

**ADVISORY COMMITTEE  
ON  
CRIMINAL RULES**

*File Copy*

Washington, D.C.  
April 7-8, 1997



# **CRIMINAL RULES COMMITTEE MEETING**

**April 7-8, 1997  
Washington, D.C.**

## **I. PRELIMINARY MATTERS**

- A. Opening Remarks and Administrative Announcements by the Chair**
- B. Approval of Minutes of October 1996, Meeting in Gleneden Beach, Oregon**
- C. Draft Minutes of Standing Committee Meeting, January 1997.**
- D. Criminal Rules Agenda Docketing.**

## **II. CRIMINAL RULES UNDER CONSIDERATION**

- A. Rules Published for Public Comment & Pending Further Review by Advisory Committee. (Memos):**
  - 1. Rule 5.1. Preliminary Examination; Production of Witness Statements. (Memo)
  - 2. Rule 26.2. Production of Witness Statements, Applicability to Rule 5.1 Proceedings. (Memo)
  - 3. Rule 31. Verdict; Individual Polling of Jury. (Memo)
  - 4. Rule 33. New Trial; Time for Filing Motion. (Memo)
  - 5. Rule 35(b). Correction or Reduction of Sentence; Changed Circumstances. (Memo)
  - 6. Rule 43. Presence of Defendant; Presence at Reduction or Correction of Sentence. (Memo)
- B. Rule Approved by Standing Committee and Judicial Conference; Pending Before Supreme Court.**
  - 1. Rule 16(a)(1)(E), (b)(C). Expert Witnesses. (No Memo).

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

1. Rule 58, Procedure for Misdemeanors and Other Petty Offenses. (Memo)

**D. Proposed Amendments to Rules of Criminal Procedure**

1. Rule 5(c). Initial Appearance; Proposed Amendment. (Memo)
2. Rule 6(d), (f); Presence of Interpreter for Deaf Person on Grand Jury and Return of Indictment by Foreperson (Memo)
3. Rule 11. Pleas. (Memo)
  - a. Rule 11(c) (advice re waiver of appeal, etc); Rule 11(e)(1)(B) & (C); Rule 11(e)(4) Plea Agreement Procedure; Rejection of Plea Agreement (Memo).
  - b. Rule 11(e)(4); Ability of Defendant to Withdraw Plea of Guilty if Judge Defers Decision on Whether to Reject or Accept Plea Agreement. (Memo)
  - c. Rule 11(a)(1); Proposed Amendment (Memo).
4. Rule 24(c). Alternate Jurors (Amendment eliminating requirement to discharge alternate jurors) (Memo).
5. Rule 26. Taking of Testimony. (Amendment conforming rule to Civil Rule 43) (Memo)
6. Rule 30. Instructions. Proposed amendment to permit judge to require submission of instructions before trial)(Memo)
7. Rule 32.2. Forfeiture Procedures. (DOJ proposal to adopt new rule governing forfeitures) (Memo).
8. Rule 54. Courts; Proposed Amendment to Delete Reference to Canal Zone court (Memo).

**E. Rules and Projects Pending Before Standing Committee and Judicial Conference**

1. Status Report on Legislation Affecting Federal Rules of Criminal Procedure (Memo).



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2. Status Report on Restyling the Appellate Rules of Procedure.(No Memo).
- 3 Other Oral Reports (No Memo).

**III. DESIGNATION OF TIME AND PLACE OF NEXT MEETING**



## ADVISORY COMMITTEE ON CRIMINAL RULES

### **Chair:**

Honorable D. Lowell Jensen  
United States District Judge  
United States Courthouse  
1301 Clay Street, 4th Floor  
Oakland, California 94612

Area Code 510  
637-3550

FAX-510-637-3555

### **Members:**

Honorable W. Eugene Davis  
United States Circuit Judge  
556 Jefferson Street, Suite 300  
Lafayette, Louisiana 70501

Area Code 318  
262-6664

FAX-318-262-6685

Honorable Edward E. Carnes  
United States Circuit Judge  
Frank M. Johnson, Jr. Federal Building  
and Courthouse  
15 Lee Street  
Montgomery, Alabama 36104

Area Code 334  
223-7132

FAX-334-223-7676

Honorable George M. Marovich  
United States District Judge  
United States District Court  
219 South Dearborn Street  
Chicago, Illinois 60604

Area Code 312  
435-5590

FAX-312-435-7578

Honorable David D. Dowd, Jr.  
United States District Judge  
United States District Court  
510 Federal Building  
2 South Main Street  
Akron, Ohio 44308

Area Code 330  
375-5834

FAX-330-375-5628

Honorable D. Brooks Smith  
United States District Judge  
United States District Court  
319 Washington Street, Room 104  
Johnstown, Pennsylvania 15901

Area Code 814  
533-4514

FAX-814-533-4519

**ADVISORY COMMITTEE ON CRIMINAL RULES (CONTD.)**

Honorable B. Waugh Crigler  
United States Magistrate Judge  
United States District Court  
255 West Main Street, Room 328  
Charlottesville, Virginia 22902

Area Code 804  
296-7779  
  
FAX-804-296-5585

Honorable Daniel E. Wathen  
Chief Justice  
Maine Supreme Judicial Court  
65 Stone Street  
Augusta, Maine 04330

Area Code 207  
287-6950  
  
FAX-207-287-4641

Professor Kate Stith  
Yale Law School  
Post Office Box 208215  
New Haven, Connecticut 06520-8215

Area Code 203  
432-4835  
  
FAX-203-432-1148

Robert C. Josefsberg, Esquire  
Podhurst, Orseck, Josefsberg, Eaton,  
Meadow, Olin & Perwin, P.A.  
City National Bank Building, Suite 800  
25 West Flagler Street  
Miami, Florida 33130-1780

Area Code 305  
358-2800  
  
FAX-305-358-2382

Darryl W. Jackson, Esquire  
Arnold & Porter  
555 Twelfth Street, N.W.  
Washington, D.C. 20004

Area Code 202  
942-5000  
  
FAX-202-942-5999

Henry A. Martin, Esquire  
Federal Public Defender  
810 Broadway, Suite 200  
Nashville, Tennessee 37203

Area Code 615  
736-5047  
  
FAX-615-736-5265

Assistant Attorney General for the  
Criminal Division (ex officio)  
Roger A. Pauley, Esquire  
Director, Office of Legislation,  
Criminal Division  
U.S. Department of Justice, Room 2313  
Washington, D.C. 20530

Area Code 202  
514-3202  
  
FAX 202-514-4042

**ADVISORY COMMITTEE ON CRIMINAL RULES (CONTD.)**

**Reporter:**

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

Area Code 210  
431-2212

FAX-210-436-3717

**Liaison Member:**

Honorable William R. Wilson, Jr.  
United States District Judge  
600 West Capitol Avenue, Room 149  
Little Rock, Arkansas 72201

Area Code 501  
324-6863

FAX-501-324-6869

**Secretary:**

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

Area Code 202  
273-1820

FAX-202-273-1826

## JUDICIAL CONFERENCE RULES COMMITTEES

### Chairs

Honorable Alicemarie H. Stotler  
United States District Judge  
751 West Santa Ana Boulevard  
Santa Ana, California 92701  
Area Code 714-836-2055  
FAX 714-836-2062

Honorable James K. Logan  
United States Circuit Judge  
100 East Park, Suite 204  
P.O. Box 790  
Olathe, Kansas 66061  
Area Code 913-782-9293  
FAX 913-782-9855

Honorable Adrian G. Duplantier  
United States District Judge  
United States Courthouse  
500 Camp Street  
New Orleans, Louisiana 70130  
Area Code 504-589-7535  
FAX 504-589-4479

Honorable Paul V. Niemeyer  
United States Circuit Judge  
United States Courthouse  
101 West Lombard Street  
Baltimore, Maryland 21201  
Area Code 410-962-4210  
FAX 410-962-2277

Honorable D. Lowell Jensen  
United States District Judge  
United States Courthouse  
1301 Clay Street, 4th Floor  
Oakland, California 94612  
Area Code 510-637-3550  
FAX 510-637-3555

### Reporters

Prof. Daniel R. Coquillette  
Boston College Law School  
885 Centre Street  
Newton Centre, MA 02159  
Area Code 617-552-8650, 4393  
FAX-617-576-1933

Professor Carol Ann Mooney  
Vice President and  
Associate Provost  
University of Notre Dame  
202 Main Building  
Notre Dame, Indiana 46556  
Area Code 219-631-4590  
FAX-219-631-6897

Professor Alan N. Resnick  
Hofstra University  
School of Law  
Hempstead, New York 11550  
Area Code 516-463-5930  
FAX 516-481-8509

Professor Edward H. Cooper  
University of Michigan  
Law School  
312 Hutchins Hall  
Ann Arbor, MI 48109-1215  
Area Code 313-764-4347  
FAX 313-763-9375

Prof. David A. Schlueter  
St. Mary's University  
School of Law  
One Camino Santa Maria  
San Antonio, Texas 78228-8602  
Area Code 210-431-2212  
FAX 210-436-3717

**CHAIRS AND REPORTERS (CONTD.)**

**Chairs**

Honorable Fern M. Smith  
United States District Judge  
United States District Court  
P.O. Box 36060  
450 Golden Gate Avenue  
San Francisco, California 94102  
Area Code 415-522-4120  
FAX 415-522-4126

**Reporters**

Professor Daniel J. Capra  
Fordham University  
School of Law  
140 West 62nd Street  
New York, New York 10023  
Area Code 212-636-6855  
FAX 212-636-6899





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

**October 7-8, 1996**  
**Gleneden, Oregon**

The Advisory Committee on the Federal Rules of Criminal Procedure met at the Gleneden, Oregon on October 7th and 8th, 1996. 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 Monday, October 7, 1996. 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. Edward E. Carnes  
Hon. Sam A. Crow  
Hon. George M. Marovich  
Hon. David D. Dowd, Jr.  
Hon. D. Brooks Smith  
Hon. B. Waugh Crigler  
Prof. Kate Stith  
Mr. Darryl W. Jackson, Esq.  
Mr. Robert C. Josefsberg, 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 William R. Wilson, Jr., a member of the Standing Committee on Rules of Practice and Procedure and a liaison to the Committee; Professor Daniel R. Coquillette, Reporter to the Standing Committee; Mr. Peter McCabe and Mr. John Rabiej from the Administrative Office of the United States Courts; Mr. Jim Eaglin from the Federal Judicial Center, and Ms. Mary Harkenrider from the Department of Justice.

The attendees were welcomed by the chair, Judge Jensen, who recognized a new member to the Committee, Judge Edward E. Carnes. Judge Jensen recognized the contributions of Judge Crow, whose term on the Committee had expired.

## **II. APPROVAL OF MINUTES OF APRIL 1996 MEETING**

Following minor changes to the minutes of the October 1995 meeting, Judge Marovich moved that they be approved. Following a second by Judge Davis, the motion carried by a unanimous vote.

## **III. RULES PUBLISHED FOR PUBLIC COMMENT AND PENDING FURTHER ACTION BY THE COMMITTEE**

The Reporter informed the Committee that the Standing Committee, at its June 1996 meeting in Washington, D.C., had approved a number of proposed amendments for publication and public comment: Rule 5.1 (Preliminary Examination; Production of Witness Statements); Rule 26.2 (Production of Witness Statements; Applicability to Rule 5.1 Proceedings); Rule 31 (Verdict; Individual Polling of Jurors); Rule 33 (New Trial; Time for Filing Motion); Rule 35(b) (Correction or Reduction of Sentence; Changed Circumstances); and Rule 43 (Presence of Defendant; Presence at Reduction or Correction of Sentence). Written comments on the proposed amendments are due not later than February 15, 1997. A hearing has been scheduled in Oakland, California for witnesses who wish to present oral testimony on the proposed amendments.

## **IV. RULES APPROVED BY STANDING COMMITTEE AND FORWARDED TO JUDICIAL CONFERENCE**

Judge Jensen reported that the Standing Committee had approved and forwarded the Committee's proposed amendment to Rule 16 to the Judicial Conference. The amendment to Rule 16(a)(1)(E) and 16(b)(1)(C), which addresses reciprocal disclosure of information on expert witnesses, had originally been included in a package of proposed amendments to Rule 16 submitted to the Judicial Conference in March 1995. The Conference had generally rejected the amendments although the opposition had focused specifically on those amendments in Rule 16(a)(1)(F), addressing the pretrial disclosure of witness names. At its meeting in April 1996, the Advisory Committee considered the amendment anew and resubmitted the matter to the Standing Committee. That Committee made several minor changes to the language of the amendment and forwarded it, without further publication, to the Judicial Conference.

**V. CRIMINAL RULES CURRENTLY UNDER CONSIDERATION  
BY ADVISORY COMMITTEE**

**A. Rule 11. Pleas.**

The Reporter indicated that several interrelated matters affecting guilty pleas and the sentencing guidelines were on the agenda for the meeting. Several judicial decisions and correspondence had generated interest in amending Rule 11.

**1. Rule 11(e); Report of Subcommittee; Impact of Sentencing  
Guidelines on Plea Bargaining; Ability of Defendant to  
Withdraw Plea**

In a continuation of discussions begun at the April 1996 meeting, a Subcommittee consisting of Judge Marovich (chair), Professor Stith, Mr. Martin, and Mr. Pauley, presented an oral report on possible amendments to Rule 11. Judge Marovich reported that the subcommittee had considered the possible impact of *United States v. Harris*, 70 F.3d 1001 (8th Cir. 1995), which read Rule 11(e)(4) to also apply to (e)(1)(B) plea agreements regarding sentencing facts or calculations. The subcommittee had concluded that *Harris* was not consistent with the language or history of Rule 11 and recommended that some amendments be made to Rule 11(e) which would clearly include references to guideline sentencing factors vis a vis plea bargains.

Judge Marovich indicated that the subcommittee had focused initially on the question of the amount of notice and information each side should have regarding applicable sentencing guidelines; the subcommittee believed that the process would work more smoothly and efficiently, if the government and the defendant had a clearer idea--going into the plea bargaining process--of the possible reaction of the court to a proposed plea agreement. Lawyers, he noted, should be able to accurately assess the probability that a plea agreement will be accepted by the court.

Judge Jensen added that Judge Conaboy, the Chair of the Sentencing Commission, had expressed interest in the Committee's action on any proposals to amend Rule 11. He had informed Judge Jensen that the Commission would welcome any input on the impact or role of sentencing guidelines in the plea bargaining process.

Mr. Pauley expressed concern about the slow process of amending Rule 11, should the Committee decide to consider global changes to the rule. He believed that the amendment addressing the *Harris* case should be moved forward now. Ms. Harkenrider added that the subcommittee's proposed amendment would make it clear that the parties might be able to agree on sentencing factors or guidelines, and not just on an agreed-to

sentence. Mr. Pauley added that the proposed language would not directly affect the right of a defendant to appeal.

Professor Stith distributed a chart she had prepared from data provided by the Sentencing Commission which demonstrated the reduction of cases going to trial. Judge Jensen noted in particular that the national average of cases being disposed of in a plea process was 92 %. He reiterated that the genesis of the discussion on the binding nature of (e)(1)(B) agreements was the *Harris* decision and that the decision in *United States v. Hyde*, 82 F.3d 319 (9th Cir. 1996) had raised the question of the impact of deferring acceptance of a guilty plea until after preparation of the Presentencing Report.

Judge Marovich observed that the Circuits may have different practices relating to when a plea is accepted and he repeated the concern that the parties may not fully know what they are facing when the plea is entered. Ms. Harkenrider noted that although the Solicitor General's office had not yet decided whether to appeal the *Hyde* decision it appeared that an appeal would be filed. Ms. Harkenrider also expressed the view that in light of such an appeal, the Committee should defer any action which would amend Rule 11 in response to the *Hyde* decision.

Professor Stith raised the question of whether it might be appropriate to amend Rule 11 to clarify when the plea could, or must, be accepted. Judge Crigler responded that any amendment to Rule 11 be as clear and straightforward as possible. Following discussion on how the sentencing guidelines had affected the plea bargaining process, Judge Dowd observed that the process is now more complicated and that Rule 11, as written, does not adequately accommodate the realities of plea bargaining and guilty pleas.

In discussing the possible process of amending Rule 11 at this point to address the *Harris* problem, Judge Jensen commented that the proposed changes should be forwarded to the Sentencing Commission. A consensus emerged that some amendment was appropriate and the discussion turned to specific language used in the proposed language submitted by the Standing Committee, which in turn had been suggested by the Department of Justice. Judge Marovich stated that the amendments were a step in the right direction.

Ultimately, Judge Davis moved to adopt the subcommittee's proposed amendments to Rule 11(e)(1)(B), (C), and (e)(4). Judge Marovich seconded the motion. Judge Carnes expressed concern about amending a criminal procedure rule specifically to address a court decision from one circuit. Several members added that it should be clear that the proposed amendment does not address the *Hyde* problem of when a plea could be accepted. The Committee approved the amendment unanimously. The reporter indicated that he would draft the appropriate language and committee note for the April 1997 meeting.

**2. Rule 11(c); Advice to Defendant Regarding Waiver of Right to Appeal**

The Reporter stated that the Committee on Criminal Law had proposed an amendment to Rule 11(c)(6) which would require the court to discuss with the defendant any terms or provisions in a plea agreement which would waive the right to appeal or collateral attack the sentence. Ms. Harkenrider moved that the proposed amendment be approved. Judge Davis seconded the motion.

The Committee discussion focused on whether the amendment would affect the defendant's constitutional rights and what is actually waived. Professor Stith expressed concern about the breadth of such waivers and Judge Carnes commented that he had always understood that the rules of procedure and any waivers are subject to the Constitution. Mr. Martin added that there might be other waiver provisions in a plea agreement, for example, provisions dealing with immigration or asset forfeiture. Ultimately, Professor Stith moved that the proposed language be amended to reflect that (c)(6) applied to terms or provisions in a plea agreement and delete the language requiring the court to discuss with the defendant the "consequences" of any waiver provision. The motion to amend was seconded by Judge Carnes and carried by a vote of 10 to 1. The Committee, by a vote of 8 to 3, approved the proposed amendment to Rule 11(c).

**3. Rule 11(e)(4). Rejection of Plea Agreement.**

Judge Davis suggested that the Committee consider an amendment to Rule 11(e)(4), in addition to the approved amendments to (e)(1)(B) and (C), supra, which would clearly address the issue in *United States v. Harris*. Following brief discussion, the Reporter was asked to draft proposed language for the April meeting which would address that decision and also draft an alternate version which would address both *Harris* and *United States v. Hyde*.

**4. Rule 11. Summary of Pending Amendments and Action**

Judge Jensen provided a summary of the Committee's actions regarding Rule 11: It had approved amendments to Rule 11(e)(1)(B) and (C), Rule 11(c)(6)(new provision). The Reporter was asked to finalize a draft of the amendments so that the Sentencing Commission would have an opportunity to review it. Second, the Committee had requested the Reporter to draft alternative versions of possible amendments to Rule 11(e)(4) which would deal with the issues raised by the *Harris* and *Hyde* decisions. Finally, Judge Jensen asked the Rule 11 Subcommittee to continue its work with a view toward additional amendments to that Rule.

**B. Rule 24(c). Alternate Jurors**

The Reporter indicated that the Committee had received a letter from Judge Selya of the Court of Appeals for the First Circuit in which the judge suggested that it would be appropriate to consider an amendment to Rule 24(c). Although that rule currently provides that alternate jurors (who are designated as replacements) are to be discharged after the jury retires to deliberate. In *United States v. Houlihan*, not yet reported, the First Circuit concluded that the trial judge committed harmless error in not discharging the alternate jurors.

Mr. Josefsburg believed that an amendment to Rule 24(c) was in order and Mr. Pauley observed that there was a certain tension between the provisions in Rule 24(c) and 23(b), citing statistics which indicate that it is less desirable to make substitutions in jurors. Following additional brief discussion, Judge Marovich moved that Rule 24(c) be amended to eliminate the mandatory language in that rule. Judge Dowd seconded the motion which carried by a vote of 8 to 2, with one abstention. The Reporter indicated that he would draft language for the Committee's consideration at its next meeting.

**C. Rule 25(b). Judge Disability**

Judge Jensen informed the Committee that Judge Kazen had proposed that the Committee consider a clarifying amendment to Rule 25(b) concerning the ability of using different judges to hear guilty pleas and handle pretrial motions. Mr. Jackson expressed the concern that judges not be viewed as fungible in the eyes of the community. Mr. Josefsburg gave several examples of state practice where judge may be rotated before completing a case. Several members of the Committee expressed the view that Rule 25(b) is not violated by substituting a judge to complete a case when another judge has found the defendant guilty following a guilty plea. Judge Jensen noted that a consensus had seemed to emerge that no change was needed at the present time; but he asked the Reporter to review the history of Rule 24(b) and make sure that it is clear the rule does not cover guilty pleas procedures.

**D. Rule 26. Taking of Testimony**

The Reporter informed the Committee that Judge Stotler, Chair of the Standing Committee, had requested the Criminal Rules Committee to consider an amendment to Criminal Rule 26 which conform that rule to amendments to Civil Rule 43, which take effect on December 1, 1996. Those amendments delete the requirement that the testimony be taken orally in open court. The change is apparently designed to permit testimony to be given in court by other means if the witness is not able to communicate orally, e.g.,

using sign language. Additionally, Rule 43 is being amended to permit presentation of testimony by transmission from another location in compelling circumstances.

Mr. Rabiej provided some additional background information on the civil rule amendment and Mr. McCabe indicated that the Ninth Circuit's pilot program of electronic transmission of proceedings was on hold--criminal defendants are apparently not consenting to those procedures. Following additional brief discussion, Mr. Josefsburg moved that Rule 26 be amended by deleting the word "orally" and that the rule be restyled to conform to the civil rule. That motion was seconded by Ms. Harkenrider. It carried unanimously.

#### **E. Rule 32.2. Forfeiture Procedures**

Mr. Pauley introduced the Justice Department's proposed new rule 32.2 which would accomplish two key points: It would consolidate several existing rules into one rule, i.e., Rule 32 and 31. Second, the new rule would eliminate the role of the jury in criminal forfeiture proceedings. He indicated that in framing the rule, the Department had polled United States Attorneys and members of the Asset Forfeiture Division. Mr. Pauley provided a detailed background of current forfeiture provisions and indicated that within the Department there is some disagreement on whether the proposed rule will help or hinder the Government's interests.

In the ensuing discussion, Professor Coquillette questioned whether the provisions for forfeiting property belonging to a third party, without a jury trial, might violate the Constitution. Other members questioned whether the rule would be consistent with existing statutory provisions governing forfeiture. Several other members suggested possible changes to the draft of the rule which first, make it clear that the court must find a nexus between the property and the defendant, second, address the issue of the right to appeal a ruling adverse to the Government. Mr. Pauley indicated that the Department would continue to work on the draft of the rule and welcomed suggested changes to address the issues raised by the Committee.

#### **F. Rule 40(a). Appearance Before Federal Magistrate Judge**

The Reporter provided a brief overview of proposed changes and discussion regarding Rule 40(a). He noted that in October 1994, the Committee had considered a proposed amendment from Magistrate Judge Robert Collings (Boston) to amend Rule 40(a) to provide that a defendant arrested in a district other than where the offense occurred could be taken to that latter district if the magistrate was located within 100 miles of the place of arrest. The Committee deferred any further action pending input from the Department of Justice. In recent correspondence between Magistrate Judge

Crigler and the Department, the issue had been revived. Following discussion of the matter, the Committee reached a consensus that no action was required; as written, the rule does not explicitly require that an arrested defendant be taken to a magistrate in the district of arrest. It only requires that the defendant be taken before the nearest available magistrate.

**VI. RULES PENDING BEFORE OTHER COMMITTEES HAVING  
IMPACT ON RULES OF CRIMINAL PROCEDURE**

**1. Bankruptcy Committee Proposal to Provide for Electronic Service of  
Motions.**

The Reporter informed Committee that the Bankruptcy Rules Committee was considering an amendment to Rules 9013 and 9014 which would permit electronic filing of motions on the other party, under technical standards established by the Judicial Conference. He added that the parallel criminal rule, Rule 49, specifically cross-references the Civil Rules, and that in the past that committee had taken the lead in considering any changes in the method of service. Judge Jensen indicated that he was not interested in changing that approach. Judge Dowd observed that the bankruptcy bar might be more attuned to using electronic filing methods than members of the criminal justice bar. No action was taken on the matter.

**2. Rules of Evidence Committee Proposal to Amend Fed. R. Evid. 103  
Re Preservation of Error**

The Reporter and Mr. Rabiej indicated that the Evidence Rules Committee had considered an amendment to Federal Rule of Evidence 103 which would clearly indicate whether counsel must renew an evidentiary objection at trial to preserve the issue for appeal. The Evidence Committee had been unable to reach a clear consensus on the issue and had requested the Civil and Criminal Rules Committees to review the issue and provide any additional input. Following a discussion of the issue, to the effect that the members did not perceive any need to amend the current rule, a consensus emerged to inform the Evidence Committee that the issue should be left to caselaw development.

**VII. ORAL REPORTS; MISCELLANEOUS**

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



Mr. Rabiej informed the Committee that there was some momentum building in Congress for a Victims Rights Amendment to the Constitution and presented copies of Joint Resolution 52 to the Committee along with a letter from the Criminal Law Committee which generally opposed the resolution. Judge Jensen raised the question of whether, and to what, extent, the Committee might make its views known. Judge Wilson recommended that the chair send a letter stating the Committee's reservations about the resolution. Judge Carnes responded that in his view, this matter was outside the purview of the federal courts. Professor Stith believed that there was good arguments for being a part of the debate on the resolution in pointing out potential problems with any amendment.

Professor Coquillette stated that the Committee had a role under the Rules Enabling Act and that the Criminal Law Committee was perhaps the best body for expressing any views on the appropriateness of the amendment. Judges Wilson and Smith expressed the view that the Committee could provide invaluable expertise on the practical implications of any amendment affecting criminal procedure. Judge Davis indicated that any input from the Committee should focus on the criminal rules and the rule-making process and Judge Dowd observed that the judiciary should speak with one voice on this matter. Mr. Rabiej added that the Committee could legitimately comment on any legislation potentially affecting the rules of criminal procedure--given its mandate to perform a continuous study and evaluation of criminal procedure matters.

Following additional discussion concerning the process of preparing the Committee's views, Judge Jensen indicated that he would draft a letter to the Standing Committee.

**B. Oral Report on Restyling of Appellate Rules of Procedure.**

Mr. Rabiej reported that the publication and comment period on the re-styled Appellate Rules was proceeding and that the Committee had received some favorable comments on the new format for the rules.

**C. Oral Report on Legislatively Proposed Language to Rule ----**

The Committee was informed by Mr. Rabiej that a part of the Child Pornography Bill would have amended Rule 32 to require judges to apprise defendants of the possible consequences of sentencing for certain offenses. He indicated that the Administrative Office had been successful in deterring that amendment.

**D. Oral Report on Change in Effective Date of Amendments to Federal Rules of Evidence 413-415.**

Finally, Mr. Rabiej informed the Committee that the Justice Department had succeeded in asking Congress to amend the effective date of Rules 413-415. Those rules, in effect, now apply to conduct committed before the effective date of those rules.

**VIII. DESIGNATION OF TIME AND PLACE OF NEXT MEETING**

The Committee decided to hold its next meeting in Washington, D.C., at the Thurgood Marshall Federal Judiciary Building, on April 7th and 8th, 1997.

Respectfully submitted

David A. Schlueter  
Professor of Law  
Reporter

**Draft minutes of the January 1997 Standing Committee Meeting will be distributed at a later date.**



# AGENDA DOCKETING

## ADVISORY COMMITTEE ON CRIMINAL RULES

Proposal	Source, Date, and Doc #	Status
[CR 4] — Require arresting officer to notify pretrial services officer, U.S. Marshal, and U.S. Attorney of arrest	Local Rules Project	10/95 — Subcommittee appointed 4/96 — Rejected by subcommittee <b>COMPLETED</b>
[CR 5(a)] — Time limit for hearings involving unlawful flight to avoid prosecution arrests	DOJ 8/91; 8/92	10/92 — Subcommittee appointed 4/93 — Considered 6/93 — Approved for publication 9/93 — Published for public comment 4/94 — Revised and forwarded to ST Committee 6/94 — Approved by Stg Com 9/94 — Approved by Jud Conf 12/95 — Effective <b>COMPLETED</b>
[CR 5(c)] — Misdemeanor defendant in custody is not entitled to preliminary examination. Cf CR58(b)(2)(G)	Magistrate Judge Robert B. Collings 3/94	10/94 — Deferred pending possible restylizing efforts <b>PENDING FURTHER ACTION</b>
[CR 5(c)] — Eliminate consent requirement for magistrate judge consideration	Judge Swearingen 10/28/96 (96-CR-E)	1/97 — Sent to Reporter <b>PENDING FURTHER ACTION</b>
[CR 5.1] — Extend production of witness statements in CR26.2 to 5.1.	Michael R. Levine, Asst. Fed. Defender 3/95	10/95 — Considered 4/96 — Draft presented and approved 6/96 — St Comm approved 8/96 — Published for public comment <b>PENDING FURTHER ACTION</b>
[CR 6] — Statistical reporting of indictments	David L. Cook AO 3/93	10/93 — Committee declined to act on the issue <b>COMPLETED</b>
[CR 6(d)] — Interpreters allowed during grand jury	DOJ 1/22/97 (97-CR-A)	1/97 — Sent directly to Chair <b>PENDING FURTHER ACTION</b>
[CR 6(e)] — Intra-Department of Justice use of Grand Jury materials	DOJ	4/92 — Rejected motion to send to ST Committee for public comment 10/94 — Discussed and no action taken <b>COMPLETED</b>
CR 6(e)(3)(C)(iv) — Disclosure of Grand Jury materials to State Officials	DOJ	4/96 — Committee decided that current practice should be reaffirmed <b>COMPLETED</b>

<b>Proposal</b>	<b>Source, Date, and Doc #</b>	<b>Status</b>
[CR 6(e)(3)(C)(iv)] — Disclosure of Grand Jury materials to State attorney discipline agencies	Barry A. Miller, Esq. 12/93	10/94 — Considered, no action taken <b>COMPLETED</b>
[CR6 (f)] — Return by foreperson rather than entire grand jury	DOJ 1/22/97 (97-CR-A)	1/97 — Sent directly to Chair <b>PENDING FURTHER ACTION</b>
[CR 10] — Arraignment of detainees through video teleconferencing	DOJ 4/92	4/92 — Deferred for further action 10/92 — Subcommittee appointed 4/93 — Considered 6/93 — ST Committee approved for publication 9/93 — Published for public comment 4/94 — Action deferred, pending outcome of FJC pilot programs 10/94 — Considered <b>PENDING FURTHER ACTION</b>
[CR 10] — Guilty plea at an arraignment	Judge B. Waugh Crigler 10/94	10/94 — Suggested and briefly considered <b>DEFERRED INDEFINITELY</b>
[CR 11] — Magistrate judges authorized to hear guilty pleas, and inform accused of possible deportation	James Craven, Esq. 1991	4/92 — Disapproved <b>COMPLETED</b>
[CR 11] — Advise defendant of impact of negotiated factual stipulation	David Adair & Toby Slawsky, AO 4/92	10/92 — Motion to amend withdrawn <b>COMPLETED</b>
[CR 11(c)] — Advise defendant of any appeal waiver provision which may be contained in plea agreement	Judge Maryanne Trump Barry 7/19/96 (96-CR-A)	10/96 — Considered, draft presented <b>PENDING FURTHER ACTION</b>
[CR 11(d)] — Examine defendant's prior discussions with an government attorney	Judge Sidney Fitzwater 11/94	4/95 — Discussed and no motion to amend <b>COMPLETED</b>
[CR 11(e)] — Judge, other than the judge assigned to hear case, may take part in plea discussions	Judge Jensen 4/95	10/95 — Considered 4/96 — Tabled as moot, but continued study by subcommittee on other Rule 11 issues <b>DEFERRED INDEFINITELY</b>
[CR 11(e)(4) — Binding Plea Agreement ( <u>Harris</u> decision)	Judge George P. Kazen 2/96	4/96 — Considered 10/96 — Considered <b>PENDING FURTHER ACTION</b>
[CR 11(e)(1) (A)(B) and (C)] — Sentencing Guidelines effect on particular plea agreements and <u>Hyde</u> decision	CR Rules Committee 4/96	4/96 — To be studied by reporter 10/96 — Draft presented and considered <b>PENDING FURTHER ACTION</b>

<b>Proposal</b>	<b>Source, Date, and Doc #</b>	<b>Status</b>
[CR 12] — Inconsistent with Constitution	Paul Sauers 8/95	10/95 — Considered and no action taken <b>COMPLETED</b>
[CR 12(b)] — Entrapment defense raised as pretrial motion	Judge Manuel L. Real 12/92 & Local Rules Project	4/93 — Denied 10/95 — Subcommittee appointed 4/96 — No action taken <b>COMPLETED</b>
[CR 12(b)] — Require defense to give notice of intent to raise entrapment defense.		<b>PENDING FURTHER ACTION</b>
[CR 12(i)] — Production of statements		7/91 — Approved by ST Committee for publication 4/92 — Considered 6/92 — Approved by ST Committee 9/92 — Approved by Judicial Conference 4/93 — Approved by Supreme Court 12/93 — Effective <b>COMPLETED</b>
[CR 16] — Disclosure to defense of information relevant to sentencing	John Rabiej 8/93	10/93 — Committee took no action <b>COMPLETED</b>
[CR 16] — Prado Report and allocation of discovery costs	'94 Report of Jud Conf	4/94 — Voted that no amendment be made to the CR rules <b>COMPLETED</b>
[CR 16] — Prosecution to inform defense of intent to introduce extrinsic act evidence	CR Rules Committee '94	10/94 — Discussed and declined <b>COMPLETED</b>
[CR 16(a)(1)] — Disclosure of experts		7/91 — Approved by ST Committee for publication 4/92 — Considered 6/92 — Approved by ST Committee 9/92 — Approved by Judicial Conference 4/93 — Approved by Supreme Court 12/93 — Effective <b>COMPLETED</b>
[CR 16(a)(1)(A)] — Disclosure of statements made by organizational defendants	ABA	11/91 — Considered 4/92 — Considered 6/92 — Approved by ST Committee for publication, but deferred 12/92 — Published 4/93 — Discussed 6/93 — Approved by ST Committee 9/93 — Approved by Judicial Conference 4/94 — Approved by Supreme Court 12/94 — Effective <b>COMPLETED</b>
[CR 16(a)(1)(C)] — Government disclosure of materials implicating defendant	Prof. Charles W. Ehrhardt 6/92 & Judge O'Brien	10/92 — Rejected 4/93 — Considered 4/94 — Discussed and no motion to amend <b>COMPLETED</b>

Proposal	Source, Date, and Doc #	Status
[CR 16(a)(1)(E)] — Require defense to disclose information concerning defense expert testimony	Jo Ann Harris, Asst. Atty. Gen., CR Div., DOJ 2/94	4/94 — Considered 6/94 — Approved for publication by ST Committee 9/94 — Published for public comment 7/95 — Approved by ST Committee 9/95 — Rejected by Judicial Conference 1/96 — Discussed at ST meeting 4/96 — Reconsidered and voted to resubmit to ST Committee 6/96 — ST approved 9/96 — Jud Conf approved <b>COMPLETED</b>
[CR 16(a) and (b)] — Disclosure of witness names and statements before trial	William R. Wilson, Jr., Esq. 2/92	2/92 — No action 10/92 — Considered and decided to draft amendment 4/93 — Deferred until 10/93 10/93 — Considered 4/94 — Considered 6/94 — Approved for publication by ST Committee 9/94 — Published for public comment 4/95 — Considered and approved 7/95 — Approved by ST Committee 9/95 — Rejected by Judicial Conference <b>COMPLETED</b>
[CR 16(d)] — Require parties to confer on discovery matters before filing a motion	Local Rules Project & Mag Judge Robert Collings 3/94	10/94 — Deferred 10/95 — Subcommittee appointed 4/96 — Rejected by subcommittee <b>COMPLETED</b>
[CR 24(a)] — Attorney conducted voir dire of prospective jurors	Judge William R. Wilson, Jr. 5/94	10/94 — Considered 4/95 — Considered 6/95 — Approved by ST Committee for publication 9/95 — Published for public comment 4/96 — Rejected by advisory committee, but should be subject to continued study and education, FJC to pursue educational programs <b>COMPLETED</b>
[CR 24(b)] — Reduce or equalize peremptory challenges in an effort to reduce court costs	Renewed suggestions from judiciary	2/91 — ST Committee, after publication and comment, rejected CR Committee 1990 proposal 4/93 — No motion to amend <b>COMPLETED</b>
[CR 24(c)] — Alternate jurors to be retained in deliberations	Judge Bruce M. Selya 8/96 (96-CR-C)	10/96 — Considered and agreed to in concept, reporter to draft appropriate implementing language <b>PENDING FURTHER ACTION</b>
[CR 26] — Questioning by jurors	Prof. Stephen Saltzburg	4/93 — Considered and tabled until 4/94 4/94 — Discussed and no action taken <b>COMPLETED</b>
[CR 26] — Expanding oral testimony	Judge Stotler 10/96	10/96 — Discussed <b>PENDING FURTHER ACTION</b>
[CR 26] — Court advise defendant of right to testify	Robert Potter	4/95 — Discussed and no motion to amend <b>COMPLETED</b>



