savings statute" to permit re-indictment for all reasons except that the initial charging instrument was not timely filed as suggested in Burdix-Dana. the last portion of the last sentence is surplusage and a long standing policy against permitting the Government to benefit from intentional violation of such statutes as Rule 7 F.R.C.P. and the Speedy Trial Act was enacted without comment.

If the Burdix-Dana interpretation is correct, a voluntary dismissal even if there has been a Speedy Trial violation or an intentional disregard for the Rules of Criminal Procedure and the Constitution will give the United States six months to bring a new proceeding. perhaps years after the statute of limitations would otherwise have expired.

If the United States brings an information where an indictment is required, the charging instrument is subject to automatic dismissal absent a waiver of indictment in open court. F.R.C.P. 7(a) and (b) If the United States were permitted to seek indictment after dismissal of the information on motion of the defendant or voluntarily. the United States could defeat the statute of limitations with impunity. Not having adequate evidence to indict within the statute of limitations for a crime requiring indictment, the United States would need only file an information in violation of Rule 7 F.R.C.P. Thereafter, upon dismissal of the information, the United States could proceed to indictment having gained whatever time it took for the defendant to move for dismissal, the court to grant the dismissal, and six months thereafter. Arguably, the United States could keep the statute of limitations open indefinitely by filing a series of such informations until it wished, in its discretion, to seek indictment by taking the matter before a Grand Jury.[1]

[1] U S v Civic Plaza National Bank, 390 F.Supp. 1342 (W.D. Mo. 1974) is the only case found which suggests an endless series of informations, dismissals, and new informations might not be permitted. There the United States attempted to reinstitute a prosecution by filing an information within six months of the dismissal of an indictment. The Court held that only an indictment would meet the requirements of 18 U.S.C. §3288 and thus the information was dismissed as being barred by the statute of limitations. The last sentence of the statute following the 1988 amendment may well reverse this holding, however, because it addresses "the filing of a new indictment or information" Unless the last portion of the last sentence of 18 U.S.C. §3288 is construed to preclude refiling of informations in such circumstances, it is not at all clear that the Government cannot continue filing, dismissing, and refiling informations until the United States finally decides to seek an indictment no matter how long after the initial information was filed.

The only way to stop the obliteration of the statute of limitations is to make clear that filing an information without a waiver of indictment for crimes which require indictment does not bring 18 U.S.C. §3288 and §3289 into play unless and until a valid waiver is received in open court as required by Rule 7 F.R.C.P. Furthermore, it must be made clear that 18 U.S.C. §3288 and §3289 do not apply to voluntary dismissals.

The clarification of 18 U.S.C. §3288 and §3289 could be accomplished by adding a new sentence before the last sentence in the current statute and modifying the last sentence as follows:

> Any prosecution hereunder must be instituted by indictment. This section does not permit the filing of a new indictment where the reason for the dismissal was the failure to file the indictment or information within the period prescribed by the applicable statute of limitations, the dismissal arose from a violation of the Speedy Trial Act or the Constitutional right to a speedy trial, a voluntary dismissal for any reason, or a dismissal pursuant to Rule 7 of the Federal Rules of Criminal Procedure.

The specificity would be further enhanced by eliminating the language currently in the statute which provides inapplicability for "some other reason that would bar a new prosecution". Having included the specific exceptions there is no need for the more general language.

Item II D4

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

FROM: **Professor Dave Schlueter, Reporter**

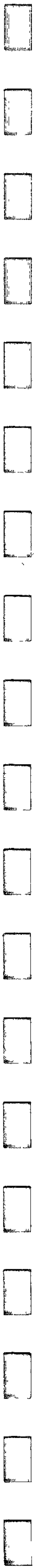
RE: **Proposed Amendment to Rule 10 Regarding Guilty Pleas at Arraignments**

DATE: **September 2, 2003**

At the Spring 1994 meeting, Magistrate Judge Waugh Crigler (a member at that time) recommended that the Committee consider an amendment to Rule 10 that would address the taking of guilty pleas at arraignments. According to the minutes of that meeting, which are attached, I indicated that we would confer about adding his proposal to the Spring 1995, meeting agenda.

For reasons no longer remembered, the matter was not placed on the agenda. The proposal, however, remains on the Criminal Rules docket.

I propose that the matter be closed out, unless there is a strong consensus that the issue is worthy of further consideration.



MINUTES
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

October 6 & 7, 1994
Santa Fe, New Mexico

The Advisory Committee on the Federal Rules of Criminal Procedure met at the New Mexico State Supreme Court in Santa Fe, New Mexico on October 6 and 7, 1994. These minutes reflect the actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Jensen, Chair of the Committee, called the meeting to order at 8:30 a.m. on Thursday, October 6, 1994. The following persons were present for all or a part of the Committee's meeting:

Hon. D. Lowell Jensen, Chair
Hon. W. Eugene Davis
Hon. Sam A. Crow
Hon. George M. Marovich
Hon. David D. Dowd, Jr.
Hon. D. Brooks Smith
Hon. B. Waugh Crigler
Mr. Darryl W. Jackson, Esq.
Mr. Henry A. Martin, Esq.
Mr. Roger Pauley, Jr., designate of Ms. Jo Ann Harris, Asst. Attorney General
Professor David A. Schlueter, Reporter

Also present at the meeting were: Judge William R. Wilson, Jr., a member respectively of the Standing Committee on Rules of Practice and Procedure; Professor Daniel Coquillette, Reporter to the Standing Committee; Ms. Mary Harkenrider, from the Department of Justice: Mr. John Rabiej and Mr. Paul Zingg from the Administrative Office of the United States Courts; and Mr. James Eaglin from the Federal Judicial Center.

Professor Stephen A. Saltzburg and Mr. Robert C. Josefsberg, Esq. were not able to attend the meeting although Professor Saltzburg did participate in a portion of the meeting by conference call.

The attendees were welcomed by the chair, Judge Jensen who introduced a new member of the Committee, Mr. Jackson. Judge Jensen noted that two outgoing members of the Committee, Mr. Tom Karas and Ms. Rikki Klieman were not able to attend; Mr. Karas' term had expired and Ms. Klieman had resigned from the Committee in conjunction with acceptance of full-time employment by Court TV, as a commentator. On behalf of the Committee Judge Jensen expressed the Committee's profound thanks for their excellent and tireless efforts over the last years.

I. Rule 10. Arraignment; Proposal to Consider Amendment.

Judge Crigler suggested that the Committee consider an amendment to Rule 10 which would provide that a guilty plea may be entered at an arraignment. The Reporter indicated that he would contact Judge Crigler about possibly placing the issue on the agenda for the Spring 1995 meeting.

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

A. Local Rules Project for Criminal Cases.

Professor Coquillette gave a full report on the background of the local rules project, which had originally focused on civil cases. He noted that with the cooperation of the Committee, he and Mary Squires had continued the project in order to study local rules governing the trial of criminal cases. He noted that the main complaint with regard to local rules was from practitioners that out-of-state lawyers may be able to quickly locate the pertinent rule. To that end, the project would focus on the possibility of uniform number among the districts. The second point, he added, is that the project would assist the district courts in reviewing their own rules and how they related to the national rules. Following a brief discussion about what if any steps could be taken if it appeared that a local rule was in conflict with the national rule, Professor Coquillette indicated that the project would be coordinated with the Committee.

B. The 1994 Crime Bill

Mr. Rabiej briefly noted several statutory changes which had resulted from the Crime Bill.. First, a typographical error in Rule 46 had been remedied as a part of the bill. Second, Title 18 had been amended to with regard to presentence reports in death penalty cases. And finally, Title 18 was amended to reflect that in capital cases, the government is required to disclose the names of its witnesses to the defense three days before trial unless it can show by a preponderance of the evidence that doing so would endanger the witness.

VIII. EVIDENCE RULES UNDER CONSIDERATION: RULES 413, 414 & 415

Judge Jensen and the Reporter provided a brief overview of recent Congressional promulgation of Federal Rules of Evidence 413, 414, and 415 which address the admissibility of propensity character evidence. They noted that those evidence rules are being considered by the Evidence Advisory Committee at an upcoming meeting and that the Committee's position or comments on the proposals might be helpful. Professor Saltzburg was connected through telephone conference call to the Committee and offered

Item II D5

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Rule 11; Proposed Amendment re Informing Defendant of Collateral Consequences of Guilty Plea**

DATE: **September 2, 2003**

At its meeting last Spring in Santa Barbara, the Committee voted to not amend Rule 11 to require the judge to inform a defendant of the collateral consequences vis a vis immigration laws. As noted at that meeting, the issue has come before the Committee on several occasions over the last number of years.

Attached is a 2001 letter from Mr. Richard Douglas (staff, Committee on Foreign Relations, United States Senate) recommending a similar amendment. This proposal is on the Criminal Rules docket, although the Committee has not acted on it—it was referred to the Reporter and the Chair.

In light of the Committee's action at its last meeting, I recommend that this proposal be similarly rejected and listed as "completed" on the docket.

RECEIVED 4/6/01

April 3, 2001

c/o Committee on Foreign Relations
United States Senate
Dirksen O.B. Room 450
Washington, D.C. 20510-6225

01-CR-C

Peter G. McCabe, Secretary
Committee on Rules and Procedure
of the Judicial Conference of the United States
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle N.E.
Washington, D.C 20544

Dear Mr. McCabe:

I would like to suggest -- and I respectfully request – that the Standing Committee on Rules of Practice and Procedure take up and recommend adoption of a federal rule to mandate, during guilty plea voir dire, an advisement from the bench to the defendant about collateral immigration consequences.

In 1999, Maryland adopted such a rule (copy enclosed) in recognition of concerns voiced by lawfully-admitted immigrants about more stringent immigration statutes. A significant number of other states have taken similar action, some by rule and some by statute.

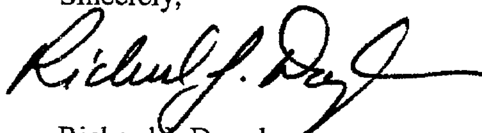
The Maryland advisement is used with all defendants. Thus, it is unnecessary for the judge to inquire about <u>any</u> defendant's citizenship or immigration status.

Under the Maryland rule, if the immigration consequences advisement is omitted inadvertently during voir dire, later vacation of the resulting sentence is optional, not mandatory.

During review of the rule in Maryland, it was recognized that collateral immigration consequences are potentially so severe – namely, permanent physical expulsion from the United States – that limiting the scope of the advisement to immigration consequences is justified.

I will be happy to answer any questions you or Committee members may have about this request. Thank you for your kind attention.

Sincerely,



Richard J. Douglas
(202) 224-6845

(MARYLAND)

Rule 4-242. Pleas.

(a) *Permitted pleas.*- A defendant may plead not guilty, guilty, or, with the consent of the court, nolo contendere. In addition to any of these pleas, the defendant may enter a plea of not criminally responsible by reason of insanity.

(b) *Method of pleading.*-

(1) *Manner.*- A defendant may plead not guilty personally or by counsel on the record in open court or in writing. A defendant may plead guilty or nolo contendere personally on the record in open court, except that a corporate defendant may plead guilty or nolo contendere by counsel or a corporate officer. A defendant may enter a plea of not criminally responsible by reason of insanity personally or by counsel and the plea shall be in writing.

(2) *Time in the District Court.*- In District Court the defendant shall initially plead at or before the time the action is called for trial.

(3) *Time in circuit court* - In circuit court the defendant shall initially plead within 15 days after the earlier of the appearance of counsel or the first appearance of the defendant before the circuit court pursuant to Rule 4-213 (c). If a motion, demand for particulars, or other paper is filed that requires a ruling by the court or compliance by a party before the defendant pleads, the time for pleading shall be extended, without special order, to 15 days after the ruling by the court or the compliance by a party. A plea of not criminally responsible by reason of insanity shall be entered at the time the defendant initially pleads, unless good cause is shown.

(4) *Failure or refusal to plead.*- If the defendant fails or refuses to plead as required by this section, the clerk or the court shall enter a plea of not guilty.

Cross References.

See Treece v. State, 313 Md. 665 (1988), concerning the right of a defendant to decide whether to interpose the defense of insanity.

(c) *Plea of guilty.*- The court may accept a plea of guilty only after it determines, upon an examination of the defendant on the record in open court conducted by the court, the State's Attorney, the attorney for the defendant, or any combination thereof, that (1) the defendant is pleading voluntarily, with understanding of the nature of the charge and the consequences of the plea; and (2) there is a factual basis for the plea. In addition, before accepting the plea, the court shall comply with section (e) of this Rule. The court may accept the plea of guilty even though the defendant does not admit guilt. Upon refusal to accept a plea of guilty, the court shall enter a plea of not guilty.

(d) *Plea of nolo contendere.*- A defendant may plead nolo contendere only with the consent of court. The court may require the defendant or counsel to provide information it deems necessary to enable it to determine whether or not it will consent. The court may accept the plea only after it determines, upon an examination of the defendant on the record in open court conducted by the court, the State's Attorney, the attorney for the defendant, or any combination thereof, that the defendant is pleading voluntarily with understanding of the nature of the charge and the consequences of the plea. In addition, before accepting the plea, the court shall comply with section (e) of this Rule. Following the acceptance of a plea of nolo contendere, the court shall proceed to disposition as on a plea of guilty, but without finding a verdict of guilty. If the court refuses to accept a plea of nolo contendere, it shall call upon the defendant to plead anew.

(e) *Collateral Consequences of a Plea of Guilty or Nolo Contendere.*- Before the court accepts a plea of guilty or nolo contendere, the court, the State's Attorney, the attorney for the defendant, or any combination thereof shall advise the defendant (1) that by entering the plea, if the defendant is not a United States citizen, the defendant may face additional consequences of deportation, detention, or ineligibility for citizenship and (2) that the defendant should consult with defense counsel if the defendant is represented and needs additional information concerning the potential consequences of the plea. The omission of advice concerning the collateral consequences of a plea does not itself mandate that the plea be declared invalid.