Proposal	Source, Date, and Doc #	Status
[CR 26.2] — Production of statements for proceedings under CR 32(e), 32.1(c), 46(i), and Rule 8 of § 2255		7/91 — Approved by ST Committee for publication 4/92 — Considered 6/92 — Approved by ST Committee 9/92 — Approved by Judicial Conference 4/93 — Approved by Supreme Court 12/93 — Effective <b>COMPLETED</b>
[CR 26.2] — Production of a witness' statement regarding preliminary examinations conducted under CR 5.1	Michael R. Levine, Asst. Fed. Defender 3/95	10/95 — Considered by committee 4/96 — Draft presented and approved 6/96 — St Comm approved 8/96 — Published for public comment <b>PENDING FURTHER ACTION</b>
[CR26.2(f)] — Definition of Statement	Crim Rules Comm 4/95	4/95 — Considered 10/95 — Considered and no action to be taken <b>COMPLETED</b>
[CR 26.3] — Proceedings for a mistrial		7/91 — Approved by ST Committee for publication 4/92 — Considered 6/92 — Approved by ST Committee 9/92 — Approved by Judicial Conference 4/93 — Approved by Supreme Court 12/93 — Effective <b>COMPLETED</b>
[CR 29(b)] — Defer ruling on motion for judgment of acquittal until after verdict	DOJ 6/91	11/91 — Considered 4/92 — Forwarded to ST Committee for public comment 6/92 — Approved for publication, but delayed pending move of RCSO 12/92 — Published for public comment on expedited basis 4/93 — Discussed 6/93 — Approved by ST Committee 9/93 — Approved by Judicial Conference 4/94 — Approved by Supreme Court 12/94 — Effective <b>COMPLETED</b>
[CR 30] — Permit or Require parties to submit proposed jury instructions before trial	Local Rules Project; Judge Stotler 1/15/97	10/95 — Subcommittee appointed 4/96 — Rejected by subcommittee <b>COMPLETED</b> 1/97 — Sent directly to chair and reporter
[CR 31] — Provide for a 5/6 vote on a verdict	Sen. Thurmond, S.1426, 11/95	4/96 — Discussed, rulemaking should handle it <b>COMPLETED</b>
[CR 31(d)] — Individual polling of jurors	Judge Brooks Smith	10/95 — Considered 4/96 — Draft presented and approved 6/96 — St Comm approved 8/96 — Published for public comment <b>PENDING FURTHER ACTION</b>

Proposal	Source, Date, and Doc #	Status
[CR 32] — Amendments to entire rule; victims' allocation during sentencing	Judge Hodges, before 4/92	10/92 — Forwarded to ST Committee for public comment 12/92 — Published 4/93 — Discussed 6/93 — Approved by ST Committee 9/93 — Approved by Judicial Conference 4/94 — Approved by Supreme Court 12/94 — Effective <b>COMPLETED</b>
[CR 32(d)(2)] — Forfeiture proceedings and procedures	Roger Pauley, DOJ, 10/93	4/94 — Considered 6/94 — Approved by ST Committee for public comment 9/94 — Published for public comment 4/95 — Revised and approved 6/95 — Stg Com approved 9/95 — Jud Conf approved 4/96 — Sup Ct approved 12/96 — Effective <b>COMPLETED</b>
[CR 32(e)] — Delete provision addressing probation and production of statements (later renumbered to CR32(c)(2))	DOJ	7/91 — Approved by ST Committee for publication 4/92 — Considered 6/92 — Approved by ST Committee 9/92 — Approved by Judicial Conference 4/93 — Approved by Supreme Court 12/93 — Effective <b>COMPLETED</b>
[CR 32.1] — Production of statements		7/91 — Approved by ST Committee for publication 4/92 — Considered 6/92 — Approved by ST Committee 9/92 — Approved by Judicial Conference 4/93 — Approved by Supreme Court 12/93 — Effective <b>COMPLETED</b>
[CR 32.2] — Create forfeiture procedures	John C. Keeney, DOJ, 3/96(96-CR-D)	10/96 — Draft presented and considered <b>PENDING FURTHER ACTION</b>
[CR 33] — Time for filing motion for new trial on ground of newly discovered evidence	John C. Keeney, DOJ 9/95	10/95 — Considered 4/96 — Draft presented and approved 6/96 — Stg Comm approved for publication 8/96 — Published for public comment <b>PENDING FURTHER ACTION</b>
[CR 35(b)] — Recognize combined pre-sentencing and post-sentencing assistance	Judge T. S. Ellis, III 7/95	10/95 — Draft presented and considered 4/96 — Forwarded to ST Committee 6/96 — Approved by ST Committee for publication 8/96 — Published for public comment <b>PENDING FURTHER ACTION</b>

Proposal	Source, Date, and Doc #	Status
[CR 35(c)] — Correction of sentence, timing	Jensen, 1994 9th Cir. decision	10/94 — Considered 4/95 — No action pending restylization of CR Rules <b>PENDING FURTHER ACTION</b>
[CR 40] — Commitment to another district (warrant may be produced by facsimile)		7/91 — Approved by ST Committee for publication 4/92 — Considered 6/92 — Approved by ST Committee 9/92 — Approved by Judicial Conference 4/93 — Approved by Supreme Court 12/93 — Effective <b>COMPLETED</b>
[CR 40] — Treat FAX copies of documents as certified	Mag Judge Wade Hampton 2/93	10/93 — Rejected <b>COMPLETED</b>
[CR 40(a)] — Technical amendment conforming with change to CR5	Criminal Rules Comm 4/94	4/94 — Considered, conforming change no publication necessary 6/94 — Stg Com approved 9/94 — Jud Conf approved 4/95 — Sup Ct approved 12/95 — Effective <b>COMPLETED</b>
[CR 40(a)] — Proximity of nearest judge for removal proceedings	Mag Judge Robert B. Collings 3/94	10/94 — Considered and deferred further discussion until 4/95 10/96 — Considered and rejected <b>COMPLETED</b>
[CR 40(d)] — Conditional release of probationer; magistrate judge sets terms of release of probationer or supervised release	Magistrate Judge Robert B. Collings 11/92	10/92 — Forwarded to ST Committee for publication 4/93 — Discussed 6/93 — Approved by ST Committee 9/93 — Approved by Judicial Conference 4/94 — Approved by Supreme Court 12/94 — Effective <b>COMPLETED</b>
[CR 41] — Search and seizure warrant issued on information sent by facsimile		7/91 — Approved by ST Committee for publication 4/92 — Considered 6/92 — Approved by ST Committee 9/92 — Approved by Judicial Conference 4/93 — Approved by Supreme Court 12/93 — Effective <b>COMPLETED</b>
[CR 41] — Warrant issued by authority within the district	J.C. Whitaker 3/93	10/93 — Failed for lack of a motion <b>COMPLETED</b>

Proposal	Source, Date, and Doc #	Status
[CR 43(b)] — Arraignment of detainees by video teleconferencing; sentence absent defendant	DOJ 4/92	10/92 — Subcommittee appointed 4/93 — Considered 6/93 — Approved by ST Committee for publication 9/93 — Published for public comment 4/94 — Deleted video teleconferencing provision & forwarded to ST Committee 6/94 — Stg Comm approved 9/94 — Jud Conf approved 4/95 — Sup Ct approved 12/95 — Effective <b>COMPLETED</b>
[CR 43(c)(4)] — Defendant need not be present to reduce or change a sentence	John Keeney, DOJ 1/96	4/96 — Considered 6/96 — St Comm approved for publication 8/96 — Published for public comment <b>PENDING FURTHER ACTION</b>
[CR 46] — Production of statements in release from custody proceedings		6/92 — Approved by ST Committee 9/92 — Approved by Judicial Conference 4/93 — Approved by Supreme Court 12/93 — Effective <b>COMPLETED</b>
[CR 46] — Release of persons after arrest for violation of probation or supervised release	Magistrate Judge Robert Collings 3/94	10/94 — Defer consideration of amendment until rule might be amended or restylized <b>PENDING FURTHER ACTION</b>
[CR 46] — Requirements in AP 9(a) that court state reasons for releasing or detaining defendant in a CR case	11/95 Stotler letter	4/96 — Discussed and no action taken <b>COMPLETED</b>
[CR 46(i)] — Typographical error in rule in cross-citation	Jensen	7/91 — Approved by ST Committee for publication 4/94 — Considered 9/94 — No action taken by Judicial Conference because Congress corrected error <b>COMPLETED</b>
[CR 47] — Require parties to confer or attempt to confer before any motion is filed	Local Rules Project	10/95 — Subcommittee appointed 4/96 — Rejected by subcommittee <b>COMPLETED</b>
[CR 49] — Double-sided paper	Environmental Defense Fund 12/91	4/92 — Chair informed EDF that matter was being considered by other committees in Judicial Conference <b>COMPLETED</b>
[CR 49(e)] — Delete provision re filing notice of dangerous offender status — conforming amendment	Prof. David Schlueter 4/94	4/94 — Considered 6/94 — Stg Comm approved without publication 9/94 — Jud Conf approved 4/95 — Sup Ct approved 12/95 — Effective <b>COMPLETED</b>

Proposal	Source, Date, and Doc #	Status
[CR53] — Cameras in the courtroom		7/93 — Stg Comm approved 10/93 — Published 4/94 — Considered and approved 6/94 — Stg Comm approved 9/94 — Jud Conf rejected 10/94 — Guidelines discussed by committee <b>COMPLETED</b>
[CR 57] — Local rules technical and conforming amendments & local rule renumbering	ST meeting 1/92	4/92 — Forwarded to ST Committee for public comment 6/93 — Approved by ST Committee for publication 9/93 — Published for public comment 4/94 — Forwarded to ST Committee 12/95 — Effective <b>COMPLETED</b>
[CR 58] — Clarify whether forfeiture of collateral amounts to a conviction	Magistrate Judge David G. Lowe 1/95	4/95 — No action <b>COMPLETED</b>
[CR 58 (b)(2)] — Consent in magistrate judge trials	Judge Philip Pro 10/24/96 (96- CR-B)	1/97 — Reported out by Criminal Rules Committee and approved by the Stg. Com. for transmission to the Jud. Conf. without publication; consistent with Federal Courts Improvement Act <b>COMPLETED</b>
[CR 59] — Authorize Judicial Conference to correct technical errors with no need for Supreme Court & Congressional action	Report from ST Subcommittee on Style	4/92 — Considered and sent to ST Committee 6/93 — Approved by ST Committee for publication 10/93 — Published for public comment 4/94 — Approved as published and forwarded to ST Committee 6/94 — Rejected by ST Committee <b>COMPLETED</b>
[Megatrials] — Address issue	ABA	11/91 — Agenda 1/92 — ST Committee, no action taken <b>COMPLETED</b>
[Rule 8. Rules Governing §2255] — Production of statements at evidentiary hearing		7/91 — Approved by ST Committee for publication 4/92 — Considered 6/92 — Approved by ST Committee 9/92 — Approved by Judicial Conference 4/93 — Approved by Supreme Court 12/93 — Effective <b>COMPLETED</b>
[U.S. Attorneys admitted to practice in Federal courts]	DOJ 11/92	4/93 — Considered <b>PENDING FURTHER ACTION</b>
[Restyling CR Rules]		10/95 — Considered 4/96 — On hold pending consideration of restyled AP Rules published for public comment <b>PENDING FURTHER ACTION</b>



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

**FROM: Professor Dave Schlueter, Reporter**

**RE: Written Comments on Rules Published for Public Comment**

**DATE: March 2, 1997**

Six rules were published for public comment last fall. The comment period ended on February 15, 1997 and to date, each member of the Committee should have received, or will shortly receive, a total of 19 written "comments." Attached is a list of the commentators and the rules they addressed in their written comments. If you have not received all of the comments please call me (210-431-2212) or Mr. John Rabiej in the Rules Committee Support Office (202-273-1820).

At this point, I have not had the opportunity to write up a summary for each commentator. Instead, I have prepared a separate memo for each of the six published rules and have summarized the comments addressing that particular rule. I do intend to bring the comments with me to the meeting, should a question arise about the details of a particular suggestion or comment.





CRIMINAL RULES COMMENTS  
SEPTEMBER 1996

DOC # 96CR	NAME OF INDIVIDUAL AND /OR ORGANIZATION	DATE REC'D	RULE	DATE RESP	DATE OF FOLLOW UP
001	Charles W. Daniels, Esquire #1441	10/08	5.1, 26.2	10/24	
002	Judge Franklin S.V. Antwerpen #1442	10/01	31	10/24	
003(AP15 & CV029)	Jack E. Horsley, Esquire #1443	10/09	26.2	10/24	
004	Judge Jack B. Weinstein #1445	10/07	5.1, 26.2	10/24	
005	Irwin H. Schwartz #1964	11/7	26.2	12/27	
006	Judge Michael S. Kanne #1965	11/6	31	12/27	
007	John E. Murphy #1963 Ohio Prosecuting Attorneys Association	12/2	5.1; 26.2	12/27	
008	Professor Margery B. Koosed #1959 The University of Akron	11/20	33	12/27	
009	Edward LeRoy Dunkerly #1966	12/17	26.2	12/27	
010	Judge Jerry Buchmeyer #1961	11/21	31	12/27	
011	Richard A. Rossman, on behalf of the State Bar of Michigan Standing Committee on U.S. Courts	1/31	5.1, 26.2, 43(c)	2/3	
012	Paul Rashkind, #2201	2/12	5.1, 33, 35(b), 43(c) (4)	2/12	
013 (CV163 & AP033)	David C. Long, on behalf of the State Bar of California Board of Governors	2/13	26.1, 31, 33, 35, & 43		
014	Prof. Charles D. Weisselberg, plus 9 other signatories	2/14	33	2/19	

DOC # 96CR	NAME OF INDIVIDUAL AND /OR ORGANIZATION	DATE REC'D	RULE	DATE RESP	DATE OF FOLLOW UP
015	Carol A. Brook, on behalf of the Federal Public and Community Defenders	2/18	5.1, 31, 33, 35, 43	2/19	
016	William W. Taylor, III, on behalf of the ABA Section of Criminal Justice	2/18	33, 35(b)	2/19	
017 (Also AP036)	George E. Tragos, Esq., on behalf of the Florida Bar Association	2/18	5.1, 26.2, 31, 33, 35, 43	2/19	
018 (Also AP037)	Carol A. Brook, William J. Genego, and Peter Goldberger, on behalf of the National Association of Criminal Defense Lawyers	2/18	5.1, 26.2, 31, 33, 35, 43	2/19	
019 (Also AP38 and CV170)	Hon. Dana E. McDonald Federal Bar Assn.	2/18	5.1, 26.2, 31, 33, 35, 43	2/25	
020 (Also CV179)	David C. Long, on behalf of the State Bar of California Committee on Federal Courts	3/5	5.1, 26.2, 31, 33, 35, 43	3/7	
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**MEMO TO: Members, Criminal Rules Advisory Committee**

**FROM: Professor Dave Schlueter, Reporter**

**RE: Rule 5.1. Preliminary Examination; Public Comments**

**DATE: March 3, 1997**

Attached is a copy of the proposed amendment to Rule 5.1 and the accompanying Committee Note, as they were published last fall for public comment. To date, 10 written comments have been received.

Only one commentator opposed the amendment--the Ohio Prosecuting Attorneys Association (96-CR-007). That organization raises concerns about perjury, witness intimidation, lack of utility, and alternative means of discovering a witness' prior statements.

Several commentators raised concerns about the last sentence of the rule, which indicates that production is triggered only when a witness testifies in person at the proceeding. The commentators believe that this unnecessarily restricts the rule and that in most preliminary examinations the government will present its evidence through affidavits or other hearsay evidence. They suggest that the sentence be deleted or modified to require production after a person's affidavit has been submitted.

One commentator, Judge Weinstein (96-CR-004), raised questions about what the words "may not" mean in line 8 and 9. Do they mean that the judge must not consider the testimony of a witness whose prior statements have not been produced? Or does the judge have discretion?

PROPOSED AMENDMENTS TO THE  
FEDERAL RULES OF CRIMINAL PROCEDURE\*

**Rule 5.1. Preliminary Examination**

\* \* \* \* \*

(d) PRODUCTION OF STATEMENTS.

(1) In General. Rule 26.2(a)-(d) and (f) applies at any hearing under this rule, unless the court, for good cause shown, rules otherwise in a particular case.

(2) Sanctions for Failure to Produce Statement. If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the moving party, the court may not consider the testimony of a witness whose statement is withheld.

COMMITTEE NOTE

The addition of subdivision (d) mirrors similar amendments made in 1993 which extended the scope of Rule 26.2 to Rules 32, 32.1, 46 and Rule 8 of the Rules Governing Proceedings under 28 U.S.C. § 2255. As indicated in the Committee Notes accompanying those amendments, the primary reason for extending the coverage of

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

Rule 26.2 rested heavily upon the compelling need for accurate information affecting a witness' credibility. That need, the Committee believes, extends to a preliminary examination under this rule where both the prosecution and the defense have high interests at stake.

A witness' statement must be produced only after the witness has personally testified.









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

**FROM: Professor Dave Schlueter, Reporter**

**RE: Rule 26.2. Production of Witness Statements; Public Comments**

**DATE: March 3, 1997**

The proposed amendment to Rule 26.2 was published for comment last fall and to date, ten written comments have been received. All but one of the commentators approve of the change; the Ohio Prosecuting Attorneys Association (96-CR-007) opposes the rule. That organization raises concerns about the possibility of perjury, witness intimidation, lack of utility, and alternative means of discovering a witness' prior statements.

One commentator (96-CR-003) suggests a minor change in the wording to state "suppression or proscription" hearing. In his view the term proscription to mean "writing against," which he believes is really contemplated by the rule change. Another commentator (96-CR-011) suggests that the committee address head on the potential inconsistency between the amendments and the Jencks Act. And another writer (96-CR-18) suggests that the committee further define who is a "witness," i.e., a person who has first-hand knowledge of the facts leading to probable cause.

## Rule 26.2. Production of Witness Statements

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2 (g) SCOPE OF RULE. This rule applies at a suppression hearing  
3 conducted under Rule 12, at trial under this rule, and to the  
4 extent specified:

- 5 (1) in Rule ~~32(e)~~ 32(c)(2) at sentencing;
- 6 (2) in Rule 32.1(c) at a hearing to revoke or modify  
7 probation or supervised release;
- 8 (3) in Rule 46(i) at a detention hearing; ~~and~~
- 9 (4) in Rule 8 of the Rules Governing Proceedings  
10 under 28 U.S.C. § 2255 - ; and
- 11 (5) in Rule 5.1 at a preliminary examination.

### COMMITTEE NOTE

The amendment to subdivision (g) mirrors similar amendments made in 1993 to this rule and to other Rules of Criminal Procedure which extended the application of Rule 26.2 to other proceedings, both pretrial and post-trial. This amendment extends the requirement of producing a witness' statement to preliminary examinations conducted under Rule 5.1.

Subdivision (g)(1) has been amended to reflect changes to Rule 32.





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

**FROM: Professor Dave Schlueter, Reporter**

**RE: Rule 31(d). Polling of Jury; Public Comments.**

**DATE: March 2, 1997**

To date, eight written comments have been received on the proposed amendment to Rule 31(d), which is attached. Only one of the comments recommends complete rejection of the amendment; Judge Buchmeyer, writing on behalf of the judges in the Northern District of Texas, opposes the change (96-CR-010). In his view the amount of time needed to conduct a poll does not outweigh the minimal concern that jurors will hesitate to voice their dissent to the verdict. He adds that most of the rules leave such matters to the judge's discretion and considers it ill advised to remove that discretion for "so meager a justification" as stated in the Committee Note.

Several other comments are worthy of note. Judge Van Antwerpen of the Eastern District of Pennsylvania supports the change but suggests that the word "individually" be stricken. (96-CR-002). He has followed the practice of having the jurors stand if they agree with the verdict and believes that that guarantees unanimity. He is also concerned that the word "individually" could be meant to require naming of the jurors who are serving on an anonymous jury.

Ms Carol Brook, (96-CR-015) suggests that the rule be amended to require "mandatory" polling of the jury--whether or not requested by counsel. She notes that most counsel already request polling.

The NADCL (96-CR-018) recommends that Committee Note be changed to reflect that the use of individual polling will reduce the *need* for motions challenging the verdict on grounds of coercion.

Finally, Judge Michael Kanne of the Seventh Circuit suggests that the Committee give thought to the problem of interpreting what the words "recording of the verdict" mean in the rule. (96-CR-006). He suggests that the Committee review *United States v. Marinari*, 32 F.3d 1209 (7th Cir. 1994) where the court addressed that point. He suggests that the words "it is recorded" be replaced with the words, "before the jury has dispersed." That decision is attached. Although at some point it would probably be advisable to develop one term or collection of words to describe when a verdict is final, it might be better to wait for the more global restyling project and define, and use, the same terms or words throughout all of the rules.

## Rule 31. Verdict

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(d) POLL OF JURY. When a verdict is returned and before it is recorded, the court, at the request of any party or upon its own motion, shall poll the jurors individually. ~~jury shall be polled at the request of any party or upon the court's own motion.~~ If upon the poll reveals a lack of unanimity there is not unanimous concurrence, ~~the court may direct~~ the jury may ~~be directed~~ to retire for further deliberations or it may be discharged ~~discharge the jury.~~

\* \* \* \* \*

## COMMITTEE NOTE

The right of a party to have the jury polled is an "undoubted right." *Humphries v. District of Columbia*, 174 U.S. 190, 194 (1899). Its purpose is to determine with certainty that "each of the jurors approves of the verdict as returned; that no one has been coerced or induced to sign a verdict to which he does not fully assent." *Id.*

Currently, Rule 31(d) is silent on the precise method of polling the jury. Thus, a court in its discretion may conduct the poll collectively or individually. As one court has noted, although the prevailing view is that the method used is a matter within the discretion of the trial court, *United States v. Miller*, 59 F.3d 417, 420 (3d Cir. 1995) (citing cases), the preference, nonetheless of the appellate and trial courts, seems to favor individual polling. *Id.* (citing cases). That is the position taken in the American Bar Association Standards for Criminal Justice § 15-4.5. Those sources favoring individual polling observe that conducting a poll of the jurors collectively saves little time and does not always adequately insure that an individual juror who has been forced to join the majority during deliberations will voice dissent from a collective response. On the other hand, an advantage to individual polling is the "likelihood that it will discourage post-trial efforts to challenge the verdict on allegations of coercion on the part of some of the jurors." *United States v. Miller, supra*, at 420, citing *Audette v. Isaksen Fishing Corp.*, 789 F.2d 956, 961, n. 6 (1st Cir. 1986).



fit, was a principal motivation for the RICO statute, *Reves v. Ernst & Young*, — U.S. —, —, 113 S.Ct. 1163, 1173, 122 L.Ed.2d 525 (1993), and “racketeering” is a frequent synonym for the characteristic activities of such syndicates. These observations fuel the defendants’ contention that the base offense level of 19 that the Sentencing Commission assigned to RICO convictions reflects the greater gravity of criminal activities engaged in by criminal syndicates, so that a departure upward when the defendant was part of such a syndicate would be double counting. We do not agree. The motivation for and the scope of a statute are often and here different things. The term “racketeering activity” in the RICO statute is a defined term, and the definition is remote from the ordinary-language meaning; all it means is committing one of a number of specified criminal acts. 18 U.S.C. § 1961(1). For conviction, it is true, some minimum structure is required (in addition to a “pattern” of racketeering activity, 18 U.S.C. § 1962)—an “enterprise” is required, 18 U.S.C. § 1961(4). But the “enterprise” need be nothing more than a small, informal gang, as in *Burdett v. Miller*, 957 F.2d 1375, 1379 (7th Cir.1992), and *United States v. Masters*, 924 F.2d 1362, 1367 (7th Cir.1991), having minimum structure and continuity; or a lawful enterprise turned to a corrupt end by a corrupt manager, as in *United States v. Robinson*, 8 F.3d 398, 406–07 (7th Cir.1993), and many other cases. We deal here with a criminal syndicate of extensive scope and extraordinary durability—one of the oldest and most notorious criminal enterprises in the United States. Had the guideline range for RICO offenses been set with the Chicago Outfit in mind, it would have greatly overpunished the run of the mill criminal activities that are the routine grist for RICO prosecutions.

We grant that the term “organized crime” is nebulous, and that there are dangers in too casually attaching the appellation to gangs that happen to seem particularly ominous. But we need not explore the outer bounds of the permissible “organized crime” departure in this case. The Chicago Outfit is the clearest possible example of a gang operating on such a scale, with such success, over such a long period of time that the danger which it

poses to society is not adequately reflected in the guideline range. It is not your average criminal RICO violator.

[15] 5. Gio committed arson in a caper with LaValley, for which he was convicted. *United States v. Gio*, 7 F.3d 1279 (7th Cir. 1993). If the arson was conduct “related” to the RICO conspiracy, the judge would have had to make Gio’s sentence for the conspiracy run concurrently with his 63-month sentence for that arson, rather than consecutively, pursuant to a provision, since deleted, in the version of U.S.S.G. § 5G1.3 under which Gio was sentenced. Although Gio obtained Patrick’s permission to commit the arson—obtained it through Rainone, who even supplied Gio with a hand grenade with which to commit it—this did not make it an Outfit job. It is commonplace in legal enterprises, and so far as the record discloses in the Chicago Outfit as well, for a subordinate to ask his superior’s permission to engage in outside activities. Otherwise a vacation would be a form of work if the employee needed permission from his employer to take it. Gio did not share the gains from the job with Alex, Patrick, or any other Outfit figure—even, so far as the record shows, Rainone—other than, of course, his coventurer, LaValley.

AFFIRMED.



UNITED STATES of America,  
Plaintiff–Appellee,

v.

Gerard J. MARINARI, Defendant–  
Appellant.

No. 93–2096.

United States Court of Appeals,  
Seventh Circuit.

Argued March 29, 1994.

Decided August 23, 1994.

Defendant was convicted in the United States District Court for the Southern Dis-

trict of Illinois, James L. Foreman, J., of criminal conspiracy to distribute marijuana. Defendant appealed. The Court of Appeals, Kanne, Circuit Judge, held that: (1) each juror's signature on verdict form did not satisfy defendant's right to poll jury; (2) time at which jury actually dispersed after discharge was time at which verdict was "recorded" within meaning of rule requiring poll request be made before recording of verdict; and (3) defense counsel's request for poll of jury was timely made before jury actually dispersed.

Reversed and remanded.

#### 1. Criminal Law §874

Each juror's signing of verdict form in jury room, standing alone, does not demonstrate uncoerced unanimity of verdict and, thus, does not satisfy defendant's right to poll jury. Fed.Rules Cr.Proc.Rule 31(d), 18 U.S.C.A.

#### 2. Criminal Law §874, 892

Time at which jury actually disperses after discharge is time when verdict becomes final and "recorded" within meaning of rule requiring that request for poll of jury be made between return and recording of verdict; before jury disperses, it remains within control of court and may be recalled. Fed. Rules Cr.Proc.Rule 31(d), 18 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

#### 3. Criminal Law §874

Defendant did not waive right to poll jury by failing to make request for poll during brief pause between reading of verdict and trial judge's remarks to jury, in light of unreasonably short time frame of pause within which to require poll request be made. Fed.Rules Cr.Proc.Rule 31(d), 18 U.S.C.A.

#### 4. Criminal Law §874

Defendant did not waive right to poll jury by failing to interrupt trial judge's closing remarks to make request for poll. Fed. Rules Cr.Proc.Rule 31(d), 18 U.S.C.A.

#### 5. Criminal Law §874

Defense counsel's request for poll of jury was made before jury actually dispersed and, thus, request was timely made before verdict was recorded, even though request was made after jury had returned to jury room after trial; jury remained sequestered in jury room awaiting security escort to parking lot. Fed.Rules Cr.Proc.Rule 31(d), 18 U.S.C.A.

Thomas Edward Leggans, Office of U.S. Atty., Crim. Div., Fairview Heights, IL (argued), Michael C. Carr, Asst. U.S. Atty., Benton, IL, for plaintiff-appellee.

Jeffrey E. Stone (argued), David J. Stetler, McDermott, Will & Emery, Chicago, IL, for defendant-appellant.

Before CUMMINGS, EASTERBROOK, and KANNE, Circuit Judges.

KANNE, Circuit Judge.

When does a request to poll a jury come too late? That is the issue presented in this case. Nine days were devoted to the trial of Gerard J. Marinari. The jury deliberations took sixteen hours over two days. The consideration of the case by the jury was difficult. Three declarations of deadlock occurred and frustration was evident. The jury ultimately found Marinari guilty of the one count of criminal conspiracy to distribute marijuana with which he was charged. All jurors signed the verdict form. No oral poll of the jury was taken, however, notwithstanding the request for one made by Marinari's counsel after the jury had retired from the courtroom—but while it remained intact in the jury room.

#### BACKGROUND

In greater detail, the situation was as follows. At 4:30 P.M., on January 19, 1993, the jury began their deliberations which continued for approximately five hours, interrupted by dinner. During this time, the jury made several requests for transcripts of the testimony of various witnesses and clarification of certain instructions. After conferring with counsel, the court provided written responses to the jury including advising them that no

transcripts were then available. Shortly after 9:30 P.M., the jury indicated by a note to the court that "the jury is at a deadlock and have been for the past three hours. The minority have stated that they cannot change their minds in good conscience." Without objection of counsel the jury was advised by a note from the judge stating: "I'm adjourning court for the evening, and ask that you resume your deliberations tomorrow morning at 9:30 a.m."

The following day the jury reconvened at 9:30 A.M., as directed. More notes passed back and forth between the jury and the court concerning the previously requested transcripts of witness testimony. At 12:12 P.M., the jury delivered another note again requesting the transcripts and inquiring when they would be prepared. The note indicated that the transcripts were "extremely important" and if they were not available the jury wanted to meet with the judge to receive guidance on how they should proceed. After a discussion with counsel, the court notified the jury in writing that it would be an hour before the transcripts could be completed. There is no indication in the record when the transcripts were actually delivered to the jury. At 3:16 P.M., the jury sent a note to the court stating they had not come any closer to reaching a decision and that "it appears that we are not going to be able to reach a unanimous decision without someone compromising their sworn oath." This note raised the concern of the court and counsel. They then discussed several options, from declaring a mistrial to regiving (in isolation) the *Silvern*<sup>1</sup> instruction or "dynamite charge."

Marinari moved for a mistrial on the basis of the jury's note. Counsel for the government, when asked by the court for the government's position, indicated that there was no objection to the motion for mistrial. Government counsel, however, agreed with the court's suggestion that before granting a mistrial an inquiry should be made about the jury's ability to reach a decision. The jury was returned into court at 4:30 P.M. When asked by the judge whether it would do any good to continue the deliberations, the fore-

man responded, "I'm not certain that it would." He then indicated how difficult it was to apply the law to the evidence presented. The foreman concluded by saying that "I think I speak for all these people here saying this is probably the hardest thing I've ever had to do. I'm going to get emotional now." After acknowledging that it was an emotional situation not only for the jury, but also for the parties and the court, the judge told them to continue their deliberations and gave the *Silvern* instruction. Thereafter, the jury resumed their deliberations.

At 5:18 P.M., the jury requested a transcript of the testimony of yet another witness. The jury also requested the time frame within which they might expect the transcript. The court responded that it could not be made available until the following morning. Shortly thereafter, the court security officer reported sounds coming from the jury room which indicated that some jurors had become highly agitated. The court then raised again the possibility of declaring a mistrial while expressing concern about how things had deteriorated in the jury room. The court wondered whether the jury could be "rehabilitated." The government objected to declaring a mistrial and the jury was called back into court at 7:25 P.M.

The court explained that transcript preparation was taking a long time because both the judge and court reporter had been involved in other cases throughout the day. When asked if the jury would feel better if they had dinner, the foreman responded, "Probably not. Probably worse." The judge suggested that perhaps the jury should "go home for the evening" and "come back tomorrow" when the transcript they wanted would be ready. The foreman declined and stated: "I don't know the answer, Your Honor. We've sat in there for a day and a half now, beat our heads against the wall, and I don't think we know where to turn from here." The court made a few comments of encouragement and the foreman responded, "I don't think anyone here wants to come back tomorrow. Why don't you just let us go back, and we will see if we can hammer something else (sic)."

1. See *United States v. Silvern*, 484 F.2d 879 (7th

Cir.1973).

The jury resumed its deliberations and returned a verdict fifty-five minutes later at 8:20 P.M. The verdict of guilty, signed individually by each juror, was read into the record by the courtroom deputy clerk. The jury was thanked by the judge and told to "go back to the jury room." After the last juror had exited the courtroom, Marinari requested that the jury be polled. The request was denied while the jurors remained in the jury room waiting to be escorted by the court security officers to the parking lot.

Marinari filed a motion for a new trial, claiming among other things that the court had committed error in refusing to have the jury return to the courtroom to be polled. The motion for new trial was denied. Marinari appeals, and asks us to reverse and remand for a new trial.

### DISCUSSION

#### POLL OF JURY AS A MATTER OF RIGHT

Marinari correctly claims that he had a right to a poll of the jury based on Federal Rule of Criminal Procedure 31(d), which provides:

[w]hen a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

Our long-standing position has been that upon a timely request a defendant has an absolute right to poll the jury to ensure the unanimity of the verdict against him. *United States v. F.J. Vollmer & Co.*, 1 F.3d 1511, 1522 (7th Cir.1993) (quoting *Mackett v. United States*, 90 F.2d 462, 466 (7th Cir.1937)). In *Vollmer* we also noted that the right to poll a jury is a substantial right and that a "[f]ailure to poll the jury upon a timely request is *per se* error requiring reversal." 1 F.3d at 1522.

In applying Rule 31(d) our cases have consistently held that after the announcement of the verdict, the parties must be afforded "a reasonable amount of time to make the request" for a poll before the verdict is record-

ed. *United States v. Randle*, 966 F.2d 1209, 1214 (7th Cir.1992); *United States v. Shepherd*, 576 F.2d 719, 724 (7th Cir.), *cert. denied*, 439 U.S. 852 (1978); *United States v. Marr*, 428 F.2d 614, 615 (7th Cir.1970).

We stated in *Shepherd* that "the purpose of affording a right to have the jury polled is not to invite each juror to reconsider his decision, but to permit an inquiry as to whether the verdict is in truth "unanimous" and "uncoerced," and that each juror has "fully assented." 576 F.2d at 725.

Our first task then is to determine whether the verdict form in this case, signed by each of the individual jurors, constituted a valid poll under Rule 31(d).

#### INDIVIDUALLY SIGNED VERDICT FORM NOT A POLL

In the immediacy of the post verdict argument, the district court concluded (later modified in his written memorandum) that the jury had been polled, because they had each signed the verdict form and that was "a form of a poll." It is true that Rule 31(d) does not prescribe how the poll of a jury is to be conducted, and leaves the method to the discretion of the district judge. However, one form of polling has been found to be inadequate. In *Government of Virgin Islands v. Hercules*, 875 F.2d 414, 418-19 (3d Cir.1989), the Third Circuit held that the reliance on verdict forms signed by all jurors in the jury room was inadequate to meet the polling requirements of Rule 31(d). The method of polling chosen must satisfy the purpose of the poll, which is to ensure "uncoerced unanimity." *Id.* at 418 (citing *Shepherd*, 576 F.2d at 725). Ensuring "uncoerced unanimity" is properly satisfied by asking each juror individually in open court to answer the question of whether or not the verdict announced was that juror's verdict.

[1] In *Shepherd*, we indicated only a preference for this method. *Id.* at 722, n. 1. However, we intend to leave no doubt now that each juror's signature on a verdict form—standing alone—cannot substitute for an oral poll of the jury in open court. This is so because the signing of the verdict form in the jury room does not demonstrate uncoerced unanimity, which is the purpose of

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#### REQUIREMENTS

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U.S. v. MARINARI

Cite as 32 F.3d 1209 (7th Cir. 1994)

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Rule 31(d). As a result, the action taken in this case with regard to the jurors' signatures on the verdict form was not a poll contemplated by Rule 31(d). Having determined that no valid poll was taken, we turn to whether Marinari preserved his right to a poll under Rule 31(d) by making a timely request.

**REQUEST FOR POLL MUST BE BEFORE VERDICT IS "RECORDED"**

As an additional ground for denying a poll of the jury, the district judge determined that Marinari failed to timely exercise that right. The relevant portion of the transcript reads as follows:

(The proceedings resume in open court with all attorneys and the defendant present, in the presence of the jury at 8:20 P.M.)

THE COURT: Mr. Schulte [Jury Foreman], I've been told you've reached a verdict.

MR. SCHULTE: Yes, we have.

THE COURT: Would you give it to Mr. Jones to give it to me? Vicki, would you read the verdict, please?

THE CLERK: Yes. The jury find the Defendant Gerard J. Marinari guilty of the offense charged in the indictment. This verdict is signed by the foreperson and the remaining jurors.

THE COURT: Members of the jury, I want to thank you ladies and gentlemen for your service to the Court, for your being here when the Court's asked you, for your patience, your diligence in listening to this case. I have other matters to take up here now, and I'll ask that you go back to the jury room.

(The Jury Exits the Courtroom)

MR. FAHRENKAMP: [Marinari's attorney] Could we have a poll of the Jury?

The district court denied the request after hearing argument of counsel. During the argument and ruling which took place in the courtroom, the jury remained together isolated in the jury room still under the control of the court.

Rule 31(d) explicitly provides that the request for a poll of the jury must be made

after "a verdict is returned and before it is recorded." But when a verdict is "recorded" is left undefined by Rule 31(d). As was apparent in the discourse in the trial court, this omission in the Rule has resulted in understandable confusion.

With regard to Rule 31(d), we know that ministerial acts dealing with the processing of the verdict have been determined to be inapplicable. Thus, the action of the courtroom deputy clerk "file stamping the verdict form and docketing the verdict is immaterial" to the question of when a verdict is "recorded." *United States v. Dakins*, 872 F.2d 1061, 1065 (D.C.Cir.1989). Hinging the "recording" of the verdict on these acts would create very difficult problems. The entry of the verdict on the docket typically occurs one or more days after the verdict is announced. In this case, for example, the verdict was entered on the docket the following day. Under such circumstances jurors will have been subjected to exposure of outside factors rendering the reliability of any poll on recall problematic. On the other hand, the timing of the file stamping of a verdict form is not consistent and may occur nearly contemporaneously with the announcement of a verdict. It could, therefore, be nearly impossible to request a poll of the jury between the verdict's announcement and the file stamping of the verdict.

**FINALITY OF VERDICT AND "RECORDING"**

Appellate decisions addressing the issue of "recording" have looked to the finality of the verdict. The recording of a verdict is initiated when it is read into the court record, but that does not render it final. Finality, and thus recording, requires the occurrence of a terminating event.

[2] Where a poll is taken, the verdict becomes final and "recorded," when the twelfth juror's assent to that verdict is made on the record. *Id.* On the other hand, where no poll is requested or taken the verdict becomes final and unalterable and is therefore "recorded" when the jury has dispersed, completing its discharge. See, e.g., *Commonwealth v. Pacini*, 224 Pa.Super. 497, 307 A.2d 346, 348 (1973).