Committee Note.

In determining whether to accept the plea, the court should not question defendants about their citizenship or **immigration** status. Rather, the court should ensure that all defendants are advised in accordance with this section. This Rule does not overrule Yoswick v. State, 347 Md. 228 (1997) and Daley v. State, 61 Md. App. 486 (1985).

(f) *Plea to a degree* - A defendant may plead not guilty to one degree and plead guilty to another degree of an offense which, by law, may be divided into degrees.

(g) *Withdrawal of plea.*- At any time before sentencing, the court may permit a defendant to withdraw a plea of guilty or nolo contendere when the withdrawal serves the interest of justice. After the imposition of sentence, on motion of a defendant filed within ten days, the court may set aside the judgment and permit the defendant to withdraw a plea of guilty or nolo contendere if the defendant establishes that the provisions of section (c) or (d) of this Rule were not complied with or there was a violation of a plea agreement entered into pursuant to Rule 4-243. The court shall hold a hearing on any timely motion to withdraw a plea of guilty or nolo contendere.

[Amended Apr. 7, 1986, effective July 1, 1986; June 28, 1989, effective July 1, 1989; Jan. 20, 1999, effective July 1, 1999.]

Item II D 6

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Proposal to Amend Rule 11 to Address Issue of Whether Plea Offer Has Been Made and Whether it Has Been Communicated to Defendant**

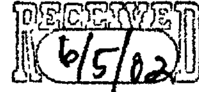
DATE: **September 2, 2003**

Last year, Judge David Dowd, a former member of the Committee, wrote to Mr. Rabiej suggesting an amendment to Rule 11, based upon his experiences in one of his cases. That letter is attached.

The matter was referred to the Chair and the Reporter for consideration, but was not placed on an agenda. As a proposed amendment, however, it remains on the Criminal Rules docket as pending.

This matter will be on the agenda for the October meeting. I recommend that the Committee reject the proposal.

United States District Court
Northern District of Ohio
United States Courthouse
2 South Main Street
Akron, Ohio 44308



02-CR-C

May 20, 2002

David D. Dowd, Jr.
Judge

(330) 375-5834
Fax: (330) 375-5628

Mr. John K. Rabiej
Chief, Rules Committee Support Office
Administrative Office of the U S. Courts
One Columbus Circle, N E
Washington, DC 20544-0001

Dear John,

It was good to talk with you, even though you had to remind me of the current plight of the Indians--as in Cleveland--not Native Americans.

I write with my concern about issues that arise from the claim of an uncommunicated offer by the prosecution to a defendant's counsel to accept a plea of guilty to reduced charges or to a plea to a proposed information that may not include all the potential charges that the government may subsequently charge. When I say "uncommunicated" that means that the defendant's counsel allegedly did not communicate the offer to the client.

I have now presided over two cases where issues relating to the subject have involved considerable time on my behalf. The first case is the DaBelko case that originated in the Northern District of Ohio, and the second case is the Ponder case that originated in the Middle District of Florida. My first involvement in DaBelko began some ten years after the trial, over which Judge George White of this district presided. Judge White rejected DaBelko's Section 2255 action but the Sixth Circuit reversed. By the time the 2255 action was returned, Judge White had retired and the case was assigned to me That case involves a trial where the claim was made that DaBelko's retained counsel had failed to adequately advise DaBelko of the risks involved in proceeding to trial and after there had been some plea discussions between DaBelko's retained counsel and the assigned AUSA By the time I conducted the required evidentiary hearing after the reversal and remand from the Sixth Circuit, DaBelko's retained counsel was unable to assist because he had serious Alzheimer problems. I denied relief as set forth in the enclosed opinion which is also published at 154 F.Supp.2d 1156 (N.D.Ohio 2000). Later, the issues were compromised by a subsequent entry which is also enclosed.

The Ponder case is one in which I presided over in the Middle District of Florida. I conducted the suppression hearing, then took the guilty pleas and conducted the sentencing after Ponder's retained counsel was permitted to withdraw. At the sentencing hearing, it developed that the AUSA had written a letter to Ponder's retained counsel and suggested a single-count information. After the retained counsel did not reply, a five-count indictment was returned and

Ponder pled to all five counts after I denied the motion to suppress. The eventual surfacing of the pre-indictment guilty plea offer eventually led to a 2255 action by Ponder which I rejected. The 11th Circuit reversed and remanded, and so I conducted an evidentiary hearing as directed by the 11th Circuit. I denied relief. I enclose a copy of the 11th Circuit's ruling and my ruling after the evidentiary hearing.

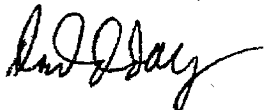
I am concerned that a whole new cottage industry involving alleged non-communicated plea offers will develop. The district court is not permitted to engage in plea discussions as we all know. I have taken to a form of self-help in which I inquire if an offer to accept a plea agreement has been directed to defendant's counsel prior to a contested trial, question the defendant if he or she has been apprized of the offer and then direct that the proposed plea offer be secured under seal. I suppose that arguably one could argue that such a process is a violation of the admonition to not be involved in plea discussions. But, I devoted a substantial amount of judicial time to the DaBelko and Ponder cases, and I am reluctant to continue to be committed to additional time in similar cases.

So this letter is for the purpose of proposing a modification of Rule 11 to allow the district court to be engaged in a process whereby he or she may inquire, prior to trial, as to whether the prosecution has advanced a proposal for a guilty plea agreement and has such a proposal been communicated to the defendant. Then, I would suggest a means by which the essence of the proposal could be secured under seal in the event of a future dispute

I enclose the relevant documents in the DaBelko and Ponder cases.

Please my best wishes to the members of the Advisory Committee

Yours very truly,



David D. Dowd, Jr.
U.S. District Judge

DDD·flm
Enclosures

Item II D 7

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

FROM: **Professor Dave Schlueter, Reporter**

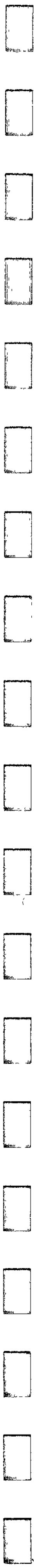
RE: **Proposed Amendment to Rule 16 re Disclosure of Government Witness's Names**

DATE: **September 2, 2003**

In 1994-95, the Committee drafted a proposed amendment to Rule 16 that would have required the government to provide the defense with a list of its witnesses. One of the chief proponents of that amendment was Judge Bill Wilson, then a member of the Standing Committee. The proposed amendment was approved by the Standing Committee, but died in the Judicial Conference, at the recommendation of the Department of Justice.

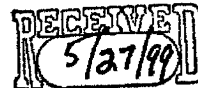
In his 1999 letter to Judge Davis, former chair of the Criminal Rules Committee, Judge Wilson urges this committee to again propose the amendment. The matter has not appeared on any agenda since then, but continues to be carried as a pending item on the Criminal Rules docket.

This item is on the agenda for the October meeting.



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
600 W. CAPITOL, ROOM 149
LITTLE ROCK, ARKANSAS 72201
(501) 324-6863
FAX (501) 324-6869

BILL WILSON
JUDGE



99-CR-D

May 18, 1999

Honorable W. Eugene Davis
United States Circuit Judge
556 Jefferson Street, Suite 300
Lafayette, LA 70501

Dear Gene:

Enclosed is a copy of the proposed amendment to Rule 16. This is the one that was approved by the Advisory Committee on Criminal Rules and the Standing Committee, but ran upon submerged rocks over at the Judicial Conference. Some friends of mine, who are members of the Conference have told me that they did not realize that they had voted down this proposal until after it was a *fait accompli*.

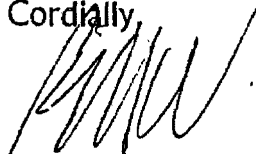
Be that as it may, it is, in my opinion, a great, albeit very, very modest, proposal. In fact, I consider it the most important issue considered in my nine years on the Standing Committee.

I am, by copy of this letter, serving Roger as agent for service of process for the Justice Department. I want the Department to be fully advised in the premises. Who knows, perhaps they will find a meritorious argument against this modest proposal (thusfar they haven't).

I recommend that your committee adopt this proposed amendment again and send it on to the Standing Committee. It may be that it will again sink from sight if it is ultimately goes to the Conference, but we will have gone first class, if we don't last more than thirty minutes. And, it will give us another opportunity to test Sir Gallahad's proposition that "Right makes might."

Thank you very much for your consideration.

Cordially,



Wm. R. Wilson, Jr.

cc: Mr. John Rabiej w/enclosure
Mr. David Schlueter w/enclosure

Agenda F-18
(Appendix D)
Rules
September 1995

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

JAMES K. LOGAN
APPELLATE RULES

PAUL MANNES
BANKRUPTCY RULES

PATRICK E. HIGGINBOTHAM
CIVIL RULES

D. LOWELL JENSEN
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

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

FROM: Hon. D. Lowell Jensen, Chair
Advisory Committee on Federal Rules of Criminal
Procedure

SUBJECT Report of Advisory Committee on Rules of Criminal Procedure

DATE: May 23, 1995

I. INTRODUCTION.

At its meeting on April 10, 1995, the Advisory Committee on the Rules of Criminal Procedure considered proposed or pending amendments to several Rules of Criminal Procedure. This report addresses those proposals. The minutes of that meeting, a GAP Report, and a proposed amendment to Rule 24(a) are attached.

II. ACTION ITEMS

A. Action on Rules Published for Public Comment: Rules 16 and 32

At its June 1994 meeting the Standing Committee approved for publication for public comment amendments to Rule 16 and 32. The deadline for those comments was February 28, 1995 and at its April 1995 meeting the Advisory Committee considered the comments, made several minor changes to the rules and now presents them to the Standing Committee. The amended Rules and Committee Notes are included in the attached GAP Report.

1. Action on Proposed Amendments to Rules 16(a)(1)(E) & (b)(1)(D). Disclosure of Expert Witnesses.

Minor stylistic changes were made to the proposed amendments to Rules 16(a)(1)(E) and (b)(1)D) which address the issue of disclosure of the names and statements of expert witnesses who may be called to testify about the defendant's mental condition.

The Advisory Committee recommends that the Standing Committee approve the amendments to Rule 16(a)(1)(E) and (b)(1)(C) and forward them to the Judicial Conference for approval.

2. Action on Proposed Amendments to Rule 16(a)(1)(F) and (b)(1)(D). Pretrial Disclosure of Witness Names and Statements.

As noted in the attached GAP Report, the Committee made several minor changes to the proposed amendment and the accompanying Committee Note. The Committee considered again the view that the amendments are inconsistent with the Jencks Act; it continues to believe that forwarding the proposed changes to Congress is appropriate under the Rules Enabling Act.

The Advisory Committee recommends that the Standing Committee approve the amendments to Rule 16(a)(1)(F) and (b)(1)D) and forward them to the Judicial Conference for approval.

3. Action on Proposed Amendments to Rule 32(d). Forfeiture Proceedings Before Sentencing

The Advisory Committee made a number of changes to Rule 32(d) after publication. Those changes which are discussed more fully in the attached GAP Report, do not in the Committee's view require additional publication and comment.

The Advisory Committee recommends that the Standing Committee approve the amendments to Rule 32(d) and forward them to the Judicial Conference for approval.

* * * * *

1 **Rule 16. Discovery and Inspection**[1]

2 (a) GOVERNMENTAL DISCLOSURE OF EVIDENCE.

3 *(1) Information Subject to Disclosure.*

4 * * * * *

5 (E) EXPERT WITNESSES. At the
6 defendant's request, the government shall disclose
7 to the defendant a written summary of testimony
8 that the government intends to use under Rules
9 702, 703, or 705 of the Federal Rules of Evidence
10 during its case-in-chief at trial. If the government
11 requests discovery under subdivision (b)(1)(C)(ii)
12 of this rule and the defendant complies, the
13 government shall, at the defendant's request,
14 disclose to the defendant a written summary of
15 testimony the government intends to use under
16 Rules 702, 703, and 705 as evidence at trial on the
17 issue of the defendant's mental condition. ~~This~~ The
18 summary provided under this subdivision shall

[1] New matter is underlined and matter to be omitted is lined through.

19 ~~must~~ describe the witnesses' opinions, the bases
20 and the reasons for those opinions ~~therefor~~, and the
21 witnesses' qualifications.
22 (F) NAMES OF WITNESSES. At the
23 defendant's request in a noncapital felony case, the
24 government shall, no later than seven days before
25 trial unless the court orders a time closer to trial,
26 disclose to the defendant the names of the
27 witnesses that the government intends to call
28 during its case-in-chief. But disclosure of that
29 information is not required if the attorney for the
30 government believes in good faith that pretrial
31 disclosure of this information might threaten the
32 safety of any person or might lead to an
33 obstruction of justice. If the attorney for the
34 government submits to the court, ex parte and
35 under seal, a written statement indicating why the
36 government believes in good faith that the name of
37 a witness cannot be disclosed, then the witness's

38 name shall not be disclosed. Such a statement is
39 not reviewable.
40 (2) *Information Not Subject to Disclosure*. Except
41 as provided in paragraphs (A), (B), (D), ~~and~~ (E), and
42 (F) of subdivision (a)(1), this rule does not authorize
43 the discovery or inspection of reports, memoranda, or
44 other internal government documents made by the
45 attorney for the government or any other government
46 agent ~~agents in connection with the investigation or~~
47 ~~prosecution of~~ investigating or prosecuting the case.
48 Nor does the rule authorize the discovery or inspection
49 of statements made by government witnesses or
50 prospective government witnesses except as provided
51 in 18 U.S.C. § 3500.
52 * * * * *
53 (b) THE DEFENDANT'S DISCLOSURE OF
54 EVIDENCE.
55 (1) *Information Subject to Disclosure*.
56 * * * * *

57 (C) EXPERT WITNESSES. Under the following
58 circumstances, the defendant shall, at the government's
59 request, disclose to the government a written summary
60 of testimony that the defendant intends to use under
61 Rules 702, 703, and 705 of the Federal Rules of
62 Evidence as evidence at trial: (i) if ~~If~~ the defendant
63 requests disclosure under subdivision (a)(1)(E) of this
64 rule and the government complies, or (ii) if the
65 defendant has given notice under Rule 12.2(b) of an
66 intent to present expert testimony on the defendant's
67 mental condition. ~~the defendant, at the government's~~
68 ~~request, must disclose to the government a written~~
69 ~~summary of testimony the defendant intends to use~~
70 ~~under Rules 702, 703 and 705 of the Federal Rules of~~
71 ~~Evidence as evidence at trial.~~ This summary ~~must~~ shall
72 describe the witnesses' opinions ~~of the witnesses~~, the
73 bases and reasons for those opinions ~~therefor~~, and the
74 witnesses' qualifications.
75 (D) NAMES OF WITNESSES. If the defendant
76 requests disclosure under subdivision (a)(1)(F) of this

77 rule, and the government complies, the defendant shall,
78 at the government's request, disclose to the
79 government before trial the names of witnesses that the
80 defense intends to call during its case-in-chief. The
81 court may limit the government's right to obtain
82 disclosure from the defendant if the government has
83 filed an ex parte statement under subdivision (a)(1)(F).
84 * * * * *

COMMITTEE NOTE

The amendments to Rule 16 cover two issues. The first addresses the ability of the government to require, upon request, the defense to provide pretrial disclosure of information concerning its expert witnesses on the issue of the defendant's mental condition. The amendment also requires the government to provide reciprocal pretrial disclosure of information about its expert witnesses when the defense has complied. The second amendment provides for pretrial disclosure of witness names.

Subdivision (a)(1)(E). Under Rule 16(a)(1)(E), as amended in 1993, the defense is entitled to disclosure of certain information about expert witnesses which the government intends to call during the trial as well as reciprocal pretrial disclosure by the government upon defense disclosure. This amendment is a parallel reciprocal disclosure provision which is triggered by a government request for information concerning defense expert witnesses as to the defendant's mental condition, which is provided for in an amendment to (b)(1)(C), *infra*.

Subdivision (a)(1)(F). No subject has generated more controversy in the Rules Enabling Act process over many years than pretrial discovery of the witnesses the government intends to call at trial. In 1974, the Supreme Court approved an amendment to Rule 16 that would have provided pretrial disclosure to a defendant of the names of government witnesses, subject to the government's right to seek a protective order. Congress, however, refused to approve the rule in the face of vigorous opposition by the Department of Justice. In recent years, a number of proposals have been made to the Advisory Committee to reconsider the rule approved by the Supreme Court. The opposition of the Department of Justice has remained constant, however, as it has argued that the threats of harm to witnesses and obstruction of justice have increased over the years along with the increase in narcotics offenses, continuing criminal enterprises, and other crimes committed by criminal organizations.

Notwithstanding the absence of an amendment to Rule 16, the federal courts have continued to confront the issue of whether the rule, read in conjunction with the Jencks Act, permits a court to order the government to disclose its witnesses before they have testified at trial. *See United States v. Price*, 448 F.Supp. 503 (D. Colo. 1978)(circuit by circuit summary of whether government is required to disclose names of its witnesses to the defendant).

The Committee has recognized that government witnesses often come forward to testify at risk to their personal safety, privacy, and economic well-being. The Committee recognized, at the same time, that the great majority of cases do not involve any such risks to witnesses.

The Committee shares the concern for safety of witnesses and third persons and the danger of obstruction of justice. But it is also concerned with the burden faced by defendants in attempting to prepare for trial without adequate discovery, as well as the burden placed on court resources and on jurors by unnecessary trial delay. The Federal Rules of Criminal Procedure recognize the importance of discovery in situations in which the government might be unfairly surprised or disadvantaged without it. In several

amendments -- approved by Congress since its rejection of the proposed 1974 amendment to Rule 16 regarding pretrial disclosure of witnesses -- the rules now provide for defense disclosure of certain information. *See, e.g.*, Rule 12.1, Notice of Alibi; Rule 12.2, Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition; and Rule 12.3, Notice of Defense Based Upon Public Authority. The Committee notes also that both Congress and the Executive Branch have recognized for years the value of liberal pretrial discovery for defendants in military criminal prosecutions. *See* D. Schlueter, *Military Criminal Justice: Practice and Procedure*, § 10-4(A) (3d ed. 1992)(discussing automatic prosecution disclosure of government witnesses and statements). Similarly, pretrial disclosure of prosecution witnesses is provided for in many State criminal justice systems where the caseload and the number of witnesses are much greater than that in the federal system. *See generally* Clennon, *Pre-Trial Discovery of Witness Lists: A Modest Proposal to Improve the Administration of Criminal Justice in the Superior Court of the District of Columbia*, 38 Cath. U. L. Rev. 641, 657-674 (1989)(citing State practices). Moreover, the vast majority of cases involving charges of violence against persons are tried in State courts.

The arguments against similar discovery for defendants in federal criminal trials seem unpersuasive and ignore the fact that the defendant is presumed innocent and therefore is presumptively as much in need of information to avoid surprise as is the government. The fact that the government bears the burden of proving all elements of the charged offense beyond a reasonable doubt is not a compelling reason for denying a defendant adequate means for responding to government evidence. In providing for enhanced discovery for the defense, the Committee believes that the danger of unfair surprise to the defense and the burden on courts and jurors will be reduced in many cases, and that trials in those cases will be fairer and more efficient.

The Committee regards the addition of Rule 16(a)(1)(F) as a reasonable, measured, step forward. In this regard it is noteworthy that the amendment rests on the following three assumptions. First, the government will act in good faith, and there

will be cases in which the information available to the government will support a good faith belief as to danger although it does not constitute "hard" evidence to prove the actual existence of danger. Second, in most cases judges will not be in a better position than the government to gauge potential danger to witnesses. And third, post-trial litigation as to the sufficiency of government reasons in every case of an *ex parte* submission under seal would result in an unacceptable drain on judicial resources.

The Committee considered several approaches to discovery of witness names. In the end, it adopted a middle ground between complete disclosure and the existing Rule 16. The amendment requires the government to provide pretrial disclosure of names of witnesses unless the attorney for the government submits, *ex parte* and under seal, to the trial court written reasons, based upon the facts relating to the individual case, why this information cannot be disclosed. The amendment adopts an approach of presumptive disclosure that is already used in a significant number of United States Attorneys offices. While the amendment recognizes the importance of discovery in all cases, it protects witnesses when the government has a good faith basis for believing that disclosure will pose a threat to the safety of a person or will lead to an obstruction of justice.

The provision that the government provide the names no later than seven days before trial should eliminate some concern about the safety of witnesses and some fears about possible obstruction of justice. The seven-day provision extends only to noncapital felony cases. Currently, in capital cases the government is required to disclose the names of its witnesses at least three days before trial. The Committee believes that the difference in the timing requirements is justified in light of the fact that any danger to witnesses would be greater in capital cases. The rule also recognizes, however, that the trial court may permit the government to disclose the names of its witnesses at a time closer to trial.

The amendment provides that the government's *ex parte* submission of reasons for not disclosing the requested information

will not be reviewed, either by the trial or the appellate court. The Committee considered, but rejected, a mechanism for post-trial review of the government's statement. It was concerned that such *ex parte* statements could become a subject of collateral litigation in every case in which they are made. Although it is true that under the rule the government could refuse to disclose a witness' name even though it lacks sufficient evidence for doing so in an individual case, the Committee found no reason to assume that bad faith on the part of the prosecutor would occur. The Committee was certain, however, that it would require an investment of significant judicial resources to permit post-trial review of all submissions. Thus, the amendment provides for no review of government submissions. No defendant will be worse off under the amended rule than under the current version of Rule 16, because the current version of Rule 16 allows the government to keep secret the information covered by the amended rule whether or not it has a good faith reason for doing so.

It should also be noted that the amendment does not preclude either the defendant or the government from seeking protective or modifying orders or sanctions from the court under subdivision (d) of this rule.

Subdivision (b)(1)(C). Amendments in 1993 to Rule 16 included provisions for pretrial disclosure of information, including names and expected testimony of both defense and government expert witnesses. Those disclosures are triggered by defense requests for the information. If the defense makes such requests and the government complies, the government is entitled to similar, reciprocal discovery. The amendment to Rule 16(b)(1)(C) provides that if the defendant has notified the government under Rule 12.2 of an intent to rely on expert testimony to show the defendant's mental condition, the government may request the defense to disclose information about its expert witnesses. Although Rule 12.2 insures that the government will not be surprised by the nature of the defense or that the defense intends to call an expert witness, that rule makes no provision for discovery of the identity, the expected testimony, or the qualifications of the expert witness. The amendment provides the government with the limited right to

respond to the notice provided under Rule 12.2 by requesting more specific information about the expert. If the government requests the specified information, and the defense complies, the defense is entitled to reciprocal discovery under an amendment to subdivision (a)(1)(E), *supra*.

Subdivision (b)(1)(D). The amendment, which provides for reciprocal discovery of defense witness names, is triggered by compliance with a defense request made under subdivision (a)(1)(F). If the government withholds any information requested under that provision, the court in its discretion may limit the government's right to disclosure under this subdivision. The amendment provides no specific deadline for defense disclosure, as long as it takes place before trial starts.

1 **Rule 32. Sentence and Judgment**

2 (d) JUDGMENT.

3 * * * * *

4 (2) *Criminal Forfeiture.* ~~When a verdict contains a~~

5 ~~finding of criminal forfeiture, the judgment must authorize~~

6 ~~the Attorney General to seize the interest or property~~

7 ~~subject to forfeiture on terms that the court considers~~

8 ~~proper.~~ If a verdict contains a finding that property is

9 subject to a criminal forfeiture, or if a defendant enters a

10 guilty plea subjecting property to such forfeiture, the court

11 may enter a preliminary order of forfeiture after providing

12 notice to the defendant and a reasonable opportunity to be

Item IID8

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Proposed Amendment to Rule 23**

DATE: **September 2, 2003**

Attached is a 2000 letter from Mr. Jeremy Bell, which was submitted in response to the comment period on the restyled criminal rules. At the time, Mr. Bell was a student of Judge Miller's in his law class at William and Mary.

In his letter, Mr. Bell recommends that the committee consider amending Rule 23 to address expressly when a defendant is entitled to a jury trial. Although the letter was submitted as part of the comment period, this specific proposal appears on the docket as "pending." The item has not appeared on any agenda for the Committee meetings.

This item is on the agenda for the October meeting.

RECEIVED
11/20/00

118 Mimosa Drive
Williamsburg, VA 23185

November 16, 2000

Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, DC 20544

00-CR- D

To Whom It May Concern:

It has come to my attention that the neither the Federal Rules of Criminal Procedure, nor the proposed amendments thereto, deal expressly with the question of when a jury trial is authorized. In the federal system, the issue is resolved by the Constitution rather than by the rules of criminal procedure, which are surprisingly silent on the question and, consequently, not helpful on the matter.[1] It is the proposition of this comment that the Criminal Rules should include a provision expressly dealing with the question of when a jury trial is authorized. By not confronting the issue in the latest amendments, the Committee has missed yet another opportunity to address the problem.

According to Rule 2, the purpose of the Rules is, *inter alia*, "to secure simplicity in procedure and fairness in administration."[2] Considering the inadequately defined law prior to 1996, criminal defendants confronted with the issue of when they are entitled to a jury trial are likely to encounter anything but "simplicity in procedure." The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States could have taken a large stride towards their intended purpose by amending the rules to include a provision outlining when a jury trial is authorized. Both practicing attorneys and criminal defendants alike would benefit

---

[1] *See* NEIL P. COHEN & DONALD J. HALL, CRIMINAL PROCEDURE: THE POST-INVESTIGATIVE PROCESS, CASES AND MATERIALS 554 (1995).

[2] FED. R. CRIM. P. 2.

from such a modification of the rules. The current realities of modern federal criminal practice require a reevaluation of the current Rules.

For decades the law on when jury trials are authorized was undefined and in constant flux. After the controversial 1996 decision in *Lewis v. United States*,[3] however, the Supreme Court has provided the criminal defendant with some much-needed clarity. Although the *Lewis* decision has been widely criticized by myriads of legal commentators,[4] it is currently binding precedent and a clear enumeration of the law concerning the right to a jury trial. Consequently, there are no good reasons for not modifying the Rules to include a provision explaining when a jury trial is authorized.

Before it is possible to adequately argue that the Criminal Rules should be amended to include a provision delineating when a jury trial is authorized, it is first necessary to supply a brief historical and constitutional overview of the law concerning this issue. It has always been well accepted that a criminal defendant is entitled to a jury trial. In fact, the 6th Amendment provides in part that in "all criminal prosecutions" the defendant is entitled to trial "by an impartial jury of the State and district wherein the crime shall have been committed."[5] Despite the seemingly clear language of the 6th Amendment, the Supreme Court, in *Duncan v.*

---

[3] 518 U.S. 322 (1996).

[4] *See, e.g.,* Colleen P. Murphy, *The Narrowing of the Entitlement to Criminal Jury Trial*, 1997 WIS. L. REV. 133 (1997) (arguing that *Lewis* was wrongly decided, both in terms of precedent and the constitutional role of the jury in our criminal justice system); Peter J. Schmidt, Note, *Mr. Lewis Goes to Washington (and Gets His Constitutional Rights Stepped On): A Criticism of the Supreme Court Decision in Lewis v. United States*, 47 DEPAUL L. REV. 191 (1997) (arguing, *inter alia*, that the court's decision in *Lewis* was incorrect).