Until the jury is actually discharged by separating or dispersing (not merely being declared discharged), the verdict remains subject to review. *Putnam Resources v. Pateman*, 958 F.2d 448, 459 (1st Cir.1992). When a jury remains as an undispersed unit within the control of the court and with no opportunity to mingle with or discuss the case with others, it is undischarged and may be recalled. *Summers v. United States*, 11 F.2d 583, 586 (4th Cir.), cert. denied, 271 U.S. 681, 46 S.Ct. 632, 70 L.Ed. 1149 (1926). As a result, the verdict is not final or "recorded" as that term is used in Rule 31(d).

The "recording" dilemma was avoided in the American Bar Association's recommended rule of criminal procedure, dealing with polling the jury. The model rule uses the actual occurrence of finality of the verdict described in the case law and thus provides for a right to a poll "[w]hen a verdict has been returned and before the jury has dispersed...." *ABA Standard for Criminal Justice* 15-4.5 (2nd ed. 1980 & Supp.1986) (emphasis added).

There is a long line of cases which demonstrate the practical reason why finality of the verdict comes upon the separation and dispersal of the jurors. It is from that time that the jurors are exposed to outside contacts. *E.g.*, *Summers*, 11 F.2d at 586 (finality of verdict occurs when jury is discharged and has separated); *People v. McNeeley*, 216 Ill.App.3d 647, 159 Ill.Dec. 119, 122, 575 N.E.2d 926, 929 (1991) (pivotal question for finality is whether "protective shield" was removed by discharge, "allowing the jurors to be influenced by improper outside factors"); *Joy v. State*, 14 Ind. 139, 142 (1860) (right to poll jury passed when "the jury were permitted to separate"). Of course, after discharge, the jurors are quite properly free to discuss the case with whomever they choose. Simple questions such as "Did we do alright?" or "We did the right thing, didn't we?"—responded to either positively or negatively would taint any subsequent poll. In

2. It is also worth observing that in some district courts in this circuit there is a standard practice of polling every jury in a criminal case immediately following the return of a verdict. This, of course, has avoided such problems as we face in this case. A few additional minutes routinely

any realistic sense, no meaningful poll, unaffected by outside influences, could be conducted at this point. Thus, in the absence of a poll, it is upon separation and dispersal of the jury that the verdict, initially read into the record, becomes final and unalterable and is therefore "recorded" for the purpose of Rule 31(d).

#### REASONABLE TIME FOR POLL REQUEST BEFORE VERDICT RECORDED

[3] Having resolved the uncertainty concerning Rule 31(d) "recording," the answer to whether Marinari's request for a poll was timely becomes plain. Yet, before announcing that conclusion, we believe it would be helpful to examine and comment on Marinari's claim that his "first opportunity" to request a poll of the jury occurred only after the jury had left the courtroom. The district judge, to the contrary, concluded that Marinari had an opportunity to make a request for a poll between the conclusion of the reading of the verdict and the judge's remarks to the jury. The judge acknowledged that this amounted to only a brief period of time, described as "a little pause" of "several seconds." Counsel for Marinari did not take advantage of whatever brief transition there may have been between the announcement of the verdict and the district judge's concluding remarks to the jury to make his request for a poll. In *United States v. Randle*, 966 F.2d 1209, 1213-14 (7th Cir.1992), we found that 1.5 seconds (there was an audio tape of the proceedings) which elapsed after the announcement of the verdict was an unreasonably short time frame within which counsel should be expected to request a poll of the jury or suffer waiver of that right. The brief pause here was likewise insufficient. Of course, the district judge later acknowledged in his written memorandum, that the better practice, as we noted in *Randle*, is to ask counsel at this point if there are any requests to poll the jury.<sup>2</sup> The error here was not critical, however, because additional time

used to establish the fact of the unanimity of a verdict provides a practical alternative to disputes which arise concerning what is a "reasonable" amount of time within which counsel should request a jury poll. There is much to recommend this procedure.

would elapse before the verdict was "recorded."

[4] Following that short pause, the court began addressing the jury. Marinari's counsel indicated that he had assumed that the court (apparently on its own motion) would poll the jury after the verdict was read, and when it did not, he did not wish to interrupt the court's closing comments. The general rule in this circumstance is that counsel's decision not to interrupt the court when it was speaking is not to be held against him. In *United States v. Shepherd*, 576 F.2d 719, 723 (7th Cir.1978), we held that counsel, by refraining from interrupting the district judge when he was speaking did not thereby waive defendant's right to a poll. That rule applies in this case as well.

Next, there was what is typically the final "window of opportunity" for counsel to make a request for a poll. This is a time frame which routinely occurs in any criminal jury trial. After the judge thanked the jury and excused them the jurors began leaving the jury box one row at a time and exited the courtroom. Common experience teaches that the length of time necessary for twelve jurors to depart "single file" provides a reasonable opportunity for counsel finally to rise to his feet and announce a request for a jury poll. Counsel risks waiver of the defendant's right to a poll by merely waiting and watching as the jury disappears behind the closed door of the jury room. See, e.g., *Marr*, 428 F.2d at 615 (no request for poll or recall of jury occurred and right to poll waived); *United States v. Beldin*, 737 F.2d 450, 455 (5th Cir.1984) (failure to object to discharge of jury or request that jury be recalled constituted waiver of right to poll). The opportunity to exercise the defendant's right to a poll of the jury was slipping away—and it would have, but for the particular circumstances of this case. The completion of the discharge of the jury, with its dispersal and exposure to outside contact, often occurs quickly after it retires from the courtroom.

#### CONCLUSION

[5] In this case, however, while the colloquy regarding Marinari's request to recall the jury for a poll was taking place in the

courtroom, the jury remained sequestered in the jury room awaiting a security escort to the parking lot. The jurors had not dispersed and they remained untainted by any outside contact. During that time, the jury continued to exist as a judicial body under the control of the court. As a result, the verdict was not yet final or "recorded." The jury, under the somewhat unusual factual circumstances of this case, was available to be recalled and polled. See, e.g., *Putnam Resources*, 958 F.2d at 459; *Brown v. Gunter*, 562 F.2d 122, 125 (1st Cir.1977).

Although Marinari's counsel let pass what is typically the last opportunity for a poll request, no waiver of that right occurred. The delayed request for a poll was timely because it came prior to the separation of the jury and thus before the verdict was "recorded." Given the defendant's absolute right to a poll of the jury at the time it was requested, it was error *per se* for the district court not to recall the jury and conduct an oral poll.

This case is REVERSED and REMANDED for a new trial.



Elizabeth MARSHALL,  
Plaintiff-Appellee,

v.

PORTER COUNTY PLAN COM-  
MISSION, et al., Defendants-  
Appellants.

No. 93-2794.

United States Court of Appeals,  
Seventh Circuit.

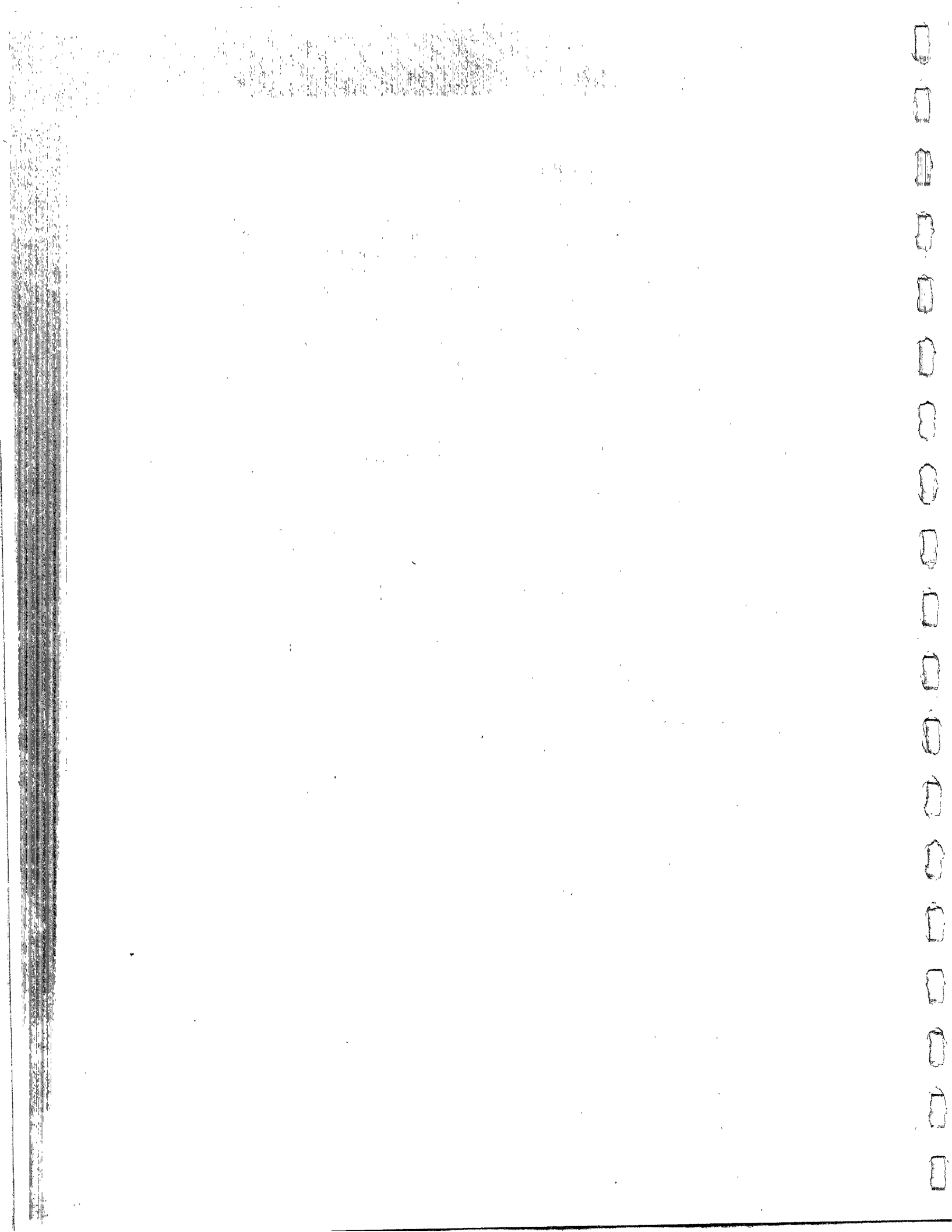
Argued Feb. 8, 1994.

Decided Aug. 23, 1994.

Rehearing and Suggestion for Rehearing  
En Banc Denied Sept. 30, 1994.

Former executive secretary of county  
plan commission brought § 1983 action









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

**FROM: Professor Dave Schlueter, Reporter**

**RE: Rule 33. New Trial; Public Comments**

**DATE: March 3, 1997**

The amendment to Rule 33 is intended to make uniform the triggering event for requesting a new trial--the "verdict or finding or guilty." By changing the triggering event for motions for new trials based on newly discovered evidence, the actual amount of time for filing such a motion has been shortened.

To date, the Committee has received nine written comments. Of those, only two favor the proposed amendment: The Federal Bar Association (96-CR-019) (it promotes consistency) and Mr. Tragos (96-CR-017)(on behalf of the Florida Bar Association). The remainder are strongly opposed to the amendment.

In summary, those opposing the amendment (including several state and national bar organizations) argue that first, there is no real need for the amendment. Consistency, in their view, is not a good enough reason for dramatically reducing the actual amount of time available to the defendant.

Second, reducing the amount of actual time available means that counsel will often have to handle sentencing, a possible appeal, and a possible motion for new trial, as opposed to fully litigating the appeal and then when that fails, pursuing an investigation regarding newly discovered evidence. Several commentators noted that the sentencing process itself uses up approximately three months of the 24-month period.

Third, given the very real possibility that additional time will permit the defendant to gather and present newly discovered evidence, the time should not be shortened but, as at least one commentator has noted, should instead be extended.

Fourth, shortening the time period further exacerbates the fact that unwary counsel may not be aware that they can file a motion for new trial with the district court, even if an appeal has been taken.

Fifth, several commentators suggest that the amendment might read to the effect that the period for filing a motion for new trial on grounds of newly discovered evidence should run for two years from the date of the verdict, etc. or six months after the Court of Appeals enters a judgment, whichever period is shorter.

It should be noted that when the proposed amendment was discussed at the April 1996 meeting, the Department of Justice indicated that it might be willing to consider changing the amount of time for filing a motion for new trial from two to three years. Following a motion to that effect and discussion by the members, the motion failed by a vote of five to six.

### Rule 33. New Trial

1           The court on motion of a defendant may grant a new  
2           trial to that defendant if required in the interest of justice. If  
3           trial was by the court without a jury the court on motion of a  
4           defendant for a new trial may vacate the judgment if entered,  
5           take additional testimony and direct the entry of a new  
6           judgment. A motion for a new trial based on the ground of  
7           newly discovered evidence may be made only before or  
8           within two years after ~~final judgment~~, the verdict or finding of  
9           guilty. ~~but if~~ If an appeal is pending the court may grant the  
10          motion only on remand of the case. A motion for a new trial  
11          based on any other grounds shall be made within 7 days after  
12          the verdict or finding of guilty or within such further time as  
13          the court may fix during the 7-day period.

### COMMITTEE NOTE

As currently written, the time for filing a motion for new trial on the ground of newly discovered evidence runs from the "final judgment." The courts, in interpreting that language, have uniformly concluded that that language refers to the action of the Court of Appeals. *See, e.g., United States v. Reyes*, 49 F.3d 63, 66 (2d Cir. 1995)(citing cases). It is less clear whether that action is the appellate court's judgment or the issuance of its mandate. In *Reyes*, the court concluded that it was the latter event. In either case, it is clear that the present approach of using the appellate court's final judgment as

the triggering event can cause great disparity in the amount of time available to a defendant to file timely a motion for new trial. This would be especially true if, as noted by the Court in *Reyes, supra* at 67, an appellate court stayed its mandate pending review by the Supreme Court. *See also Herrera v. Collins*, 113 S.Ct. 853, 865-866 (1993)(noting divergent treatment by States of time for filing motions for new trial).

It is the intent of the Committee to remove that element of inconsistency by using the trial court's verdict or finding of guilty as the triggering event. The change also furthers consistency within the rule itself; the time for filing a motion for new trial on any other ground currently runs from that same event.



100



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

**FROM: Professor Dave Schlueter, Reporter**

**RE: Rule 35(b). Reduction of Sentence**

**DATE: March 3, 1997**

At this point, the Committee has received seven written comments addressing the proposed amendments to Rule 35(b). All of them favor the amendment.

Several specific comments are worthy of note, however. First, two comments from organizations (Federal Public and Community Defenders; CR-015)(NADCL, CR-018) suggest that the language in the Committee Note regarding double dipping be removed. In their view, that comment may be read by judges to mean that they are required to make detailed findings as to what factors or information was considered at sentencing. (Note that although two organizations have made that suggestion, in fact it may be coming from one commentator, Ms. Brook, who apparently serves as an officer in both organizations).

Second, the ABA's Criminal Justice Section (CR-016) recommends that the one year limit for filing the motion to reduce be deleted from the rule and that the rule be amended to permit such motions by the defense as well as the government.

## Rule 35. Correction or Reduction of Sentence

\*\*\*\*\*

(b) REDUCTION OF SENTENCE FOR CHANGED CIRCUMSTANCES. The court, on motion of the Government made within one year after the imposition of the sentence, may reduce a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense, in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code. The court may consider a government motion to reduce a sentence made one year or more after imposition of the sentence where the defendant's substantial assistance involves information or evidence not known by the defendant until one year or more after imposition of sentence. In evaluating whether substantial assistance has been rendered, the court may consider the defendant's pre-sentence assistance. The court's authority to reduce a sentence under this ~~subsection~~ subdivision includes the authority to reduce such sentence to a level below that established by statute as a minimum sentence.

\*\*\*\*\*

### COMMITTEE NOTE

The amendment to Rule 35(b) is intended to fill a gap in current practice. Under the Sentencing Reform Act and the applicable guidelines, a defendant who has provided "substantial" assistance before sentencing may receive a reduced sentence under United States Sentencing Guideline § 5K1.1. And a defendant who provides substantial assistance after the sentence has been imposed may receive a reduction of the sentence if the Government files a

8057  
motion under Rule 35(b). In theory, a defendant who has provided substantial assistance both before and after sentencing could benefit from both § 5K1.1 and Rule 35(b). But a defendant who has provided, on the whole, substantial assistance may not be able to benefit from either provision because each provision requires "substantial assistance." As one court has noted, those two provisions contain distinct "temporal boundaries." *United States v. Drown*, 942 F.2d 55, 59 (1st Cir. 1991).

Although several decisions suggest that a court may aggregate the defendant's pre-sentencing and post-sentencing assistance in determining whether the "substantial assistance" requirement of Rule 35(b) has been met, *United States v. Speed*, 53 F.3d 643, 647-649 (4th Cir. 1995) (Ellis, J. concurring), there is no formal mechanism for doing so. The amendment to Rule 35(b) is designed to fill that need. Thus, the amendment permits the court to consider, in determining the substantiality of post-sentencing assistance, the defendant's pre-sentencing assistance, irrespective of whether that assistance, standing alone, was substantial.

The amendment, however, is not intended to provide a double benefit to the defendant. Thus, if the defendant has already received a reduction of sentence under U.S.S.G. § 5K1.1 for substantial pre-sentencing assistance, he or she may not have that assistance counted again in any Rule 35(b) motion.







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

**FROM: Professor Dave Schlueter, Reporter**

**RE: Rule 43(c). Presence of Defendant Not Required; Public Comments**

**DATE: March 3, 1997**

The Committee has proposed an amendment to Rule 43(c) clarifying the presence of the defendant at various post-sentencing proceedings. To date, six commentators have submitted written comments on the proposed changes. Only two of them, the Federal Bar Association and Mr. Tragos, writing on behalf of the Florida Bar Association.

The other commentators, including several organizations, oppose the amendment. They note that as a general rule the defendant should have the opportunity to be present at any proceeding affecting his or her freedom. At least one commentator, the State Bar of Michigan Standing Committee on United States Courts believes that a proceeding to reduce a sentence under Rule 35(b) is a critical stage at which the defendant has a right to be present.

### Rule 43. Presence of the Defendant

\*\*\*\*\*

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

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

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

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

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

#### COMMITTEE NOTE

The amendment to Rule 43(c)(4) is intended to address two issues. First, the rule is rewritten to clarify whether a defendant is entitled to be present at resentencing proceedings conducted under Rule 35. As a result of amendments over the last several years to Rule 35, implementation of the Sentencing Reform Act, and caselaw interpretations of Rules 35 and 43, questions had been raised whether the defendant had to be present at those proceedings. Under the



present version of the rule, it could be possible to require the defendant's presence at a "reduction" of sentence hearing conducted under Rule 35(b), but not a "correction" of sentence hearing conducted under Rule 35(a). That potential result seemed at odds with sound practice. As amended, Rule 43(c)(4) would permit a court to reduce or correct a sentence under Rule 35(b) or (c), respectively, without the defendant being present. But a sentencing proceeding being conducted on remand by an appellate court under Rule 35(a) would continue to require the defendant's presence. *See, e.g., United States v. Moree*, 928 F.2d 654, 655-656 (5th Cir. 1991)(noting distinction between presence of defendant at modification of sentencing proceedings and those hearings that impose new sentence after original sentence has been set aside).

The second issue addressed by the amendment is the applicability of Rule 43 to resentencing hearings conducted under 18 U.S.C. § 3582(c). Under that provision, a resentencing may be conducted as a result of retroactive changes to the Sentencing Guidelines by the United States Sentencing Commission or as a result of a motion by the Bureau of Prisons to reduce a sentence based on "extraordinary and compelling reasons." The amendment provides that a defendant's presence is not required at such proceedings. In the Committee's view, those proceedings are analogous to Rule 35(b) as it read before the Sentencing Reform Act of 1984, where the defendant's presence was not required. Further, the court may only reduce the original sentence under these proceedings.



PROPOSED AMENDMENTS TO THE  
FEDERAL RULES OF CRIMINAL PROCEDURE\*

**Rule 58. Procedure for Misdemeanors and Other Petty  
Offenses**

1 (a) SCOPE.

2 (1) *In General.* This rule governs the procedure and practice  
3 for the conduct of proceedings involving misdemeanors and  
4 other petty offenses, and for appeals to district judges of the  
5 ~~district courts~~ in such cases tried by United States magistrate  
6 judges.

7 \* \* \* \* \*

8 (b) PRETRIAL PROCEDURES.

9 \* \* \* \* \*

10 (2) *Initial Appearance.* At the defendant's initial appearance  
11 on a misdemeanor or other petty offense charge, the court  
12 shall inform the defendant of:

13 \* \* \* \* \*

---

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

2       FEDERAL RULES OF CRIMINAL PROCEDURE

14               (C) ~~unless the charge is a petty offense for which~~  
15               ~~appointment of counsel is not required;~~ the right to  
16               request the ~~assignment~~ appointment of counsel if the  
17               defendant is unable to obtain counsel, unless the  
18               charge is a petty offense for which an appointment of  
19               counsel is not required;

20                               \* \* \* \* \*

21               (E) the right to trial, judgment, and sentencing before  
22               a district judge ~~of the district court~~ , unless;

23                       (i) the charge is a Class B misdemeanor  
24                       motor-vehicle offense, a Class C  
25                       misdemeanor, or an infraction; or

26                       (ii) the defendant consents to trial, judgment,  
27                       and sentencing before a magistrate judge;

28               (F) ~~unless the charge is a petty offense;~~ the right to  
29               trial by jury before either a United States magistrate

FEDERAL RULES OF CRIMINAL PROCEDURE 3

30 judge or a district judge of the district court, unless the  
31 charge is a petty offense; and

32 (G) ~~if the defendant is held in custody and charged~~  
33 ~~with a misdemeanor other than a petty offense, the~~  
34 ~~right to a preliminary examination in accordance with~~  
35 ~~18 U.S.C. § 3060, and the general circumstances~~  
36 ~~under which the defendant may secure pretrial release,~~  
37 if the defendant is held in custody and charged with a  
38 misdemeanor other than a petty offense.

39 (3) *Consent and Arraignment.*

40 (A) ~~TRIAL~~ <sup>PLEA</sup> BEFORE A UNITED STATES MAGISTRATE  
41 JUDGE. ~~If the defendant signs a written consent to be~~  
42 ~~tried before the magistrate judge which specifically~~  
43 ~~waives trial before a judge of the district court, the~~  
44 ~~magistrate judge shall take the defendant's plea. A~~  
45 magistrate judge shall take the defendant's plea in a  
46 Class B misdemeanor charging a motor vehicle-

4       FEDERAL RULES OF CRIMINAL PROCEDURE

47               offense, a Class C misdemeanor, or an infraction. In  
48               every other misdemeanor case, a magistrate judge may  
49               take the plea only if the defendant consents either in  
50               writing or orally on the record to be tried before the  
51               magistrate judge and specifically waives trial before  
52               a district judge. The defendant may plead not guilty,  
53               guilty, or with the consent of the magistrate judge,  
54               nolo contendere.

55               (B) FAILURE TO CONSENT. ~~If the defendant does not~~  
56               ~~consent to trial before the magistrate judge, In a~~  
57               misdemeanor case — other than a Class B  
58               misdemeanor charging a motor-vehicle offense, a  
59               Class C misdemeanor, or an infraction,— the  
60               ~~defendant shall be ordered~~ magistrate judge shall  
61               order the defendant to appear before a district judge of  
62               ~~the district court~~ for further proceedings on notice,  
63               unless the defendant consents to trial before the

FEDERAL RULES OF CRIMINAL PROCEDURE 5

64 magistrate judge.

65 \* \* \* \* \*

66 (g) APPEAL.

67 (1) *Decision, Order, Judgment or Sentence by a District*  
68 *Judge.* An appeal from a decision, order, judgment or  
69 conviction or sentence by a district judge of the district court  
70 shall be taken in accordance with the Federal Rules of  
71 Appellate Procedure.

72 (2) *Decision, Order, Judgment or Sentence by a United*  
73 *States Magistrate Judge.*

74 (A) INTERLOCUTORY APPEAL. A decision or order  
75 by a magistrate judge which, if made by a district  
76 judge of the district court, could be appealed by the  
77 government or defendant under any provision of law,  
78 shall be subject to an appeal to a district judge of the  
79 district court provided such appeal is taken within 10  
80 days of the entry of the decision or order. An appeal

6       FEDERAL RULES OF CRIMINAL PROCEDURE

81           shall be taken by filing with the clerk of court a  
82           statement specifying the decision or order from which  
83           an appeal is taken and by serving a copy of the  
84           statement upon the adverse party, personally or by  
85           mail, and by filing a copy with the magistrate judge.

86           (B) APPEAL FROM CONVICTION OR SENTENCE. An  
87           appeal from a judgment of conviction or sentence by  
88           a magistrate judge to a district judge ~~of the district~~  
89           court shall be taken within 10 days after entry of the  
90           judgment. An appeal shall be taken by filing with the  
91           clerk of court a statement specifying the judgment  
92           from which an appeal is taken, and by serving a copy  
93           of the statement upon the United States Attorney,  
94           personally or by mail, and by filing a copy with the  
95           magistrate judge.

96                               \* \* \* \* \*



FEDERAL RULES OF CRIMINAL PROCEDURE 7

97 (D) SCOPE OF APPEAL. The defendant shall not be  
98 entitled to a trial de novo by a district judge of the  
99 ~~district court~~. The scope of appeal shall be the same  
100 as an appeal from a judgment of a district court to a  
101 court of appeals.

102 \* \* \* \* \*

COMMITTEE NOTE

The Federal Courts Improvement Act of 1996, Sec. 202, amended 18 U.S.C. § 3401(b) and 28 U.S.C. § 636(a) to remove the requirement that a defendant must consent to a trial before a magistrate judge in a petty offense that is a class B misdemeanor charging a motor vehicle offense, a class C misdemeanor, or an infraction. Section 202 also changed 18 U.S.C. § 3401(b) to provide that in all other misdemeanor cases, the defendant may consent to trial either orally on the record or in writing. The amendments to Rule 58(b)(2) and (3) conform the rule to the new statutory language and include minor stylistic changes.



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

**FROM: Professor Dave Schlueter, Reporter**

**RE: Proposal to Amend Rule 5(c)**

**DATE: Feb. 26, 1997**

Attached is a letter from Magistrate Judge Ervin S. Swearingen who recommends, on behalf of the Federal Magistrate Judges Association (FMJA) that Rule 5(c) and 18 USC 3060 be amended. His materials include proposed language for both the rule itself and an Advisory Committee Note.

The proposed amendment would address current language in Rule 5(c) regarding the ability of a magistrate judge to grant a continuance for the preliminary examination. As the rule currently reads, a magistrate judge's authority to grant a continuance extends only to those cases where the defendant or accused has consented to the delay. In those cases where the defendant does not consent to the delay, only a district judge may grant the continuance and then only in those cases where the "delay of the preliminary hearing is indispensable to the interests of justice."

The proposed Committee Note in the materials explains the reasons for amending the rule to permit the magistrate judge to grant continuances even in those cases where the defendant does not consent. Chief among the reasons is the argument the magistrate judge's lack of authority can result in unnecessary loss of time.

Assuming that the proposal has merit, the current rule clearly tracks the statutory language in 18 USC 3060 (attached). As stated in § 3060(c), only the district judge may grant a contested request for a continuance of the preliminary examination. Thus, any proposed amendment to Rule 5(c) would be inconsistent with the clear language of the statute.





# FEDERAL MAGISTRATE JUDGES ASSOCIATION

35th Annual Convention - Denver, Colorado  
July 8-11, 1997

October 28, 1996

96-CV-C

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Peter McCabe, Secretary  
Committee on Rules of Practice and Procedure  
of the Judicial Conference of the United States  
Thurgood Marshall Federal Judiciary Building  
Washington, DC 20544

RE: Proposed Amendment to Rule 68 of the Federal Rules of Civil Procedure  
and Rule 5(c) of the Federal Rules of Criminal Procedure.

Dear Pete:

The Federal Magistrate Judges Association (FMJA) submits two proposed rules changes to the Rules Advisory Committee. These matters were first considered by the Rules Committee of the FMJA chaired by Hon. Carol E. Heckman. The committee members are: Hon. Nancy Stein Nowak, Hon. Anthony Battaglia, Hon. Paul Komives, Hon. Andrew Wistrich, Hon. Thomas Phillips, Hon. Patricia Hemann, Hon. John L. Carroll, and Hon. B. Waugh Crigler. The committee members come from several kinds of districts and have varying types of duties. Many of them consulted with their colleagues in the course of preparing these proposals. The proposals were then reviewed and approved by the Officers and Directors of the FMJA. They reflect the considered position of the magistrate judges as a whole.

The first proposal is an amendment to Rule 68 of the Federal Rules of Civil Procedure, which relates to offers of judgment. The proposal allows the rule to be equally available to plaintiffs and claimants, adds expert witness fees and expenses to costs recoverable under the rule, and advances the timing from more than 10 days before the trial to more than 30 days before trial to reduce last minute settlements.

The second proposal is to amend Rule 5(c) of the Federal Rules of Criminal Procedure as well as 18 U.S.C. § 3060(c). These amendments relate to the ability of a magistrate judge to continue a preliminary examination absent the consent of the defendant. Currently, both of these provisions require a district court, and not a magistrate judge, to make such determinations.

Comments are included with both proposals. We are pleased to have this opportunity to present our proposals for your committee's consideration.

Sincerely,

Ervin S. Swearingen  
United States Magistrate Judge  
President, FMJA

ESS/gmc  
enclosures

**Committee Note Re: Proposed Amendments to  
Rule 5(c), Fed. R. Crim. P. and 18 U.S.C. § 3060 (c)**

The proposed amendments to Criminal Rule 5(c) and 18 U.S.C. § 3060 (c) relate to the ability of a magistrate judge to continue the preliminary examination absent the consent of the defendant.

Rule 5 of the Federal Rules of Criminal Procedure entitles a defendant in a felony case to a preliminary examination before a magistrate judge, within a specified period of time. The time for the examination can be continued by a magistrate judge on the consent of the defendant, or in the alternative, upon the order of a district judge showing that extraordinary circumstances exist and that the delay is indispensable to the interests of justice.

Magistrate judges in most districts are frequently called upon to extend the time for the preliminary hearing to allow the parties to discuss pre-indictment disposition. In fact, in many districts, very few preliminary examinations are actually conducted. Under the current statutory provisions, in the circumstances where a defendant is unwilling to consent to a continuance of the hearing date, and the prosecution moves to continue the hearing, the magistrate judge is required to transfer the matter to a district judge for purposes of the contested motion. The motion to continue typically arises on the date set for the preliminary hearing. As a result, a district judge must address the matter that same day. This procedure results in a great consumption of time for the judges, the judicial staff, the marshals, the attorneys, the court interpreters, and the pre-trial service officers. Realistically, providing magistrate judges jurisdiction to hear and determine the contested motion to continue will facilitate the handling of Rule 5 proceedings and conserve the resources of the judiciary and the associated individuals and agencies.

While the committee found no case law specifically limiting magistrate judges from exercising jurisdiction to grant the contested motion to continue, contemporary federal jurisprudence seems to indicate that the decision is outside the jurisdiction of the magistrate judge. This premise is supported by the notes of the Advisory Committee on Rules regarding the 1972 amendments to Fed. R. Crim. P. 54(c)<sup>1</sup> stating that the phrase "judge of the United States" does not include an United States magistrate. This premise is also reflected in The Legal Manual for United States Magistrate Judges, Vol. 1, § 7.02.b, published by the Administrative Office of the Courts, Magistrate Judges Division. Citing 18 U.S.C. § 3060(c) and Fed. R. Crim. P. 5(c), the Legal Manual states, "absent the defendant's consent, the preliminary examination may be continued only upon the order of a United States district judge. The district judge must find that extraordinary circumstances exist and that the delay of the preliminary examination is indispensable to the interests of justice."

The Legal Manual does point out that by local rules a district court could empower a magistrate judge to conduct the hearing on a request for a continuance of the preliminary examination and submit a report and recommendation to a district judge. This, of course, does nothing to save the resources of the involved entities and agencies, or expedite the process, and is not a practical solution to the problem.

In terms of other published works, Kent Sinclair, Jr., Practice Before Federal Magistrates (1995) confirms the contemporary position that "in the absence of defendants consent, a district judge may no less extend these dates" (for preliminary examination). *Id.* at §409. The cited authority in this instance is again, Fed. R. Crim. P. 5(c). The current statutory framework for this issue has been in effect since 1968. In 1968, 18 U.S.C. § 3060 (c) was amended<sup>2</sup> to clarify procedures with regard to the preliminary examination. Prior to that time, the only statutory

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<sup>1</sup> Fed. R. Crim. P. 54 deals with the application of these rules. Paragraph (c) defines many of the terms used throughout the rules including "federal magistrate judge," "magistrate judge," and "judge of the United States."

<sup>2</sup> The amendment was part of a bill to amend the Federal Magistrates Act, 28 U.S.C. § 631 et seq., with a stated purpose to "abolish the office of U.S. Commissioner and reform the first echelon of the Federal Judiciary into an effective component of a modern scheme of justice by establishing a system of U.S. Magistrates. H.R. 90-1629, 1968 U.S.C.C.A.N. 4252, 1968 W.L. 5307 [Leg. Hist. at \*2].

guidance regarding the time for preliminary examination was the reference in Fed. R. Crim. P. 5 which provided that the preliminary examination must be held "within a reasonable time following the initial appearance of an accused". HR 90-1629, 1968 U.S.C.C.A.N. 4252, 1968 WL 5307 [Leg. Hist., at \*13 ("House Report")]. The 1968 amendment to 3060(c) introduced the specific outside time limits of 10 (for defendants in custody) and 20 (for defendants on bond or otherwise released) days from the initial appearance for holding the preliminary examination. At that time the amendment also added the provisions with regard to continuances.

The 1968 amendment to 18 U.S.C. § 3060(c) was the subject of discussion in the case of United States v. Green, 305 F. Supp. 125 (S.D.N.Y. 1969).<sup>3</sup> In Green, the Court highlighted that the amendment was precipitated by the routine continuances of the preliminary examination by commissioners (the predecessor of the magistrate judge), under the "reasonable time" standard. Congress moved to insure that a determination on probable cause is made soon after a person is taken into custody.

Review of 18 U.S.C. § 3060 (c) shows a distinction in contrasting the circumstances concerning a continuance by the magistrate judge with the defendant's consent and a continuance absent consent only on an order of a "judge of the appropriate United States district court". This distinction in the statutory language may well be the genesis of the current interpretation. Viewed in light of the 1972 amendments to Fed. R. Crim. P. 54(c) and its definitions, this premise is provided support.

In 1972, in concert with amendments to the Federal Magistrates Act (28 U.S.C. § 631 et seq.), Rule 54(c), Rule 5 was amended to be consistent with 18 U.S.C. §3060(c) concerning the timing of the preliminary examination. As amended in 1972, Rule 5(c) also, specifically discusses the role of the magistrate judge regarding a continuance of the preliminary examination with defendant's consent versus disposition absent consent by "a judge of the United States," supporting the distinction and the limitation in the power of the magistrate judge to grant the opposed continuance.

Interestingly, however, the published Advisory Committee Notes regarding the 1972 amendment to Rule 5 state that the time limits of Rule 5(c) were taken directly from Section 3060 with two exceptions:

The new language allows delay to be consented to by the defendant only if there is 'a showing of good cause, taking into account the public interest and the prompt disposition of criminal cases'...*The second difference between the new rule and 18 U.S.C.A. §3060 is that the rule allows the decision to grant a continuance to be made by United States magistrate as well as by a judge of the United States.* This reflects the view of the advisory committee that the United States magistrate should have sufficient judicial competence to make decisions such as that contemplated by subdivision (c).

While an argument can be made that the 1972 amendments to Rule 5, and as explained by the Advisory Committee Notes, did confer full jurisdiction to the magistrate judge to continue the preliminary examination, with or without the defendant's consent, this statement is in conflict with the 1972 Advisory Committee notes to Rule 54(c) and the legal culture has maintained the distinction in the authority between magistrate judges and district judges regarding Rule 5(c).

This is an anomaly since the magistrate judge sets the preliminary examination on his or her calendar at the initial appearance in each case,<sup>4</sup> and is the judicial officer rendering the determination of probable cause resulting in the defendant's release or requirement that the defendant proceed

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<sup>3</sup> This case involved an appeal of the district courts dismissal of a criminal complaint for failure of the government to afford the defendant an opportunity for preliminary examination under the former "reasonable time" standard for the hearing of a preliminary examination.

<sup>4</sup> Fed. R. Crim. P. 5(c).

toward trial in the case.<sup>5</sup> While the magistrate judge is empowered to hear and determine probable cause<sup>6</sup> as well as other liberty interest issues<sup>7</sup>, this same judicial officer cannot make the decision with regard to the extraordinary circumstances or the interests of justice in an issue where the need for the continuance of a proceeding on this judicial officer's calendar is disputed. Like the Preliminary Examination itself, the magistrate judges order would be reviewable by a district judge.<sup>8</sup>

For all of the foregoing reasons, the proposed amendments would be consistent with the utilization of magistrate judges envisioned by the Congress, would serve in the best interests of judicial economy, and would be consistent with the pre-indictment management of criminal proceedings envisioned in developing the role of United States Magistrate Judge.

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<sup>5</sup> Fed. R. Crim. P. 5.1.

<sup>6</sup> "This procedure is designed to insure that a determination of probable cause is made-- by either the magistrate, some other judicial officer, or the grand jury-- soon after a person is taken into custody. No citizen should have his liberty restrained, even to the limited extent of being required to post bail or meet other conditions of release, unless some independent judicial determination has been made that the restraint is justified." U.S. v. Green, 305 F. Supp. 125, 132, fn.5 (S.D.N.Y. 1969).

<sup>7</sup> This would include bail determinations and pre-trial detention, 18 U.S.C. § 3142 et. seq.

<sup>8</sup> See United States v. Florida, 165 F. Supp. 318, 331 (E.D.Ark. 1958) and United States v. Vassallo, 282 F. Supp. 928, 929 (E.D. Pa. 1968).



**§ 3060. Preliminary examination.**

(c) With the consent of the arrested person, the date fixed by the judge or magistrate judge<sup>9</sup> for the preliminary examination may be a date later than that prescribed by subsection (b), or may be continued one or more times to a date subsequent to the date initially fixed therefor. In the absence of such consent of the accused, the date fixed for the preliminary hearing may be a date later than that prescribed by subsection (b), or may be continued to a date subsequent to the date initially fixed therefor, only upon the order of a **United States magistrate judge or other judge** of the appropriate United States district court after a finding that extraordinary circumstances exist, and that the delay of the preliminary hearing is indispensable to the interests of justice. . . .