[5] U.S. CONST. amend. VI.

Louisiana,[6] has interpreted the language to apply only to "serious," as opposed to "petty," offenses.

The traditional approach for gauging the seriousness of a crime was to examine both its common law indictability and its moral nature.[7] This approach, however, "proved nettlesome and yielded incongruous results."[8] The *Duncan* Court, consequently, "sought more objective indications of the seriousness with which society regards [an] offense."[9] In addition, the Court wanted to establish more "objective criteria" to aid in jury trial determinations.[10] In furtherance of its goal, the Court looked to "the penalty authorized by the law of the locality ... as a gauge of its social and ethical judgements ... ."[11] Moreover, while the Court declined to designate a specific term of imprisonment to distinguish petty offenses from serious ones, it did clearly establish that potential sentence exposure, not the sentence actually imposed, is the proper measure of an offense's seriousness.[12]

Shortly after *Duncan*, the Supreme Court further developed its new standard. In *Baldwin v. New York*[13] the Court held that "no offense can be deemed 'petty' for purposes of the right to

---

[6] 391 U.S. 145 (1968).

[7] *See* Christine E. Pardo, *Multiple Petty Offenses With Serious Penalties: A Case for the Right to Trial By Jury*, 23 FORDHAM URB. L.J. 895 (1996).

[8] *Id.* (citing Brief for Appellee at 7, United States v. Lewis, 518 U.S. 322 (1996) (brief prepared by Assistant United States Attorneys Susan Corkery and James Walden of the United States Attorney's Office for the Eastern District of New York)).

[9] Blanton v. City of Las Vegas, 489 U.S. 538, 541 (quoting Frank v. United States, 395 U.S. 147, 148 (1969)).

[10] *See* Pardo, *supra* note 7, at 901.

[11] Duncan 391 U.S. at 160 (quoting District of Columbia v. Clawans, 300 U.S. 617, 628 (1937)).

[12] *See* Pardo, *supra* note 7, at 901.

trial by jury where imprisonment for more than six months is authorized."[14] The Court again addressed the issue in 1989 in the case of *Blanton v. City of North Las Vegas.*[15] In *Blanton* the Court limited its earlier ruling in *Baldwin* and held that the when determining if a jury trial is authorized the focus is upon the various penalties which the legislature has attached to the offense in question.[16]

Given the preceding discussion on the ever-changing law on when jury trials are authorized, it is easy to understand why the Committee has been hesitant to include a provision in the Criminal Rules dealing with the issue. This, however, is no longer a problem as the law has since been clearly defined. It is now well accepted that any crime punishable by a prison sentence greater than six months triggers the right to a jury trial regardless of the sentence ultimately imposed.[17] Furthermore, it is now known that for crimes punishable by a sentence of six months or less, the right to a jury trial attaches only if additional statutory or regulatory penalties "are so severe that the legislature clearly determined that the offense is a 'serious' one."[18] In addition, in the absence of a statutory maximum penalty, an appellate court will consider the sanction actually imposed.[19]

---

[13] 399 U.S. 66 (1970).

[14] *Id.* The Court pointed out that this was also true even in cases where the actual sentence imposed is less than 6 months.

[15] 489 U.S. 538 (1989). With all of this flux in the law it is easy to see why the Committee chose not to include a section within the Criminal Rules dealing with when jury trials were authorized.

[16] *See* WAYNE R. LAFAVE, JEROLD H. ISRAEL AND NANCY J. KING, CRIMINAL PROCEDURE § 22.1(b) (3d ed. 2000).

[17] *See* Michael Hatcher and Kalea Seitz, *Right to Jury Trial*, 88 GEO L.J. 1345, 1346 (citing Blanton v. City of North Las Vegas, 489 U.S. 538, 542 (1989)).

[18] *Id.* (quoting U.S. v. Nachtigal, 507 U.S. 1, 5 (1993)).

[19] *See* Hatcher and Seitz, *supra* note 17, at 1347.

Despite this newly discovered clarity, there was still a valid excuse for the Committee to point to in defending their decision to remain silent on the question of when a jury trial is authorized. Until 1996 the Committee could have argued that it would have had a difficult time outlining the law in the Rules as there were still lingering questions surrounding the issue. This too is no longer a problem as we now have an answer to perhaps the most controversial question in this area. Specifically, in an majority opinion delivered by Justice O'Connor, the Court held in 1996 that a defendant charged with multiple offenses does not have a right to a trial by jury when the aggregate sentences exceed six months.[20] O'Connor's own words are worth quoting:

> Here, by setting the maximum authorized prison term at six months, the legislature categorized the offense of obstructing the mail as petty. The fact that the petitioner was charged with two counts of a petty offense does not revise the legislative judgment as to the gravity of that particular offense, nor does it transform the petty offense into a serious one, to which the jury-trial right would apply.

Thus, after *Lewis*, it became clear that it is the gravity of the offense that implicates the right to a jury trial, not the number of offenses. In other words, a criminal defendant could conceivably be charged with five petty offenses that in the aggregate could require years of jail time and he or she would still not be afforded the right to a jury trial.[21] Not surprisingly, this decision sparked criticism from legal scholars everywhere.[22] However, a discussion into the logic and rationale supporting the decision is beyond the scope of this comment. Even if one believes that the *Lewis* decision was clearly wrong, that does not change the fact that it illustrates controlling federal

---

[20] *See* Lewis v. United States, 518 U.S. 522 (1996).

[21] My Criminal Procedure Professor gave an example in which one could be pulled over for many different petty offenses on a popular road outside of Williamsburg, Virginia and potentially be sentenced to years of jail time and not have the right to a trial by jury. This is because the traffic infractions on the particular road used in the illustration, the Colonial Parkway, impose sentences that carry large fines and even jail time, although none of the potential sentences by themselves impose more than six months of jail time.

law. As such, one of the critical remaining questions in the realm of trial by jury law has been answered. Consequently, the Committee can no longer use the fact that there is uncertainty in the law as a buttress to its decision not to address the issue in the Criminal Rules.

Federal Rule of Criminal Procedure 23(a) deals specifically with the criminal trial by jury. Unfortunately, however, Rule 23(a) is silent on the question of when a jury trial is authorized. This omission on the part of the Committee was understandable and even justifiable for many years as the law was in flux and there were many unanswered questions. These problems, however, are no longer present as the law is now well enumerated and the difficult and controversial questions have now been addressed and answered. Thus it is time for the Committee to address the issue of when a jury trial is authorized.

Rule 23(a) has remained largely unchanged in the half century since its enactment. It is now time for the Committee to reevaluate the current Rule and, ultimately, amend Rule 23(a) to include a provision addressing the issue of when a jury trial is authorized. Not only does fair and efficient administration of criminal justice require that the Committee amend Federal Rule of Criminal Procedure 23(a), such a modification would also further the intended purpose of the rules.

Thank you for your time and consideration.

Jeremy A. Bell

Jeremy A. Bell

College of William and Mary School of Law

[22] *See supra* note 4 (listing examples of works criticizing the *Lewis* decision).

Item II D9

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Proposal to Amend Rule 32 re Failure of Clerk to File Notice of Appeal**

DATE: **September 2, 2003**

Attached is a letter addressed to Judge Davis (former chair of the Committee) and opinion from the Seventh Circuit concerning an issue that court had addressed in 2000. The Court requested the Committee to consider amending Rule 32 regarding the possibility of a situation where the clerk failed to file a defendant's notice of appeal.

The matter, referred to the chair and reporter, has not appeared on any agenda for the Committee. It is being carried on the Criminal Rules docket as a pending item.

This matter will be on the agenda for the October meeting.

RECEIVED 4/11/00

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

00-AP-B

DATE: April 11, 2000 00-CR-A

TO: Mr. John K. Rabiej

FROM: W. Eugene Davis

SUBJECT: Letter from Gino Agnello

Dear John:

Please respond to this request.

Sincerely,

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
219 SOUTH DEARBORN STREET
CHICAGO, ILLINOIS 60604

GINO J. AGNELLO
CLERK
312-435-5850

March 29, 2000

Honorable W. Eugene Davis
Chair, Advisory Committee on Criminal Rules
5100 United States Courthouse
800 Lafayette Street
Lafayette, Louisiana 70501

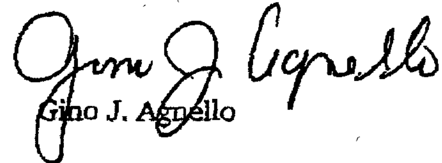
Dear Judge Davis,

I am writing at the request of the Seventh Circuit Court of Appeals. On March 23, 2000, the court released the enclosed opinion (*U.S. v. Hirsch*, No. 99-2304). The opinion addresses the issue of Fed. R. Crim. P. 32(c)(5) (clerk of court filing notice of appeal on defendant's behalf).

The author of the opinion asks that your committee consider whether Fed. R. Crim. P. 32(c)(5) or Fed. R. App. P. 4(b)(4) should provide for the possibility that the clerk will fail to comply with a request from a criminal defendant to file a notice of appeal.

Thank you for your consideration.

Sincerely,



Gino J. Agnello

GJA/jc
enclosure: as indicated

In the

United States Court of Appeals

For the Seventh Circuit

No. 99-2304

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

STEVEN HIRSCH,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Illinois.
No. 4:96CR40094-002—J. Phil Gilbert, *Chief Judge.*

SUBMITTED OCTOBER 1, 1999—DECIDED MARCH 23, 2000

Before EASTERBROOK, RIPPLE, and KANNE, *Circuit Judges.*

EASTERBROOK, *Circuit Judge*. Following a guilty plea to drug-related crimes, Steven Hirsch was sentenced to 157 months' imprisonment. The sentence was pronounced on January 29, 1999, and docketed on February 3, 1999; any appeal was due by February 16. Fed. R. App. P. 4(b). (February 13 was a Saturday, and Monday, February 15, was a holiday.) A notice of appeal was filed on May 21, 1999, more than three months late.

Counsel's explanation for this delay, if true, is shocking. After imposing sentence, a federal judge must inform the

04/11/00 13:00 FAX 3375935309 JUDGE EUGENE DAVIS → RABIER ☑004

defendant of his right to appeal and must offer an opportunity to have the clerk of court file a notice of appeal on defendant's behalf. Fed. R. Crim. P. 32(c)(5). Hirsch's lawyer has stated that, when asked whether the clerk should file an appeal on his behalf, Hirsch answered yes. But the clerk did nothing, and by the time counsel realized this it was too late.

This is shocking for at least two reasons. One is the clerk's failure to perform a ministerial act whose omission could have serious adverse consequences for a criminal defendant. The other is counsel's failure to ensure that a notice of appeal was filed. Defendants have 10 days to appeal, with an extension to 40 days available for "excusable neglect or good cause". Fed. R. App. P. 4(b)(4). The clerk's failure would have been "good cause" for counsel to file a belated appeal, so all counsel had to do was check the docket any time within 40 days—but Hirsch's lawyer did not take that simple precaution. The absence of a docketing notice from this court would have put a prudent lawyer on guard. Both the Rules of Appellate Procedure and the Circuit Rules impose duties on counsel that begin with the notice of appeal. For example, the appellant's lawyer must file a docketing statement within seven days after the notice of appeal. Circuit Rule 3(c)(1). An appellant must order any relevant transcript within 10 days of the notice of appeal. Fed. R. App. P. 10(b)(1). In this circuit, the appellant's brief is due 40 days after the appeal is docketed, Circuit Rule 31(a), so counsel must ascertain the docketing date. Had Hirsch's lawyer taken any steps to comply with these rules, he would have learned that no notice of appeal had been filed. But for approximately 100 days after Hirsch's sentencing, his lawyer did nothing.

Not until May 20, 1999, did Hirsch's lawyer (Douglas A. Forsyth, of St. Louis, Missouri) bestir himself on behalf of his client. On May 20 he filed in the district court a motion for permission to take an untimely appeal; the next day Forsyth filed a notice of appeal. On June 11 the district judge entered an order granting Forsyth's motion and stating that "the May 21, 1999, Notice of Appeal is deemed timely." That decision is ineffectual. Appellate Rule 4(b)(4) provides that a district court may "extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b)." Rule 26(b)(1) adds that a district court lacks power to extend the time for a notice of appeal, except to the extent provided in Rule 4. Thus the maximum lawful extension would have been to March 15, 1999, a date long gone when Forsyth asked for extra time. (The outer limit is March 15, rather than March 18, because the extra days added to an original period that ends on a weekend or holiday are not tacked onto the extension period.)

When purporting to grant Forsyth additional time to file a notice of appeal, the district court did not make findings of fact concerning Forsyth's assertion that Hirsch asked the clerk to file a notice of appeal on his behalf. If such a request was made, then the district court needs to change its procedures to ensure compliance with Rule 32(c)(5). Failure to file a notice of appeal, after the defendant so requests in open court, is rare and may be unique; we have been unable to find any other case in which judges have had to ponder how to proceed when the clerk does not carry out that mechanical step. One possibility would be to declare that what *should* have been done will be treated *as* done; then we would proceed as if a notice of appeal had been filed on January 29, 1999. That approach would protect defendants from bureaucratic errors, but it could not be reconciled with the Rules of Appellate Procedure, which require an actual notice of appeal rather than a virtual one, or with the principle that a timely notice of appeal is essential to appellate jurisdiction. *Browder v. Director, Department of Corrections*, 434 U.S. 257, 264 (1978). Treating as done whatever *should* have been done would demolish the Rules' timetables. It would, for example, treat a client's request to his lawyer to file a notice of appeal as getting

04/11/00 13:00 FAX 3375935309 JUDGE EUGENE DAVIS → RABIER 005

the appeal under way, whether the lawyer filed the notice or not. Even limiting the approach to public officials would require many rules and doctrines to be rewritten. Consider, for example, Fed. R. Crim. P. 29(c), which limits to seven days the time a defendant has to file a motion for acquittal (and also limits the period within which the judge may extend that time). *Carlisle v. United States*, 517 U.S. 416 (1996), holds that the court lacks authority to grant a motion filed one day late, even on the assumption that it should have been filed earlier and that the delay did not cause prejudice. A principle that the court will treat a motion (or notice of appeal) as filed when it *should* have been filed would require a different outcome in *Carlisle* and many similar cases. Even the "unique circumstances doctrine," an approach that treats some steps in the appellate process as if they had been done on time, applies only when a court expressly assures counsel or a litigant that a step has been taken correctly, *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 178-79 (1989), and no express assurance is evident here.

Unsettling as it is to disadvantage Hirsch because of what may have been a clerical error, we have no choice but to dismiss this appeal. But just as in *United States v. Marbley*, 81 F.3d 51 (7th Cir. 1996), dismissal does not bring proceedings to a close; quite the contrary. Strict enforcement of a rule meant to expedite appellate resolution will breed delay, for Hirsch is not out of options. He may now file a motion under 28 U.S.C. §2255, contending that Forsyth's failure to ensure that the clerk followed through deprived Hirsch of the assistance of counsel guaranteed by the sixth amendment. See *Roe v. Flores-Ortega*, 68 U.S.L.W. 4132 (U.S. Feb. 23, 2000); *United States v. Nagib*, 56 F.3d 798 (7th Cir. 1995); *Castellanos v. United States*, 26 F.3d 717 (7th Cir. 1994). If the district court finds that Forsyth was asleep on the job, then the court must vacate the judgment and reimpose the sentence to permit an appeal.

Of course, the judge cannot overlook the possibility that Hirsch did *not* make a timely request for an appeal on his behalf. If he did not make a request in open court, or to counsel within 10 days, then relief is not available under §2255. See *United States v. Nagib*, 44 F.3d 619 (7th Cir. 1995); *United States v. Mosley*, 967 F.2d 242 (7th Cir. 1992).

The transcript of the sentencing proceedings, which was prepared at our request, does not jibe with Forsyth's representations to the district court (or to us). The district judge informed Hirsch: "If you so request, a notice of appeal will be docketed by the clerk at this time. Do you understand that?" Hirsch answered "yes" but did not go on to make the request. If the transcript is in error and Hirsch did make a timely request in open court, or if he asked Forsyth within 10 days to file an appeal, then Hirsch has received ineffective assistance of counsel. But if there was no request within 10 days in or out of court, then Hirsch cannot change his mind later and blame his lawyer. See *Flores-Ortega*, 68 U.S.L.W. at 4133-35.

We observed in *Marbley* that this multi-step process poorly serves the interests of both defendants and the judicial system. We are sending this opinion to the Judicial Conference's Standing Committee on Rules of Practice and Procedure so that the bodies charged with proposing changes to the federal rules may consider whether it would be prudent to amend either Criminal Rule 32(c)(5) or Appellate Rule 4(b)(4) to provide for the possibility that the clerk will fail to comply with a request to file a notice of appeal. Perhaps it would be beneficial to amend Appellate Rule 4(b)(4) to provide that an appeal is timely if, within 10 days after being sentenced, a criminal defendant informs either court or counsel of his desire to appeal. Our function today, however, is not to draft new rules but to implement the rules as they exist. Under those rules, Hirsch's appeal must be dismissed for want of jurisdiction.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

Item II D 10

MEMO TO: Members, Criminal Rules Committee

FROM: Professor Dave Schlueter, Reporter

RE: Possible Amendments to Rule 32.1 re Victim Allocution

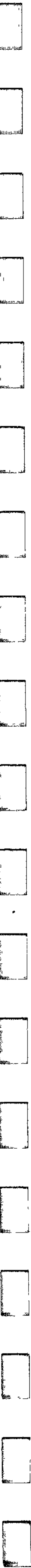
DATE: September 2, 2003

In 1997-98, Congress was in the process of considering legislation concerning victim allocution. As reflected in the attached minutes of the October 1997 meeting, Judge Davis, former chair of the Committee, appointed a subcommittee to consider whether Rules 11, 32, and 32.1 should be amended to provide for victim allocution. At that meeting, the Committee agreed to continue the subcommittee and monitor any further legislative developments in the area, and be prepared to respond to Congress.

This issue is listed on the Criminal Rules docket as "pending." At some unspecified point, the subcommittee was apparently discontinued (probably as the original members left the Committee).

Since then, the Committee has actively considered victim allocution and has proposed additional amendments to Rule 32. No similar amendments have been suggested with regard to Rule 32.1.

This matter is on the agenda for the October meeting. I recommend that this matter be listed as "completed," with no further action contemplated at this time.



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

October 13-14, 1997
Monterey, California

The Advisory Committee on the Federal Rules of Criminal Procedure met at Monterey, California on October 13th and 14th, 1997. 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, October 13, 1997. The following persons were present for all or a part of the Committee's meeting:

Hon. W. Eugene Davis, Chair
Hon. D. Lowell Jensen
Hon. Edward E. Carnes
Hon. George M. Marovich
Hon. David D. Dowd, Jr.
Hon. D. Brooks Smith
Hon. John M. Roll
Hon. Tommy E. Miller
Hon. B. Waugh Crigler
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; Mr. Peter McCabe and Mr. John Rabiej from the Administrative Office of the United States Courts; Mr. David Pimentel, Judicial Fellow at the Administrative Office, and Ms. Mary Harkenrider from the Department of Justice.

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

V. CRIMINAL RULE APPROVED BY SUPREME COURT AND PENDING BEFORE CONGRESS

The Reporter informed the Committee that the Supreme Court had approved an amendment to Rule 58 and that absent any further action by Congress, the amendment would become effective on December 1, 1997.

VI CRIMINAL RULES CURRENTLY UNDER CONSIDERATION BY ADVISORY COMMITTEE

A. Report of Subcommittee on Victim Allocution Legislation; Possible Amendments to Rules 11, 32, and 32.1.

Judge Davis offered introductory comments on pending legislation which would amend a number of criminal rules to provide for notice to victims and victim allocution when the accused enters a plea, at sentencing, and at revocation of probation proceedings. He noted that in the past the Committee had been reluctant to provide for victim allocution but that the proposed legislation provided the Committee with an opportunity to re-examine its position. He noted that a subcommittee consisting of Judge Dowd (Chair), Judge Smith, Mr. Josefsberg, and Mr. Pauley had been appointed to study the legislation and recommend a course of action to the Committee.

Speaking for the subcommittee, Judge Dowd provided additional information on the legislation, and the fact that it had apparently been offered as an alternative to a move to amend the Constitution. He added that under the legislation, the Judicial Conference would be given a short period of time to respond to the proposed changes and that the role of the subcommittee had been to review the proposed changes and be prepared to recommend changes to the full Committee for its consideration.

Mr. Rabiej believed that the legislation was not going to be passed in the current session of Congress. Mr. Pauley agreed but indicated that the legislation might be passed in the next session. He believed that the Committee might be overreacting to the proposed legislation because it disregards the legislation proposed by the President and the it disregards the fact that the legislation will only move at the behest of the chairs of the congressional committees on the judiciary. He agreed, however, that the subcommittee should continue to monitor the legislation.

Judge Jensen observed that the legislation put the committee in the unique posture of requiring the Judicial Conference to react to specific amendments. Judge Stotler echoed that view and indicated that once again there was a question about the fundamental role of Congress in the rule-making enterprise. Justice Wathen noted that from a State's perspective, there was concern that the victim's movement might result in a constitutional amendment. Mr. Josefsberg opined that the proposed legislation seemed to require very little, e.g., notice to victims of pending hearings and an opportunity to be heard. Judge Marovich agreed with that assessment and saw little danger in the legislation. Several members indicated that under the circumstances, it would be wise to keep the subcommittee in place and ready to react to the legislation. Judge Jensen added that for the most part the federal system was catching up to what was already in place in many state and local jurisdictions. Judge Davis indicated that it would be appropriate, absent the need for more immediate action, to discuss the subcommittee's proposals at the Spring meeting. Following additional discussion concerning the definition of "victim" and "alleged victim" in the proposed legislation, Judge Carnes moved that the Committee express the view that it was not opposed to addressing the legislation. Mr. Josefsberg seconded the motion which carried by a vote of 10 to 1, with one abstention.

B. 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. Following brief discussion on proposed style changes to the rule, Mr. Josefsberg moved that the rule be amended. Judge Miller seconded the motion. Following additional discussion on the motion, several members questioned whether the amendment was even necessary. Judge Crigler observed that he had never seen the problem but Judge Miller indicated that in larger cities, it would help if a magistrate judge had the authority to act

Item II D 4

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **ABA Proposed Amendment to Rule 35**

DATE: **September 2, 2003**

In 2001, the ABA submitted comments on the proposed restyled rules and offered two suggested amendments — one to Rule 6 concerning presence of counsel in the grand jury proceedings, and a proposed amendment to Rule 35, which would permit the defendant to move for a reduction of sentence.

The attached letter addresses both proposed amendments. This matter was referred to the Chair and Reporter and although the Committee has never expressly discussed this matter, it appears on the Criminal Rules docket as "pending."

This item will be on the agenda for the October meeting.

AMERICAN BAR ASSOCIATION

Governmental Affairs Office
740 Fifteenth Street, NW
Washington, DC 20005-1022
(202) 662-1760
FAX (202) 662-1762
(202) 662-1032

GOVERNMENTAL AFFAIRS OFFICE

DIRECTOR
Robert D Evans
(202) 662-1765
rdevans@staff abanet org

SENIOR LEGISLATIVE COUNSEL
Denise A Cardman
(202) 662-1761
cardmand@staff abanet org

Kevin J Driscoll
(202) 662-1766
driscollk@staff abanet org

Lillian B Gaskin
(202) 662-1768
gaskinl@staff abanet org

LEGISLATIVE COUNSEL
R Larson Frisby
(202) 662-1098
frisbyr@staff abanet org

Kristi Gaines
(202) 662-1763
gainesk@staff abanet org

Mondi Kumbula-Fraser
(202) 662-1789
kumbulam@staff abanet org

Ellen McBarnette
(202) 662-1767
mcbarnee@staff abanet org

E Bruce Nicholson
(202) 662-1769
nicholsonb@staff abanet org

DIRECTOR GRASSROOTS OPERATIONS
Julie M Strandlie
(202) 662-1764
strandlj@staff abanet org

EXECUTIVE ASSISTANT
Diane Crocker-McBrayer
(202) 662-1777
dcrocker@staff abanet org

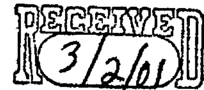
INTELLECTUAL PROPERTY LAW CONSULTANT
Hayden Gregory
(202) 662-1772
gregoryh@staff abanet org

STAFF DIRECTOR FOR STATE LEGISLATION
Kenneth Goldsmith
(202) 662-1780
goldsmithk@staff abanet org

STAFF DIRECTOR FOR INFORMATION SERVICES
Sharon Greene
(202) 662-1014
greenes@staff abanet org

EDITOR WASHINGTON LETTER
Rhonda J McMillion
(202) 662-1017
mcmillionr@staff abanet org

March 2, 2001



01-CR-B

Peter G. McCabe
Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Administrative Office of the United States Courts
Washington, DC 20544

Dear Mr. McCabe:

The Advisory Committee on Criminal Rules has published for comment amendments to Rules 6 and 35 of the Federal Rules of Criminal Procedure.

On behalf of the American Bar Association, it is requested that the Committee consider the following Association views related to these Rules.

<u>Rule 6</u>

While the Advisory Committee has proposed only stylistic changes to Rule 6, the American Bar Association asks that the Committee consider the Association's long standing policy related to this Rule. This policy supports allowing any witness who appears before a grand jury and testifies to be accompanied by counsel. The ABA policy provides that the attorney may only be present when the witness is present. Furthermore, the attorney would be present only to advise the client, not to address the grand jury or otherwise take part in the proceedings before it.

Since the Advisory Committee is making some much-needed changes to the Federal Rules of Criminal Procedure, the Association suggests that the Committee add a provision allowing the presence of a witness' counsel when the witness appears before the grand jury. This change would bring the Federal Rules of Criminal Procedure in line with those States that have already allowed witnesses to appear with counsel during grand jury proceedings. Further, this would enhance the fairness of the grand jury process without injury to the prosecution's case.

A copy of the relevant Association policy is enclosed.

Rule 35

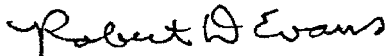
The Advisory Committee recommends certain clarifying, yet substantive amendments to Rule 35.

The Association recommends that the Committee consider making further amendments to allow defense counsel to move for reduction and corrections of sentence. Prior to passage of the Comprehensive Crime Control Act of 1984, the Rule provided that defense counsel could make such a motion for the court's consideration.

Enclosed is the relevant American Bar Association policy on this matter. Although adopted in 1987, the principles it espouses are still valid. The accompanying report, which is not a part of the official ABA policy, may be useful to the Committee in considering this matter.

The American Bar Association appreciates the opportunity to transmit its views on these matters being considered by the Advisory Committee.

Sincerely,



Robert D. Evans

/RE

Enclosures

0892 wpd

Item II D 12

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Proposed Amendment to Rule 40(c) re Setting Conditions for Release**

DATE: **September 2, 2003**

Attached is a letter from Magistrate Judge Collings in which he proposes an amendment to Rule 40(c). His attached letter is self-explanatory.

This matter was referred initially to the Chair and Reporter and is currently listed on the Criminal Rules docket as "pending."

This item will be on the agenda for the October meeting.