---

<sup>9</sup> This statute was last amended in 1968, prior to the change of name of United States Magistrate to United States Magistrate Judge, effective December 1, 1990. The proposed amendment to section (c) should also include correction so that the term United States magistrate judge is replaced wherever the former term magistrate is used in section (c) and throughout Rule 5.

**RULE 5. Initial Appearance Before the Magistrate Judge**

**(c) Offenses Not Triable by the United States Magistrate Judge.** . . . With the consent of the defendant and upon a showing of good cause, taking into account the public interest in the prompt disposition of criminal cases, time limits specified in this subdivision may be extended one or more times by a federal magistrate judge. In the absence of such consent by the defendant, time limits may be extended by a **United States magistrate judge or other judge of the United States** only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice.

ajb/rules.civ/rule5(a)

ajb/rules.civ/sec(a).306

## **§ 3060. Preliminary examination**

(a) Except as otherwise provided by this section, a preliminary examination shall be held within the time set by the judge or magistrate pursuant to subsection (b) of this section, to determine whether there is probable cause to believe that an offense has been committed and that the arrested person has committed it.

(b) The date for the preliminary examination shall be fixed by the judge or magistrate at the initial appearance of the arrested person. Except as provided by subsection (c) of this section, or unless the arrested person waives the preliminary examination, such examination shall be held within a reasonable time following initial appearance, but in any event not later than—

(1) the tenth day following the date of the initial appearance of the arrested person before such officer if the arrested person is held in custody without any provision for release, or is held in custody for failure to meet the conditions of release imposed, or is released from custody only during specified hours of the day; or

(2) the twentieth day following the date of the initial appearance if the arrested person is released from custody under any condition other than a condition described in paragraph (1) of this subsection.

(c) With the consent of the arrested person, the date fixed by the judge or magistrate for the preliminary examination may be a date later than that prescribed by subsection (b), or may be continued one or more times to a date subsequent to the date initially fixed therefor. In the absence of such consent of the accused, the date fixed for the preliminary hearing may be a date later than that prescribed by subsection (b), or may be continued to a date subsequent to the date initially fixed therefor, only upon the order of a judge of the appropriate United States district court after a finding that extraordinary circumstances exist, and that the delay of the preliminary hearing is indispensable to the interests of justice.

(d) Except as provided by subsection (e) of this section, an arrested person who has not been accorded the preliminary examination required by subsection (a) within the period of time fixed by the judge or magistrate in compliance with subsections (b) and (c), shall be discharged from custody or from the requirement of bail or any other condition of release, without prejudice, however, to the institution of further criminal proceedings against him upon the charge upon which he was arrested.

(e) No preliminary examination in compliance with subsection (a) of this section shall be required to be accorded an arrested person, nor shall such arrested person be discharged from custody or from the requirement of bail or any other condition of release pursuant to subsection (d), if at any time subsequent to the initial appearance of such person before a judge or magistrate and prior to the date fixed for the preliminary examination pursuant to subsections (b) and (c) an indictment is returned or, in appropriate cases, an information is filed against such person in a court of the United States.

(f) Proceedings before United States magistrates under this section shall be taken down by a court reporter or recorded by suitable sound recording equipment. A copy of the record of such proceeding shall be made available at the expense of the United States to a person who makes affidavit that he is unable to pay or give security therefor, and the expense of such copy shall be paid by the Director of the Administrative Office of the United States Courts.

(June 25, 1948, c. 645, 62 Stat. 819; Oct. 17, 1968, Pub.L. 90-578, Title III, § 303(a), 82 Stat. 1117.)



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

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CRIMINAL RULES

**FERN M. SMITH**  
EVIDENCE RULES

December 23, 1996

Honorable Ervin S. Swearingen  
United States Magistrate Judge  
President, FMJA  
P.O. Box 1049  
Florence, South Carolina 29503

Dear Judge Swearingen:

Thank you for your letter on behalf of the Federal Magistrate Judges Association proposing amendments to Rule 68 of the Federal Rules of Civil Procedure and Rule 5(c) of the Federal Rules of Criminal Procedure. A copy of your letter will be sent to the chairs and reporters of the Advisory Committees on Civil and Criminal Rules for their consideration.

From 1992 to 1995, the Advisory Committee on Civil Rules spent substantial time studying proposed revisions of Rule 68. A draft proposed amendment together with an extensive Committee Note was prepared, which would have extended the rule to both parties and permitted the shifting of attorney fees under a capped formula. The committee also requested the Federal Judicial Center to survey the bar on their reaction to the proposed amendments to Rule 68. During its many discussions on this subject, the committee considered more modest proposals, including variations of the California offer-of-judgment procedure.

The committee concluded that the proposed amendments and the more modest alternative proposals were subject to abusive gamesmanship. In the end, the committee decided to defer indefinitely further consideration of a proposed revision of Rule 68. For your information, I am enclosing the following committee materials on Rule 68: (1) a copy of the Federal Judicial Center survey; (2) draft proposed amendments to Rule 68 and excerpts of minutes of various committee

Honorable Ervin S. Swearingen

Page 2

meetings on Rule 68 ; and (3) a discussion of the problems with Rule 68 and the many suggested proposals amending it prepared by Professor Edward H. Cooper, the committee's reporter.

We welcome the Federal Magistrate Judges Association's suggestions and appreciate your interest in the rulemaking process.

Sincerely,

A handwritten signature in black ink, appearing to read "P. G. McCabe".Handwritten initials "fa" in black ink.

Peter G. McCabe  
Secretary

cc: Chairs and Reporters,  
Advisory Committees on Civil and Criminal Rules  
Agenda and Policy Subcommittee

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

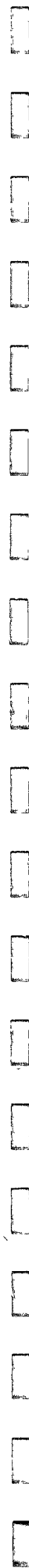
**FROM: Professor Dave Schlueter, Reporter**

**RE: DOJ Proposals to Amend Rule 6(d) (Presence of Interpreters) and Rule 6(f) (Return of Indictment by Foreperson)**

**DATE: February 26, 1997**

The Department of Justice has proposed two amendments to Rule 6. As noted in the attached correspondence, the first proposal would amend Rule 6(d) to permit an interpreter to be present during the grand jury's deliberations--in order to assist any deaf members serving on the jury. The second proposal would amend Rule 6(f) to require that an indictment be returned to the court either by the grand jury itself or by the foreperson (or deputy foreperson) acting on behalf of the grand jury.

I have drafted proposed amendments to accomplish what the Department suggests and also a proposed Committee Note.





**Rule 6. The Grand Jury**

\* \* \* \* \*

**(d) WHO MAY BE PRESENT**

(1) While Grand Jury is in Session. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session.

(2) During Deliberations and Voting. ~~but no~~ No person other than the jurors, and any interpreter necessary to assist a deaf juror, may be present while the grand jury is deliberating or voting.

\* \* \* \* \*

**(f) FINDING AND RETURN OF INDICTMENT.** An indictment may be found only upon the concurrence of 12 or more jurors. The indictment shall be returned by the grand jury, or through the foreperson or deputy foreperson on its behalf, to a federal magistrate judge in open court. If a complaint or information is pending against the defendant and 12 jurors do not concur in finding an indictment, the foreperson shall so report to a federal magistrate in writing as soon as possible ~~forthwith~~.

**ADVISORY COMMITTEE NOTE**

**Subdivision 6(d).** As currently written, Rule 6(d) absolutely bars any person, other than the jurors themselves, from being present during the jury's deliberations and voting. Accordingly, interpreters are barred from attending the deliberations and voting by the grand jury, even though they may have been present during the taking of testimony.

The amendment is intended to permit interpreters to assist any deaf persons who may be serving on a grand jury. Although the Committee believes that the need for secrecy of grand jury deliberations and voting is paramount, permitting such interpreters in the process seems a reasonable accommodation. *See also United States v. Dempsy*, 830 F.2d 1084 (10th Cir. 1987) (constitutionally rooted prohibition of non-jurors being present during deliberations was not violated by interpreter for deaf petit jury member). The subdivision has also been restyled and reorganized.

**Subdivision 6(f).** The amendment to Rule 6(f) is intended to avoid the problems associated with bringing the entire jury to the court for the purpose of returning an indictment. Although the practice is long-standing, in *Breese v. United States*, 226 U.S. 1 (1912), the Court rejected the argument that the requirement was rooted in the Constitution and observed that if there were ever any strong reasons for the requirement, "they have disappeared, at least in part." 226 U.S. at 9. The Court added that grand jury's presence at the time the indictment was presented was a defect, if at all, in form only. *Id.* at 11. Given the problems of space, in some jurisdictions, the grand jury sits in a building completely separated from the courtrooms and in those cases, moving the entire jury to the courtroom for the simple process of presenting the indictment may prove difficult and time consuming. Even where the jury is in the same location, having all of the jurors present can be unnecessarily cumbersome in light of the fact that filing of the indictment requires a certification as to how the jurors voted.

The amendment provides that the indictment must be presented either by the jurors themselves, as currently provided for in the rule, or by the foreperson or the deputy foreperson, acting on behalf of the jurors. In an appropriate case, the court might require all of the jurors to be present if it had inquiries about the indictment.



U. S. Department of Justice

Criminal Division

Office of the Assistant Attorney General

Washington, D.C. 20530

January 22, 1997

The Honorable D. Lowell Jensen  
Judge of the U.S. District Court,  
Northern California  
Oakland, California 94612

Dear Judge Jensen:

I am writing in order to place on the agenda of the Advisory Committee at its next meeting two issues relating to Rule 6, F.R. Crim.P. The first is whether Rule 6(d) should be amended to permit, under appropriate safeguards and by court order, an interpreter to be present in the grand jury room during deliberations to assist a deaf grand juror. The second is whether Rule 6(f) should be amended to allow the foreperson or deputy foreperson of a grand jury, rather than the entire grand jury, to return an indictment to a federal magistrate judge in open court. Each of these changes, although modest in scope, would facilitate service on a grand jury and thus in our view would benefit the grand jury as an institution. The following discussion addresses each proposal in turn.

1. Rule 6(d). Although Rule 6(d) permits the presence of an interpreter "when needed" while the grand jury is in session and taking evidence, the rule explicitly provides that "no person other than the jurors may be present while the grand jury is deliberating or voting." Because this provision appears to bar deaf persons from serving on federal grand juries, we believe it should be reviewed by the Advisory Committee.

In many jurisdictions, persons who are deaf have been admitted to trial jury panels, and the presence of an interpreter has met with court approval. See United States v. Dempsey, 830 F.2d 1084, 1091 n.9 (10th Cir. 1987). In Dempsey, the court concluded, in a comprehensive opinion, that the strong constitutionally rooted stricture against the presence of any outside person during the deliberations of a petit jury was not violated by having an interpreter present for a deaf jury member. Id. at 1089-1092. The court treated a properly instructed interpreter not as a "thirteenth" person, but rather as an extension of the deaf member of the jury. The court pointed out, however, that there "...is no strict secrecy rule..." applicable to petit jury deliberations. Id. at 1089. Although courts have

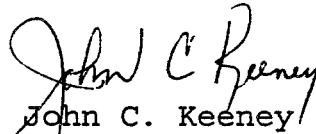
stressed the importance of secrecy in trial jury deliberations, "...[trial] jurors are not prohibited by law from discussing their deliberations after the case is over." United States v. Beasley, 464 F.2d 468, 470 (10th Cir. 1972). The rule of secrecy applicable to grand jury deliberations and voting, however, combined with the specific language of Rule 6(d), appears to place the issue of an interpreter in the grand jury on a different footing.

We believe that to the extent the provision in Rule 6(d) operates to bar the deaf from grand jury service, the rule should be amended. In light of the rule's provision permitting an interpreter to assist in the grand jury sessions when evidence is taken, to permit an interpreter to be present during grand jury deliberations and voting to assist a deaf juror would appear to be a reasonable accommodation. Amendment to the Rule should also ensure that any interpreter allowed in the grand jury room to assist a deaf juror should be subject to the same secrecy strictures as the juror. Of course, whether any particular person is qualified to be seated as a juror at trial or in the grand jury, should remain a matter for determination by the court. See 28 U.S.C. 1865.

2. Rule 6(f). Many States such as New York and Ohio have long permitted an indictment to be returned to the court by a foreperson rather than the entire grand jury. The reason for the requirement in Rule 6(f) that the indictment be "returned by the grand jury" rather than a foreperson is not clear. Justice Holmes, speaking for a unanimous Supreme Court more than three quarters of a century ago dismissed as insubstantial any contention that the requirement is constitutionally rooted, and stated that "if they [such reasons] ever were very strong", they "have disappeared, at least in part." Breese v. United States, 226 U.S. 1 (1912). Today, the requirement seems especially excessive, in light of the fact that, due to the scarcity of space, grand juries in some districts no longer sit in the same building that houses a federal magistrate judge. Even if the grand jury is in the same building, it is an unnecessary burden for the entire grand jury to come to court inasmuch as the filing of the indictment requires a certification that declares the vote of the grand jury on the indictment. Having all the jurors present would only be useful in the rare event the court wished to inquire of them as to the indictment. We therefore suggest that the second sentence of Rule 6(f) be amended to read: "The indictment shall be returned by the grand jury or through the foreperson or deputy foreperson on its behalf to a federal magistrate judge in open court. (proposed new matter underlined)."

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

Sincerely,



John C. Keeney  
Acting Assistant Attorney General



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

**FROM: Professor Dave Schlueter, Reporter**

**RE: Proposed Amendments to Rule 11--In General**

**DATE: 2-28-97**

For the last several meetings the Committee has considered a number of problems associated with Rule 11. At its meeting last October, the Committee considered several proposed amendments to that rule. As a result of that discussion, specific language was recommended for amending Rule 11(c)(6) (advice to an accused regarding a plea agreement which required waiver of the right to appeal the sentence, etc.), Rule 11(e)(1)(B), (C) (recognizing sentencing guidelines, etc.). Those amendments, which appear to be relatively noncontroversial, are discussed in a separate memo, *infra*.

The second major Rule 11 issue discussed at the October meeting was the decision in *United States v. Hyde*. In that case the Ninth Circuit held that until the judge has accepted both the guilty plea and the plea agreement, the defendant may withdraw his or her plea for any or no reason. Since the meeting, the Supreme Court has granted cert. in the case and presumably will decide the issue before the end of the current term. That *Hyde* issue and the question of whether any amendments should be made to Rule 11, or any other rule are also discussed in separate memo, *infra*.





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

**FROM: Professor Dave Schlueter, Reporter**

**RE: Amendments to Rule 11(c)(6); (e)(1)(B) and (e)(1)(C).**

**DATE: 2-28-97**

At its last meeting in Fall 1996, the Committee approved specific language to amend three provisions of Rule 11. The first amendment was to Rule 11(e)(6) regarding the requirement that the judge discuss with the defendant any provision in the plea agreement which requires the defendant to waive the right to appeal or collaterally attack the sentence.

The second amendment was to Rule 11(e)(1)(B) to reflect explicitly that the defendant and the government may include sentencing guidelines, factors, and policy statements in the plea agreement. Under (e)(1)(B), as before, the agreement is not binding on the court.

The third amendment addresses Rule 11(e)(1)(C), again to reflect explicitly that the parties might include references to sentencing guidelines, etc. in their plea agreement. Under this provision, the agreement is binding on the court, as before, if the court accepts the agreement.

As noted in the proposed Committee Note the amendments to (e)(1)(B) and (C) were also intended to clarify the differences in those two provisions regarding the ability of the parties to bind, or not bind, the court.

The proposed amendments and accompanying Note are attached. After they were drafted last fall, a copy was forwarded to the Sentencing Commission information purposes.



1   **Rule 11. Pleas**

2           (c) ADVICE TO DEFENDANT. Before accepting a plea of guilty or nolo  
3   contendere, the court must address the defendant personally in open court and  
4   inform the defendant of, and determine that the defendant understands, the  
5   following:

6                               \* \* \* \* \*

7                       (6) the terms of any provision in a plea agreement waiving the right  
8   to appeal or to collaterally attack the sentence.

9                               \* \* \* \* \*

10          (e) PLEA AGREEMENT PROCEDURE.

11               (1) *In General.* The attorney for the government and the attorney  
12   for the defendant or the defendant when acting pro se may engage in discussions  
13   with a view toward reaching an agreement that, upon the entering of a plea of  
14   guilty or nolo contendere to a charged offense or to a lesser or related offense, the  
15   attorney for the government will do any of the following:

16                               (A) move for dismissal of other charges; or

17                               (B) make a recommendation, or agree not to oppose the  
18   defendant's request, for a particular sentence, or sentencing range, or that a  
19   particular guideline, sentencing factor, or policy statement is or is not applicable to

20 the case, with the understanding that such recommendation or request shall not be  
21 binding upon the court; or

22 (C) agree that a specific sentence is the appropriate  
23 disposition of the case, or that a particular sentencing guideline, sentencing factor,  
24 or policy statement is or is not applicable to the case, with the understanding that  
25 the plea agreement shall be binding on the court if accepted by the court.

26 The court shall not participate in any such discussions.

27 (2) *Notice of Such Agreement.* If a plea agreement has been  
28 reached by the parties, the court shall, on the record, require the disclosure of the  
29 agreement in open court or, on a showing of good cause, in camera, at the time the  
30 plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or  
31 (C), the court may accept or reject the agreement, or may defer its decision as to  
32 the acceptance or rejection until there has been an opportunity to consider the  
33 presentence report. If the court defers its decision to accept or reject the accused's  
34 plea or plea agreement, the accused may withdraw his or her plea for any reason,  
35 or for no reason, until the court accepts both the plea and the plea agreement. If  
36 the agreement is of the type specified in subdivision (e)(1)(B), the court shall  
37 advise the defendant that if the court does not accept the recommendation or  
38 request the defendant nevertheless has no right to withdraw the plea.

## COMMITTEE NOTE

**Subdivision (c)(6).** Rule 11(c) has been amended specifically to reflect the increasing practice of including provisions in plea agreements which require the defendant to waive certain appellate rights. The increased use of such provisions is due in part to the increasing number of direct appeals and collateral reviews challenging sentencing decisions. The courts have recognized the validity of waivers of collateral review. *United States v. Wilkes*, 20 F.3d 651, 653 (5th Cir. 1994)(per curiam). And in *United States v. Mezzanatto*, 115 S.Ct. 797, 801 (1995), the Supreme Court upheld the defendant's waiver of the right to object to the use of plea statements and negotiations under Rule 11(e)(6) and Federal Rule of Evidence 410. Given the <sup>SIGNIFICANT USE OF</sup> anticipated increase in such provisions, the Committee believed it was important to insure first, <sup>that</sup> a complete record, <sup>exists</sup> regarding any waiver provisions, and second, that the waiver was voluntarily and knowingly made by the defendant. The amendment provides no specific guidance on the content of the court's advice. That is left to the court's discretion and judgment.

**Subdivision (e).** Amendments have been made to Rule 11(e)(1)(B) and (C) to reflect the impact of the Sentencing Guidelines on guilty pleas. Although Rule 11 is generally silent on the subject, it has become clear that the courts have struggled with the subject of guideline sentencing vis a vis plea agreements, entry and timing of guilty pleas, and the ability of the defendant to withdraw a plea of guilty. The amendments are intended to address two specific issues.

First, both subdivisions (e)(1)(B) and (e)(1)(C) has been amended to recognize that a plea agreement may specifically address not only what amounts to an appropriate sentence, but also a sentencing guideline, a sentencing factor, or a policy statement accompanying a sentencing guideline or factor. Under a (e)(1)(B) agreement, the government, as before, simply agrees to make a recommendation to the court, or agrees not to oppose a defense request concerning a particular sentence or consideration of a sentencing guideline, factor, or policy statement. And under (e)(1)(C), the government and defense have actually agreed on what amounts to an appropriate sentence or have agreed to one of the foregoing components.

The second change to (e)(1)(B) and (C) is intended to make it clear that the two provisions are not to be confused with regard to the defendant's ability to withdraw a plea if the court rejects the agreement. An agreement under (e)(1)(B) is not binding on the court. If the court rejects such an agreement, the defendant is not entitled to withdraw his or her plea. *Cf. United States v. Harris*, 70 F.3d 1001 (8th Cir. 1995). In contrast, an (e)(1)(C) agreement is binding on the court, if it is accepted by the court. If the court rejects that type of agreement, the defendant is free to withdraw his or her plea.



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

**FROM: Professor Dave Schlueter, Reporter**

**RE: Rule 11--the *Hyde* Problem**

**DATE: 3-1-97**

Among the issues discussed by the Committee at its last meeting in Oregon, was the question of whether any amendment should be made to the Rules of Criminal Procedure in light of the Ninth Circuit's decision in *United States v. Hyde*, 82 F.3d 319 (9th Cir. 1996), as amended at 92 F.3d 779 (9th Cir. 1996). In sum, the court in *Hyde* ruled that until the trial judge accepts or rejects **both** the plea and the plea agreement, the defendant is entitled to withdraw his or her plea without stating any reasons for doing so. Because many judges routinely accept a plea and then defer a decision on whether to accept or reject the agreement until after they see the presentence report, as required by the Sentencing Guidelines, the *Hyde* scenario may arise with greater frequency. At the meeting, it seemed to be the consensus that the decision flies in the face of the language of Rules 11 and 32(d).

For now the Ninth Circuit stands alone on the issue; the Fourth and Seventh Circuits have read the rules to mean that once the defendant's plea is accepted, the defendant may only withdraw the plea under the provisions of Rule 11(e)(4) (where the court rejects the plea agreement) or under Rule 32(d) (where the defendant must present a "fair and just reason" for withdrawing the plea).

Since the Committee's meeting in Oregon, the Supreme Court granted certiorari review of *Hyde*. Presumably, the case will be argued and decided this term--but not before the Committee's April 7th meeting.

At the last meeting, I was asked to draft some language which might provide some alternatives for addressing the *Hyde* issue, assuming that the Committee to decide to address the problem in the rules. Now that the Court has agreed to hear the case, several options seem to present themselves. First, if the Supreme Court overrules *Hyde* and concludes that the decision conflicts with rules, one option would be to do nothing. Second, even if the Court rejects the *Hyde* reading of the rules, there might still be room to suggest minor amendments to the rule to clear up any ambiguities or perceived gaps in the ability of the defendant to withdraw his or her plea. Third, if the Court agrees with *Hyde*, the Committee might again decide to leave the issue alone and not offer any amendments. Fourth, if the Court agrees with *Hyde*, or suggests that the ability of

the defendant to withdraw a plea should generally be unlimited, a good argument could be made that some change should be made to the rule.

I have drafted several versions of amendments to different provisions in Rule 11. The first option assumes that the *Hyde* decision is upheld by the Supreme Court. That amendment would change Rule 11(e)(4) to reflect the *Hyde* ruling that before the judge accepts both the plea and the agreement, the defendant may withdraw his plea for any, or no, reason. A new subdivision (f) is added to consolidate the rules governing the ability of a defendant to withdraw a plea. If the Court affirms *Hyde*, it would also be appropriate to amend Rule 32(d).

The second option assumes that the Supreme Court flatly rejects *Hyde*. Although in that case it might be wise to simply leave the rules alone, a good argument can be made that Rule 11 should be amended to include a specific provision spelling out the withdrawal options. As the rules stand now, the reader is left with flipping back and forth between Rules 11 and 32 and interpolating when, if at all, a defendant may withdraw his or her plea--and how all of that relates to delays in deciding whether to accept or reject the plea agreement. As drafted, this option is not intended to make any changes in the majority rule that a defendant's ability to withdraw a plea is limited once the court accepts it.

In addition to the proposed drafts and accompanying Notes, I am also attaching portions of the government's Petition for Certiorari in *Hyde*. It includes references to the decisions in the Fourth and Seventh Circuits and the *Hyde* opinion.



**PROPOSED DRAFT # 1**  
**[Assuming Supreme Court affirms *Hyde*]**

1     **Rule 11. Pleas**

2             (e) PLEA AGREEMENT PROCEDURE.

3                             \* \* \* \* \*

4             (2) *Notice of Such Agreement.* If a plea agreement has been  
5 reached by the parties, the court shall, on the record, require the disclosure of the  
6 agreement in open court or, on a showing of good cause, in camera, at the time the  
7 plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or  
8 (C), the court may accept or reject the agreement, or may defer its decision as to  
9 the acceptance or rejection until there has been an opportunity to consider the  
10 presentence report. If the court defers its decision to accept or reject the accused's  
11 plea or plea agreement, the accused may withdraw his or her plea for any reason,  
12 or for no reason, until the court accepts both the plea and the plea agreement. If  
13 the agreement is of the type specified in subdivision (e)(1)(B), the court shall  
14 advise the defendant that if the court does not accept the recommendation or  
15 request the defendant nevertheless has no right to withdraw the plea.

16                             \* \* \* \* \*

17             (f) WITHDRAWAL OF PLEAS. A defendant may withdraw a plea of  
18 guilty or nolo contendere as follows:

19                     (1) Before the court accepts a plea of guilty or a plea of nolo  
20 contendere and any plea agreement, the defendant may withdraw the plea for any,  
21 or no, reason.

22                   (2) After the court accepts a plea of guilty or nolo contendere and  
23   any plea agreement, but before it imposes sentence, the defendant may withdraw  
24   the plea if the defendant can show fair and just reasons for requesting the  
25   withdrawal as provided in Rule 32(d).  
26                   (3) After the court imposes a sentence the defendant may not  
27   withdraw a plea of guilty or nolo contendere and it may be set aside only on direct  
28   appeal or by motion under 28 U.S.C. § 2255.

#### COMMITTEE NOTE

The amendment to (e)(2) reflects the Supreme Court's decision in *United States v. Hyde* \_\_\_\_ U.S. \_\_\_\_ (1997). In that case the Court concluded that the accused's plea and the plea agreement should be considered as a unit and that until the court has decided whether to accept both the plea and the agreement, the accused's right to withdraw his or her guilty or nolo contendere plea should be unfettered. Thus, until the trial court has made a decision regarding either the plea or the agreement, the accused may withdraw the plea for any, or no, reason.

The addition of new subdivision (f) clarifies the ability of the defendant to withdraw a plea of guilty or nolo contendere and reflects the Supreme Court's holding in *United States v. Hyde, supra.*

If the Supreme Court accepts the Ninth Circuit's decision in Hyde, Rule 32(d) should also be amended. If the above changes are made to Rule 11 regarding the ability to withdraw a plea, then Rule 32(d) might be simply amended as follows:

**Rule 32. Sentence and Judgment**

\* \* \* \*

(d) The ability of a defendant to withdraw a plea of guilty or nolo contendere before, or after, sentence is imposed, is governed by Rule 11(f).



**PROPOSED DRAFT # 2**  
[Assuming Supreme Court overrules *Hyde*.]

1     **Rule 11. Pleas**

2                                   \* \* \* \* \*

3             (f) WITHDRAWAL OF PLEAS. A defendant may withdraw a plea of  
4 guilty or nolo contendere as follows:

5                   (1) Before the court accepts a plea of guilty or a plea of nolo  
6 contendere, the defendant may withdraw the plea for any, or no, reason.

7                   (2) After the court accepts a plea of guilty or nolo contendere, but  
8 before it imposes sentence, the defendant may withdraw the plea if (i) the court  
9 rejects a plea agreement between the defendant and the government, as provided in  
10 (e)(4) or (ii) the defendant can show fair and just reasons for requesting the  
11 withdrawal as provided in Rule 32(d). If the court has accepted a plea of guilty or  
12 nolo contendere but has deferred a decision on whether to accept or reject a plea  
13 agreement, the defendant may request to withdraw the plea only on a showing of  
14 fair and just reasons for doing so.

15                   (3) After the court imposes a sentence the defendant may not  
16 withdraw a plea of guilty or nolo contendere and it may be set aside only on direct  
17 appeal or by motion under 28 U.S.C. § 2255.

**COMMITTEE NOTE**

**Subdivision (f)** A new subdivision has been added to clarify the ability of a defendant to withdraw a plea of guilty or plea of nolo contendere, especially where the court has accepted one of those pleas but defers the decision on whether to accept or reject a plea agreement. The amendment makes clear that once the plea has been accepted the ability of the defendant to withdraw are limited. [*United*

*States v. Hyde*, \_\_\_\_ U.S. \_\_\_\_ (1997)] [*Cf. United States v. Hyde*, 82 F.3d 319 (9th Cir. 1996), as amended at 92 F.3d 779 (9th Cir. 1996)]. If the court later rejects the plea agreement, under Rule 11(e)(4), the defendant has the right, for that reason alone, to withdraw the plea. In any event, until the court imposes sentence the defendant may request to withdraw the plea for "fair and just reasons" as provided in Rule 32(d). In adding this subdivision, the Committee intended to make no changes in the existing practice.

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# In the Supreme Court of the United States

OCTOBER TERM, 1996

No.

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT E. HYDE

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

### OPINIONS BELOW

The decision of the court of appeals (App., *infra*, 1a-5a) is reported at 82 F.3d 319 and as amended (see App., *infra*, 6a-7a) at 92 F.3d 779. The order of the district court denying defendant's motion to withdraw his guilty plea (App., *infra*, 8a-18a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on April 30, 1996. A petition for rehearing was denied on

July 29, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

#### **RULE AND GUIDELINES PROVISIONS INVOLVED**

Rules 11 and 32(e) of the Federal Rules of Criminal Procedure and Sentencing Guidelines § 6B1.1(a) are reproduced at App., *infra*, 19a-26a.

#### **STATEMENT**

1. On December 13, 1991, a grand jury in the Northern District of California returned an indictment charging respondent as principal and as accessory with three counts of mail fraud, in violation of 18 U.S.C. 1341; three counts of wire fraud, in violation of 18 U.S.C. 1343; and two counts of receiving stolen property, in violation of 18 U.S.C. 2315. Appellant's C.A. E.R. 1-11. The charges arose from a bogus loan brokerage scheme, under which respondent would allegedly promise to obtain loans on behalf of his victims, in return for their payment of up-front application fees. Although the victims paid the fees, respondent allegedly failed to arrange for the loans. App., *infra*, 9a.

2. On November 29, 1993, the date set for the commencement of trial, respondent and the government entered into a written plea agreement. Appellant's C.A. E.R. 21-29. That agreement provided that respondent would plead guilty to two of the mail fraud counts and to the two counts charging receipt of stolen property. *Id.* at 21. The agreement also provided that the government would move to dismiss the remaining four counts with which respondent was charged, *id.* at 22, and would not bring further charges based on respondent's participation in the loan brokerage scheme or based on certain other past activities of respondent, *id.* at 23. Finally, the

agreement stated that respondent and the government agreed on a number of details concerning the application of the Sentencing Guidelines to this case and the calculation of the amount of restitution that should be ordered. *Id.* at 24-26. The agreement recognized, however, that "[t]he district court will be free to make its own determinations pursuant to the Guidelines" and it stated that "[t]he defendant understands that the final decision as to which Guidelines apply rests with the court." *Id.* at 26.

That same afternoon, respondent pleaded guilty in open court to the four counts specified in the plea agreement. The court addressed respondent and ascertained that respondent knew the nature of the charges and possible punishment, that respondent was willing to waive his various trial rights by virtue of his guilty plea, and that respondent's plea was knowing and voluntary. Appellant's C.A. E.R. 39-46. The court also ascertained that respondent understood the plea agreement, the obligations it imposed on each party, and the continuing final authority of the court to determine an appropriate sentence in accord with the Sentencing Guidelines *Id.* at 46-49.

Of particular relevance to this case, the court informed respondent that "I may accept or reject [the plea] agreement today, or I may reserve ruling to accept or reject the plea agreement pending completion of the presentence report." Appellant's C.A. E.R. 49. The court asked respondent to state in his own words what he had done that led him to plead guilty to each of the four counts. The court also asked the government to set forth the factual basis for each charge, and the court confirmed that defendant agreed with the government's statements about the offenses



*Id.* at 50-62. The court asked respondent whether he had committed the crimes charged, and respondent replied "Yes, your honor, I did." *Id.* at 62. The court then reviewed the maximum sentences that could be imposed, *id.* at 63-65, and the court ascertained that respondent had no objection to the advice he had received from his advisory counsel, *id.* at 65-66. Finally, the court inquired how respondent pleaded to each of the four counts. With respect to each count, respondent answered, "Guilty, your honor." *Id.* at 66. The court accepted the guilty pleas and stated that it "reserves ruling on whether to accept the plea agreement pending completion of the presentence report." *Id.* at 67. The court also filed a written order providing "that the defendant's plea of 'GUILTY' be accepted." *Id.* at 20.

3. On December 23, 1993, respondent filed a motion to withdraw his guilty plea on grounds of duress, claiming that the prosecutor and other Justice Department officials had threatened harm to his wife. App., *infra*, 10a. There followed a series of proceedings, including a hearing at which respondent failed to present evidence supporting his claim, see *ibid.*; respondent's submission of a "vague and conclusory" unsigned, unsworn statement by respondent's wife, *id.* at 11a; and an evidentiary hearing at which respondent introduced the testimony of his wife and daughter, and the government introduced the testimony of the FBI agent who was alleged to have threatened respondent's wife, see *id.* at 12a.

On July 19, 1994, the court issued a memorandum and order denying respondent's motion to withdraw his plea. The court noted that, under Fed. R. Crim. P. 32(e), a defendant may withdraw a guilty plea before sentencing "upon a showing by the defendant of any

fair and just reason." See App., *infra*, 12a. In this case, the court held, "[t]here is absolutely no credible evidence to support [respondent's] claim" of duress. *Id.* at 13a. The court also found that "[t]here is \* \* \* no evidence that [the FBI agent] improperly threatened or coerced [respondent's wife]." *Id.* at 14a. Finding that "the defendant lacks any semblance of credibility," *id.* at 16a, the court ruled "that the defendant entered his guilty plea knowingly, voluntarily and intelligently." *Ibid.* The court also rejected respondent's claim that the court had committed error under Rule 11 at the guilty plea hearing. App., *infra*, 16a-17a.

The court subsequently sentenced respondent to 30 months' imprisonment, to be followed by three years' supervised release, and ordered that he make restitution in the amount of \$477,990. Appellant's C.A. E.R. 127-132.

4. The court of appeals reversed. The court held that the requirement of Fed. R. Crim. P. 32(e) of a "fair and just reason" for withdrawing a plea of guilty was inapplicable in this case. The court observed that "when a defendant makes a motion to withdraw his guilty plea before the district court has accepted that plea, he need not offer any reason at all for his motion; the court must permit the withdrawal." App., *infra*, 2a. The court noted respondent first moved to withdraw the plea almost a month after the court had accepted it, but concluded that that fact was irrelevant, because the district court had not yet accepted the plea agreement. The court explained that

[t]he plea agreement and the plea are 'inextricably bound up together' such that the deferment of the decision whether to accept the plea agreement

carried with it postponement of the decision whether to accept the plea. This is so even though the court explicitly stated that it accepted [the] plea.

*Id.* at 3a (quoting *United States v. Cordova-Perez*, 65 F.3d 1552, 1556 (9th Cir. 1995), cert. denied, No. 95-9101 (Oct. 7, 1996)). The court concluded that

[i]f the court defers acceptance of the plea or of the plea agreement, the defendant may withdraw his plea for any reason or for no reason, until the time that the court does accept both the plea and the agreement. Only after that must a defendant who wishes to withdraw show a reason for his desire.

App., *infra*, 4a. The court therefore reversed respondent's conviction "so that he can plead anew." *Ibid.*

Judge Ferguson filed a brief concurring opinion (App., *infra*, 5a), in which he stated that in his view the result in this case followed from the Ninth Circuit's decision in *United States v. Cordova-Perez*, *supra*. In that case, the district court accepted a defendant's guilty plea, but after reviewing the presentence report, the court concluded that it could not accept the plea agreement, which provided for dismissal of charges that could have resulted in a high mandatory minimum sentence. *Cordova-Perez*, 65 F.3d at 1554. The Ninth Circuit affirmed the district court's determination in that situation to vacate the defendant's guilty plea and set the matter for trial. *Id.* at 1555-1557. Judge Ferguson had dissented from that decision, and he stated here that he continued to believe that *Cordova-Perez* was wrongly decided. He stated, however, that "when [the government] advocated the result in *Cordova-Perez*, it must live with the mistake," which in his view entailed permitting

the defendant to withdraw his guilty plea for no reason at all in this case. App., *infra*, 5a.

### REASONS FOR GRANTING THE PETITION

The Ninth Circuit held that a defendant who has pleaded guilty to a crime, but who has also entered into a plea agreement, may withdraw his guilty plea for any reason at all—or for no reason—at any time before the court's acceptance of the plea agreement. In most circumstances, district courts postpone a decision whether to accept a plea agreement until a presentence report has been prepared and the court has had the opportunity to review it. Accordingly, under the Ninth Circuit's ruling, a knowing and voluntary guilty plea entered into with full procedural safeguards and due formality in open court has no legal significance for a period of months, until the presentence report has been prepared and the court has determined whether to accept the plea agreement. Throughout that period, under the Ninth Circuit's rule, the defendant remains entirely free to withdraw his plea; his confession and plea of guilty amount merely to a statement by the defendant that he may or may not have committed the crime and that he may or may not demand a trial on the charges of which he is accused.

The Ninth Circuit's decision is contrary to express provisions of the Federal Rules of Criminal Procedure. It also conflicts with the decisions of the two other courts of appeals that have addressed the issue. Finally, the decision threatens to introduce substantial instability into the plea bargaining process that is pivotal to the resolution of the majority of federal criminal cases. This Court's review is therefore warranted.

1. Rule 11 of the Federal Rules of Criminal Procedure contains a set of detailed requirements that must accompany the entry and acceptance of a guilty plea. The rule provides that, "[b]efore accepting a plea of guilty \* \* \*, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands," a number of crucial facts. Fed. R. Crim. P. 11(c). Those include the nature of the charge, the maximum and minimum penalties to which the defendant will be subject, and the defendant's rights to representation by an attorney at every stage of the proceeding, to trial by jury, to confront and cross-examine witnesses, and to the privilege against compelled self-incrimination. *Ibid.* The court must also ensure, "by addressing the defendant personally in open court," that the defendant's plea is "voluntary and not the result of force or threats or of promises apart from a plea agreement." Fed. R. Crim. P. 11(d). In addition, the court "should not enter a judgment upon [a guilty] plea without making such inquiry as shall satisfy it that there is a factual basis for the plea." Fed. R. Crim. P. 11(f).