03-CR-A

RECEIVED 1/24/03

United States District Court
District of Massachusetts
United States Courthouse
1 Courthouse Way, Suite 6420
Boston, Massachusetts 02210

Chambers of
Robert B. Collings
United States Magistrate Judge

Telephone No.
(617) 748-9229

January 23, 2003

Peter G. McCabe, Esquire
Secretary to the Rules Committee
Administrative Office of United States Courts
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Dear Mr. McCabe:

I recently encountered the following situation:

(a) A defendant who had been released on conditions of release in Pittsburgh was allowed to reside in Massachusetts while on release.

(b) While on release in Massachusetts, he allegedly violated those conditions of release.

(c) The magistrate judge in Pittsburgh issued a warrant for the defendant's arrest pursuant to 18 U.S.C. § 3148(b).

(d) The defendant was arrested on the Pittsburgh warrant in Massachusetts and brought before me.

(e) At the hearing, the Government took the position that I had no power, were I so inclined, to set conditions of release which would govern the defendant's return to Pittsburgh and that I had to detain the defendant and issue an Order of Removal if identity was found.

The reason this factual situation created a problem was that Rule 40, as it now reads after the December 1, 2002 amendments, deals only with arrest in another district for **failing to appear** and not with arrest in another district for violation of a condition of release other than for failing to appear.

After hearing from counsel and researching the issue, I concluded that the Government was correct. I issued an opinion in the case, *United States v. Zhu,* explaining the problem and the reasons for my conclusion, and I enclose a copy.

As I state in the opinion, it seems to me anomalous that if someone is arrested for failing to appear - perhaps the most serious violation of release conditions - the magistrate judge has authority to set new conditions of release pursuant to Rule 40(c). But if a defendant is arrested for a less serious violation - such as a minor violation of a curfew - the magistrate judge has no power to set new conditions of release.

Accordingly, I propose that Rule 40 be amended as follows; the suggested additions are in italics:

Rule 40. **Arrest for Failing to Appear in Another District** *or for Violation of Conditions of Release Set in Another District*

(a) **In General.** If a person is arrested under a warrant issued in another district for failing to appear - as required by the terms of that person's release under 18 U.S.C. §§ 3141-3156 or by subpoena - *or for otherwise failing to comply with the terms of the release set in the other district,* the person must be taken without unnecessary delay before a magistrate judge in the district of arrest.

The proposed amendment would have the effect of granting magistrate judges the same powers they now have in cases of arrest for failure to appear in another district to cases of arrest for failure to comply with other conditions of release set in another district.

Please advise if you are in need of any further information. As always, I'm looking forward to seeing you in March.

Very truly yours,

ROBERT B. COLLINGS
United States Magistrate Judge

Enclosure.

Item II D 13

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Proposed Amendment to Rule 41 re Transcript of Sworn Oral Testimony**

DATE: **September 2, 2003**

In 1998, Judge David Dowd (a member of the Committee at the time) recommended in a letter (attached) that the Committee amend Rule 41 regarding preparation of a transcript of sworn testimony presented to the magistrate in requesting a search warrant. My original memo on the subject is also attached.

The attached copy of the minutes from the April 1998 meeting reflects the Committee's discussion of the proposed change. Following discussion, the Committee decided "not to take any action to amend Rule 41 at this time."

The proposal has not been considered again and remains on the Criminal Rules docket as being "deferred indefinitely." I recommend that the item be listed as "completed," with no expectation that the Committee will need to address the item any further.

This matter is on the agenda for the October meeting.

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

January 12, 1998

BY FACSIMILE AND U.S. MAIL
Professor David A. Schlueter
St. Mary's University
School of Law
One Camino Santa Maria
San Antonio, TX 78228-8602

Dear David:

I sat on the 6th Circuit in December. We have under consideration a case dealing with a search warrant based on oral testimony under the provisions of Criminal Rule 41(c)(2)(A). Unfortunately, the provisions of 41(c)(2)(D) were not followed. There is neither a recording of the conversation between the officer and the magistrate-judge nor a stenographic or longhand verbatim record of the oral testimony given in support of the issuance of the warrant.

Nineteen months after the search the affiant submitted an affidavit describing the oral testimony presented to the magistrate-judge.

I have been reviewing the committee notes for the 1977 amendment which added 41(c)(2) and the notes state the four requirements for the subdivision (c)(2) warrant. The fourth requirement is described as follows:

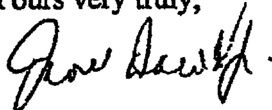
> (4) Return of the duplicate original warrant, and the original warrant must conform to subdivision (d). The transcript of the sworn oral testimony setting forth the grounds for issuance of the warrant must be signed by affiant in the presence of the magistrate and filed with the court.

I have reviewed Rule 41 and I am unable to find in the rule the requirement that "the transcript of the sworn oral testimony setting forth the grounds for issuance of the warrant must be signed by the affiant in the presence of the magistrate and filed with the court". Am I missing something? Or is this an example of an incorrect note accompanying a rule?

I would like to discuss this with you at your earliest convenience. We have done research on this type of search warrant, but to my knowledge no one has picked up on what I have called the fourth requirement.

We are sending this letter by fax.

Yours very truly,



David D. Dowd, Jr.
United States District Judge

DDD:dmw

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

FROM: **Professor D. Schlueter, Reporter**

RE: **Consideration of an Amendment to Rule 41(c)(2)(D)**

DATE: **March 27, 1998**

Judge Dowd has suggested that the Committee consider a possible amendment to Rule 41(c)(2)(D). He 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. The majority concluded that 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 dissented.

As Judge Dowd notes in his dissent and in his correspondence, 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 suggests that the Committee consider placing that requirement back into Rule 41.

He also suggests that the rule be amended to provide that a district judge is permitted to issue a warrant. The current rule already provides that a warrant may be issue by a "federal magistrate judge," and Rule 54(c) indicates that a "federal magistrate judge" includes a "judge of the United States" which in turn includes a "district judge."

This matter is on the agenda for the April meeting.

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

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

Item II D 14

MEMO TO: Members, Criminal Rules Committee

FROM: Professor Dave Schlueter, Reporter

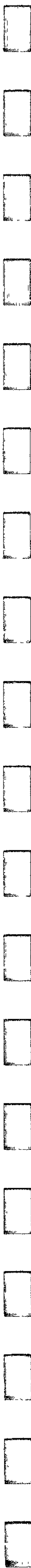
RE: Uniform Effective Date for Local Rules

DATE: September 2, 2003

At its June 1997 meeting members of the Standing Committee recommended that the various Advisory Committees consider adoption of a uniform effective date for any local rules adopted under Rule 57. As the attached minutes of that meeting, reflect, the matter was referred to each of the Advisory Committees for their consideration.

Although the Committee has discussed the local rules from time to time, I have no recollection that the Committee has specifically addressed this particular issue. It remains on the Criminal Rules docket as being "deferred indefinitely."

This item will be on the agenda for the October meeting.



COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 19-20, 1997
Washington, D C.

Minutes

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D C on Thursday and Friday, June 19-20, 1997 The following members were present·

Judge Alicemarie H Stotler, Chair
Judge Frank W Bullock, Jr.
Judge Frank H. Easterbrook
Professor Geoffrey C. Hazard, Jr
Judge Phyllis A. Kravitch
Gene W Lafitte, Esquire
Judge James A. Parker
Alan W Perry, Esquire
Sol Schreiber, Esquire
Judge Morey L. Sear
Chief Justice E. Norman Veasey
Acting Deputy Attorney General Seth P Waxman
Judge William R. Wilson

Alan C. Sundberg, Esquire was unable to be present Mr. Waxman was able to attend the meeting only on June 19. Ian H. Gershengorn, Esquire and Roger A. Pauley, Esquire represented the Department of Justice on June 20

Supporting 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· Mark D. Shapiro, senior attorney in that office. and Patricia S. Channon, senior attorney in the Bankruptcy Judges Division of the Administrative Office

Representing the advisory committees at the meeting were:

Advisory Committee on Appellate Rules -
  Judge James K. Logan, Chair
  Professor Carol Ann Mooney, 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

Judge Stotler stated that she did not favor directing the advisory committees to accomplish a specific task by a specific date. Rather, she emphasized the need for the advisory committees to make recommendations on the best ways to deal with the attorney conduct issues.

The committee agreed to have each advisory committee consider the proposed draft rules and supporting materials presented by Professor Coquillette and present status reports to the Standing Committee at its June 1998 meeting.

LOCAL RULES OF COURT

Uniform Renumbering of Local Rules

Professor Squiers reported that in March 1996 the Judicial Conference had required the courts to renumber their local rules in accordance with the national rules. As of June 1997, 41% of the district courts had renumbered their rules, and by December 1997, 58% had completed the renumbering. She said that she had contacted the remaining district courts by telephone to determine whether they were making progress in renumbering and had received largely positive responses.

Several members stated that the renumbering requirement had been very helpful in motivating the courts to review their local rules, improve them, and eliminate inconsistencies. They also said that the project had fostered the goal of greater national uniformity and would prove to be of substantial benefit to the bar.

Impact on Local Rules of the Expiration of the Civil Justice Reform Act

Professor Squiers reported that with the recent sunsetting of the Civil Justice Reform Act, she had examined the local CJRA plans of all the district courts. She found that 31% of the district plans referred to the court's local rules and specified the court's interest in eventually integrating the content of the plans into the court's local rules. The other plans were silent on the matter. Accordingly, she telephoned 12 district courts randomly and inquired whether they anticipated incorporating the content of their CJRA plans into their local rules or intended to use their CJRA plans in another fashion. She reported that seven of the 12 courts had already taken action to modify their local rules as of December 1997. Three of the courts said that they anticipated doing so at some point, and the remaining two districts reported that they contemplated taking no action.

Other Proposed Changes in Local Rule Requirements

A number of members added that it would also be beneficial to require courts to send their local rules to the Administrative Office for posting on the Internet. One participant suggested that consideration be

given to amending the Rules Enabling Act to require that all local rules take effect on or shortly after December 1 of each year, in coordination with the effective date of amendments to the national rules. Judge Garwood responded that the Advisory Committee on Appellate Rules had placed that suggestion on its agenda Another participant said that consideration might be given to amending the national rules to provide that local rules may not take effect until they are filed electronically with the Administrative Office

Judge Stotler agreed to refer to each of the advisory committees the various suggestions raised at the meeting regarding the effective date and the effectiveness of local court rules.

Judge Stotler requested that Professor Squiers and the Local Rules Project study the impact on local court rules of the 1995 amendments to Fed. R Civ. P 83, Fed. R. Crim P 57, Fed. R. Bankr. P. 8018 and 9029, and Fed R. App. P. 47.

Limitations on the Number of Local Rules

Judge Wilson stated that there were too many local rules of court and too many local procedural variations. Therefore, he recommended that the rules committees take appropriate action to promote greater uniformity in federal practice and place limits on local rulemaking authority. **To that end, he moved to request that the Advisory Committee on Civil Rules study amending Fed. R. Civ. P. 83 by striking the words "imposing a requirement of form" from subdivision (2) and adding a new subdivision (3) that would prohibit a court from adopting more than 20 local rules, including discrete subparts.**

The committee thereupon engaged in an extensive discussion regarding the number, scope, and merit of local rules. Some members stated that a number of courts were strongly attached to their own practices and would resist efforts to limit local rulemaking authority. They noted that the district courts had taken a wide variety of approaches to local rules. Some courts have very few local rules, while others have promulgated lengthy and detailed sets of rules.

Several members stated that there had been a long-standing consensus among the members of both the Standing Committee and the advisory committees that (1) there were too many local rules, and (2) local rules should fill the gaps in the national rules, rather than legitimize local variations in federal practice. Several pointed out that the rules committees had debated these issues extensively in the past and had concluded that it would not be feasible to eliminate local variations simply by limiting local rules. Local procedural variations would likely continue in effect through the use of standing orders, individual case orders, and other, less formal mechanisms.

A number of members pointed out that the 1995 amendments to Fed. R. Civ. P. 83 -- together with companion amendments to Fed. R. Crim. P. 57, Fed. R. Bankr. P. 8018 and 9029, and Fed. R. App. P. 47 -- had been designed expressly to foster national uniformity by requiring that:

1. all local rules be consistent with the national rules and federal statutes;

2. all local rules conform to a national numbering system;

3. no local rule imposing a requirement of form be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement; and

Item III A

LEGISLATION AFFECTING THE FEDERAL RULES OF PRACTICE AND PROCEDURE[1]
108th Congress

SENATE BILLS

- S. 151 - *Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003*
  - Introduced by: Hatch
  - Date Introduced: 1/13/03
  - Status: Read twice and referred to the Senate Committee on the Judiciary (1/13/03). Senate Judiciary Committee reported favorably with amendments (1/30/03). Report No. 108-2 filed (2/11/03). Passed Senate by a vote of 84-0 (2/24/03). Referred to House Judiciary Committee (2/25/03). Referred to House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security (3/6/03). House inserted own version of bill. Chairman Sensenbrenner requested conference (3/27/03). Conferees appointed (3/27/03, 3/31/03, 4/3/03). Conference report 108-66 filed (4/9/03). House agreed to conference report by a vote of 400-25 (4/10/03). Senate agreed to conference report by a vote of 98-0 (4/10/03). Signed by President (4/30/03) (Pub. L. 108-21).
  - Related Bills: S. 885
  - Key Provisions:

    — Section 610 amends **Criminal Rule 7(c)(1)** to permit the naming of an unknown defendant in an indictment so long as that defendant has a particular DNA profile as defined in 18 U.S.C. § 3282.

- S. 274 - *Class Action Fairness Act of 2003*
  - Introduced by: Grassley
  - Date Introduced: 2/4/03
  - Status: Read twice and referred to the Senate Committee on the Judiciary (2/4/03). Judiciary Committee approved the bill with two amendments by a vote of 12-7 and ordered it reported out of committee (4/11/03). Placed on Senate Legislative Calendar (6/2/03). Report No. 108-123 filed (7/31/03).
  - Related Bills: None
  - Key Provisions:

    — Section 3 amends **Part V of title 28, U.S.C.**, to include a new chapter on Consumer Class Action Bill of Rights and Improved Procedures for Interstate Class Actions. The new chapter includes provisions on judicial review and

---

[1] The Congress has authorized the federal judiciary to prescribe the rules of practice, procedure, and evidence for the federal courts, subject to the ultimate legislative right of the Congress to reject, modify, or defer any of the rules. The authority and procedures for promulgating rules are set forth in the Rules Enabling Act. 28 U.S.C. §§ 2071-2077.

approval of noncash settlements, prohibition on the payment of bounties, review and approval of proposed settlements (protection against loss by class members and prohibition against discrimination based on geographic location), publication of settlement information in plain English, and notification of proposed settlement to appropriate state and federal officials.

— Section 4 amends **section 1332 of title 28, U.S.C.**, to give district courts original jurisdiction of any civil action in which the amount in controversy exceeds $2 million, exclusive of interest and costs, and is a class action in which (1) any plaintiff class member is a citizen of a state different from any defendant, (2) any plaintiff class member is a foreign state or subject of a foreign state and any defendant is a citizen of a state, or (3) any plaintiff class member is a citizen of a state and any defendant is a foreign state or a subject of a foreign state. The above provisions do not apply in any civil action where (a) the substantial majority of the plaintiff class and the primary defendants are citizens of the state where the action was originally filed, and the claims asserted will be governed primarily by the laws of the state where the action was originally filed; (b) the primary defendants are states, state officials, or other governmental entities; or (c) the number of all members of all proposed plaintiff classes in the aggregate is less than 100.

— Section 5 provides for removal of interstate class actions to a United States district court and for review of orders remanding class actions to State courts.

— Section 6 directs the Judicial Conference of the United States to submit reports to the Senate and House Judiciary Committees on class action settlements. In these reports, the Judicial Conference shall include the following: (1) recommendations on the "best practices" that courts can use to ensure that settlements are fair; (2) recommendations to ensure that the fees and expenses awarded to counsel in connection with a settlement appropriately reflect the time, risk, expense, and risk that counsel devoted to the litigation; (3) recommendations to ensure that class members are the primary beneficiaries of settlement; (4) the actions that the Judicial Conference will take to implement its recommendations.

[As amended, only class actions involving at least $5 million would be eligible for federal court. Further, in class actions where more than two-thirds of the plaintiffs are from the same state, the case would remain in state court automatically. In class actions where between one-third and two-thirds of the plaintiffs are from the same state as the defendant, the court has the discretion to accept removal or remand the case back to state court based on five specified factors. The second amendment deleted language from Section 4 that classified "private attorney general" as class actions.]

- S. 413 - *Asbestos Claims Criteria and Compensation Act of 2003*
  - Introduced by: Nickles
  - Date Introduced: 2/13/03

• Status: Read twice and referred to the Senate Committee on the Judiciary (2/13/03).
• Related Bills: H.R. 1586
• Key Provisions:

— Section 4 states that no person shall file a civil action alleging a nonmalignant asbestos claim unless the person makes a prima facie showing that he or she suffers from a medical condition to which exposure to asbestos was a substantial contributing factor.

— Section 5 provides that a court may consolidate for trial any number and type of asbestos claims with the consent of all parties. Without such consent, the court may consolidate for trial only those claims relating to the same exposed person and that person's household.

— Section 5 also provides that a plaintiff may file a civil action in the state of his or her domicile or in the state where the plaintiff was exposed to asbestos, such exposure being a substantial contributing factor to the physical impairment upon which plaintiff bases his or her claim.

— Section 5 further directs that any party may remove the action to federal court if the state court fails to comply with the procedural requirements in section 5. The federal court shall have jurisdiction of all civil actions removed, without regard to the amount in controversy and without regard to the citizenship or residence of the parties.

- S. 554 - *A bill to allow media coverage of court proceedings*
  - Introduced by: Grassley
  - Date Introduced: 3/6/03
  - Status: Referred to the Senate Judiciary Committee (3/6/03). Senate Judiciary Committee reported bill without amendment favorably (5/22/03).
  - Related Bills: None
  - Key Provisions:

— Section 2 states that the presiding judge of an appellate or district court has the discretionary authority to allow the photographing, electronic recording, broadcasting, or televising to the public of any court proceedings over which that judge presides.

— Section 2 also directs the presiding district court judge to inform each non-party witness that the witness has the right to request that his or her image and voice be obscured during the witness's testimony.

— Section 2 specifies that the Judicial Conference may promulgate advisory guidelines on the management and administration of media access to court proceedings.

— Section 3 contains a "sunset" provision that terminates the authority of district court judges to allow media access three years after the date the Act is enacted.

- S. 644 - *Comprehensive Child Protection Act of 2003*
  - Introduced by: Hatch

- Date Introduced: 3/18/03
- Status: Referred to the Senate Judiciary Committee (3/18/03).
- Related Bills: None
- Key Provisions:

  — Section 6 amends **Evidence Rule 414(a).** The amendment would allow the admission of evidence, in a child molestation case, that the defendant had committed the offense of possessing sexually explicit materials involving a minor. Section 6 also amends the definition of a "child" to include those persons below the age of 18 (instead of the current age of 14).

  — Section 7 amends **28 U.S.C. chapter 119** by adding a new section 1826A that would make the marital communication privilege and the adverse spousal privilege inapplicable in any federal proceeding in which one spouse is charged with a crime against (a) a child of either spouse, or (b) a child under the custody or control of either spouse.

- S. 805 - *Crime Victims Assistance Act of 2003*
  - Introduced by: Leahy
  - Date Introduced: 4/7/03
  - Status: Read twice and referred to the Senate Judiciary Committee (4/7/03).
  - Related Bills: None
  - Key Provisions:

    — Section 103 amends **Criminal Rule 11** by inserting a new subdivision that requires the court, before entering judgment following a guilty plea from the defendant, to ask whether the victim has been consulted on the guilty plea and whether the victim has any views on the plea. Section 103 also directs the Judicial Conference to submit a report to Congress, within 180 days after enactment, recommending amendments to the **Criminal Rules** that give victims the opportunity to be heard on whether the court should accept the defendant's guilty or no contest plea.

    — Section 105 amends **Criminal Rule 32 of the Federal Rules of Criminal Procedure** by affording victims an "enhanced" opportunity to be heard at sentencing. Section 105 also directs the Judicial Conference to submit a report to Congress, within 180 days after enactment, recommending amendments to the **Criminal Rules** that give victims enhanced opportunities to participate "during the pre-sentencing and sentencing phase of the criminal process."

- S. 817 - *Sunshine in Litigation Act of 2003*
  - Introduced by: Kohl
  - Date Introduced: 4/8 /03
  - Status: Read twice and referred to the Senate Judiciary Committee (4/8/03).
  - Related Bills: None
  - Key Provisions:

    — Section 2 amends **28 U.S.C. chapter 111** by inserting a new section 1660.

New section 1660 states that a court shall not enter an order pursuant to **Civil Rule 26(c)** that (1) restricts the disclosure of information through discovery, (2) approves a settlement agreement that would limit the disclosure of such agreement, or (3) restricting access to court records in a civil case unless the court conducts a balancing test that weighs the litigants' privacy interests against the public's interest in health and safety.
— Section 3 provides that the amendments shall take effect (1) 30 days after the date of enactment, and (2) apply only to orders entered in civil actions or agreements entered into after the effective date.

- S. 885 - *Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003*
  - Introduced by: Kennedy
  - Date Introduced: 4/10/03
  - Status: Read twice and referred to the Senate Committee on the Judiciary (4/10/03).
  - Related Bills: S. 151
  - Key Provisions:

    — Section 610 amends **Criminal Rule 7(c)(1)** to permit the naming of an unknown defendant in an indictment so long as that defendant has a particular DNA profile as defined in 18 U.S.C. § 3282.

- S. 1023 - *To increase the annual salaries of justices and judges of the United States*
  - Introduced by: Hatch
  - Date Introduced: 5/7/03
  - Status: Read twice and referred to the Senate Committee on the Judiciary (5/7/03). Ordered to be reported with amendments favorably (5/22/03). Placed on Senate Legislative Calendar (6/18/03).
  - Related Bills: S. 554

    — Section 3 authorizes the presiding judge of an appellate or district court to allow the photographing, electronic recording, broadcasting, or televising to the public of any court proceedings over which that judge presides. Section 3 also directs the presiding district judge to inform each non-party witness that the witness has the right to request that his or her image and voice be obscured during the witness's testimony. Section 3 provides that the Judicial Conference may promulgate advisory guidelines on the management and administration of the above photographing, televising, broadcasting, or recording of court proceedings. The authority of a district judge under this act shall terminate 3 years after the date of enactment of the act.

- S. 1125 - *Fairness in Asbestos Injury Resolution Act of 2003*
  - Introduced by: Hatch
  - Date Introduced: 5/22/03
  - Status: Read twice and referred to the Senate Committee on the Judiciary (5/22/03).

Senate Judiciary Committee held hearing (6/4/03). Markup session held (6/19/03, 6/24/03, 6/26/03). Senate Judiciary Committee reported favorably with amendments (7/10/03). Report No. 108-118 filed (7/30/03). Placed on Senate Calendar (7/30/03).
• Related Bills: None
• Key Provisions:
— Section 101 amends **Part I of title 28, U.S.C.**, to create a new five-judge Article I court called the United States Court of Asbestos Claims. The Act also sets forth procedures governing: filing of claims, medical criteria, awards, funding allocation, and judicial review.
— Section 402 states the Act's effect on bankruptcy laws.
— Section 403 provides that the Act supersedes federal and state law insofar as these laws may relate to any asbestos claim filed under the Act. Section 403 also makes clear that the Act's remedies shall be the exclusive remedy for any asbestos claim filed under any federal or state law.

HOUSE BILLS

● H.R. 538 - *Parent-Child Privilege Act of 2003*
• Introduced by: Andrews
• Date Introduced: 2/5/03
• Status: Referred to the House Committee on the Judiciary (2/5/03). Referred to the Subcommittee on Courts, the Internet, and Intellectual Property (5/5/2003).
• Related Bills: None
• Key Provisions:
— Section 2 amends **Article V of the Federal Rules of Evidence** by establishing a parent-child privilege. Under proposed **new Evidence Rule 502(b)**, neither a parent or a child shall be compelled to give adverse testimony against the other in a civil or criminal proceeding. Section 2 also provides that neither a parent nor a child shall be compelled to disclose any confidential communication made between that parent and that child.

● H.R. 637 - *Social Security Number Misuse Prevention Act*
• Introduced by: Sweeney
• Date Introduced: 2/5/03
• Status: Referred to the House Committees on the Judiciary and Ways and Means (2/5/03). Referred to the House Ways and Means' Subcommittee on Social Security (2/19/03). Referred to the House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security (3/6/03).
• Related Bills: None
• Key Provisions:
— Section 3 amends **chapter 47 of title 18, U.S.C.**, to prohibit the sale, public display, or purchase of a person's social security number without that person's affirmatively expressed consent.
— Section 4 states that the above prohibition does not apply to a "public record."

Section 4 defines "public record" to mean "any governmental record that is made available to the public." (One exception to section 4 is public records posted on the Internet: "Section 1028A shall apply to any public record first posted onto the Internet or provided in an electronic medium by, or on behalf of a government entity after the date of enactment of this section, except as limited by the Attorney General[.]")

— Section 4 also provides that the Comptroller of the United States, in consultation with the Administrative Office of the U.S. Courts, shall conduct a study and prepare a report on the use of social security numbers in public records.

- H.R. 700 - *Openness in Justice Act*
  - Introduced by: Paul
  - Date Introduced: 2/11/03
  - Status: Referred to the House Committee on the Judiciary (2/11/03). Referred to the House Judiciary's Subcommittee on Courts, the Internet, and Intellectual Property (3/6/03).
  - Related Bills: None
  - Key Provisions:

    — Section 2 inserts a new Rule 49 in the Federal Rules of Appellate Procedure. Proposed Rule 49(a) would require the courts to issue a written opinion in the following cases: (1) a civil action removed from state court, (2) a diversity jurisdiction case in which the amount in controversy exceeds $100,000, and (3) any appeal involving the use of the court's inherent powers. In addition, any party on direct appeal may request a written opinion under proposed Rule 49(b).

- H.R. 781 - *Privacy Protection Clarification Act*
  - Introduced by: Biggert
  - Date Introduced: 2/13/03
  - Status: Referred to the House Committee on Financial Services (2/13/03). Referred to the House Financial Services' Subcommittee on Financial Institutions and Consumer Credit (3/10/03).
  - Related Bills: None
  - Key Provisions:

    — Section 2 amends the Gramm-Leach-Bliley Financial Modernization Act (Pub. L. No. 106-102) to exempt attorneys from the privacy provisions of the Act. Specifically, section 2 defines "financial institution" to exclude attorneys who are subject to, and are in compliance with, client-confidentiality provisions under their state, district, or territory's professional code of conduct.

- H.R. 975 - *Bankruptcy Abuse Prevention and Consumer Protection Act of 2003*
  - Introduced by: Sensenbrenner
  - Date Introduced: 2/27/03
  - Status: Referred to the House Committees on the Judiciary and Financial Services

(2/27/03). Referred to the House Judiciary Committee Subcommittee on Commercial and Administrative Law (2/28/03). Subcommittee hearings held (3/4/03). Subcommittee discharged (3/7/03). Committee consideration and mark-up session held. Committee ordered bill to be reported by a vote of 18-11 (3/12/03). House Report 108-40 filed (3/18/03). Passed the House with several amendments by a vote of 315-113 (3/19/03). Received in the Senate, read the first time, and placed on Senate Legislative Calendar (3/20/03). Read the second time and placed on Senate Legislative Calendar (3/21/03).