The detailed requirements of Rule 11 are based on the recognition "[t]hat a guilty plea is a grave and solemn act to be accepted only with care and discernment." *Brady v. United States*, 397 U.S. 742, 748 (1970). As the Court in *Brady* explained, "[c]entral to the plea \* \* \* is the defendant's admission in open court that he committed the acts charged in the indictment." *Ibid.* The procedures required for entering a guilty plea are therefore designed to ensure that the defendant knows precisely the significance and consequences of making that admission. Where the proper procedures are followed and where the de-

fendant has publicly admitted to having committed the offense charged, the defendant's admission is not "a mere gesture, a temporary and meaningless formality reversible at the defendant's whim." *United States v. Barker*, 514 F.2d 208, 221 (D.C. Cir.), cert. denied, 421 U.S. 1013 (1975).

The court of appeals' holding that a guilty plea may be withdrawn at any time before accepting the plea agreement conflicts with the Federal Rules of Criminal Procedure. The Rules do not state or imply that a court that defers decision on whether to accept a plea agreement thereby grants the defendant a license to withdraw his guilty plea at will. To the contrary, the Rules contain two provisions addressing the circumstances under which a plea of guilty may be withdrawn. The court of appeals' decision is inconsistent with both of those provisions.

Rule 11(e)(4) specifically provides that the defendant has an absolute option to withdraw his guilty plea under one circumstance—where the court rejects the plea agreement. See Rule 11(e)(4) ("If the court rejects the plea agreement, the court shall \* \* \* afford the defendant the opportunity to withdraw the plea."). The rationale for that rule is that if the court rejects the plea agreement, the defendant will not receive the benefit of the bargain that induced him to plead guilty; the defendant should therefore have the option to abrogate the agreement and return the situation to the status quo ante. The court of appeals' decision renders that rule superfluous in most cases, by providing the defendant with an unqualified right to withdraw the plea *regardless* of whether the district court accepts or rejects the plea agreement.

The court of appeals' holding is also inconsistent with the requirements of Fed. R. Crim. P. 32(e), which governs when a plea may be withdrawn. Under Rule 32(e), "[i]f a motion to withdraw a plea of guilty \* \* \* is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason." Although that standard on its face applies to this case, the court of appeals refused to apply it. By permitting a defendant to withdraw a guilty plea regardless of whether he has any reason for doing so, the court of appeals' decision is directly contrary to the terms of Rule 32(e).<sup>1</sup>

<sup>1</sup> The court of appeals' reliance on *Cordova-Perez* was misplaced. App., *infra*, 3a. In *Cordova-Perez*, the court rejected a plea agreement that called for the government to dismiss a greater charge and for the defendant to plead guilty to a lesser-included charge. It then vacated the defendant's guilty plea to the lesser included charge and ordered that the case go to trial. Under Rule 11(e)(4), after rejecting the plea agreement, the court should have inquired whether the defendant still wanted to plead guilty to the lesser included charge before vacating his plea. The defendant, however, did not complain of that error (which in any event would have been easily curable had the defendant simply informed the court that he still wanted to plead guilty to the lesser charge). Instead, the defendant argued that the court erred in permitting trial on the greater charge. The court of appeals correctly rejected that claim. Rule 11(e)(4) plainly envisions that the court's determination not to accept a plea agreement calling for dismissal of certain charges ordinarily will lead to a trial on those charges. The fact that a defendant may have an absolute right to withdraw a guilty plea when the court defers decision on a plea agreement and then *rejects* it (as in a situation like *Cordova-Perez*) does not suggest that a defendant has the same right when the court defers decision on a plea agreement and then *accepts* it (as occurred here).

2. The decision of the court of appeals conflicts with decisions of the Fourth and Seventh Circuits, the only other courts of appeals that have directly addressed the issue.

In *United States v. Ewing*, 957 F.2d 115 (4th Cir.), cert. denied, 505 U.S. 1210 (1992), the defendant pleaded guilty in open court after the exhaustive colloquy required by Rule 11, and the court accepted the plea. 957 F.2d at 117. Like respondent, the defendant then moved to withdraw his plea on the ground of coercion. Like the district court in this case, the district court in *Ewing* concluded that the defendant had not established a "fair and just reason" for withdrawing the plea under Rule 32(e), and the court therefore proceeded to sentencing. 957 F.2d at 117.

On appeal, the defendant argued that until the district court has accepted the plea agreement, the defendant "should be able to withdraw his plea upon some showing of cause less demanding than the current fair and just reason standard." 957 F.2d at 118. The court rejected that argument because of "its failure to acknowledge the distinction between a plea of guilty and a plea agreement." *Ibid.* The court noted that the district court had "explicitly accepted [the defendant's] plea of guilty immediately following the Rule 11 colloquy," but that it had "defer[red] acceptance of the plea agreement until it had an opportunity to review the presentence report." *Ibid.* The court explained that "once a plea of guilty is accepted by the court, the defendant is bound by his choice and may withdraw his plea only in two ways relevant here, either by showing a fair and just reason under Rule 32(d), or by withdrawing under Rule 11(e)(4) after a rejected plea agreement." 957 F.2d at 119.

In *United States v. Ellison*, 798 F.2d 1102 (1986), cert. denied, 479 U.S. 1038 (1987), the Seventh Circuit reached the identical conclusion on virtually identical facts. The defendant pleaded guilty to four offenses. The district court accepted the guilty plea but deferred its decision whether to accept a plea agreement that required the government to move to dismiss other charges and not to recommend consecutive sentences. 798 F.2d at 1103. Three days before sentencing, the defendant attempted to withdraw his guilty plea on the ground that it was the product of "psychological pressures" and the advice of counsel. *Id.* at 1104. The court denied the motion, finding that there was no defect in the plea proceedings and that the guilty plea had been knowing and voluntary.

On appeal, the defendant advanced essentially the same claim advanced by the defendant in *Ewing* and respondent here: That, despite Rule 32(e)'s "fair and just reason" standard, Rule 11 "requires application of a different standard for withdrawal of guilty pleas entered pursuant to plea agreements that have not yet been accepted by the court." 798 F.2d at 1105. The court rejected that argument, explaining that "to preserve the integrity of the plea-taking process, Congress limited withdrawal of a plea to those situations where defendant demonstrates a fair and just reason." *Id.* at 1106. Therefore, the court held, "there is no absolute right to withdraw a plea prior to acceptance of the plea agreement by the court." *Ibid.*

3. The rule adopted by the court of appeals has damaging implications for the federal criminal system. The vast majority of pleas of guilty in federal

court are accompanied by plea agreements.<sup>2</sup> In such cases, both the Federal Rules of Criminal Procedure and the Sentencing Guidelines provide for deferral of the district court's decision whether to accept a plea agreement. Under Rule 11(e), a court has discretion to defer acceptance of the plea agreement until a presentence report has been prepared and the court has had the opportunity to review it.<sup>3</sup> Under the

<sup>2</sup> See Fed. R. Crim. P. 11(e), Notes of the Advisory Committee on Rules, 1974 Amendments ("guilty pleas account for the disposition of as many as 95% of all criminal cases," and "[a] substantial number of these are the result of plea discussions"); see also *Blackledge v. Allison*, 431 U.S. 63, 71 (1977) ("the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system"); *Santobello v. New York*, 404 U.S. 257, 261 (1971) ("Disposition of charges after plea discussions \* \* \* leads to prompt and largely final disposition of most criminal cases.").

<sup>3</sup> If the government has agreed either to drop certain charges (under Rule 11(e)(1)(A)) or that a specific sentence is appropriate (under Rule 11(e)(1)(C)), the Rules expressly provide that "the court may accept or reject the agreement, or may defer its decision \* \* \* until there has been an opportunity to consider the presentence report." Fed. R. Crim. P. 11(e)(2). Insofar as the plea agreement in this case provided that the government would drop certain charges against respondent, it falls within that rule. The court and the parties treated the plea agreement as having been made under Rule 11(e)(1)(A). See Appellant's C.A. E.R. 49.

The Rules also provide that the government may agree in a plea agreement to make a recommendation regarding the sentence that is not binding on the court (under Rule 11(e)(1)(B)). The Rules contemplate that, where a district court rejects such a recommendation, the defendant has no right to withdraw his guilty plea. See Fed. R. Crim. P. 11(e)(2) (the court "shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea"). Insofar as the plea agreement in-

Sentencing Guidelines, deferral of a decision whether to accept the plea agreement until the court can review the presentence report is mandatory in most cases.<sup>4</sup> By so deferring a decision on accepting the plea agreement, the court may ensure that the results of the plea bargaining process are consistent with the public interest in the just disposition of criminal charges. In addition, the court may fulfill its obligation "to make certain that prosecutors have not used plea bargaining to undermine the sentencing guidelines." United States Sentencing Comm'n, *Guidelines Manual*, Ch. 6, Pt. B (introductory comments) (Nov. 1, 1995) (quoting S. Rep. No. 225, 98th Cong., 2d Sess. 63, 167 (1983)).

this case provided that the parties agreed to a certain treatment of petitioner's sentence under the Sentencing Guidelines, it could be construed to fall within that rule. The parties and the court at the plea agreement proceeding, however, treated the agreement as having been made pursuant to Rule 11(e)(1)(A) because the government did not make any specific recommendation as to the appropriate sentence. Appellant's C.A. E.R. 49; see also App., *infra*, 17a. Because the district court did not reject any portion of the plea agreement in this case, the question whether the plea agreement was in fact based in part on Rule 11(e)(1)(B) is of no consequence.

<sup>4</sup> Sentencing Guidelines § 6B1.1(c) provides that "[t]he court shall defer its decision \* \* \* to accept or reject any plea agreement pursuant to Rules 11(e)(1)(A) and 11(e)(1)(C) until there has been an opportunity to consider the presentence report, unless a report is not required under § 6A1.1." Sentencing Guidelines § 6A1.1 in turn provides that "[a] probation officer shall conduct a presentence investigation and report to the court before the imposition of sentence unless the court finds that there is information in the record sufficient to enable the meaningful exercise of sentencing authority pursuant to 18 U.S.C. § 3553, and the court explains this finding on the record."

The result of the Rule 11 and Sentencing Guidelines provisions is that, after accepting a plea of guilty, a district court will ordinarily defer a decision whether to accept a plea agreement for a period of months or longer, until at or near the time of sentencing. Indeed, preparation of a presentence report ordinarily will commence only after the guilty plea is accepted, and when the presentence report is completed, the case is ready for sentencing. Under the Ninth Circuit's rule, during the entire period between the court's acceptance of the guilty plea and sentencing, the defendant has the absolute right to withdraw his guilty plea.

The court of appeals made quite clear that, under its ruling, the defendant need not satisfy any standard of cause to withdraw his guilty plea during that period. Nor need the defendant show that the plea was involuntary, misinformed, or defective in any way. Under the court of appeals' ruling in this case, the defendant need only state he changed his mind: "If the court defers acceptance of the plea or of the plea agreement, the defendant may withdraw his plea for any reason or for no reason." App., *infra*, 4a (emphasis added).

That holding encourages defendants to engage in manipulation and gamesmanship. For example, a defendant may delay a trial several months or longer—and put the government and the court to the substantial expense of needlessly delaying the trial and preparing and reviewing a presentence report—simply by entering into a plea agreement and guilty plea on the eve of trial and then withdrawing his plea just before sentencing. A defendant may also in effect delay his decision whether to plead guilty until he has had the opportunity to review the presentence report,

at which time the defendant's expectations about his sentence may be less optimistic than at the time of the guilty plea.

Finally, the court of appeals' decision reduces respect for judicial proceedings. It converts the defendant's solemn confession of guilt, made in open court during a guilty plea proceeding, into a statement that is revocable at will and that in most cases will have no legal effect unless and until the defendant later decides that it is advantageous to adhere to it. Because the court of appeals' holding will produce those adverse consequences for the administration of criminal justice, this Court's review is warranted.

### CONCLUSION

The petition for a writ of certiorari should be granted. Respectfully submitted.

WALTER DELLINGER

*Acting Solicitor General*

JOHN C. KEENEY

*Acting Assistant Attorney General*

MICHAEL R. DREBEN

*Deputy Solicitor General*

JAMES A. FELDMAN

*Assistant to the Solicitor General*

PATTY MERKAMP STEMLER

*Attorney*

OCTOBER 1996

### APPENDIX A

#### UNITED STATES COURT OF APPEALS NINTH CIRCUIT

No. CR-91-00672-SBA  
No. 95-10113

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

*v.*

ROBERT E. HYDE, DEFENDANT-APPELLANT

Appeal From The United States District Court  
For The Northern District Of California  
Saundra B. Armstrong, District Judge, Presiding

[Argued and Submitted April 8, 1996]  
[Decided April 30, 1996]

### OPINION

Before: WARREN J. FERGUSON, DOROTHY W. NELSON, and FERDINAND F. FERNANDEZ, Circuit Judges.

Opinion by Judge FERNANDEZ; Concurrence by Judge FERGUSON.

FERNANDEZ, Circuit Judge:

Robert Elmer Hyde was indicted for mail fraud and wire fraud. *See* 18 U.S.C. §§ 1341, 1343, 2(b). He then entered into a plea agreement and entered his guilty plea. The district court accepted the guilty plea but reserved ruling on the acceptance of the plea

(1a)



agreement until it had seen the presentence report. Long before that report was prepared, Hyde moved to withdraw his plea. The district court determined that he had not given a sufficient reason to justify withdrawal. Thus, it denied his motion and went forward to judgment and sentencing. Hyde appealed. We reverse and remand.

#### STANDARD OF REVIEW

We review for an abuse of discretion the district court's denial of a motion to withdraw a guilty plea. See *United States v. Alber*, 56 F.3d 1106, 1111 (9th Cir.1995). A failure to apply the correct legal principles is an abuse of discretion. See *Hunt v. National Broadcasting Co., Inc.*, 872 F.2d 289, 292 (9th Cir.1989).

#### DISCUSSION

The government argues and the district court found that Hyde did not offer a "fair and just reason" to withdraw his plea. Fed.R.Crim.P. 32(e). However, we have held that when a defendant makes a motion to withdraw his guilty plea before the district court has accepted that plea, he need not offer any reason at all for his motion; the district court must permit the withdrawal. See *United States v. Washman*, 66 F.3d 210, 212-13 (9th Cir.1995); *United States v. Savage*, 978 F.2d 1136, 1137 (9th Cir.1992), cert. denied, 507 U.S. 997, 113 S.Ct. 1613, 123 L.Ed.2d 174 (1993). As we said in *Washman*:

We need not decide whether Washman had a "fair and just" reason for withdrawing his plea pursuant to Fed.R.Crim.P. 32(e) because we hold that Washman should have been allowed to withdraw his plea without offering any reason. The

reason is that, at the time Washman moved to withdraw from the plea agreement, the district court had not yet accepted the plea. Under our precedent, Washman and the Government were not bound by the plea agreement until it was accepted by the court.

66 F.3d at 212 (citations omitted).

But, the government argues, the district court did accept Hyde's plea even if it did not accept the plea agreement. That is a distinction without a difference. As we have held, "[t]he plea agreement and the plea are 'inextricably bound up together' such that the deferment of the decision whether to accept the plea agreement carried with it postponement of the decision whether to accept the plea. This is so even though the court explicitly stated it accepted [the] plea." *United States v. Cordova-Perez*, 65 F.3d 1552, 1556 (9th Cir.1995) (citations omitted).

We have heard the government's ululation that the Sentencing Guidelines prohibit an early acceptance of pleas. United States Sentencing Guidelines § 6B1.1(c)<sup>1</sup> provides that:

The court shall defer its decision to accept or reject any nonbinding recommendation pursuant to Rule 11(e)(1)(B), and the court's decision to accept or reject any plea agreement pursuant to Rules 11(e)(1)(A) and 11(e)(1)(C) until there has been an opportunity to consider the presentence report. . . .

<sup>1</sup> Because of *ex post facto* considerations, the district court used the Guideline Manual in effect July 15, 1988. This provision, however, remains the same to this day.



The government's concern is a bit overstated because a close reading of the Guideline shows that some plea agreements may still be accepted at the time of the plea. However, the Guidelines undoubtedly take away much of the discretion that a district court would otherwise have.<sup>2</sup> See Fed.R.Crim.P. 11(e)(1) & (2). Nevertheless, if the Sentencing Commission's interference with district court discretion causes practical difficulties regarding pleas, as well it may, that is a situation to which the Commission can turn its attention.

### CONCLUSION

When a defendant seeks to plead guilty, the district court must hold a plea hearing. Fed.R.Crim.P. 11. According to that Rule, the court may then accept, reject, or defer a decision on acceptance or rejection. Fed.R.Crim.P. 11(e). If the court defers acceptance of the plea or of the plea agreement, the defendant may withdraw his plea for any reason or for no reason, until the time that the court does accept both the plea and the agreement. Only after that must a defendant who wishes to withdraw show a reason for his desire. Fed.R.Crim.P. 32(e).

Thus, the district court erred when it refused to allow Hyde to withdraw his plea. We therefore reverse his conviction and remand so that he can plead anew.

<sup>2</sup> At the time relevant to this case, stand-alone policy statements were not necessarily binding. See *United States v. Forrester*, 19 F.3d 482, 483-84 (9th Cir.1994). Now they are. See *United States v. Plunkett*, slip op. 3417, 3422, 74 F.3d 938 (9th Cir. Mar. 12, 1996) (No. 95-95-30053).

REVERSED and REMANDED for further proceedings.

FERGUSON, Circuit Judge, concurring.

While I concur in the opinion of this case, I write in order to restate my dissent in *United States v. Cordova-Perez*, 65 F.3d 1552 (9th Cir.1995).

I continue to believe that case was decided incorrectly and that an injustice was done. Yet the government insisted upon the result. Now it would like us to disregard *Cordova-Perez*, which of course would be a monumental disaster. The government cannot have it both ways. When it advocated the result in *Cordova-Perez*, it must live with the mistake.



Item: IID3-C

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

**FROM: Professor Dave Schlueter, Reporter**

**RE: Rule 11(a)(1); Proposed Amendment**

**DATE: March 3, 1997**

As noted in Mr. Pauley's attached letter, the term "corporation" in Rule 11(a)(1) should be changed to the broader and more correct term "organization" as that term is defined in 18 U.S.C. § 18. I have attached a proposed amendment to accomplish that change.



1   **Rule 11. Pleas**

2           (a) ALTERNATIVES.

3                   (1) *In General.* A defendant may plead not guilty,  
4 guilty, or nolo contendere. If a defendant refuses to plead or if a  
5 defendant ~~corporation~~ organization, as defined in 18 U.S.C. § 18,  
6 fails to appear, the court shall enter a plea of not guilty.

**COMMITTEE NOTE**

The amendment deletes use of the term "corporation" and substitutes in its place the term "organization," with a reference to the definition of that term in 18 U.S.C. § 18.



U. S. Department of Justice

Criminal Division

Washington, D.C. 20530

October 25, 1996

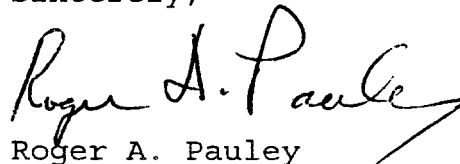
Professor David A. Schlueter  
St. Mary's University of San Antonio  
School of Law  
One Camino Santa Maria  
San Antonio, Texas 78284

Dear David:

I write to bring to your attention two technical matters that I believe the Advisory Committee should take care of at some point. One is found in Rule 11, which the Committee will be considering in any event at its next meeting. Rule 11(a)(1) states, in part, that if "a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty." (emphasis supplied) It seems clear that the term "corporation" is too narrow and that the Rule properly applies to any "organization, as defined in 18 U.S.C. 18, that may fail to appear, including partnerships unions, and other legal entities. You may recall that the Committee recently addressed the same problem in two other Rules that improperly used "corporation" when "organization" was the appropriate term. See Rules 16(a)(1) and 43(c)(1).

The other technical matter concerns the Canal Zone. The reference in Rule 54(a) to the United States District Court for the Canal Zone is obsolete. That court has not existed for more than a decade.

Sincerely,

  
Roger A. Pauley

Item II D4

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

**FROM: Professor Dave Schlueter, Reporter**

**RE: Proposed Amendment to Rule 24(c), Retention of Alternate Jurors**

**DATE: February 27, 1997**

At its meeting in Oregon last fall, the Committee voted to amend Rule 24(c) to permit the court to retain alternate jurors (who do not actually replace jurors) during deliberations. Attached is a draft of an amendment to Rule 24(c), a proposed Advisory Committee Note, and a copy of the pertinent pages in *United States v. Houlihan*.





**Rule 24. Trial Jurors**

\* \* \* \* \*

(c) ALTERNATE JURORS.

(1) In General. The court may direct that not more than 6 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, ~~prior to the time the jury retires to consider its verdict,~~ become or are found to be unable or disqualified to perform their duties. Alternate jurors must ~~shall~~ (i) be drawn in the same manner, ~~shall~~ (ii) have the same qualifications, ~~shall~~ (iii) be subject to the same examination and challenges, ~~shall~~ (iv) take the same oath and will ~~shall~~ have the same functions, powers, facilities and privileges as the regular jurors. ~~An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict.~~

(2) Peremptory Challenges. Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate jurors are to be impanelled, 2 peremptory challenges if 3 or 4 alternate jurors are to be impanelled, and 3 peremptory challenges if 5 or 6 alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by these rules may not be used against an alternate juror.

(3) Discharge. When the jury retires to consider the verdict, the court in its discretion may retain the alternate jurors during deliberations. If the court decides to

- 23 retain the alternate jurors, it must insure that alternates do not take part in the  
24 deliberations or otherwise discuss the case with the jurors during their deliberations.

#### COMMITTEE NOTE

As currently written, Rule 24(c) explicitly requires the court to discharge all of the alternate jurors--who have not been selected to replace other jurors--when the jury retires to deliberate. That requirement is grounded on the concern that after the case has been submitted to the jury, its deliberations must be private and inviolate. *United States v. Houlihan*, 92 F.3d 1271, 1285 (1st Cir. 1996), citing *United States v. Virginia Election Corp.*, 335 F.2d 868, 872 (4th Cir. 1964). Notwithstanding that clear rule, there may be cases where it is better to retain the alternates when the jury retires, insulate them from the deliberation process, and have them available should one or more vacancies occur in the jury. Cf. Rule 23(b) (providing for jury consisting of less than twelve jurors). That might be especially appropriate in a long, costly, and complicated case. To that end the Committee believed that the court should have the discretion to decide whether to retain or discharge the alternates at the time the jury retires to deliberate.

In order to protect the sanctity of the deliberative process, the rule requires the court to take appropriate steps to insulate the alternate jurors. That may be done, for example, by locating the alternates in a separate location, instructing both the alternate jurors and jurors about the need for privacy, and occasionally polling both the alternate and regular jurors to insure that no improper communications or information have passed between them during the deliberations. See, e.g., *United States v. Houlihan*, 92 F.3d 1271, 1286-88 (1st Cir. 1996) (harmless error to retain alternate jurors in violation of Rule 24(c); in finding harmless error the court cited the steps taken by the trial judge to insulate the alternates).

Finally, the rule has been reorganized and restyled.

**U.S. v. HOULIHAN**

Cite as 92 F.3d 1271 (1st Cir. 1996)

1271

**UNITED STATES of America, Appellee,**

**v.**

**John HOULIHAN, Defendant, Appellant.**

**UNITED STATES of America, Appellee,**

**v.**

**Joseph A. NARDONE, Defendant,  
Appellant.**

**UNITED STATES of America, Appellee,**

**v.**

**Michael D. FITZGERALD,  
Defendant, Appellant.**

**Nos. 95-1614, 95-1615 and 95-1675.**

**United States Court of Appeals,  
First Circuit.**

**Heard June 5, 1996.**

**Decided Aug. 22, 1996.**

Defendants were convicted in the United States District Court for the District of Massachusetts, William G. Young, J., of numerous drug, racketeering, and homicide-related charges. Defendants appealed. The Court of Appeals, Selya, Circuit Judge, held that: (1) defendant who wrongfully causes potential witness' unavailability with intention of preventing witness from testifying at future trial waives confrontation clause right to object to witness' out-of-court statements at trial; (2) two defendants waived confrontation clause right to object to admission of murdered witness' out-of-court statements; (3) two defendants waived right to object on hearsay grounds to admission of murdered witness' out-of-court statements; (4) district court properly redacted portions of murdered witness' out-of-court statements; (5) district court's failure to discharge alternate jurors once deliberations commenced was not reversible error; (6) government did not violate Jencks Act by instructing interviewing agents to minimize notetaking; (7) evidence did not support one defendant's murder-for-hire conviction; (8) house was forfeitable as fruit of one defendant's racketeering even though defendant's uncle had title to house;

and (9) under double jeopardy clause, affirmation of two defendants' continuing criminal enterprise (CCE) convictions and sentence necessitated vacation of convictions and contingent sentences on conspiracy to distribute controlled substance.

Affirmed in part, reversed in part, and vacated in part.

**1. Criminal Law ⇨662.80**

Defendant may waive right to confrontation by knowing and intentional relinquishment. U.S.C.A. Const.Amend. 6.

**2. Criminal Law ⇨662.80**

Waiver of right to confront witnesses typically is express, but defendant also may waive it through intentional misconduct. U.S.C.A. Const.Amend. 6.

**3. Criminal Law ⇨662.80**

Defendant who wrongfully procures witness' absence for purpose of denying government that witness's testimony waives right under confrontation clause to object to admission of absent witness's hearsay statements. U.S.C.A. Const.Amend. 6.

**4. Criminal Law ⇨662.80**

To establish that defendant waived right under confrontation clause to object to absent witness' hearsay statements by wrongfully procuring witness' absence, it is sufficient to show that defendant was motivated in part by desire to silence witness; intent to deprive prosecution of testimony need not be defendant's sole motivation. U.S.C.A. Const.Amend. 6.

**5. Criminal Law ⇨662.80**

When person who eventually emerges as defendant causes potential witness' unavailability by wrongful act undertaken with intention of preventing potential witness from testifying at future trial, defendant waives right to object on confrontation grounds to admission of unavailable declarant's out-of-court statements at trial. U.S.C.A. Const.Amend. 6.

**6. Criminal Law ⇨662.80**

To invoke coconspirator exception to hearsay rule, proponent of statement must

over, the district court instructed the jurors on the spot that they were not to consider Sargent's statements in deciding Fitzgerald's fate. To complement that directive, the court redacted all references to Fitzgerald from the portions of those statements that the jury heard, and it repeated its prophylactic instruction on several occasions. Under these circumstances, the presumption that jurors follow the court's instructions is intact. Ergo, Fitzgerald suffered no unfair prejudice.

### III. ALTERNATE JURORS

The appellants calumnize the district court because, despite their repeated objections, the court refused to discharge the alternate jurors once deliberations commenced and compounded its obduracy by allowing the alternate jurors to have intermittent contact with the regular jurors during the currency of jury deliberations. This argument requires us to address, for the first time, the interplay between violations of Fed. R.Crim.P. 24(c) and the applicable test for harmless error.

The imperative of Rule 24(c) is clear and categorical: "An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict." Fed.R.Crim.P. 24(c). The rule reflects the abiding concern that, once a criminal case has been submitted, the jury's deliberations shall remain private and inviolate.<sup>11</sup> See *United States v. Virginia Erection Corp.*, 335 F.2d 868, 872 (4th Cir.1964).

Here, the appellants' claim of error is well founded. Rule 24(c) brooks no exceptions, and the district court transgressed its letter by retaining the alternate jurors throughout the deliberative period. The lingering question, however, is whether the infraction requires us to invalidate the convictions. The appellants say that it does. In their view, a violation of Rule 24(c) automatically necessitates a new trial where, as here, the defendants preserved their claim of error, or, at least, the continued contact between regular

and alternate jurors that transpired in this case demands that result. The government endeavors to parry this thrust by classifying the error as benign. We find that the Rule 24(c) violation caused no cognizable harm, and we deny relief on that basis.

The watershed case in this recondite corner of the law is *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). There the trial court permitted alternate jurors, while under instructions to refrain from engaging personally in the deliberative process, to remain in the jury room and audit the regular jurors' deliberations. See *id.* at 727-29, 113 S.Ct. at 1774-75. The jury found the defendants guilty. The court of appeals, terming the presence of alternate jurors in the jury room during deliberations "inherently prejudicial," granted them new trials although they had not lodged contemporaneous objections. *United States v. Olano*, 934 F.2d 1425, 1428 (9th Cir.1991). The Supreme Court demurred. It noted that unless an unpreserved error affects defendants' "substantial rights," Fed.R.Crim.P. 52(b), the error cannot serve as a fulcrum for overturning their convictions. 507 U.S. at 737, 113 S.Ct. at 1779. The Court then declared that the mere "presence of alternate jurors during jury deliberations is not the kind of error that 'affect[s] substantial rights' independent of its prejudicial impact." *Id.* Instead, the critical inquiry is whether the presence of the alternates in the jury room during deliberations actually prejudiced the defendants. See *id.* at 739, 113 S.Ct. at 1780.

The Justices conceded that, as a theoretical matter, the presence of any outsider, including an alternate juror, may cause prejudice if he or she actually participates in the deliberations either "verbally" or through "body language," or if his or her attendance were somehow to chill the jurors' deliberations. *Id.* The Court recognized, however, that a judge's cautionary instructions to alternates (e.g., to refrain from injecting themselves into the deliberations) can operate to lessen or eliminate these risks. See *id.* at

11. Notwithstanding that Criminal Rule 23(b) permits the remaining eleven jurors to return a valid verdict if a deliberating juror is excused for cause, the wisdom of Rule 24(c) remains debatable. We can understand a district judge's reluc-

tance, following a long, complicated, and hotly contested trial, to release alternate jurors before a verdict is obtained. But courts, above all other institutions, must obey the rules.

740, 113 S.Ct. at 1781 (remarking "the almost invariable assumption of the law that jurors follow their instructions") (quoting *Richardson v. Marsh*, 481 U.S. 200, 206, 107 S.Ct. 1702, 1707, 95 L.Ed.2d 176 (1987)). Thus, absent a "specific showing" that the alternates in fact participated in, or otherwise chilled, deliberations, the trial court's instructions to the alternates not to intervene in the jury's deliberations precluded a finding of plain error. *Id.* at 741, 113 S.Ct. at 1781.

This case presents a variation on the *Olano* theme. Here, unlike in *Olano*, the appellants contemporaneously objected to the district court's retention of the alternate jurors, thus relegating plain error analysis to the scrap heap. This circumstance denotes two things. First, here, unlike in *Olano*, the government, not the defendants, bears the devoir of persuasion with regard to the existence *vel non* of prejudice. Second, we must today answer the precise question that the *Olano* Court reserved for later decision. *See id.* Withal, the framework of the inquiry in all other respects remains the same. *See id.* at 734, 113 S.Ct. at 1777 (noting that, apart from the allocation of the burden of proof, a claim of error under Fed.R.Crim.P. 52(b) ordinarily requires the same type of prejudice-determining inquiry as does a preserved error). We do not discount the significance of this solitary difference, *see, e.g., id.* at 742, 113 S.Ct. at 1782 (Kennedy, J., concurring) (commenting that it is "most difficult for the Government to show the absence of prejudice"), but "difficult" does not mean "impossi-

ble." Since *Olano* teaches that a violation of Rule 24(c) is not reversible error per se,<sup>12</sup> *see id.* at 737, 113 S.Ct. at 1779, we must undertake a particularized inquiry directed at whether the instant violation, in the circumstances of this case, "prejudiced [the defendants], either specifically or presumptively." *Id.* at 739, 113 S.Ct. at 1780.

Our task, then, is to decide if the government has made a sufficiently convincing case that the district court's failure to observe the punctilio of Rule 24(c) did not affect the verdicts. *See, e.g., id.* at 734, 113 S.Ct. at 1777; *Kotteakos v. United States*, 328 U.S. 750, 758-65, 66 S.Ct. 1239, 1244-48, 90 L.Ed. 1557 (1946). In performing this task, we find the Court's reasoning in *Olano* instructive. *Cf. Lee v. Marshall*, 42 F.3d 1296, 1299 (9th Cir.1994) (finding *Olano* Court's reasoning transferable to harmless error analysis in habeas case). The risks that were run here by retaining the alternates were identical to the risks that were run at the trial level in *Olano*,<sup>13</sup> and the district judge's ability to minimize or eliminate those risks was the same in both situations.

The operative facts are as follows. Although the district court retained the alternates, subsequent physical contact between them and the regular jurors occurred only sporadically—confined mostly to the beginning of each day (when all the jurors assembled prior to the commencement of daily deliberations) and lunch time (when court security officers were invariably present).<sup>14</sup>

jury room during breaks (except for retrieving snacks from the jury room when court security officers confirmed that a break in deliberations had occurred).

On another occasion defense counsel voiced suspicion that a note from the jury to the judge (requesting transcripts of several witnesses' testimony) had been written in the presence of the alternates. At counsels' urging, Judge Young, in the course of responding to the note in open court, asked each juror whether "the alternates and the deliberating jurors, or vice versa, [had] discussed the substance of the case" during the pertinent time frame. All the jurors responded in the negative, and Judge Young reinstructed the regular jurors not to discuss the case with, or deliberate in the presence of, the alternate jurors. The defendants took no exception either to the form of the inquiry or to the instructions that the court gave.

12. On this score, *Olano* confirmed what this court anticipated. *See United States v. Levesque*, 681 F.2d 75, 80-81 (1st Cir.1982) (dictum).

13. In one respect, treating this case as comparable to *Olano* tilts matters in the appellants' favor. There, the undischarged alternates actually stayed in the jury room during deliberations. 507 U.S. at 729-30, 113 S.Ct. at 1775-76. Here, they did not; indeed, the regular jurors and the undischarged alternates were never in physical proximity while the deliberative process was ongoing.

14. On one occasion when the regular jurors were on a mid-morning break, an alternate juror retrieved a plate of delicacies from the jury room. Defense counsel brought this interlude to Judge Young's attention, and the judge immediately agreed to instruct the alternates to stay out of the

Judge Young at no time allowed the alternates to come within earshot of the deliberating jurors.

Equally as important, the court did not leave either set of venirepersons uninstructed. At the beginning of his charge, Judge Young told the alternates not to discuss the substance of the case either among themselves or with the regular jurors. He then directed the regular jurors not to discuss the case with the alternates. Near the end of the charge, the judge admonished all the talesmen that "if [the regular jurors are] in the presence of the alternates or the alternates are in the presence of the jurors, [there is to be] no talking about the case, no deliberating about the case." The regular jurors retired to the jury room for their deliberations, and the undischarged alternates retired to an anteroom in the judge's chambers (which remained their base of operations for the duration of the deliberations).

The deliberations lasted eleven days.<sup>15</sup> Each morning, Judge Young asked the regular jurors and the alternate jurors, on penalty of perjury, whether they had spoken about the case with anyone since the previous day's adjournment. On each occasion, all the jurors (regular and alternate) responded in the negative. The judge reiterated his instructions to both the regular and alternate jurors at the close of every court session. In addition, he routinely warned the venire that, when they assembled the next morning before deliberations resumed, "no one is to talk about the case."

[19, 20] On this record, we believe that the regular jurors were well insulated from the risks posed by the retention of the alternates. The judge repeatedly instructed the jurors—in far greater detail than in *Olano*—and those instructions were delicately phrased and admirably specific. Appropriate prophylactic instructions are a means of preventing the potential harm that hovers when a trial court fails to dismiss alternate jurors on schedule. See *Olano*, 507 U.S. at 740–41, 113 S.Ct. at 1781–82; *United States v. Sobamowo*, 892 F.2d 90, 97 (D.C.Cir.1989) (Gins-

burg, J.) (attaching great importance to trial court's prophylactic instructions in holding failure to discharge alternate jurors harmless); cf. *United States v. Ottersburg*, 76 F.3d 137, 139 (7th Cir.1996) (setting aside verdict and emphasizing trial court's failure to provide such instructions). Courts must presume "that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case," *Francis v. Franklin*, 471 U.S. 307, 324 n. 9, 105 S.Ct. 1965, 1976 n. 9, 85 L.Ed.2d 344 (1985), and that they follow those instructions.

[21] Here, we have more than the usual presumption that the jury understood the instructions and followed them. The court interrogated the entire panel—regular jurors and undischarged alternates—on a daily basis, and received an unbroken string of assurances that the regular jurors had not spoken with the alternates concerning the substance of the case, and vice versa. Just as it is fitting for appellate courts to presume, in the absence of a contrary indication, that jurors follow a trial judge's instructions, so, too, it is fitting for appellate courts to presume, in the absence of a contrary indication, that jurors answer a trial judge's questions honestly.

One last observation is telling. Over and above the plenitude of instructions, there is another salient difference between this case and *Ottersburg* (the only reported criminal case in which a federal appellate court invalidated a verdict due to the trial court's failure to discharge alternate jurors). Here, unlike in *Ottersburg*, 76 F.3d at 139, the judge at no time permitted the alternates to sit in on, or listen to, the jury's deliberations (even as mute observers). Hence, the alternates had no opportunity to participate in the deliberations, and nothing in the record plausibly suggests that they otherwise influenced the jury's actions. If the mere presence of silent alternates in the jury room during ongoing deliberations cannot in and of itself be deemed to chill discourse or establish prejudice, see *Olano*, 507 U.S. at 740–41, 113 S.Ct. at 1781–82, it is surprisingly difficult to

15. On the third day a regular juror had to be excused. With counsels' consent, Judge Young replaced the lost juror with an alternate and

instructed the jurors to begin deliberations anew. On appeal, neither side contests the propriety of this substitution.

imagine how absent (though undischarged) alternates, properly instructed, could have a toxic effect on the deliberative process.<sup>16</sup>

[22] We will not paint the lily. Given the lack of any contact between regular and alternate jurors during ongoing deliberations, the trial judge's careful and oft-repeated instructions, the venire's unanimous disclaimers that any discussions about the case took place between the two subgroups, the overall strength of the prosecution's evidence on virtually all the counts of conviction, and the discriminating nature of the verdicts that were returned (e.g., the jury acquitted the appellants on sundry counts and also acquitted the fourth defendant, Herd, outright), we conclude that the government has carried its burden of demonstrating that the outcome of the trial would have been precisely the same had the district court dismissed the alternate jurors when the jury first retired to deliberate. It follows that because the appellants suffered no prejudice in consequence of the court's *hevue*, they are not entitled to return to square one.

#### IV. DISCOVERY DISPUTES

The appellants stridently protest a series of government actions involving document discovery. We first deal with a claim that implicates the scope of the Jencks Act, 18 U.S.C. § 3500, and then treat the appellants' other asseverations.

##### A. Scope of the Jencks Act.

The Jencks Act provides criminal defendants, for purposes of cross-examination, with a limited right to obtain certain witness statements that are in the government's possession. That right is subject to a temporal condition: it does not vest until the witness takes the stand in the government's case and completes his direct testimony. *Id.* § 3500(a). It is also subject to categorical, content-based restrictions delineated in the statute: a statement is not open to produc-

tion under the Jencks Act unless it (i) relates to the same subject matter as the witness's direct testimony, *id.* § 3500(b), and (ii) either comprises grand jury testimony, *id.* § 3500(e)(3), or falls within one of two general classes of statements, namely,

(1) a written statement made by [the] witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement....

18 U.S.C. § 3500(e)(1)-(2).

In this case, the government agents who led the investigation instructed all but the most senior prosecutors to refrain from taking notes during pretrial interviews. The appellants decried this practice in the district court, but Judge Young found that even the deliberate use of investigatory techniques designed to minimize the production of written reports would not violate the Jencks Act. Before us, the appellants renew their challenge. We, too, think that it lacks force.

[23] The Jencks Act does not impose an obligation on government agents to record witness interviews or to take notes during such interviews. After all, the Act applies only to recordings, written statements, and notes that meet certain criteria, not to items that never came into being (whether or not a prudent investigator—cynics might say an unsophisticated investigator—would have arranged things differently). *See United States v. Lieberman*, 608 F.2d 889, 897 (1st Cir.1979) (rejecting a claim that the government has "a duty to create Jencks Act material by recording everything a potential witness says"), *cert. denied*, 444 U.S. 1019, 100 S.Ct. 673, 62 L.Ed.2d 649 (1980); *accord United States v. Bernard*, 625 F.2d 854, 859 (9th Cir.1980); *United States v. Head*, 586

mitted, and the substantial rights of the parties are violated." *Id.* at 1002. In the instant case, unlike in *Cabral*, there is neither proof nor reason to suspect that the undischarged alternates participated in the regular jurors' deliberations.

16. In *Cabral v. Sullivan*, 961 F.2d 998 (1st Cir. 1992), a case that antedated *Olano*, we considered a civil analog to Criminal Rule 24(c) and stated that "[w]hen a trial court allows an ... alternate juror[] to deliberate with the regular jurors ... an inherently prejudicial error is com-





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

**FROM: Professor Dave Schlueter, Reporter**

**RE: Rule 26. Taking of Testimony; Conforming Amendment**

**DATE: March 1, 1997**

At its October 1997 meeting the Committee approved an amendment to Rule 26 which would remove the requirement that testimony be taken "orally" in open court. The change follows a similar amendment to Civil Rule 43 which became effective on December 1, 1996.



1    **Rule 26. Taking of Testimony**

- 2            In all trials the testimony of witnesses shall be taken orally in open court, unless  
3    otherwise provided by an Act of Congress or by these rules, the Federal Rules of  
4    Evidence, or other rules adopted by the Supreme Court.

**COMMITTEE NOTE**

        The amendment is intended to accommodate witnesses who are not able to present oral testimony in open court and may need, for example, a sign language interpreter. The change conforms the rule in that respect with an amendment to Civil Rule 43, which became effective on December 1, 1996.



The separate reference to filing by facsimile transmission is deleted. Facsimile transmission continues to be included as an electronic means.

### Rule 43. Taking of Testimony

1 (a) Form. In all every trials, the testimony of  
2 witnesses shall be taken orally in open court, unless  
3 otherwise provided by an Act of Congress or by a  
4 federal law, these rules, the Federal Rules of  
5 Evidence, or other rules adopted by the Supreme  
6 Court provide otherwise. The court may, for good  
7 cause shown in compelling circumstances and upon  
8 appropriate safeguards, permit presentation of  
9 testimony in open court by contemporaneous  
10 transmission from a different location.

11

\* \* \* \* \*

### Committee Note

Rule 43(a) is revised to conform to the style conventions adopted for simplifying the present Civil Rules. The only intended changes of meaning are described below.

The requirement that testimony be taken "orally" is deleted. The deletion makes it clear that testimony of a witness may be given in open court by other means if the witness is not able to communicate orally. Writing or sign language are common examples. The development of advanced technology may enable testimony to be given by other means. A witness unable to sign or write by hand may be able to communicate through a computer or similar device.

Contemporaneous transmission of testimony from a different location is permitted only on showing good cause in compelling circumstances. The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truth-telling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition. Transmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial.

The most persuasive showings of good cause and compelling circumstances are likely to arise when a witness is unable to attend trial for unexpected reasons, such as accident or illness, but remains able to testify from a different place. Contemporaneous transmission may be better than an attempt to reschedule the trial, particularly if there is a risk that other — and perhaps more important — witnesses might not be available at a later time.

Other possible justifications for remote transmission must be approached cautiously. Ordinarily depositions, including video depositions, provide a superior means of

securing the testimony of a witness who is beyond the reach of a trial subpoena, or of resolving difficulties in scheduling a trial that can be attended by all witnesses. Deposition procedures ensure the opportunity of all parties to be represented while the witness is testifying. An unforeseen need for the testimony of a remote witness that arises during trial, however, may establish good cause and compelling circumstances. Justification is particularly likely if the need arises from the interjection of new issues during trial or from the unexpected inability to present testimony as planned from a different witness.

Good cause and compelling circumstances may be established with relative ease if all parties agree that testimony should be presented by transmission. The court is not bound by a stipulation, however, and can insist on live testimony. Rejection of the parties' agreement will be influenced, among other factors, by the apparent importance of the testimony in the full context of the trial.

A party who could reasonably foresee the circumstances offered to justify transmission of testimony will have special difficulty in showing good cause and the compelling nature of the circumstances. Notice of a desire to transmit testimony from a different location should be given as soon as the reasons are known, to enable other parties to arrange a deposition, or to secure an advance ruling on transmission so as to know whether to prepare to be present with the witness while testifying.

No attempt is made to specify the means of transmission that may be used. Audio transmission without video images may be sufficient in some circumstances, particularly as to less important testimony. Video

transmission ordinarily should be preferred when the cost is reasonable in relation to the matters in dispute, the means of the parties, and the circumstances that justify transmission. Transmission that merely produces the equivalent of a written statement ordinarily should not be used.

Safeguards must be adopted that ensure accurate identification of the witness and that protect against influence by persons present with the witness. Accurate transmission likewise must be assured.

Other safeguards should be employed to ensure that advance notice is given to all parties of foreseeable circumstances that may lead the proponent to offer testimony by transmission. Advance notice is important to protect the opportunity to argue for attendance of the witness at trial. Advance notice also ensures an opportunity to depose the witness, perhaps by video record, as a means of supplementing transmitted testimony.



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

**FROM: Professor Dave Schlueter, Reporter**

**RE: Proposed Amendment to Rule 30**

**DATE: 2-28-97**

At the Committee's meeting in April 1996, a subcommittee on the local rules project recommended that the Committee not adopt as a national rule a requirement that all instructions be submitted to the court before trial. Judge Stotler has suggested that perhaps a compromise might be appropriate. To that end she suggests that the court in its discretion might require or permit the parties to file their requested instructions either before trial.



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

ALICEMARIE H. STOTLER  
CHAIR

CHAIRS OF ADVISORY COMMITTEES

PETER G. McCABE  
SECRETARY

January 15, 1997

JAMES K. LOGAN  
APPELLATE RULES

ADRIAN G. DUPLANTIER  
BANKRUPTCY RULES

PAUL V. NIEMEYER  
CIVIL RULES

D. LOWELL JENSEN  
CRIMINAL RULES

FERN M. SMITH  
EVIDENCE RULES

The Honorable D. Lowell Jensen  
U.S. District Judge  
United States Courthouse  
1301 Clay Street, 4th Floor  
Oakland, CA 94612

Re: Suggested Amendment to Criminal Rule 30

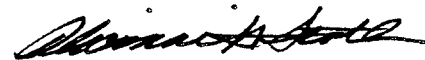
Dear Judge Jensen:

As I mentioned during the Standing Committee meeting in Arizona, upon review of the Rules Committee Support Office criminal docket contained in the Standing Committee agenda book, I learned that a subcommittee recently rejected a proposal to require that the parties submit proposed jury instructions sometime before trial. Upon further reflection, perhaps my retraction at the Tucson meeting was premature.

What I meant to convey was that Rule 30 should not preclude a judge from requiring jury instructions before trial. As the rule now reads, such an order may be disobeyed without sanction since it is invalid under Rule 57. Based on the April 1996 minutes, it appears that the subcommittee was considering the suggestion of the Local Rules Project that the national rule require pre-trial submission. All I had hoped to suggest was that a judge who wished to do so would not be issuing an order inconsistent with the national rules if she chose to require jury instructions prior to trial. Since it is incumbent on all who write with rule changes to submit their own idea of proper text, please see the enclosed.

I am reluctant to renew the suggestion in light of the subcommittee's recent action, and I therefore defer to your judgment as to whether the issue is worth raising with only a slightly different twist. Thank you for your attention to my suggestion.

Sincerely,



Alicemarie H. Stotler

enclosure

cc: Professor Daniel R. Coquillette  
Professor David A. Schlueter  
Professor Mary P. Squiers  
John K. Rabiej, Esquire

## Rule 30. Instructions

At the close of evidence, or at ~~such~~ an earlier time before or during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests.

\* \* \* \* \*

1   **Rule 30. Instructions**

2       Any party may file written requests that the court instruct the jury on the law as  
3 specified in the requests (1) ~~At~~ at the close of the evidence, or (2) ~~at such an~~ earlier time  
4 before or during the trial as the court reasonably directs, ~~any party may file written~~  
5 ~~requests that the court instruct the jury on the law as set forth in the requests.~~ At the  
6 same time copies of such requests shall be furnished to all parties. The court shall inform  
7 counsel of its proposed action upon the requests prior to their arguments to the jury. The  
8 court may instruct the jury before or after the arguments are completed or at both times.  
9 No party may assign as error any portion of the charge or omission therefrom unless that  
10 party objects thereto before the jury retires to consider its verdict, stating distinctly the  
11 matter to which that party objects and the grounds of the objection. Opportunity shall be  
12 given to make the objection out of the hearing of the jury and, on request of any party, out  
13 of the presence of the jury.

**ADVISORY COMMITTEE NOTE**

The amendment addresses the timing of requests for instructions. As currently written, the trial court may not direct the parties to file such requests before trial without violating Rules 30 and 57. While the amendment falls short of requiring all requests to be made before trial in all cases, the amendment now permits a court to do so in a particular case or as a matter of local practice under local rules promulgated under Rule 57.



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

**FROM: Professor Dave Schlueter, Reporter**

**RE: Proposed Rule 32.2. Criminal Forfeiture**

**DATE: February 27, 1997**

Attached are materials on the Department of Justice's proposed new rule, Rule 32.2, which would govern criminal forfeiture provisions. This proposal was originally discussed at the Committee's April 1996 meeting in Washington, D.C. as a proposed amendment to Rule 31. The matter was deferred to the Fall 1996 meet in Glenedon, Oregon and was presented as a new rule, Rule 32.2.

As noted in the Minutes for that meeting, several key points were addressed: First, several members suggested that the rule make it clear that the court must find a nexus between the defendant and the property; Second, some concern was expressed that providing for a non-jury hearing on forfeiture of property belonging to third persons might violate the Seventh Amendment; Third, some members questioned whether the new rule would be consistent with existing statutory forfeiture provisions and procedures; Fourth, it was suggested that some provision be made for government appeals. Following that discussion the Department indicated that it would continue working on the draft and asked members to pass along any other suggestions.

The redraft has been completed and is included here. As noted in the cover letter from Ms. Harkenrider and Mr. Pauley, the Department has made a number of changes. On the point concerning the Seventh Amendment issue, the Department included in its packet an unpublished decision from the Sixth Circuit and portions of the brief in that case which addressed the constitutional issue. I have included the Department's version and a version I prepared which includes line numbers and wider margins, etc. for quicker reference during the Committee's discussion.

Also included are comments and suggestions that have been received from Mr. David Smith and Mr. Terrance Reed. Those comments are generally self-explanatory.

Finally, I am attaching some material forwarded to me by John Rabiej on an ABA article on forfeiture proceedings.

In summary, the attached materials regarding Rule 32.2 are as follows:

- A cover letter from Ms. Harkenrider and Mr. Pauley (12-13-96);
- A draft of Rule 32.2, dated 2-20-97, prepared by me;

**Rule 32.2**

**2**

**Memo**

**2-27-97**

- The DOJ draft submitted with the cover letter along with an explanation of the rule;
- The Sixth Circuit's unpublished opinion in *United States v. Henry*;
- Letter and attachments from John Rabiej (11-6-96)
- Pages from the government's brief in *Henry*; (Seventh Amendment issue);
- Letter from Mr. Terrance Reed (comment on Fall 1996 Draft of Rule)
- Letter from Mr. David Smith with attachments (comment on Fall 1996 Draft)

This item is on the agenda for the April meeting in Washington, DC.





U. S. Department of Justice

*Criminal Division*

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Washington, D.C. 20530

December 13, 1996

Honorable D. Lowell Jensen  
United States District Judge  
United States Courthouse  
1301 Clay Street, 4th Floor  
Oakland, California 94612

Dear Judge Jensen:

At the last meeting of the Advisory Committee on Criminal Rules, there was considerable discussion of the Department's proposal to consolidate the Rules relating to criminal forfeiture and to streamline the procedure, in the wake of Libretti v. United States, 116 S. Ct. 356 (1995), by eliminating the role of jury in criminal forfeiture determinations. As a result of the Committee's consideration, the Department was asked to revise its proposal and to present it at the upcoming meeting in April.

Enclosed is our revamped proposal. Most of the Committee's discussion had centered around the issue of how to handle the situation in which the court has found that the property in question is subject to forfeiture because of its relationship to the offense, and consequently has entered a preliminary order of forfeiture, and thereafter no third party petition is filed claiming an interest in the property. The enclosed draft contains two bracketed alternatives acceptable to the Department for addressing this situation, reflecting, we believe, the competing views expressed by some members of the Committee. We have also made other minor changes, for example, providing that an order of forfeiture may become final as to a defendant earlier than at the time of sentencing if the defendant consents in writing. This is to deal with a cooperating defendant whose sentencing may have been deferred for a long time in order to assess the extent of his anticipated cooperation.

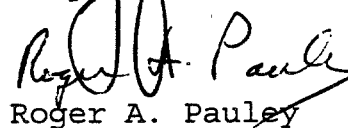
Professor Coquillette also raised at the last meeting the issue of the constitutionality of the existing statutes providing that the determination of third party claims in ancillary criminal forfeiture proceedings shall be by "the court alone, without a jury." 18 U.S.C. 1963(1)(2); 21 U.S.C. 853(n)(2). Our Rules proposal does not address this issue. Nevertheless, we undertook to advise the Committee as to the existence of any caselaw, as well as the Department's position, on the matter. We are aware of no

reported decision on this issue. However, the Sixth Circuit in 1995, in an unpublished decision, upheld the statute against the claim that it was invalid for lack of a jury trial. The government's brief in the case contains a comprehensive analysis (at pages 34-49) of why we believe the court's conclusion to be correct. Both the court's decision and our brief are also enclosed, for consideration by the Committee.

We look forward to seeing you and the other Committee members in a few months.

Sincerely,

  
Mary Frances Harkenrider

  
Roger A. Pauley

cc: Professor Schlueter

**Federal Rules of Criminal Procedure**  
**Rule 32.2**  
**Feb. 20, 1997**

1

Rules 7(c)(2), 31(e), and 32(d)(2) are repealed and replaced by the following new Rule. Rule 38(e) is amended by striking "3554," and by striking "Criminal Forfeiture" in the heading:

1 **32.2. Criminal Forfeiture**

2 (a) INDICTMENT <sup>OR</sup> ~~AND~~ INFORMATION. No  
3 judgment of forfeiture may be entered in a criminal  
4 proceeding unless the indictment or the information alleges  
5 that <sup>A</sup> ~~the~~ defendant <sup>HAS A POSSESSORY OR LEGAL</sup> ~~or defendants have~~ an interest in property  
6 that is subject to forfeiture in accordance with the applicable  
7 statute.

8 (b) HEARING AND ENTRY OF  
9 PRELIMINARY ORDER OF FORFEITURE AFTER  
10 VERDICT. <sup>AS SOON AS PRACTICABLE AFTER</sup> ~~Within 10 days of~~ entering a verdict of guilty or  
11 accepting a plea of guilty or nolo contendere on any count  
12 in the indictment or information for which criminal

**Federal Rules of Criminal Procedure**  
**Rule 32.2**  
**Feb. 20, 1997**

2

13 forfeiture is alleged, the court must determine what property  
14 is subject to forfeiture because <sup>IT IS RELATED</sup> ~~of its relationship~~ to the  
15 offense. The determination may be based on evidence  
16 already in the record, including any written plea agreement,  
17 or on evidence adduced at a post-trial hearing. If the ~~court~~  
18 ~~finds that~~ <sup>THE COURT</sup> property is subject to forfeiture, ~~it~~ must enter a  
19 preliminary order directing the forfeiture of whatever  
20 interest each defendant may have in the property, without  
21 determining what that interest <sup>IS. DECIDING</sup> ~~may be~~. A determination of  
22 the extent of each defendant's interest <sup>IS</sup> ~~in the property will be~~  
23 deferred until any third party claiming an interest in the  
24 property has petitioned the court pursuant to statute for  
25 consideration of the claim. [If no such petition is timely  
26 filed, the property is presumed to be the property of  
27 defendant or defendants and is forfeited in its entirety.]

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3

+ THE COURT FINDS A DEFT. HAS A  
POSSESSORY OR LEGAL INTEREST IN  
THE PROPERTY,

28 [If no such petition is timely filed, the property is forfeited  
29 in its entirety upon a finding by the court that one or more  
30 of the defendants had a possessory or legal interest in the  
31 property.]

32 (c) PRELIMINARY ORDER OF  
WHEN THE COURT ENTERS

33 FORFEITURE. The entry of a preliminary order of

34 forfeiture will authorize the Attorney General <sup>MAY</sup> to seize the

35 property subject to forfeiture, <sup>ANY</sup> to conduct <sup>THAT</sup> such discovery as

36 the court <sup>CONSIDERS</sup> may deem proper to facilitate the identification <sup>IN IDENTIFYING,</sup>

37 location <sup>ING</sup> or disposition <sup>ING</sup> of the property, and to commence

38 proceedings consistent with any statutory requirements

39 pertaining to third-party rights. At the time of sentencing —

40 (or at any time before sentencing if the defendant consents) —

41 the order of forfeiture becomes final as to the defendant.

42 and must be made a part of the sentence and included in the

43 judgment. The court may include in the order of forfeiture

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44 whatever conditions are reasonably necessary to preserve  
45 the property value pending any appeal.

46 (d) ANCILLARY PROCEEDINGS.

47 (1) If, as prescribed by statute, a third party  
48 files a petition asserting an interest in the forfeited  
49 property, the court must conduct an ancillary  
50 proceeding. In that proceeding, the court may  
51 <sup>CONSIDER</sup> ~~entertain~~ a motion to dismiss the petition for lack of  
52 standing, for failure to state a claim upon which  
53 <sup>CAN</sup> ~~relief could~~ be granted, or for any other ground. For  
54 purposes of the motion, <sup>THE</sup> ~~the~~ facts set forth in the  
55 <sup>ARE</sup> ~~petition must be~~ <sup>BE</sup> assumed to be true.

56 (2) <sup>RULE 32.2(d)(1) MOTION TO DISMISS</sup> If a ~~motion~~ referred to in paragraph  
57 <sup>NOT</sup> ~~(1)~~ is denied, or if no such motion is made, the court  
58 may permit the parties to conduct discovery in  
59 accordance with the Federal Rules of Civil

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5

60 Procedure to the extent that the court determines  
61 such discovery to be necessary or desirable to  
62 resolve factual issues before conducting an  
63 evidentiary hearing. At the conclusion of this  
64 discovery, <sup>AFTER</sup> <sup>ENDS,</sup> <sup>ASK</sup> either party may seek to have the court to  
65 dispose of the petition on a motion for summary  
66 judgment in the manner described in Rule 56 of the  
67 Federal Rules of Civil Procedure.  
68 <sup>AFTER</sup> (3) At the conclusion of the ancillary  
69 proceeding, the court must enter a final order of  
70 forfeiture amending the preliminary order as  
71 necessary to take into account the disposition of any  
72 third-party petition.  
73 (4) If multiple petitions are filed in the  
74 same case, an order dismissing or granting fewer  
75 than all of the petitions is not appealable until all

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6

76            petitions are resolved, unless the court determines  
77            that there is no just reason for delay and directs the  
78            entry of final judgment <sup>on</sup> with respect to one or more  
79            but fewer than all of the petitions.

80            (e) STAY OF FORFEITURE PENDING

81            APPEAL. If the defendant appeals from the conviction or

82            order of forfeiture, the court may stay the order of forfeiture

83            upon <sup>that</sup> ~~such~~ terms as the court finds appropriate to ensure

84            that the property remains available in case the conviction or

85            order of forfeiture is vacated. ~~But~~ <sup>The</sup> stay will not delay

86            ~~the conduct of the ancillary proceeding or the determination~~

87            <sup>A THIRD PARTY</sup> of ~~the~~ rights or interests, ~~of any third party.~~ If the

88            defendant's appeal is still pending when the court determines

89            that the order of forfeiture must be amended to recognize A

90            third party's interest in the property, the court must amend

91            the order of forfeiture but must refrain from directing the



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92 transfer of any property or interest to the third party until  
93 the defendant's appeal is final, unless the defendant, ~~in~~  
94 ~~writing~~ <sup>IN WRITING</sup> consents to the transfer of the property or interest  
95 to the third party.

96 (f) SUBSTITUTE PROPERTY. If the applicable  
97 ~~forfeiture~~ statute authorizes the forfeiture of substitute  
98 property, the court may at any time ~~entertain~~ <sup>CONSIDER</sup> a motion by  
99 the government to order forfeiture of substitute property. If  
100 the government makes the requisite showing, the court must  
101 enter an order forfeiting the substitute property, or must  
102 amend an existing preliminary or final order to include that  
103 property.

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U. S. Department of Justice

*Criminal Division*

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Washington, D.C. 20530

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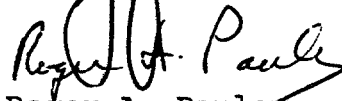
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### **32.2 Criminal Forfeiture**

(a) **INDICTMENT AND INFORMATION.** No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information alleges that the defendant or defendants have an interest in property that is subject to forfeiture in accordance with the applicable statute.

(b) **HEARING AND ENTRY OF PRELIMINARY ORDER OF FORFEITURE AFTER VERDICT.** Within 10 days of entering a verdict of guilty or accepting a plea of guilty or nolo contendere on any count in the indictment or information for which criminal forfeiture is alleged, the court must determine what property is subject to forfeiture because of its relationship to the offense. The determination may be based on evidence already in the record, including any written plea agreement, or on evidence adduced at a post-trial hearing. If the court finds that property is subject to forfeiture, it must enter a preliminary order directing the forfeiture of whatever interest each defendant may have in the property, without determining what that interest may be. A determination of the extent of each defendant's interest in the property will be deferred until any third party claiming an interest in the property has petitioned the court pursuant to statute for consideration of the claim. [If no such petition is timely filed, the property is presumed to be the property of the

defendant or defendants and is forfeited in its entirety.]

[If no such petition is timely filed, the property is forfeited in its entirety upon a finding by the court that one or more of the defendants had a possessory or legal interest in the property.]

(c) **PRELIMINARY ORDER OF FORFEITURE.** The entry of a preliminary order of forfeiture will authorize the Attorney General to seize the property subject to forfeiture, to conduct such discovery as the court may deem proper to facilitate the identification, location or disposition of the property, and to commence proceedings consistent with any statutory requirements pertaining to third-party rights. At the time of sentencing (or at any time before sentencing if the defendant consents), the order of forfeiture becomes final as to the defendant, and must be made a part of the sentence and included in the judgment. The court may include in the order of forfeiture whatever conditions are reasonably necessary to preserve the property value pending any appeal.

(d) **ANCILLARY PROCEEDINGS.** (1) If, as prescribed by statute, a third party files a petition asserting an interest in the forfeited property, the court must conduct an ancillary proceeding. In that proceeding, the court may entertain a motion to dismiss the petition for lack of standing, for failure to state a claim upon which relief could be granted, or for any other ground. For purposes of the motion, all facts set forth in the petition must be assumed to be true.



(2) If a motion referred to in paragraph (1) is denied, or if no such motion is made, the court may permit the parties to conduct discovery in accordance with the Federal Rules of Civil Procedure to the extent that the court determines such discovery to be necessary or desirable to resolve factual issues before conducting an evidentiary hearing. At the conclusion of this discovery, either party may seek to have the court dispose of the petition on a motion for summary judgment in the manner described in Rule 56 of the Federal Rules of Civil Procedure.

(3) At the conclusion of the ancillary proceeding, the court must enter a final order of forfeiture amending the preliminary order as necessary to take into account the disposition of any third-party petition.

(4) If multiple petitions are filed in the same case, an order dismissing or granting fewer than all of the petitions is not appealable until all petitions are resolved, unless the court determines that there is no just reason for delay and directs the entry of final judgment with respect to one or more but fewer than all of the petitions.

**(e) STAY OF FORFEITURE PENDING APPEAL.** If the defendant appeals from the conviction or order of forfeiture, the court may stay the order of forfeiture upon such terms as the court finds appropriate to ensure that the property remains available in case the conviction or order of forfeiture is vacated. But the stay will not delay the conduct of the ancillary proceeding or the determination of the rights or interests of any third party. If

the defendant's appeal is still pending when the court determines that the order of forfeiture must be amended to recognize third party's interest in the property, the court must amend the order of forfeiture but must refrain from directing the transfer of any property or interest to the third party until the defendant's appeal is final, unless the defendant, in writing, consents to the transfer of the property or interest to the third party.

(f) **SUBSTITUTE PROPERTY.** If the applicable forfeiture statute authorizes the forfeiture of substitute property, the court may at any time entertain a motion by the government to order forfeiture of substitute property. If the government makes the requisite showing, the court must enter an order forfeiting the substitute property, or must amend an existing preliminary or final order to include that property.

## EXPLANATION OF RULE 32.2

Rule 32.2 brings together in one place a single set of procedural rules governing the forfeiture of assets in a criminal case. Existing Rules 7(c)(2), 31(e) and 32(d)(2) are repealed and replaced by the new Rule. In addition, the forfeiture-related provisions of Rule 38(e) are stricken.

Subsection (a) is derived from Rule 7(c)(2) which provides that notwithstanding statutory authority for the forfeiture of property following a criminal conviction, no forfeiture order may be entered unless the defendant was given notice of the forfeiture in the indictment or information. As courts have held, subsection (a) is not intended to require that an itemized list of the property to be forfeited appear in the indictment or information itself; instead, such an itemization may be set forth in one or more bills of particulars. See United States v. Moffitt, Zwerling & Kemler, P.C., 83 F.3d 660, 665 (4th Cir. 1996), aff'g 846 F. Supp. 463 (E.D. Va. 1994) (Moffitt I) (indictment need not list each asset subject to forfeiture; under Rule 7(c), this can be done with bill of particulars). The same applies with respect to property to be forfeited only as "substitute assets." See United States v. Voight, 89 F.3d 1050 (3rd Cir. 1996) (court may amend order of forfeiture at any time to include substitute assets).

Subsection (b) replaces Rule 31(e) which provides that the jury in a criminal case must return a special verdict "as to the extent of the interest or property subject to forfeiture." This Rule has proven problematic in light of changes in the law that have occurred since the Rule was promulgated in 1972.

The first problem concerns the role of the jury. When the Rule was promulgated, it was assumed that criminal forfeiture was akin to a separate criminal offense on which evidence would be presented and the jury would have to return a verdict. In Libretti v. United States, 116 S. Ct. 356 (1995), however, the Supreme Court held that criminal forfeiture constitutes an aspect of the sentence imposed in a criminal case, and that accordingly the defendant has no constitutional right to have the jury determine any part of the forfeiture. The special verdict requirement in Rule 31(e), the Court said, is in the nature of a statutory right that can be modified or repealed at any time.

Even before Libretti, lower courts had determined that criminal forfeiture is a sentencing matter and concluded that criminal trials therefore should be bifurcated so that the jury first returns a verdict on guilt or innocence and then returns to hear evidence regarding the forfeiture. In the second part of the bifurcated proceeding, the jury is instructed that the government must establish the forfeitability of the property by a preponderance of the evidence. See United States v. Myers, 21 F.3d 826 (8th Cir. 1994) (preponderance standard applies because criminal forfeiture is part of the sentence in money laundering

cases); United States v. Voight, 89 F.3d 1050 (3rd Cir. 1996) (following Myers); United States v. Smith, 966 F.2d 1045, 1050-53 (6th Cir. 1992) (same for drug cases); United States v. Bieri, 21 F.3d 819 (8th Cir. 1994) (same).

In light of Libretti, it is questionable whether the jury should have any role in the forfeiture process. Traditionally, juries do not have a role in sentencing other than in capital cases, and elimination of that role in criminal forfeiture cases would streamline criminal trials. Undoubtedly, it is confusing for a jury to be instructed regarding a different standard of proof in the second phase of the trial, and it is burdensome to have to return to hear additional evidence after what may have been a contentious and exhausting period of deliberation regarding the defendant's guilt or innocence.

For these reasons, the proposal replaces Rule 31(e) with a provision that requires the court alone, at any time within 10 days after the verdict in the criminal case, to hold a hearing to determine if the property was subject to forfeiture, and to enter a preliminary order of forfeiture accordingly.

The second problem with the present rule concerns the scope of the determination that must be made prior to entering an order of forfeiture. This issue is the same whether the determination is made by the court or by the jury.

As mentioned, the current Rule requires the jury to return a special verdict "as to the extent of the interest or property subject to forfeiture." Some courts interpret this to mean only that the jury must answer "yes" or "no" when asked if the property named in the indictment is subject to forfeiture under the terms of the forfeiture statute -- e.g. was the property used to facilitate a drug offense? Other courts also ask the jury if the defendant has a legal interest in the forfeited property. Still other courts, including the Fourth Circuit, require the jury to determine the extent of the defendant's interest in the property vis a vis third parties. See United States v. Ham, 58 F.3d 78 (4th Cir. 1995) (case remanded to the district court to empanel a jury to determine, in the first instance, the extent of the defendant's forfeitable interest in the subject property).

The notion that the "extent" of the defendant's interest must be established as part of the criminal trial is related to the fact that criminal forfeiture is an in personam action in which only the defendant's interest in the property may be forfeited. United States v. Riley, 78 F.3d 367 (8th Cir. 1996). When the criminal forfeiture statutes were first enacted in the 1970's, it was clear that a forfeiture of property other than the defendant's could not occur in a criminal case, but there was no mechanism designed to limit the forfeiture to the defendant's interest. Accordingly, Rule 31(e) was drafted to make a

determination of the "extent" of the defendant's interest part of the verdict.

The problem, of course, is that third parties who might have an interest in the forfeited property are not parties to the criminal case. At the same time, a defendant who has no interest in property has no incentive, at trial, to dispute the government's forfeiture allegations. Thus, it was apparent by the 1980's that Rule 31(e) was an inadequate safeguard against the inadvertent forfeiture of property in which the defendant held no interest.

In 1984, Congress addressed this problem when it enacted a statutory scheme whereby third party interests in criminally forfeited property are litigated by the court in an ancillary proceeding following the conclusion of the criminal case and the entry of a preliminary order of forfeiture. See 21 U.S.C. § 853(n); 18 U.S.C. § 1963(1). Under this scheme, the court orders the forfeiture of the defendant's interest in the property -- whatever that interest may be -- in the criminal case. At that point, the court conducts a separate proceeding in which all potential third party claimants are given an opportunity to challenge the forfeiture by asserting a superior interest in the property. This proceeding does not involve relitigation of the forfeitability of the property; its only purpose is to determine whether any third party has a legal interest in the property such that the forfeiture of the property from the defendant would be invalid.

The notice provisions regarding the ancillary proceeding are equivalent to the notice provisions that govern civil forfeitures. Compare 21 U.S.C. § 853(n)(1) with 19 U.S.C. § 1607(a); see United States v. Boulter, 927 F. Supp. 911 (W.D.N.C. 1996) (civil notice rules apply to ancillary criminal proceedings). Notice is published and sent to third parties who have a potential interest. See United States v. BCCI Holdings (Luxembourg) S.A. (In re Petition of Indosuez Bank), 916 F. Supp. 1276 (D.D.C. 1996) (discussing steps taken by government to provide notice of criminal forfeiture to third parties). If no one files a claim, or if all claims are denied following a hearing, the forfeiture becomes final and the United States is deemed to have clear title to the property. 21 U.S.C. § 853(n)(7); United States v. Hentz, 1996 WL 355327 (E.D. Pa. 1996) (once third party fails to file a claim in the ancillary proceeding, government has clear title under § 853(n)(7) and can market the property notwithstanding third party's name on the deed).

Thus, the ancillary proceeding has become the forum for determining the extent of the defendant's forfeitable interest in the property. It allows the court to conduct a proceeding in

which all parties can participate that ensures that the property forfeited actually belongs to the defendant.

Since the enactment of the ancillary proceeding statutes, the requirement in Rule 31(e) that the court (or jury) determine the extent of the defendant's interest in the property as part of the criminal trial has become an unnecessary anachronism that leads more often than not to duplication and a waste of judicial resources. There is no longer any reason to delay the conclusion of the criminal trial with a lengthy hearing over the extent of the defendant's interest in property when the same issues will have to be litigated a second time in the ancillary proceeding if someone files a claim challenging the forfeiture. For example, in United States v. Messino, 921 F. Supp. 1231 (N.D. Ill. 1996), the court allowed the defendant to call witnesses to attempt to establish that they, not he, were the true owners of the property. After the jury rejected this evidence and the property was forfeited, the court conducted an ancillary proceeding in which the same witnesses litigated their claims to the same property.

A more sensible procedure would be for the court, once it determines that property was involved in the criminal offense for which the defendant has been convicted, to order the forfeiture of whatever interest a defendant may have in the property without having to determine exactly what that interest is. If third parties assert that they have an interest in all or part of the property, those interests can be adjudicated at one time in the ancillary proceeding.

This approach would also address confusion that occurs in multi-defendant cases where it is clear that each defendant should forfeit whatever interest he may have in the property used to commit the offense, but it is not at all clear which defendant is the actual owner of the property. For example, suppose A and B are co-defendants in a drug and money laundering case in which the government seeks to forfeit property involved in the scheme that is held in B's name but of which A may be the true owner. It makes no sense to invest the court's time in determining which of the two defendants holds the interest that should be forfeited. Both defendants should forfeit whatever interest they may have. Moreover, to the extent that the current rule forces the court to find that A is the true owner of the property, it gives B the right to file a claim in the ancillary proceeding where he may attempt to recover the property despite his criminal conviction. United States v. Real Property in Waterboro, 64 F.3d 752 (1st Cir. 1995) (co-defendant in drug/money laundering case who is not alleged to be the owner of the property is considered a third party for the purpose of challenging the forfeiture of the other co-defendant's interest).

The revised Rule resolves these difficulties by postponing the determination of the extent of the defendant's interest until the ancillary proceeding. Under this procedure, the court, at any time within 10 days after the verdict in the criminal case, would determine if the property was subject to forfeiture in accordance with the applicable statute -- e.g., whether the property represented the proceeds of the offense, was used to facilitate the offense, or was involved in the offense in some other way. The determination could be made by the court alone based on the evidence in the record from the criminal trial or the facts set forth in a written plea agreement submitted to the court at the time of the defendant's guilty plea, or the court could hold a hearing to determine if the requisite relationship existed between the property and the offense. It would not be necessary to determine at this stage what interest any defendant might have in the property. Instead, the court would order the forfeiture of whatever interest each defendant might have in the property and conduct the ancillary proceeding. If someone files a claim, the court would determine the respective interests of the defendants versus the third party claimants and amend the order of forfeiture accordingly. On the other hand, if no one files a claim in the ancillary proceeding, the court would enter a final order forfeiting the property in its entirety.

The proposal contains bracketed language containing two alternative ways of addressing this latter point. In the first alternative, if no one files a claim, the property is forfeited in its entirety because it is presumed that the property belongs to the defendant. This corresponds to the practice under current law in cases involving guilty pleas where Rule 31(e) does not apply. See United States v. Saccoccia, 58 F.3d 754 (1st Cir. 1995) (Rule 31(e) only applies to jury trials; no special verdict required when defendant waives jury right on the forfeiture issues). In the second alternative, if no one files a claim, the property is forfeited in its entirety only after the court makes a finding that one of the defendants had a possessory or legal interest in the property.<sup>1</sup> This corresponds to the requirement under current law, at least as it is interpreted in some courts, in instances where Rule 31(e) applies.

---

<sup>1</sup> The distinction between "possessory" and "legal" interests is necessary. If the court were required to find that the defendant had a "legal" interest in the forfeited property, it might never be possible to obtain an order forfeiting criminal proceeds that the defendant possessed but did not lawfully own. Moreover, if a possessory interest is a sufficient basis for a forfeiture order, it will not be necessary for the court to determine whether the defendant or a nominee was the true owner of the property when no third-party claim is filed.

Subsection (c) replaces Rule 32(d)(2) (effective December 1, 1996). It provides that once the court enters a preliminary order of forfeiture directing the forfeiture of whatever interest each defendant may have in the forfeited property, the government may seize the property and commence an ancillary proceeding to determine the interests of any third party. Again, if no third party files a claim, the court, at the time of sentencing, will enter a final order forfeiting the property in its entirety. If a third party files a claim, the order of forfeiture will become final as to the defendant at the time of sentencing but will be subject to amendment in favor of a third party pending the conclusion of the ancillary proceeding.