• Related Bills: None

• Key Provisions:

— Section 221 amends **11 U.S.C. § 110** by inserting a new provision that allows the Supreme Court to promulgate rules under the Rules Enabling Act or the Judicial Conference to prescribe guidelines that establish a maximum allowable fee chargeable by a bankruptcy petition preparer.

— Section 315 states that within 180 days after the bill is enacted, the Director of the Administrative Office of the U.S. Courts shall establish procedures for safeguarding the confidentiality of any tax information required to be provided under this section. Section 315 also directs the Director to prepare and submit a report to Congress on, among other things, the effectiveness of said procedures.

— Section 319 expresses the sense of Congress that **Bankruptcy Rule 9011** should be amended to require the debtor or debtor's attorney to verify that information contained in all documents submitted to the court or trustee be (a) well grounded in law and (b) warranted by existing law or a good-faith argument for extension, modification, or reversal of existing law.

— Section 419 directs the Advisory Committee on Bankruptcy Rules to propose amendments to the **Bankruptcy Rules** and **Bankruptcy Forms** that require Chapter 11 debtors to disclose certain information by filing and serving periodic financial reports. The required information shall include the value, operations, and profitability of any closely held corporation, partnership, or any other entity in which the debtor holds a substantial or controlling interest.

— Section 433 directs the Advisory Committee on Bankruptcy Rules to, within a reasonable time after the date of enactment, propose new **Bankruptcy Forms** on disclosure statements and plans of reorganization for small businesses.

— Section 434 adds **new section 308 to 11 U.S.C. chapter 3** (debtor reporting requirements). Section 434 also stipulates that the effective date "shall take effect 60 days after the date on which rules are prescribed under section 2075 of title 28, United States Code, to establish forms to be used to comply with section 308 of title 11, United States Code, as added by subsection (a)."

— Section 435 directs the Advisory Committee on Bankruptcy Rules to propose amendments to the **Bankruptcy Rules** and **Bankruptcy Forms** to assist small business debtors in complying with the new uniform national reporting requirements.

— Section 601 amends **chapter 6 of 28 U.S.C.,** to direct: (1) the clerk of each district court (or clerk of the bankruptcy court if certified pursuant to section

156(b) of this title) to compile bankruptcy statistics pertaining to consumer credit debtors seeking relief under Chapters 7, 11, and 13; (2) the Director of the Administrative Office of the U.S. Courts to make such statistics available to the public; and (3) the Director of the Administrative Office of the U.S. Courts to prepare and submit to Congress an annual report concerning the statistics collected. This report is due no later than June 1, 2005.

— Section 604 expresses the sense of Congress that: (1) it should be the national policy of the United States that all public data maintained by the bankruptcy clerks in electronic form should be available to the public and released in usable electronic form subject to privacy concerns and safeguards as developed by Congress and the Judicial Conference.

— Section 716 expresses the sense of Congress that the Advisory Committee on Bankruptcy Rules should, as soon as practicable after the bill is enacted, propose amendments to the **Bankruptcy Rules** regarding an objection to the confirmation plan filed by a governmental unit and objections to a claim for a tax filed under Chapter 13.

— Section 1232 amends **28 U.S.C. § 2075** to insert: "The bankruptcy rules promulgated under this section shall prescribe a form for the statement required under section 707(b)(2)(C) of title 11 and may provide general rules on the content of such statement."

— Section 1233 amends **28 U.S.C. § 158** to provide for direct appeals of certain bankruptcy matters to the circuit courts of appeals.

- H.R. 1115 - *Class Action Fairness Act of 2003*
  - Introduced by: Goodlatte
  - Date Introduced: 3/6/03
  - Status: Referred to the House Committee on the Judiciary (3/6/03). House Judiciary Committee held hearing (5/15/03). House Judiciary Committee held markup and ordered bill reported, with two amendments, favorably by a vote of 20-14 (5/21/03). House Report No. 108-144 filed (6/9/03). H. Amdt. 167 approved (6/12/03). Passed the House by a vote of 253-170 (6/12/03). Received in Senate and referred to Judiciary Committee (6/12/03).
  - Related Bills: S. 274
  - Key Provisions:

    — Section 3 amends **Part V of title 28, U.S.C.**, to include a new chapter on Consumer Class Action Bill of Rights and Improved Procedures for Interstate Class Actions. The new chapter includes provisions on judicial review and approval of noncash settlements, prohibition on the payment of bounties, review and approval of proposed settlements (protection against loss by class members and against discrimination based on geographic location), and the publication of settlement information in plain English.

    — Section 4 amends **section 1332 of title 28, U.S.C.**, to give district courts original jurisdiction of any civil action in which the amount in controversy

exceeds $2 million, exclusive of interest and costs, and is a class action in which (1) any plaintiff class member is a citizen of a state different from any defendant, (2) any plaintiff class member is a foreign state or subject of a foreign state and any defendant is a citizen of a state, or (3) any plaintiff class member is a citizen of a state and any defendant is a foreign state or a citizen or subject of a foreign state. These provisions do not apply in any civil action where (a) the substantial majority of the plaintiff class and the primary defendants are citizens of the state where the action was originally filed, and the claims asserted will be governed primarily by the laws of the state where the action was originally filed; (b) the primary defendants are states, state officials, or other governmental entities; or (c) the number of proposed plaintiff class members is less than 100.
— Section 5 provides for removal of interstate class actions to a federal district court and for review of orders remanding class actions to state courts.
— Section 6 amends **section 1292(a) of title 28, U.S.C.**, to allow appellate review of orders granting or denying class certification under Civil Rule 23. Section 6 also provides that discovery will be stayed pending the outcome of the appeal.

[As amended on May 21, 2003, the bill conforms the plain English-provisions to the proposed amendments to Civil Rule 23 that were approved by the Supreme Court on March 27, 2003. The second amendment revises the effective date of the legislation. The legislation will apply to all pending cases in which the class certification decision has not yet been made.]

[House Amdt. 167 raises the aggregate amount in controversy required for federal court jurisdiction from $2 million to $5 million. The amendment also gives federal courts discretion to return intrastate class actions to state courts after weighing five factors to determine if the case is of a local character. This discretion would come into play when between one-third and two-thirds of the plaintiffs are citizens of the same state as the primary defendants. If less than one-third are citizens of the same state, the case would automatically be eligible for federal court jurisdiction. If more than two-thirds are citizens of the same state, the case would remain in state court.]

● H.R. 1303 - *To amend the E-Government Act of 2002 with respect to rulemaking authority of the Judicial Conference.*

- Introduced by: Smith
- Date Introduced: 3/18/03
- Status: Referred to the House Committee on the Judiciary (3/18/03). Referred to the House Subcommittee on Courts, the Internet, and Intellectual Property (3/19/03). Subcommittee held mark-up session and subsequently voted to forward the bill to the full committee (3/20/03). House Judiciary Committee held mark-up session, approved amendments, and ordered to be reported (7/16/03). House Report 108-239 filed (7/25/03).

• Related Bills: None
• Key Provisions:

— As amended, Section 1 amends Section 205(c) of the E-Government Act of 2002 by requiring the Judicial Conference to promulgate rules that protect privacy and security interests pertaining to the filing and public availability of electronic documents. [The bill, as introduced, would have amended Section 205(c) of the E-Government Act of 2002 by providing that the Judicial Conference *may* promulgate rules to protect privacy and security interests pertaining to documents filed electronically with the courts.] Section 1 also amends the E-Government Act of 2002 by allowing a party to file an unredacted document under seal, with the option that the court could require a redacted copy of the document for the public file.

- H.R. 1586 - *Asbestos Compensation Fairness Act of 2003*
  - Introduced by: Cannon
  - Date Introduced: 4/3/03
  - Status: Referred to the House Committee on the Judiciary (4/3/03).
  - Related Bills: S. 413
  - Key Provisions:

    — Section 3 states that no person shall file a civil action alleging a nonmalignant asbestos claim unless the person makes a prima facie showing of physical impairment resulting from a medical condition to which exposure to asbestos was a substantial contributing factor.

    — Section 4 provides that a court may consolidate for trial any number and type of asbestos claims with the consent of all parties. Without such consent, the court may consolidate for trial only those claims relating to the same exposed person and that person's household.

    — Section 4 also provides that a plaintiff must file a civil action in the state of his or her domicile or in the state where the plaintiff was exposed to asbestos, such exposure being a substantial contributing factor to the physical impairment upon which plaintiff bases his or her claim.

    — Section 4 further directs that any party may remove the action to federal court if the state court fails to comply with the procedural requirements in section 4. The federal court shall have jurisdiction of all civil actions removed, without regard to the amount in controversy and without regard to the citizenship or residence of the parties.

- H.R. 1768 - *Multidistrict Litigation Restoration Act of 2003*
  - Introduced by: Sensenbrenner
  - Date Introduced: 4/11/03
  - Status: Referred to the House Committee on the Judiciary (4/11/03). Referred to the Subcommittee on Courts, the Internet, and Intellectual Property (5/5/2003). Subcommittee held mark-up session and forwarded to full committee (7/22/03).

• Related Bills: None.
• Key Provisions:
— Section 2 amends **28 U.S.C. § 1407** to permit the transferee court in a multidistrict-litigation case to retain jurisdiction over the case for trial. The transferee court may also retain jurisdiction to determine compensatory and punitive damages.

- H.R. 2134 - *Bail Bond Fairness Act of 2003*
  • Introduced by: Keller
  • Date Introduced: 5/15/03
  • Status: Referred to the House Committee on the Judiciary (5/15/03). Referred to the Subcommittee on Crime, Terrorism, and Homeland Security (6/25/03). House Judiciary Committee favorably reported by acclamation (9/10/03) (Committee also voted to delete finding 5 in Section 2(a)(5) by a voice vote. That finding iterated that "[i]n the absence of a meaningful bail bond option, thousands of defendants in the Federal system fail to show up for court appearances every year.")
  • Related Bills: None.
  • Key Provisions:
  — Section 3 ostensibly amends, among other things, **Criminal Rule 46(f)(1)** by providing that the district court declare bail forfeited only when the defendant fails to physically appear before the court. (The existing rule provides that the court declare bail forfeited if a condition of the bond is breached.)

- H.R. 3037 - *Antiterrorism Tools Enhancement Act of 2003*
  • Introduced by: Feeney
  • Date Introduced: 9/9/03
  • Status: Referred to the House Committee on the Judiciary (9/9/03).
  • Related Bills: None.
  • Key Provisions:
  — Section 2 amends **Criminal Rule 41(b)(3)** by providing that a magistrate judge in a district where an act of terrorism has occurred may issue a warrant for a person or property within or without that district.

SENATE RESOLUTIONS

- S.J. Res. 1 - *Proposing an Amendment to the Constitution of the United States to Protect the Rights of Crime Victims*
  • Introduced by: Kyl
  • Date Introduced: 1/7/03.
  • Status: Referred to the Senate Committee on the Judiciary (1/7/03). Judiciary Committee held hearing (4/8/03). Referred to House Judiciary Committee's Subcommittee on Constitution, Civil Rights, and Property Rights (6/10/03).

Subcommittee on Constitution approved without amendment by a vote of 5-4 (6/12/03). Markup sessions held (7/24/03 and 7/31/03). Senate Judiciary Committee reported favorably without amendment and written report (9/4/03).

- Related Bills: H.J. Res. 10, H.J. Res. 48
- Key Provisions:
  — Section 2 provides that a victim of a violent crime shall have the constitutional right to (1) reasonable and timely notice of any public proceeding involving the crime and any release or escape of the accused; (2) appear at such proceedings and to be heard on matters such as the release, plea, sentencing, reprieve, and pardon of the accused; and (3) adjudicative decisions that consider the victim's safety, interest in avoiding unnecessary delay, and interest in fair and timely claims to restitution from the accused. These rights shall not be restricted except as dictated by public safety, compelling necessity, or the administration of justice.

HOUSE RESOLUTIONS

● H.J. Res. 10 - *Proposing an Amendment to the Constitution of the United States to Protect the Rights of Crime Victims*

- Introduced by: Royce
- Date Introduced: 1/7/03.
- Status: Referred to the House Committee on the Judiciary (1/7/03).
- Related Bills: S.J. Res. 1, H.J. Res. 48
- Key Provisions:
  — Section 2 provides that a victim of a violent crime shall have the constitutional right to (1) reasonable and timely notice of any public proceeding involving the crime and any release or escape of the accused; (2) appear at such proceedings and to be heard on matters such as the release, plea, sentencing, reprieve, and pardon of the accused; and (3) adjudicative decisions that consider the victim's safety, interest in avoiding unnecessary delay, and interest in fair and timely claims to restitution from the accused. These rights shall not be restricted except as dictated by public safety, compelling necessity, or the administration of justice.

● H.J. Res. 48 - *Proposing an Amendment to the Constitution of the United States to Protect the Rights of Crime Victims*

- Introduced by: Chabot
- Date Introduced: 4/10/03.
- Status: Referred to the House Committee on the Judiciary (4/10/03). Referred to the Subcommittee on the Constitution (5/5/2003).
- Related Bills: S.J. Res. 1, H.J. Res. 10
- Key Provisions:
  — Section 2 provides that a victim of a violent crime shall have the constitutional right to (1) reasonable and timely notice of any public proceeding involving the

crime and any release or escape of the accused; (2) appear at such proceedings and to be heard on matters such as the release, plea, sentencing, reprieve, and pardon of the accused; and (3) adjudicative decisions that consider the victim's safety, interest in avoiding unnecessary delay, and interest in fair and timely claims to restitution from the accused. These rights shall not be restricted except as dictated by public safety, compelling necessity, or the administration of justice.