Because it is not uncommon for sentencing to be postponed for an extended period to allow a defendant to cooperate with the government in an ongoing investigation, the Rule would allow the order of forfeiture to become final as to the defendant before sentencing, if the defendant agrees to that procedure. Otherwise, the government would be unable to dispose of the property until the sentencing took place.

Subsection (d) sets forth a set of rules governing the conduct of the ancillary proceeding. When the ancillary hearing provisions were added to 18 U.S.C. § 1963 and 21 U.S.C. § 853 in 1984, Congress apparently assumed that the proceedings under the new provisions would involve simple questions of ownership that could, in the ordinary case, be resolved in 30 days. See 18 U.S.C. § 1963(l)(4). Presumably for that reason, the statute contains no procedures governing motions practice or discovery such as would be available in an ordinary civil case.

Experience has shown, however, that ancillary hearings can involve issues of enormous complexity that require years to resolve. See United States v. BCCI Holdings (Luxembourg) S.A., 833 F. Supp. 9 (D.D.C. 1993) (ancillary proceeding involving over 100 claimants and \$451 million); United States v. Porcelli, CR-85-00756 (CPS), 1992 U.S. Dist. LEXIS 17928 (E.D.N.Y. Nov. 5, 1992) (litigation over third party claim continuing 6 years after RICO conviction). In such cases, procedures akin to those available under the Federal Rules of Civil Procedure should be available to the court and the parties to aid in the efficient resolution of the claims.

Because an ancillary hearing is part of a criminal case, it would not be appropriate to make the civil Rules applicable in all respects. The amendment, however, describes several fundamental areas in which procedures analogous to those in the civil Rules may be followed. These include the filing of a motion to dismiss a claim, the conduct of discovery, the disposition of a claim on a motion for summary judgment, and the taking of an appeal from final disposition of a claim. Where applicable, the amendment follows the prevailing case law on the issue. See,



e.g., United States v. Lavin, 942 F.2d 177 (3rd Cir. 1991) (ancillary proceeding treated as civil case for purposes of applying Rules of Appellate Procedure); United States v. BCCI Holdings (Luxembourg) S.A. (In re Petitions of General Creditors), 919 F. Supp. 31 (D.D.C. 1996) ("If a third party fails to allege in its petition all elements necessary for recovery, including those relating to standing, the court may dismiss the petition without providing a hearing"); United States v. BCCI (Holdings) Luxembourg S.A. (In re Petition of Department of Private Affairs), 1993 WL 760232 (D.D.C. 1993) (applying court's inherent powers to permit third party to obtain discovery from defendant in accordance with civil rules). The provision governing appeals in cases where there are multiple claims is derived from Fed.R.Civ.P. 54(b).

Subsection (e) replaces the forfeiture provisions of Rule 38(e) which provide that the court may stay an order of forfeiture pending appeal. The purpose of the provision is to ensure that the property remains intact and unencumbered so that it may be returned to the defendant in the event his appeal is successful. Subsection (e) makes clear, however, that a district court is not divested of jurisdiction over an ancillary proceeding even if the defendant appeals his or her conviction. This allows the court to proceed with the resolution of third party claims even as the appeal is considered by the appellate court. Otherwise, third parties would have to await the conclusion of the appellate process even to begin to have their claims heard. See United States v. Messino, 907 F. Supp. 1231 (N.D. Ill. 1995) (the district court retains jurisdiction over forfeiture matters while an appeal is pending).

Finally, subsection (e) provides a rule to govern what happens if the court determines that a third-party claim should be granted but the defendant's appeal is still pending. The defendant, of course, is barred from filing a claim in the ancillary proceeding. See 18 U.S.C. § 1963(1)(2); 21 U.S.C. § 853(n)(2). Thus, the court's determination, in the ancillary proceeding, that a third party has an interest in the property superior to that of the defendant cannot be binding on the defendant. So, in the event that the court finds in favor of the third party, that determination is final only with respect to the government's alleged interest. If the defendant prevails on appeal, he recovers the property as if no conviction or forfeiture ever took place. But if the order of forfeiture is affirmed, the amendment to the order of forfeiture in favor of the third party becomes effective.

Subsection (f) makes clear, as courts have found, that the court retains jurisdiction to amend the order of forfeiture to include substitute assets at any time. See United States v. Hurley, 63 F.3d 1 (1st Cir. 1995) (court retains authority to order forfeiture of substitute assets after appeal is filed);

United States v. Voight, 89 F.3d 1050 (3rd Cir. 1996) (following Hurley). Third parties, of course, may contest the forfeiture of substitute assets in the ancillary proceeding. See United States v. Lester, 85 F.3d 1409 (9th Cir. 1996).





NOTICE: Sixth Circuit Rule 24(c) states that citation of unpublished dispositions is disfavored except for establishing res judicata, estoppel, or the law of the case and requires service of copies of cited unpublished dispositions of the Sixth Circuit.

(The decision of the Court is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter.)

**UNITED STATES of America, Plaintiff-  
Appellee,**

**v.**

**Tom HENRY, Defendant,  
Jo-Ann Henry, Claimant-Appellant.**

**No. 94-6188.**

**United States Court of Appeals, Sixth Circuit.**

**Aug. 10, 1995.**

On Appeal from the United States District Court  
for the Middle District of Tennessee, No. 91-00095;  
John T. Nixon, Chief Judge.

M.D.Tenn., 850 F.Supp.681.

**AFFIRMED.**

Before: **KRUPANSKY, MILBURN, and  
BATCHELDER, Circuit Judges.**

**PER CURIAM.**

**\*\*1** Claimant-appellant appeals the district court's order forfeiting substitute assets of defendant. For the reasons that follow, we affirm the district court's order.

**I.**

Defendant, Tom Henry, purchased a house for himself and his family at 101 Ewing Court in 1989 for \$195,000. From the time the property was first purchased, the deed and property title were recorded solely in the name of claimant-appellant Jo-Ann Henry, the wife of Tom Henry. Jo-Ann Henry alleges that at the time Tom Henry bought the 101 Ewing Court residence in 1989, she insisted that title to the property be recorded in her name alone.

She claims that she intended to retain title in the property to replace her interest in another house, acquired from her previous marriage that she had just sold, and to provide a home for her children to grow up in and eventually inherit. According to Tom Henry, the 101 Ewing Court residence was titled in his wife's name in order to provide her with financial security and because of his affection for her.

As the Government points out, however, despite Jo-Ann Henry's claim that she is the sole owner of the 101 Ewing Court residence, Tom Henry admitted that the funds used to purchase the house came from his companies, not from his wife. And not only did Tom Henry expend the money to buy the new house, the Government traced those funds to the illegal activity of Tom Henry. The Government thus correctly contends that Jo-Ann Henry holds only nominal title in the 101 Ewing Court property.

This criminal forfeiture action resulted after Tom Henry was convicted of money laundering related to a Medicare fraud scheme, and ordered to forfeit \$191,206.80 in U.S. currency to the U.S. Government. When it became clear that the cash could not be recovered from Tom Henry, the Government filed a motion to forfeit substitute property including the real property located at 101 Ewing Court, the property at issue in this appeal. According to the Government, Tom Henry had transferred proceeds of his criminal activity to various third parties including his wife, Jo-Ann Henry. The court entered an amended preliminary order on November 20, 1992, ordering the forfeiture of substitute property including 101 Ewing Court.

On January 15, 1993, appellant, Jo-Ann Henry filed a petition for a hearing to adjudicate her alleged third-party interest in property targeted by the amended forfeiture order, including 101 Ewing Court. Appellant Jo-Ann Henry filed a second motion on March 8, 1993, asking that the district court declare the enabling statutes, 18 U.S.C.A. § 1963(1) and 21 U.S.C.A. § 853(n), unconstitutional. After an ancillary hearing was held, the court entered a final order of forfeiture of the property at 101 Ewing Court, but specifically excepted from forfeiture Jo-Ann Henry's legal

interest in the property of \$23,951.20. Appellant Henry then filed this timely appeal.

II.

**\*\*2** This forfeiture action is governed by 21 U.S.C. § 853. Section 853(p) is termed the "substitute asset" provision, and reads in relevant part:

(p) Forfeiture of substitute property

If any of the property described in subsection (a) of this section, as a result of any act or omission of the defendant —

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

21 U.S.C.A. § 853(p) (West Supp. 1995) (emphasis added). The second section at issue in this case defines third party interests:

(n) Third party interests ....

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that —

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

21 U.S.C.A. § 853(n)(6) (West Supp. 1995) (emphasis added). Thus, the substitute asset provision, § 853(p), permits a court to substitute assets of the defendant for forfeitable property,

while § 853(n)(6) protects third parties by giving them the opportunity to prove that they are innocent owners of property to be forfeited.

Appellant alleges that she held superior title in the Ewing Court property over that of her husband, the defendant in this action. We find that appellant was not a bona fide purchaser of the Ewing Court property, but rather holds only bare legal title in the property that the defendant purchased with proceeds of his illegal activity. In *United States v. 526 Liscum Drive*, 866 F.2d 213 (6th Cir. 1989), the claimant also held legal title to real property. This Court found, however, that unless claimant could prove some dominion or control over the property, or some other indicia of true ownership, she was nothing more than a nominal or straw owner. 526 Liscum Drive, 866 F.2d at 217. As we observed, the purpose of forfeiture statutes is to "deprive criminals of the tools by which they conduct their illegal activities.... A failure to look beyond bare legal title would foster manipulation of nominal ownership to frustrate this intent." *Id.* (citations omitted).

**\*\*3** Jo-Ann Henry testified that her only contribution to the payment price was the amount of \$23,951.20. In addition, the special verdict indicated the jury's belief that Tom Henry had purchased the house with illegally obtained funds. Consequently, appellant did not hold superior legal title in the property "at the time of the commission of the acts" which gave rise to the district court's forfeiture order.

We are not persuaded by appellant's argument that § 853(n)(6)(A) should be read to measure Jo-Ann Henry's legal right at the time the court grants a motion to substitute an asset. The essence of Jo-Ann Henry's argument is that the relation-back doctrine should not be applicable in the forfeiture of a substitute asset. We need not reach this precise question at this time, however, because the substitute asset at issue in this case — the 101 Ewing Court residence — was purchased with funds illegally obtained by the defendant. The Ewing Court property is therefore directly traceable to defendant Tom Henry's illegal actions. We can be assured of the property's traceability by the jury's special verdict finding that the Ewing Court property was obtained with illegal funds. [FN1] For the same reason that relation back is applicable

(Cite as: 64 F.3d 664, 1995 WL 478635 (6th Cir, \*\*3.(Tenn.)))

to this substitute asset, any marital property right that Jo-Ann Henry might have had in the Ewing Court property is also defeated by the fact that the residence is directly traceable to the defendant's illegal activity. Finally, because the property was purchased with illegal funds, the statute's clear and unambiguous language instructs that the alleged superior legal interest must be measured at the time that the illegal acts were committed. *United States v. Campos*, 859 F.2d 1233, 1239 (6th Cir. 1988).

FN1. The jury's verdict with regard to Count Thirty-Six, indicating that the Ewing Court property was not forfeitable, does not interfere with the jury's verdict with regard to Count Four that the property was obtained by illegal funds. Nor does fact that the jury indicated that the property should not be forfeited preclude the forfeiture of 101 Ewing Court as a substitute asset in light of direct evidence and proof that the property was purchased with illegal funds.

Appellant further alleges that her constitutional right to due process has been violated because she was denied her right to a jury trial and because a claimant such as herself should not bear the burden of proving her superior legal interest in the property. Once again, appellant's arguments run counter to the language of the statute itself which provides third parties the opportunity to obtain an ancillary hearing before the court but as § 853(n)(2) states, "[t]he hearing shall be held before the court alone, without a jury." 21 U.S.C.A. § 853(n)(2) (West Supp. 1995). We do not find this statute's denial of a jury trial to be unconstitutional. As the Supreme Court has stated, the Seventh Amendment "was never intended to establish the jury as the exclusive mechanism for factfinding in civil cases." *Atlas Roofing Co., Inc. v. OSHA*, 430 U.S. 442, 460 (1977). Appellant's petition challenging the district court's forfeiture order is not the type of action which necessitates a jury trial; thus as long as the claimant is provided with an ancillary hearing, no constitutional right is violated.

\*\*4 Finally, the jury verdict indicating that the Ewing Court residence should not be forfeited does not prevent the forfeiture of the property as a substitute asset. The jury's verdict of "not forfeit" did not determine whether the residence could be seized as a substitute asset. Therefore, the jury's verdict does not preclude the district court's order

forfeiting the property as a substitute asset. As the Government points out, the very nature of a substitute asset requires that it is not property which is directly forfeitable. See *United States v. Swank Corp.*, 797 F. Supp. 497 (E.D. Va. 1992) (holding that an order of forfeiture for substitute assets has to be satisfied out of something which was not itself forfeitable).

### III.

For the foregoing reasons, the district court's forfeiture order is AFFIRMED.

END OF DOCUMENT











LEONIDAS RALPH MECHAM  
Director

ADMINISTRATIVE OFFICE OF THE  
UNITED STATES COURTS

CLARENCE A. LEE, JR.  
Associate Director

WASHINGTON, D.C. 20544

JOHN K. RABIEJ  
Chief  
Rules Committee Support Office

November 6, 1996  
*Via Facsimile*

MEMORANDUM TO CHAIRS AND REPORTERS OF THE ADVISORY  
COMMITTEES ON CIVIL, CRIMINAL, AND EVIDENCE RULES

SUBJECT: *Forfeiture Proceedings*

For your information, I am attaching an ABA Journal article describing that group's recommendations on forfeiture proceedings. Congressman Hyde's bill on civil asset forfeiture (H.R.1916), which is referred to in the article, is also attached. Among other things, the bill would amend the Admiralty Rules and extend the time for filing a third party claim to property subject to forfeiture. It would also raise the government's burden of proof in certain other forfeiture proceedings. I have asked our Legislative Affairs Office to monitor action on this issue in the new Congress.

A handwritten signature in cursive script, reading "John K. Rabiej".

John K. Rabiej

Attachments

cc: Honorable Alicemarie H. Stotler  
Professor Daniel R. Coquillette  
Mark O. Kasanin, Esquire



# Fairness in Civil Forfeiture

ABA backs bill that seeks to avoid punishing 'innocent' property owners

BY RHONDA McMILLION

In response to widespread inconsistencies and unfairness in the use of civil forfeiture laws, the ABA is urging Congress to enact federal legislation to make the laws more just and equitable based on a set of principles the association adopted earlier this year.

Federal civil forfeiture laws now allow the government to seize personal property by showing "probable cause" for the belief that the property was used unlawfully by anyone. The laws then place the burden upon the owners to prove by a "preponderance of the evidence" that their property was not used in a crime.

It is estimated that 80 percent of all property owners who lose property to civil forfeiture have not been charged with a crime, but government officials usually keep the seized property.

This is in stark contrast to criminal forfeiture laws, which allow the court in a criminal case to order, as part of a sentence, the forfeiture of a convicted defendant's interest in property derived from or used to commit a criminal offense.

"Civil asset forfeiture too often punishes innocent people," House Judiciary Chairman Henry J. Hyde, R-Ill., declared in introducing the Civil Asset Forfeiture Reform Act.

"These procedures may have made sense in the 18th century, when ships containing contraband or smuggled goods were seized. But in today's modern world, the targets of noncriminal forfeiture are residences, businesses and bank accounts."

Hyde's bill, H.R. 1916, seeks to clarify the intent of Congress that either lack of knowledge or lack of consent by a property owner is sufficient for an "innocent owner" defense if the owner took reasonable steps to prevent illegal use of the property.

The proposals also would place the burden of proof on the government to justify a civil forfeiture by "clear and convincing" evidence and

would lengthen to 30 days the 10-day period during which property owners may make a forfeiture relief claim. Other provisions would:

- Make clear that the federal government is financially responsible

essential to obtain just results, it will also help restore public confidence that the civil forfeiture laws can and will be fairly deployed to fight crime, and not merely to further fiscal interests," said Terrance G. Reed, chair

of the Racketeer Influenced and Corrupt Organizations, Forfeiture and Civil Remedies Committee of the ABA Criminal Justice Section, speaking to Hyde's committee during a July hearing on the legislation.

Reed explained that the ABA's Statement of Principles on the Revision of the Federal Asset Forfeiture Laws is broader than H.R. 1916, but the direction and thrust of the ABA's forfeiture policies are fully consistent with the type of procedural reforms outlined in the legislation.

The Clinton administration, agreeing that the forfeiture laws must

be improved, embodied the ABA's 13 principles as well as numerous other provisions in its own comprehensive proposal, which has not yet been introduced as a bill.

Stefan Cassella, deputy chief of the Department of Justice Criminal Division's Asset Forfeiture and Money Laundering Section, emphasized during the hearing that civil forfeiture is particularly important because it allows the government to reach assets that cannot be reached any other way.

"In the last decade, forfeiture has become an essential part of many areas of federal law enforcement from gambling to child pornography to bank fraud to narcotics," he said. "It is no exaggeration to say that the use of forfeiture in these areas has given us the strongest and most effective new law enforcement tool that we have seen in the last 25 years."

This extensive use of forfeiture and the widespread concern for protecting innocent property owners is expected to prompt consideration of the proposed legislation early in the 105th Congress.



Terrance G. Reed: Seizure law should be fairly deployed.

ble for property damage caused by the negligent handling of seized property by government officials.

- Provide that indigent property owners can obtain the service of court-appointed counsel.

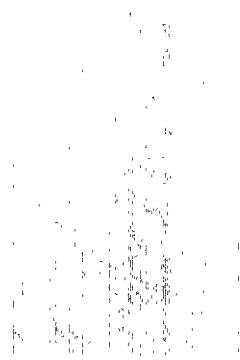
- Provide federal courts with the discretion to release property seized for civil forfeiture proceedings before trial in order to prevent a substantial hardship to the claimant.

"Implementation of fair civil forfeiture procedures will not only restore the necessary balance between the government and property owners

## ON THE HILL RECENT ABA TESTIMONY

- In September, William W. Taylor III, chair of the Criminal Justice Section, submitted a statement on ethical standards for federal prosecutors to the House Judiciary Subcommittee on Courts and Intellectual Property.

*Rhonda McMillion is editor of Washington Letter, a monthly publication of the ABA Governmental Affairs Office.*



**PREVIOUS BILL | NEXT BILL**

**PREVIOUS BILL:ALL | NEXT BILL:ALL**

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## **H.R.1916**

**SPONSOR:** Rep Hyde, (introduced 06/22/95)

---

### **TITLE(S):**

**SHORT TITLE(S) AS INTRODUCED:**

Civil Asset Forfeiture Reform Act

**OFFICIAL TITLE AS INTRODUCED:**

A bill to reform certain statutes regarding civil asset forfeiture.

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**STATUS:** Floor Actions

\*\*\*NONE\*\*\*

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**STATUS:** Detailed Legislative History

### **House Action(s)**

**Jun 22, 95:**

Referred to the Committee on the Judiciary, and in addition to the Committee on Ways and Means, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned.

**Jul 28, 95:**

Referred to the Subcommittee on Crime.

**Jul 22, 96:**

Committee Hearings Held.

**Jun 22, 95:**

Referred to the Committee on the Judiciary, and in addition to the Committee on Ways and Means, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned.

**Jun 28, 95:**

Referred to the Subcommittee on Trade.

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**STATUS:** Congressional Record Page References

\*\*\*NONE\*\*\*

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**COMMITTEE(S):**

**COMMITTEE(S) OF REFERRAL:**

SUBCOMMITTEE(S):

Hsc Trade  
Hsc Crime

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AMENDMENT(S):

\*\*\*NONE\*\*\*

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SUBJECT(S):

INDEX TERMS:

<u>Law enforcement</u>	<u>Actions and defenses</u>
<u>Administrative remedies--Department of the Treasury</u>	<u>Budgets</u>
<u>Civil liberties</u>	<u>Civil procedure</u>
<u>Claims</u>	<u>Criminal justice</u>
<u>Customs administration</u>	<u>Drug abuse</u>
<u>Drug law enforcement</u>	<u>Evidence (Law)</u>
<u>Executive departments</u>	<u>Foreign trade</u>
<u>Forfeiture</u>	<u>Government information</u>
<u>Government liability</u>	<u>Government paperwork</u>
<u>Government trust funds</u>	<u>Income tax</u>
<u>Law</u>	<u>Legal assistance to the poor</u>
<u>Legal fees</u>	<u>Narcotic traffic</u>
<u>Negligence</u>	<u>Right to counsel</u>
<u>Searches and seizures</u>	<u>Tax administration</u>
<u>Taxation</u>	<u>Trade</u>
<u>Welfare</u>	

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23 COSPONSORS:

<u>Rep Barton</u> - 09/20/95	<u>Rep Beilenson</u> - 09/20/95
<u>Rep Dornan</u> - 09/20/95	<u>Rep Frank</u> - 09/20/95
<u>Rep Jacobs</u> - 09/20/95	<u>Rep Manzullo</u> - 09/20/95
<u>Rep Meyers</u> - 09/20/95	<u>Rep Pryce</u> - 09/20/95
<u>Rep Quillen</u> - 09/20/95	<u>Rep Serrano</u> - 09/20/95
<u>Rep Smith, Lamar</u> - 09/20/95	<u>Rep Taylor, C.</u> - 09/20/95
<u>Rep Rivers</u> - 09/20/95	<u>Rep Hayworth</u> - 09/27/95
<u>Rep Calvert</u> - 11/08/95	<u>Rep Gillmor</u> - 03/14/96
<u>Rep Cox</u> - 03/14/96	<u>Rep Bryant, J.</u> - 03/26/96
<u>Rep Bliley</u> - 03/26/96	<u>Rep Greene</u> - 05/23/96
<u>Rep Cunningham</u> - 07/11/96	<u>Rep Barr</u> - 07/22/96
<u>Rep Chenoweth</u> - 09/25/96	



## **DIGEST:**

### **(AS INTRODUCED)**

**Civil Asset Forfeiture Reform Act** - Amends the Federal judicial code to exclude from the customs and tax exemption under tort claims procedures any claim based on the negligent destruction, injury, or loss of goods or merchandise (including real property) while in the possession of any customs or other law enforcement officer.

Extends the period for filing claims in certain in rem proceedings.

Amends the Tariff Act of 1930 to provide that: (1) in all suits or actions brought for the forfeiture of any vessel, vehicle, aircraft, merchandise, or baggage seized under the provisions of any law relating to the collection of duties on imports or tonnage, with exceptions, and for the recovery of the value of any forfeited property because of violation of any such law, the burden of proof is on the Government to establish by clear and convincing evidence that the property was subject to forfeiture; (2) any person claiming such property may at any time within 30 days from the date of the first publication of the notice of seizure file a claim with the appropriate customs officer, who shall transmit such claim to the U.S. attorney for the district in which seizure was made; and (3) if the person filing such claim (or a claim regarding seized property under any other provision of law that incorporates by reference the seizure, forfeiture, and condemnation procedures of the customs laws) is financially unable to obtain representation, the court may appoint counsel, subject to specified requirements.

Specifies that a claimant is entitled to immediate release of seized property if continued possession by the Government would cause the claimant substantial hardship, such as preventing the functioning of a business, preventing an individual from working, or leaving an individual homeless. Sets forth procedures regarding the request for release, return of property, and time for decision by the court on a complaint for such return.

Makes sums in the Department of Justice Assets Forfeiture Fund available for the payment of court-awarded compensation for representation of claimants under the Tariff Act, with respect to seizure claims by individuals financially unable to obtain representation of counsel.

Amends the Controlled Substances Act to provide that no conveyance shall be forfeited to the extent of an interest of an owner by reason of any act or omission established by that owner to have been committed or omitted either without the knowledge or without the consent of that owner. Specifies that property shall not be considered to have been used for a proscribed use without the knowledge or consent of the owner of an interest in that property if that owner was wilfully blind to, or has failed to take reasonable steps to prevent, the proscribed use.



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## **Civil Asset Forfeiture Reform Act (Introduced in the House)**

HR 1916 IH

104th CONGRESS

1st Session

H. R. 1916

To reform certain statutes regarding civil asset forfeiture.

### **IN THE HOUSE OF REPRESENTATIVES**

**June 22, 1995**

Mr. HYDE introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committee on Ways and Means, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

### **A BILL**

To reform certain statutes regarding civil asset forfeiture.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

#### **SECTION 1. SHORT TITLE.**

This Act may be cited as the 'Civil Asset Forfeiture Reform Act'.

#### **SEC. 2. LIMITATION OF CUSTOMS AND TAX EXEMPTION UNDER THE TORT CLAIMS PROCEDURES.**

Section 2680(c) of title 28, United States Code, is amended—

(1) by striking 'law-enforcement' and inserting 'law enforcement'; and

(2) by inserting before the period the following: ', except that the provisions of this chapter and section 1346(b) of this title shall apply to any claim based on the negligent destruction, injury, or loss of goods or merchandise (including real property) while in the possession of any officer of customs or excise or any

other law enforcement officer'.

### **SEC. 3. LONGER PERIOD FOR FILING CLAIMS IN CERTAIN IN REM PROCEEDINGS.**

Paragraph (6) of Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims to the Federal Rules of Civil Procedure (28 U.S.C. Appendix) is amended by striking '10 days' and inserting '30 days'.

### **SEC. 4. BURDEN OF PROOF IN FORFEITURE PROCEEDINGS.**

Section 615 of the Tariff Act of 1930 (19 U.S.C. 1615) is amended to read as follows:

#### **'SEC. 615. BURDEN OF PROOF IN FORFEITURE PROCEEDINGS.**

'In—

'(1) all suits or actions (other than those arising under section 592) brought for the forfeiture of any vessel, vehicle, aircraft, merchandise, or baggage seized under the provisions of any law relating to the collection of duties on imports or tonnage; and

'(2) in all suits or actions brought for the recovery of the value of any vessel, vehicle, aircraft, merchandise, or baggage, because of violation of any such law;

the burden of proof is on the United States Government to establish, by clear and convincing evidence, that the property was subject to forfeiture.'

### **SEC. 5. CLAIM AFTER SEIZURE.**

Section 608 of the Tariff Act of 1930 (19 U.S.C. 1608) is amended to read as follows:

#### **'SEC. 608. SEIZURE; CLAIMS; REPRESENTATION.**

'(a) IN GENERAL- Any person claiming such vessel, vehicle, aircraft, merchandise, or baggage may at any time within 30 days from the date of the first publication of the notice of seizure file with the appropriate customs officer a claim stating his interest therein. Upon the filing of such claim, the customs officer shall transmit such claim, with a duplicate list and description of the articles seized, to the United States attorney for the district in which seizure was made, who shall proceed to a condemnation of the merchandise or other property in the manner prescribed by law.

'(b) COURT-APPOINTED REPRESENTATION- If the person filing a claim under subsection (a), or a claim regarding seized property under any other provision of law that incorporates by reference the seizure, forfeiture, and condemnation procedures of the customs laws, is financially unable to obtain representation of counsel, the court may appoint appropriate counsel to represent that person with respect to the claim. The court shall set the compensation for that representation, which shall—

'(1) be equivalent to that provided for court-appointed representation under section 3006A of title 18, United States Code, and

'(2) be paid from the Justice Assets Forfeiture Fund established under section 524 of title 28, United States Code.'

### **SEC. 6. RELEASE OF SEIZED PROPERTY FOR SUBSTANTIAL HARDSHIP.**

Section 614 of the Tariff Act of 1930 (19 U.S.C. 1614) is amended—

(1) by inserting before the first word in the section the following: '(a) RELEASE UPON PAYMENT-'; and

(2) by adding at the end the following:

**“(b) RELEASE OF SEIZED PROPERTY FOR SUBSTANTIAL HARDSHIP-**

“(1) REQUEST FOR RELEASE- A claimant is entitled to immediate release of seized property if continued possession by the United States Government would cause the claimant substantial hardship, such as preventing the functioning of a business, preventing an individual from working, or leaving an individual homeless. A claimant seeking release of property under this subsection must request possession of the property from the appropriate customs officer, and the request must set forth the basis therefor. If within 10 days after the date of the request the property has not been released, the claimant may file a complaint in any district court that would have jurisdiction of forfeiture proceedings relating to the property setting forth--

“(A) the nature of the claim to the seized property;

“(B) the reason why the continued possession by the United States Government pending the final disposition of forfeiture proceedings will cause substantial hardship to the claimant; and

“(C) the steps the claimant has taken to secure release of the property from the appropriate customs officer.

“(2) RETURN OF PROPERTY- If a complaint is filed under paragraph (1), the district court shall order that the property be returned to the claimant, pending completion of proceedings by the United States Government to obtain forfeiture of the property, if the claimant shows that--

“(A) the claimant is likely to demonstrate a possessory interest in the seized property; and

“(B) continued possession by the United States Government of the seized property is likely to cause substantial hardship to the claimant.

The court may place such conditions on release of the property as it finds are appropriate to preserve the availability of the property or its equivalent for forfeiture.

“(3) TIME FOR DECISION- The district court shall render a decision on a complaint filed under paragraph (2) no later than 30 days after the date of the filing, unless such 30-day limitation is extended by consent of the parties or by the court for good cause shown.”

**SEC. 7. JUSTICE ASSETS FORFEITURE FUND.**

Section 524(c) of title 28, United States Code, is amended--

(1) by striking out “law enforcement purposes--” in the matter preceding subparagraph (A) in paragraph (1) and inserting “purposes--”;

(2) by redesignating the final 3 subparagraphs in paragraph (1) as subparagraphs (I), (J), and (K), respectively;

(3) by inserting after subparagraph (G) of paragraph (1) the following new subparagraph:

“(H) payment of court-awarded compensation for representation of claimants pursuant to section 608(b) of the Tariff Act of 1930;” and

(4) by striking out “(H)” in subparagraph (A) of paragraph (9) and inserting “(I)”.

**SEC. 8. CLARIFICATION REGARDING FORFEITURES UNDER THE CONTROLLED SUBSTANCES ACT.**

(a) IN GENERAL- Section 511(a) of the Controlled Substances Act (21 U.S.C. 881(a)) is amended--

(1) in paragraph (4)(C), by striking 'without the knowledge, consent, or willful blindness of the owner.' and inserting 'either without the knowledge of that owner or without the consent of that owner.'

(2) in each of paragraphs (6) and (7), by striking 'without the knowledge or consent of that owner.' and inserting 'either without the knowledge of that owner or without the consent of that owner.'

(b) SPECIAL RULE-

(1) GENERALLY- Section 511 of the Controlled Substances Act (21 U.S.C. 881) is amended by adding at the end the following:

'(l) For the purposes of this section, property shall not be considered to have been used for a proscribed use without the knowledge or without the consent of the owner of an interest in that property, if that owner was wilfully blind to, or has failed to take reasonable steps to prevent, the proscribed use.'

(2) CONFORMING TECHNICAL AMENDMENT- The subsection (l) of section 511 that relates to an agreement between the Attorney General and the Postal Service is redesignated as subsection (k).

## SEC. 9. APPLICABILITY.

The amendments made by this Act apply with respect to claims, suits, and actions filed on or after the date of the enactment of this Act.

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### STATEMENT OF THE CASE

This case involves the forfeiture of the assets of the criminal defendant in the prosecution United States v. Tom Henry, et al. On August 25, 1992, the United States District Court for the Middle District of Tennessee entered a preliminary order of forfeiture, pursuant to 18 U.S.C. § 982(a)(1), directing convicted defendant Tom Henry to forfeit the pecuniary sum of \$191,206.80 to the federal government.<sup>1</sup> The court thereafter entered an amended preliminary order of forfeiture, pursuant to 18 U.S.C. § 982(b)(1) and 21 U.S.C. § 853(p), requiring the forfeiture of "substitute" property in place of the \$191,206.80 previously ordered forfeited.<sup>2</sup> This "substitute" property includes the real property located at 101 Ewing Court, Lebanon, Tennessee -- the property at issue in this appeal.

On January 15, 1993, appellant Jo-Ann Henry, spouse of convicted defendant Tom Henry, filed a petition for a hearing to adjudicate her alleged third-party interest in the subject real property.<sup>3</sup> She later filed a motion challenging the constitutionality of the "ancillary hearing" statute, 21 U.S.C. § 853(n).<sup>4</sup> On April 22, 1993, the government filed a motion to dismiss the Jo-Ann Henry's petition.

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<sup>1</sup>R. 270; Preliminary Forfeiture Order.

<sup>2</sup>R. 340; First Amended Preliminary Order of Forfeiture.

<sup>3</sup>R. 352; Petition by Jo-Ann Henry for Hearing to Adjudicate Validity of Interest in Property.

<sup>4</sup>R. 368; Motion to Declare Enabling Statute Unconstitutional.

On April 18, 1994, the District Court granted in part and denied in part the government's motion to dismiss Jo-Ann Henry's ancillary petition.<sup>5</sup> The government filed a motion for reconsideration of that part of the district court order denying the government's motion to dismiss.<sup>6</sup> The District Court denied this motion.<sup>7</sup>

On September 1, 1994, the District Court entered a final order of forfeiture.<sup>8</sup> This order required forfeiture of the real property located at 101 Ewing Court, as well as other assets, as "substitute" property of Tom Henry, in satisfaction of the pecuniary sum of \$191,206.80 previously ordered forfeited. The court further found that Jo-Ann Henry's legal interest in the real property located at 101 Ewing Court was limited to \$23,951.20.<sup>9</sup> Jo-Ann Henry thereafter filed a timely notice of appeal.<sup>10</sup>

#### STATEMENT OF THE FACTS

Criminal defendant Tom Henry and claimant/appellant Jo-Ann Henry, husband and wife, purchased their residence at 101 Ewing Court in Lebanon, Tennessee [hereinafter "the residence"] in 1989 for \$195,000.00. They lived together at this residence from the

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<sup>5</sup>R. 409; Order.

<sup>6</sup>R. 412; Motion for Reconsideration of Order Denying in Part the Government's Motion to Dismiss the Ancillary Hearing Petition of Jo-Ann Henry.

<sup>7</sup>R. 420; Order.

<sup>8</sup>R. 429; Order.

<sup>9</sup>R. 429; Order at 1.

<sup>10</sup>R. 430; Notice of Appeal.

date of purchase until Mr. Henry was incarcerated following his conviction in this case. The residence is solely titled in the name Jo-Ann Henry, a homemaker, who has never been otherwise employed. Jo-Ann Henry's sole source of income since her marriage has been the earnings of her husband. (See, Jo-Ann Henry depo. Vol I, p. 67 and Vol. II, pp. 4-5).

Jo-Ann Henry holds nominal title to the residence. However, the special jury verdict on the Count Four of the superseding indictment against Tom Henry indisputably establishes beyond a reasonable doubt that he: (1) defrauded Medicare; (2) laundered the proceeds of this fraud through Tennessee Health Services, Inc. [hereinafter "THS"] and Tennessee Health Care [hereinafter "THC"]; and then (3) used those same laundered proceeds to purchase the residence. (R. 242). Tom Henry himself testified that all of funds used to purchase the residence, which were paid by check, came from his own companies, either THS or THC, and not from his wife. (Tom Henry, June 5 Transcript at T. 5). Tom Henry further testified that he did not maintain a personal bank account during the period that the residence was purchased; instead, he occasionally deposited funds derived from his own companies, THS or THC, into his wife's checking account and then drew upon those funds to pay all or a substantial part of the purchase price for the residence. (Tom Henry at T. 2119). Tom Henry admitted that in purchasing the residence, he wrote a \$1,000 earnest money check and two \$10,000 checks that comprised part of the down payment for the residence. (Tom Henry depo.

Vol. II at p. 162; Tom Henry at T. 4). Tom Henry also admitted that he personally went to the bank and purchased the cashier's checks that were used as payment for the residence. (Trial testimony of Tom Henry at T. 2120).

The record indicates that a check from THS in the amount of \$35,000 was deposited in Jo-Ann Henry's checking account on July 27, 1989. (R. 376; Motion to Dismiss Ancillary Hearing Petition of Jo-Ann Henry, Exhibit 1). Later that day, Tom Henry used a check drawn on this account, in the amount of \$34,123.67, to purchase a cashier's check that was subsequently used in purchasing the residence. (R. 376; Motion to Dismiss Ancillary Hearing Petition of Jo-Ann Henry, Exhibit 1; Trial testimony of Tom Henry at T. 2120). On August 31, 1989, a THS check in the amount of \$23,951.20 was exchanged for a cashier's check that subsequently was used in purchasing the residence. (R. 376; Motion to Dismiss Ancillary Hearing Petition of Jo-Ann Henry, Exhibit 1). On October 2, 1989, a THS check in the amount of \$23,951.20 was given to Tony Watson in partial payment for the residence. (R. 376; Motion to Dismiss Ancillary Hearing Petition of Jo-Ann Henry, Exhibit 1). On December 4, 1989, January 10, 1990, and February 16, 1990, Tom Henry used THC checks, each in the amount of \$23,951.00, to complete payment for the residence. (R. 376; Motion to Dismiss Ancillary Hearing Petition of Jo-Ann Henry, Exhibit 1).

Jo-Ann Henry testified that Tom Henry personally made all of the payments to purchase the residence (Jo-Ann Henry depo. Vol.

II, pp. 99-103). She further testified that Tom Henry paid the property taxes for the residence. (Id. at p. 88).

Tony Watson, the seller of the residence, testified that he received all of the purchase monies for the residence at Tom Henry's office and generally from Tom Henry directly. (Tony Watson at T. 1652-53). Watson also testified that Tom Henry signed the checks used in making these payments. (Watson at T. 1648-1654). Tom Henry paid Watson an additional \$10,000-\$12,000 for improvements Watson agreed to make to the residence (e.g., installation of a patio, entrance walls, front lights and minor interior work) shortly after its purchase. (Watson at T. 1653). Tom Henry paid for these improvements with a check drawn on THC and signed by Tom Henry. (Watson at T. 1653). Finally, Tom Henry even admitted to making all of the mortgage payments on Jo-Ann Henry's prior home from November 1983 to the date that home was sold. (Trial Testimony of Tom Henry, 2172-2173).

Tom Henry claimed that he placed title to the residence in the name of Jo-Ann Henry to provide her with security for the value to the home she had brought into their marriage -- a home that was her's by virtue of her previous marriage. (Tom Henry Depo. at 163). However, Tom Henry was unable to explain why he placed title to the residence, which was purchased for \$207,000, in the name of Jo-Ann Henry, when the proceeds from the sale of Jo-Ann Henry's former home totalled only \$69,000; he attributed this apparent largesse to his affection for Jo-Ann Henry. (Id. at 164).

Tom Henry even admitted to placing all of his assets in Jo-Ann Henry's name. (Tom Henry Depo. at 117-120, 128-129, 160-161, 163, 169-170, 172). He testified, consistent with this assertion, that he purchased a lot next door to the residence and placed title to this property in Jo-Ann Henry's name. (Trial Testimony of Tom Henry, June 5 at 17-18). Jo-Ann Henry confirmed this fact. (Jo-Ann Henry depo. Vol. II, p. 75). Jo-Ann Henry further testified that she neither was involved in, nor did she make any financial contribution to, the purchase of this lot. (Jo-Ann Henry depo. Vol. II, p. 75-76).

Tom Henry's unusual methods of purchasing property were not limited to his real property acquisitions. Indeed, John Greer, Jr., a business associate of Tom Henry's, testified that he and Tom Henry engaged in a sham purchase of THS in March, 1989, the same year the residence was purchased. (Trial Testimony of John Greer at T. 1171-1174, 1180-1181).

Jo-Ann Henry asserts that of the \$195,000 paid by Tom Henry to Mr. Watson in purchasing the residence, she personally contributed only the funds used in making the partial payment of \$23,951.20 on October 29, 1989. (Jo-Ann Henry depo. Vol. II, p. 82). She alleges that these funds derived from the equity she realized from the 1989 sale of her prior home. Tom Henry acknowledged at trial that his wife had received approximately \$69,000 from the sale of her prior residence. (Tom Henry, June 5 transcript at T. 11). Jo-Ann Henry testified that, of this amount, other monies were expended on the acquisition of personal

property.<sup>11</sup> She testified that she had no other independent source of income during this period -- that she was unemployed, had never been employed, and had no source of other income except for funds given to her by Tom Henry. (Jo-Ann Henry depo. Vol. I, p. 7; Vol. II, pp. 4-5). Tom Henry, in turn, unequivocally testified that the funds used in purchasing the residence were derived from his companies, THC and THS. (Tom Henry, June 5 transcript at T. 5).

This testimony is confirmed by the jury's special verdict of guilty on the substantive criminal counts against Tom Henry. Count Four of the superseding indictment charged that Tom Henry defrauded Medicare, laundered the proceeds of his fraud thereof through THS and THC, and then used those same laundered proceeds to purchase the residence. (R. 242) The jury's verdict on this count is reflected in the Verdict Form, which states as follows:

(4) With regard to the charge in Count Four of the indictment, that between in or about July, 1989 and in or about July, 1990, in the Middle District of Tennessee, TOM HENRY obtained by fraud and intentionally misapplied property that was valued at \$5,000 or more, and was under the care, custody, and control of Tennessee Health Services, Inc., to wit: funds were taken by TOM HENRY out of Tennessee Health Services, Inc., in the amount of approximately \$191,206.80 which funds were used to purchase Mr. Henry's personal residence and an adjacent lot in

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<sup>11</sup>For example, she testified to spending \$5,000 on a bedroom suite; \$13,000 on dining room furniture; \$2,500 on den furniture; \$1,000 on two pedestal tables; \$1,350 on a French Commode; \$2,500 on den furniture; \$2,400 on paintings; \$8,000 on a lost furniture deposit; \$2,000 on a canopy bed; \$1,500 on a highboy chest; \$500 on a vanity chest; \$3,500 on a glass bookcase; \$1,000 on a foyer table; \$150 on a foyer pedestal; \$350 on master bath stools; and \$600 on Christmas decorations. (Jo-Ann Henry Depo, Vol. II, p. 20-22, 24, 26, 38-40).

violation of Title 18, United States Code, we find the defendant TOM HENRY:

Guilty: X

Not Guilty:     

(Emphasis added). (R. 242). The jury, therefore, found beyond a reasonable doubt -- and certainly beyond peradventure in this case -- that Tom Henry, not Jo-Ann Henry, purchased the residence -- and, indeed, did so with the proceeds of his fraud scheme.

Count 36 of the superseding indictment, the criminal forfeiture count, requested that the jury return a verdict of "Forfeit" or "Not Forfeit" as to each of three items of property: (1) the residence; (2) the lot adjacent to the residence; (3) the pecuniary amount of \$191,206.80. (R. 181). The jury returned a verdict of "Not Forfeit" as to the residence and adjacent lot, but returned a verdict of "Forfeit" as to the pecuniary sum of \$191,206.80. It is critically important to note that this pecuniary sum is identical in amount to the funds used by Tom Henry in purchasing the residence and adjacent lot -- as established by the jury's special verdict of guilty on Count Four. It is likewise critically important to note that the jury was not asked to consider whether the residence constituted "other property of the defendant" Tom Henry.<sup>12</sup>

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<sup>12</sup>The jury's verdict on the forfeiture count may be explained in any number of ways -- all of them speculative. The jury may have concluded that Tom Henry purchased and improved the residence, but did so with legitimate funds and spent his fraud proceeds elsewhere. In all likelihood, however, the forfeiture verdict may be explained as an effort to prevent a multiple recovery by the government. The verdict form asked the jury to return a verdict of forfeiture against two pieces of real property -- the residence and



## ARGUMENT

### **I. STANDARD OF REVIEW**

Petitioner/Appellant Jo-Ann Henry challenges the factual determinations and legal conclusions of the District Court, as well as the constitutionality of the "ancillary hearing" statute, 21 U.S.C. § 853(n). Findings of fact may be reversed only if found to be clearly erroneous; conclusions of law are subject to *de novo* review by this Court. Freeman v. Laventhol & Horwath, 34 F.3d 333, 338 (6th Cir. 1994). The constitutionality of a statute is a question of law subject to *de novo* review. Id. at 342.

### **II. THE DISTRICT COURT CORRECTLY RULED THAT THE RESIDENCE CONSTITUTES PROPERTY OF DEFENDANT TOM HENRY AND THEREFORE WAS PROPERLY FORFEITABLE AS A SUBSTITUTE ASSET**

#### **A. Introduction**

This case require interpretation of two provisions of the criminal forfeiture statute, 21 U.S.C. § 853(n) and (p). These provisions are incorporated by reference in the money laundering criminal forfeiture statute at issue in this case. See 18 U.S.C. § 982(b)(1).

The so-called "substitute assets" provisions of 21 U.S.C. § 853(p), permit the forfeiture of "substitute property" of a convicted criminal defendant in certain enumerated circumstances. Subsection (p), as it pertains to this case, states as follows:

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adjacent lot -- or a pecuniary sum equal in amount to the funds used in purchasing the two pieces of real property. Faced with the apparent prospect of granting the government multiple recoveries (i.e., the real property and the funds), the jury returned a verdict of forfeiture only as to the funds.

(p) Forfeiture of substitute property

If any of the property [directly subject to forfeiture under the provisions of § 853(a)], as a result of any act or omission of the defendant --

- (1) cannot be located upon the exercise of due diligence . . .

the court shall order the forfeiture of any other property of the defendant up to the value of [the property directly subject to forfeiture.

21 U.S.C. § 853(p) (underscoring added).

Jo-Ann Henry contends that this provision does not apply to the residence, because title to this property was placed in her name, not that of her convicted husband, Tom Henry. As more fully set forth below, this assertion simply ignores the salient facts that Tom Henry paid for nearly all of this property with his own earnings and that the District Court protected what small part Jo-Ann Henry contributed to the purchase of the property. Hence, under controlling law, the property is rightly considered to be "other property" of the convicted defendant Tom Henry, notwithstanding that nominal legal title to the property was held by Jo-Ann Henry.

The second provision at issue in this case, 21 U.S.C. § 853(n), provides limited affirmative legal defenses to certain third-parties (i.e., non-defendant) asserting a legal interest in the property subject to forfeiture. A third-party holding a cognizable legal interest is authorized to petition the court for a hearing "to adjudicate the validity of his alleged interest in the property." 21 U.S.C. § 853(n)(2). This hearing is held

before the court alone, without a jury. Id. The statute provides protection against forfeiture of the third-party's interest if he establishes, by a preponderance of the evidence, either that he: (1) held an interest in the property superior to that of the defendant "at the time of the commission of the acts which gave rise to the forfeiture;" or (2) is a bona fide purchaser for value or an interest in the property and was, at the time of the purchase, reasonably without cause to believe that the property was subject to forfeiture. 21 U.S.C. § 853(n)(6). As noted, this provision applies only to persons asserting a cognizable "legal interest" in property ordered forfeited to the United States. 21 U.S.C. § 853(n)(2).

As more fully set forth below, Jo-Ann Henry's nominal legal title was insufficient to give her a cognizable legal title in the residence, given that the property was paid for and improved almost entirely with funds derived from her husband's income. Moreover, even assuming arguendo that Jo-Ann Henry's nominal title was sufficient to establish a cognizable legal interest, she failed to establish, by a preponderance of the evidence, either that: (1) her interest in the property was superior to that of her convicted husband at the time of the commission of the acts giving rise to the forfeiture; or (2) she qualifies as a bona fide purchaser for value of her right, title, or interest in the property who was, at the time of the purchase, reasonably without cause to believe that the property was subject to forfeiture.

B. The Residence Qualifies as Property of Convicted Defendant Tom Henry

The "substitute asset" provisions of 21 U.S.C. § 853(p) authorize a court to order the forfeiture of "any other property of the defendant" up to the value of property otherwise directly subject to forfeiture in five enumerated circumstances. The circumstance at issue in this case is where the property otherwise directly subject to forfeiture "cannot be located upon the exercise of due diligence." See 21 U.S.C. § 853(p)(1). The government sought to forfeit Tom Henry's enormous financial interest in the residence as a "substitute asset" in satisfaction of the jury's verdict of forfeiture in the pecuniary sum of \$191,206.80. The District Court, in ordering "substitution" of this interest, correctly concluded that it constituted "other property of the defendant" Tom Henry under § 853(p).

Briefly to summarize the evidence set out in greater detail supra at 3-8, Tom Henry himself testified that he personally paid virtually the entire purchase price of the residence out of his income from THS or THC. He also used this income to pay for certain improvements to the property. Jo-Ann Henry testified that she only personally contributed the funds used to make a partial payment for the residence of \$23,951.20. These funds derived from equity realized upon the sale of her prior residence.<sup>13</sup> Jo-Ann Henry testified that she had no other independent sources of income -- she was unemployed, had never

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<sup>13</sup>It is important to note that the District Court fully protected her interest to the extent of this investment.

been employed, and was otherwise financially dependent on funds given to her by Tom Henry.

Further and indisputable evidence of Tom Henry's heavy financial contribution to the purchase of the residence is provided by the jury's "special verdict" of guilty on Count Four of the superseding indictment. As noted supra at 7-8, the jury found beyond a reasonable doubt that Tom Henry used funds obtained through his fraud, in the amount of approximately \$191,206.80, "to purchase [his] personal residence and [the] adjacent lot." (R. 181). Hence, Tom Henry's enormous financial investment in the residence has been established beyond a reasonable doubt. The residence accordingly qualifies as "other property of the defendant" pursuant to 21 U.S.C. § 853(p). See Braxton v. United States, 858 F.2d 650, 654-65 (11th Cir. 1988); United States v. Kramer, 807 F. Supp. 707, 738 (S.D. Fla. 1991).<sup>14</sup> See also United States v. Ben-Hur, 20 F.3d 313, 316-319 (7th Cir. 1994) (property paid for by criminal defendant, but held in the name of a nominee at the time of its involvement in criminal activity, directly subject to forfeiture as property of the defendant).

Such property may be substituted in satisfaction of the forfeiture judgment, subject only to the limitations and defenses

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<sup>14</sup> Both Braxton and Kramer involved construction of the ancillary hearing provisions of the RICO criminal forfeiture statute, 18 U.S.C. § 1963(l). These provisions are virtually identical to the ancillary hearing provisions of the statute at issue in this case, 21 U.S.C. § 853(n). Therefore, cases interpreting 18 U.S.C. § 1963(l) are instructive as to the meaning of 21 U.S.C. § 853(n).

set forth in 21 U.S.C. § 853(n). The issue therefore arises whether, and to what extent, Jo-Ann Henry holds a legally cognizable and protected interest in the residence under the provisions of § 853(n).

C. Jo-Ann Henry Failed to Sustain Her Burden of Demonstrating a Cognizable Legal Interest in the Residence Beyond Her Personal Contribution to the Purchase Price; She Holds Title as a Mere Nominee

Jo-Ann Henry asserts that she has a cognizable legal interest in the entire residence, notwithstanding her limited contribution to the purchase price, simply because legal title was placed in her name. . Under the controlling statute, 21 U.S.C. § 853(n), she bears the burden of establishing that she possesses such a cognizable legal interest in the property.<sup>15</sup> She clearly failed to sustain this burden as to that substantial part of the residence property representing the financial interest and investment of her husband Tom Henry.

Federal courts, in both criminal and civil forfeiture cases, have consistently rejected the proposition that bare, legal title is sufficient to establish a legally cognizable ownership interest.<sup>16</sup> Indeed, courts have routinely rejected petitions

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<sup>15</sup>See 21 U.S.C. § 853(n) (2), (3) and (6); S. Rep. No. 225, 98th Cong., 2d Sess. at 209, reprinted in 1984 U.S.C.C.A.N. 3182, 3392. See also United States v. Campos, 859 F.2d 1233, 1235 n.3 (6th Cir. 1988). Accord United States v. De Ortiz, 910 F.2d 376, 381 n.8 (7th Cir. 1990).

<sup>16</sup>See, e.g., United States v. A Single Family Residence, 803 F.2d 625 (11th Cir. 1986) (disregarding legal title held by nominee where the criminal defendant actually purchased the property); Decker v. United States, 837 F.Supp. 1148 (M.D.Fla. 1993) (mortgage possessed by criminal defendant's attorney was a sham; therefore,

filed in ancillary hearings by title-holders where the evidence established that the property in question had been paid for by a criminal wrongdoer, but legal title had been placed in the name of another person. See Braxton v. United States, 858 F.2d 650, 654-65 (11th Cir. 1988); United States v. Kramer, 807 F. Supp. 707, 738 (S.D. Fla. 1991). Courts similarly have rejected arguments by criminal defendants that they did not own property, which they had previously purchased, at the time an offense involving the property was committed, because nominal title had been placed in the name of a third party. See United States v. Ben-Hur, 20 F.3d 313, 316-319 (7th Cir. 1994).

This Court too has previously recognized the need to look beyond bare legal title in order to prevent criminals from avoiding forfeiture by having the nominee owner assert a claim of innocent ownership. United States v. 526 Liscum Drive, Dayton, Montgomery, 866 F.2d 213, 217 (6th Cir. 1988):

The intent of the forfeiture provision of the Controlled Substances Act is to deprive criminals of the tools by which they conduct their illegal activities. A failure to look beyond bare legal title would foster manipulation of nominal ownership to frustrate this intent.

(Citations omitted). The holding of the foregoing cases -- that nominee title-holders of property purchased by criminal

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the attorney's could not assert a third-party interest in the criminally forfeited property); United States v. Lot 9, Block 1, Village East Unit 4, 704 F.Supp. 1025, 1029 (D.Colo. 1989) (denying claims of record title owners; finding that the true owner was the criminal wrongdoer who continued to maintain the residence, to pay the mortgage, taxes, etc. and to be involved in sales negotiations involving the property).

wrongdoers lack any cognizable legal interest in the property -- fully comports with the policies and legislative purpose behind the criminal forfeiture statutes.

The overriding purpose of criminal forfeiture is to "strip these offenders [racketeers and drug dealers] and organizations of their economic power." S. Rep. No. 225, 98th Cong., 2d Sess. at 191, reprinted in 1984 U.S.C.C.A.N. 3182, 3374. Congress, when it enacted the two subsections at issue in this case, 21 U.S.C. § 853(n) and (p), recognized that "a person who anticipates that some of his property may be subject to criminal forfeiture has not only an obvious incentive, but also ample opportunity, to transfer assets . . . and so shield them from any possibility of forfeiture." S. Rep. No. 225, 98th Cong., 2d Sess. at 195, reprinted in 1984 U.S.C.C.A.N. 3182, 3378. It accordingly enacted a number of provisions -- provisions such as the "substitute assets" provisions of 21 U.S.C. § 853(p), the narrow affirmative defense provisions of 21 U.S.C. § 853(n), and the "relation-back" provisions of 21 U.S.C. § 853(c) -- to guard against such transfers.<sup>17</sup> See generally Ben-Hur, 20 F.3d at 319

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<sup>17</sup> Congress explained that the "substitute assets" provisions of 21 U.S.C. § 853(p) were enacted to counteract what it called "one of the most serious impediment to significant criminal forfeiture" -- permitting a criminal defendant to "succeed in avoiding forfeiture by transferring his assets to another, . . . or taking other actions to render his forfeitable property unavailable at the time of conviction." S. Rep. No. 225, 98th Cong., 2d Sess. at 201, reprinted in 1984 U.S.C.C.A.N. 3182, 3384. Moreover, Congress codified the common law relation-back doctrine "to permit the voiding of certain pre-conviction transfers" and to "close a potential loophole in the law whereby the criminal forfeiture action could be avoided by transactions that were not 'arms' length' transactions." S. Rep. No. 225, 98th Cong., 2d Sess. at



(discussing legislative intent and policy behind the 1984 amendments to 21 U.S.C. § 853; citing cases).

Of particular interest in this case is the fact that Congress, in enacting the very narrowly tailored affirmative defense provisions of 21 U.S.C. § 853(n) -- under which Jo-Ann Henry claims standing -- expressly stated that the provision "should be construed to deny relief to third parties acting as nominees of the defendant or who have knowingly engaged in sham or fraudulent transactions. S. Rep. No. 225, 98th Cong., 2d Sess. at 209 n.47, reprinted in 1984 U.S.C.C.A.N. at 3392 n.47 (emphasis added). The foregoing case law and this clear and explicit statement of congressional intent clearly establish that Jo-Ann Henry's nominal title to the residence does not suffice to create a legally cognizable interest in the entire property under 21 U.S.C. § 853(n).

The sworn record and the jury verdict offer compelling evidence that Tom Henry holds a substantial financial interest in the residence notwithstanding that legal title is in the name of Jo-Ann Henry. Indeed, Tom Henry's pattern of placing all of his assets in Jo-Ann Henry's name, his illegal activity, and his payment for the residence out of his personal income creates a fairly compelling inference that the titling of the subject residence in appellant's name was nothing more than a sham

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200-01, reprinted in 1984 U.S.C.C.A.N. at 3383-84.

transaction designed to defeat the federal forfeiture laws.<sup>18</sup> The court below ordered the forfeiture of the subject residence as a substitute asset. (R. 429, Order at 2). It accordingly concluded, quite correctly, that the residence represented "other property" of Tom Henry. At that same time, the court recognized that Jo-Ann Henry's interest in the subject property was limited to \$23,951.20, and granted her that sum from proceeds from the sale of the residence.<sup>19</sup> (R. 429, Order at 1, 2) It merely

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<sup>18</sup> It may fairly be inferred that Tom Henry placed the property in Jo-Ann Henry's name solely for the purpose of avoiding forfeiture and not, as he claimed, to give her security for the home that she brought into the marriage and otherwise out of affection for his spouse. First, Tom Henry testified that he place all his assets in his wife's name, not just that of the residence. For example, he placed title to the lot adjacent to the residence in his wife's name even though she contributed nothing to the purchase of this lot. Second, he admitted to engaging in sham transactions with business associates. John Greer, Jr., a business associate of Tom Henry's, testified that he engaged in a sham purchase of THS with Henry in March, 1989. Third, many of Tom Henry's rationalizations for his actions arguably defy common sense and logic. For example, he was unable to explain why he titled the residence in Jo-Ann Henry's name, as security for the equity value of her prior home that she brought to the marriage, when the residence was purchased for \$195,000, and the proceeds from the sale of Jo-Ann Henry's former home totalled only \$69,000. Finally, it seems rather strange that Tom Henry would place title to all of his property in Jo-Ann Henry's name when it was allegedly her intent to pass that property on to her children rather than back to Henry. This action would leave Tom Henry penniless if Jo-Ann Henry predeceased him and carried through with her intent to bequeath the property to her children.

<sup>19</sup> Jo-Ann Henry will realize significantly more than her judicially recognized interest in the residence upon its sale by the United States Marshals Service. She will receive the amount remaining after satisfaction of the government's approximately \$143,473.20 interest in the residence and payment of the United States Marshals Service's costs relating to the maintenance and sale of the residence. The house was purchased for \$195,000. Thus, she should realize substantially more than the \$23,951.20 that she originally invested.

rejected her petition as to the remaining portion of the property's value -- the portion representing the financial interest of her convicted husband Tom Henry.

Moreover, as the next subsection demonstrates, Jo-Ann Henry failed to sustain her burden of establishing an affirmative defense to the forfeiture even assuming arguendo that she otherwise had a cognizable legal interest in the entire property under the statute.

D. Jo-Ann Henry Never Possessed Superior Right, Title, Or Interest To That of Tom Henry In The Real Property Located at 101 Ewing Court At The Time It Became Subject To Forfeiture

The ancillary hearing provisions -- enacted simultaneously with the "substitute assets" provisions in 1984 -- provide affirmative defenses to third-parties claiming a legal interest in "property ordered forfeited to the United States" pursuant 21 U.S.C. § 853. 21 U.S.C. § 853(n)(2) and (6). Under these provisions, a third party may successfully defend his interest in forfeited property if he establishes by a preponderance of the evidence that he either: (1) held a legal interest in the property, superior to that of the defendant, at the time the crime giving rise to the forfeiture was committed; or (2) is a bona fide purchaser for value of the property who was, at the time of purchase, reasonably without cause to believe the property was subject to forfeiture.<sup>20</sup> After relying on the

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<sup>20</sup>21 U.S.C. § 853(n)(6)(A)-(B); S. Rep. No. 225, 98th Cong., 2d Sess. at 209, reprinted in 1984 U.S.C.C.A.N. 3182, 3392. See also United States v. Campos, 859 F.2d 1233, 1235 (6th Cir. 1988). Lavin, 942 F.2d at 184-85; De Ortiz, 910 F.2d at 380; United States

second, bona fide purchaser, defense throughout virtually the entire ancillary proceeding, Jo-Ann Henry made an eleventh-hour assertion of the first, superior interest, defense.<sup>21</sup> She has now waived reliance on the bona fide purchaser defense<sup>22</sup> in favor of the first, superior interest, defense.

This defense fails for one plain and very simple reason: it protects only persons who held an interest in the property superior to that of the defendant "at the time of the commission of the acts which gave rise to the forfeiture of the property" under section 853. 21 U.S.C. § 853(n)(6)(A) (emphasis added). Jo-Ann Henry had no interest whatsoever -- much less an interest superior to that of her husband Tom Henry -- in either the residence or the funds used to purchase the residence (beyond the already-protected funds she contributed out of the equity realized from sale of her prior home) "at the time of the commission of the acts which gave rise to the forfeiture."

The "acts which gave rise to the forfeiture" in this case consisted of Tom Henry's fraud and money laundering scheme. These acts pre-dated the purchase of the home and continued

V. Bissell, 866 F.2d 1343, 1349 n.5 (11th Cir.), cert. denied, 493 U.S. 876 (1989).

<sup>21</sup>Jo-Ann Henry did not assert that she possessed a superior right, title or interest in the subject property until the submission of her Prehearing Memorandum on August 22, 1994. (R. 425).

<sup>22</sup>Jo-Ann Henry makes no claim in her brief that she is a bona fide purchaser for value of the subject property, except as to the interest already granted her in the ancillary proceeding. The government does not contest that interest.

thereafter. Indeed, as the jury found in its special verdict as to Count Four of the superseding indictment, Tom Henry used the proceeds of his criminal acts in purchasing the residence.<sup>23</sup> But regardless of whether the funds used by Tom Henry in purchasing the residence were legitimate or illegitimate, the plain fact is that the funds belonged to him alone at the time of the commission of the acts giving rise to the forfeiture in this case. Jo-Ann Henry had no interest, much less a superior interest, in those funds at that critical time. Hence, her assertion of the statutory defense under 21 U.S.C. § 853(n)(6)(A) is simply baseless.

Jo-Ann Henry attempts to avoid this rather obvious result by inviting this Court to rewrite the statute. She argues that the statutory reference to "the time of the commission of the acts which gave rise to the forfeiture of the property" has a special meaning as applied to "substitute assets" forfeited under 21 U.S.C. § 853(p): namely, the time at which the district court grants the government's motion to substitute assets. This clearly contrived reading of the statutory language is simply absurd and has no basis whatsoever in either the relevant case law, the statutory language, or the legislative history.

Indeed, this very Court has interpreted the this phrase, as it appears in § 853(n)(6)(A) as meaning "the time [the defendant] committed the criminal acts." United States v. Campos, 859 F.2d 1233, 1239 (6th Cir. 1988). Other courts construing this phrase

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<sup>23</sup>See discussion, supra, at 7-8.

have reached the same conclusion: that it refers to the criminal acts of the convicted defendant, not entry of an order of forfeiture by a court.<sup>24</sup>

This reading fully comports with the polestar canon of statutory construction that "the most authoritative indication of what Congress intended are the words it chose in drafting the statute." Lavin, 942 F.2d at 184.<sup>25</sup> Congress, in enacting subsection 853(n), expressly provided that the affirmative defenses thereunder are to apply, without distinction, to section 853 in its entirety.<sup>26</sup> Nothing in the legislative history of either the "ancillary hearing" provisions of § 853(n) or the "substitute asset" provisions of § 853(p) indicates that the statutory reference to "the time of the commission of the acts which gave rise to the forfeiture of the property under this section" in § 853(n)(6)(A) should have one meaning as applied to "tainted" assets directly forfeitable under § 853(a) and an entirely different meaning as to "substitute" assets forfeitable

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<sup>24</sup>See, e.g., United States v. Lavin, 942 F.2d 177, 185 (3d Cir. 1991) De Ortiz, 910 F.2d at 380.

<sup>25</sup>See also United States v. Winters, 33 F.3d 720, 721 (6th Cir. 1994) (applying canon in non-forfeiture context).

<sup>26</sup>See, 21 U.S.C. § 853(n)(6)(A) (providing affirmative defense to owners who held a superior legal interest in the property to that of the defendant "at the time of the commission of the acts giving rise to the forfeiture of the property under this section"). See also 21 U.S.C. § 853(n)(2) (providing standing to "[a]ny person, other than the defendant, asserting a legal interest in property which has been forfeited under this section").

under § 853(p).<sup>27</sup> Indeed, both subsection (n) and subsection (p) were enacted at the same time in 1984; had Congress intended to draw any distinction between the treatment of "tainted" and "substitute" assets in the ancillary hearings, it presumably would have done so expressly.

Further evidence that the phrase in question refers only to the commission of the criminal acts giving rise to the forfeiture may be found in the use of virtually identical language in 21 U.S.C. § 853(c).<sup>28</sup> This subsection, which also was enacted in 1984, codifies the common law relation-back doctrine and provides that government's title in forfeited property vests "upon commission of the act giving rise to forfeiture under [§ 853]."

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<sup>27</sup>Indeed, the relevant legislative history clearly indicates that Congress intended "substitute" assets to be treated the same as "tainted" assets as regards the affirmative defenses under subsection 853(n)(6). Congress, in discussing § 853(p), stated that "where property found to be subject to forfeiture is no longer available at the time of conviction, the court is authorized to order the defendant to forfeit substitute assets of equivalent value." S. Rep. No. 225, 98th Cong., 2d Sess. at 201, reprinted in 1984 U.S.C.C.A.N. 3182, 3384 (emphasis added). Congress then noted that the ancillary hearing provisions provide for a hearing "to be held after conviction of the defendant at which third parties asserting a legal interest in property that has been ordered forfeited may obtain a judicial resolution of their claims." S. Rep. No. 225, at 207, 1984 U.S.C.C.A.N. at 3390 (emphasis added). No distinctions are drawn in the legislative history between ancillary hearings held as to "tainted" assets versus hearings held as to "substitute" assets.

<sup>28</sup>The common law relation-back doctrine provided that the government's title in forfeited property "relates back" to the date the criminal act giving rise to the forfeiture was committed. See United States v. Stowell, 133 U.S. 1, 16-17 (1890). Congress, in enacting § 853(c), sought merely to codify this doctrine. S. Rep. No. 225, 98th Cong., 2d Sess. at 200, reprinted in 1984 U.S.C.C.A.N. 3182, 3383 ("Subsection (c) . . . is a codification of the 'taint' theory which has long been recognized in forfeiture cases" (citing Stowell)).

21 U.S.C. § 853(c) (emphasis added). The legislative history pertaining to this provision makes plain that the Congress understood the phrase to refer to the commission of the criminal act by the defendant.<sup>29</sup> It is, of course, a "normal" rule of statutory construction that identical language used in different parts of the same act are intended to have the same meaning.<sup>30</sup> Moreover, courts construing the statutory relation-back doctrine have consistently interpreted "the act giving rise to forfeiture" as referring to the criminal act of the defendant.<sup>31</sup>

Jo-Ann Henry finally resorts to the "rule of lenity" in arguing that the statute should be interpreted (i.e., rewritten) as she would like it. This rule simply has no place in this

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<sup>29</sup>S. Rep. No. 225, 98th Cong., 2d Sess. at 201, reprinted in 1984 U.S.C.C.A.N. 3182, 3384, states as follows:

Under this provision, the jury could render a special verdict of forfeiture with respect to property used or acquired by the defendant in a manner rendering it subject to forfeiture, irrespective of the fact that it may have been transferred to a third party subsequent to the acts of the defendant giving rise to the forfeiture.

(Emphasis added).

<sup>30</sup>See, e.g., Commissioner of Internal Revenue v. Keystone Consolidated Industries, Inc., \_\_\_ U.S. \_\_\_, 113 S. Ct. 2006, 2011 (1993) (citing cases).

<sup>31</sup>See, e.g., United States v. Ben-Hur, 20 F.3d 313, 317 (7th Cir. 1994); Lavin, 942 F.2d at 185; United States v. Reckmeyer, 836 F.2d 200, 203 (4th Cir. 1987); United States v. Ginsburg, 773 F.2d 798, 801 (7th Cir. 1985), cert. denied, 475 U.S. 1011 (1986); United States v. Mageean, 649 F.Supp. 820, 826 (D.Nev. 1986), aff'd mem., 822 F.2d 62 (9th Cir. 1987).



case.<sup>32</sup> Moreover, the rule is confined to criminal prosecutions; ancillary hearings are civil in nature.

E. Jo-Ann Henry Received Full Due Process Under The Fifth Amendment

Jo-Ann Henry makes a blanket claim that the application of the rules set forth in 21 U.S.C. § 853(n) violates her due process rights under the Fifth Amendment. (Appellant's Brief at 15-22). However, she never clearly states how she was deprived of due process in this case. The fact of the matter is that Ms. Henry has received full due process protections.

The essence of procedural due process is that individuals "must receive notice and an opportunity to be heard before the Government deprives them of property." United States v. James Daniel Good Real Property, \_\_\_ U.S. \_\_\_, 114 S. Ct. 492, 498, 500 (1993) (citing cases). Jo-Ann Henry received both adequate notice and opportunity for a hearing prior to the forfeiture of the residence, in accordance with the statutory mandates.<sup>33</sup> Indeed, Jo-Ann Henry received the benefit of a lengthy and adversarial ancillary hearing proceeding, conducted in full compliance with statutory requirements and applicable rules of

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<sup>32</sup>See U.S. v. Shabani, \_\_\_ U.S. \_\_\_, 115 S. Ct. 382, 386 (1994) (the rule applies "only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute;" the rule were not be applied based upon a mere possibility of articulating a narrower construction of a statute (citing cases)).

<sup>33</sup>See 21 U.S.C. § 853(n)(1) (notice); § 853(n)(2) (opportunity for hearing); § 853(n)(5)-(6) (procedural elements of hearing).

procedure. This is as much, if not more, procedural due process than is required by the cases upon which Ms. Henry relies.<sup>34</sup>

It must be remembered, in assessing the adequacy of ancillary hearings under the Due Process Clause, that, prior to 1984, the criminal forfeiture statutes provided no form of hearing for third parties holding interests in forfeited property. The only statutory relief afforded such third parties was to petition the Attorney General or the Secretary of the Treasury for remission or mitigation of the forfeiture.<sup>35</sup> The Supreme Court nonetheless held that this system was constitutional.<sup>36</sup> It is hardly surprising, therefore, that the ancillary hearing procedures have been found to be in full comply

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<sup>34</sup>Jo-Ann Henry's reliance on the James Daniel Good case is misplaced. That case merely stands for the proposition that a property owner must receive prior notice and opportunity for a adversarial hearing prior to the seizure of real property for purposes of civil forfeiture. Jo-Ann Henry received much more in the way of procedural protections than the James Daniel Good decision would require.

Jo-Ann Henry also cites United States v. Ripinsky, 20 F.3d 359 (9th Cir. 1994), Assets of Martin, 1 F.3d 1351 (3d Cir. 1993), and United States v. Floyd, 992 F.2d 498 (5th Cir. 1993), for the proposition that "substitute assets" should be treated differently status than "tainted" assets forfeited pursuant to 21 U.S.C. § 853(a) in the ancillary hearing process. All three of these cases, however, base their holding that "substitute assets" are not subject to pretrial restraint solely on the statutory language of the restraining order provision, 21 U.S.C. § 853(e), which does not refer to 21 U.S.C. § 853(p). Nothing in any of these cases suggests that there is a constitutional basis for distinguishing between "tainted" and "substitute" assets; nor do they suggest at all that the procedural provisions of § 853(n) violate due process.

<sup>35</sup>See discussion infra, at 36-37.

<sup>36</sup>Calero-Toledo v. Pearson Yacht Leasing Company, 416 U.S. 663, 680 (1974). See also United States v. Campos, 859 F.2d 1233, 1240 (6th Cir. 1988).

with constitutional requirements.<sup>37</sup> The fact that the ancillary hearing provisions expressly bar trial by jury is addressed infra, at 34-53.

**II. THE RESIDENCE WAS FORFEITED AS A SUBSTITUTE ASSET AND  
THEREFORE THE JURY VERDICT OF "NOT FORFEIT" DOES NOT OPERATE  
AS RES JUDICATA AS TO THE PROPERTY'S FORFEITABILITY**

Jo-Ann Henry argues that the jury verdict of "Not Forfeit" as to the criminal forfeiture count against the residence in the criminal case has a preclusive, res judicata, effect as to forfeiture of the residence as a "substitute asset." (Appellant's Brief at 11-15). This argument simply misapplies the law of res judicata and collateral estoppel. More importantly, it simply ignores the jury's special verdict on Count Four of the superseding indictment, on which Tom Henry was convicted. This special verdict form, as noted supra at 7-8, contains an express finding by the jury -- beyond a reasonable doubt -- that Tom Henry received funds representing the proceeds from his fraud scheme and used those funds to purchase the residence and the adjacent lot. Indeed, if any finding by the jury should be accorded res judicata effect, it is this finding that Tom Henry holds a very substantial financial interest in the residence inasmuch as he used funds acquired from THS and THC in purchasing the residence.

But Jo-Ann Henry's arguments also are without merit as a matter of law. The jury in the criminal prosecution had to

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<sup>37</sup>See, e.g., United States v. Mageean, 649 F. Supp. 820, 826 (D. Nev. 1986), aff'd mem., 822 F.2d 62 (9th Cir. 1987).

determine only whether the residence was "tainted" property forfeitable under the provisions of 18 U.S.C. § 982(a). The jury's verdict of "Not Forfeit" did not conclusively establish that the residence was not the property of Tom Henry (e.g., the jury could have determined that the residence was property of Tom Henry but that the funds used in purchasing the property were not tainted).<sup>38</sup>

In order to forfeit property as a "substitute asset," by contrast, the District Court had to determine that (1) tainted property was unavailable for forfeiture for any of five enumerated reasons and (2) the asset in question constituted "other property of the defendant." See 21 U.S.C. § 853(p). In other words, "substitute assets" are, by definition, property of the defendant that is not directly subject to forfeiture as "tainted" property under the pertinent forfeiture statute.<sup>39</sup>

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<sup>38</sup>As explained supra at n.12, the jury may have returned a "Not Forfeit" verdict against the residence and the adjacent property simply to prevent a multiple recovery by the government, given its verdict of "Forfeit" on the exact pecuniary amount it found had been invested in the property in its guilty verdict on Count Four. Or the jury may have forfeited the pecuniary sum, rather than the residence, in the expectation that this judgment might be satisfied out of some other assets of Tom Henry. However, the government has not found any other assets of Tom Henry against which to satisfy this money judgment of forfeiture.

<sup>39</sup>United States v. Swank Corp., 797 F.Supp. 497, 502-503 (E.D.Va. 1992) ("An order of forfeiture for substitute assets would have to be satisfied out of something which was not itself subject to forfeiture. Any other construction would allow one to satisfy a substitute forfeiture judgement with property that belongs to the United States and thereby render meaningless the substitute asset provision of the statute.")

Jo-Ann Henry attempts to distinguish Swank Corp. from In re Assets of Tom Billman, 915 F.2d 916 (4th Cir. 1994), cert. denied

For example, substitution of assets may be used, as here, merely an alternative method of recovering an amount ordered criminally forfeited -- similar to enforcement of a money judgment -- and as such may be satisfied out of any other assets in which the criminal defendant has an ownership interest.<sup>40</sup>

It is clear, therefore, that the verdict of "Not Forfeit" in the criminal prosecution and the judgment forfeiting the residence as "substitute" property of defendant Tom Henry did not constitute identical causes of action. Under res judicata, "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." Montana v.

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sub nom. McKinney v. United States, \_\_\_ U.S. \_\_\_, 111 S. Ct. 2258 (1991). She states that:

[T]he court in [Swank Corp.], noted with approval that the government agreed to release a restraint on property held as tenants by the entirety due to the interest of the non-defendant spouse. Therefore, it can be assumed that the Swank Corp. court did not consider Billman to reach assets owned by an innocent spouse.

(Appellant's Brief at 18). This is incorrect. The court in Swank Corp., supra, at 503-04, stated: "Because of the practical considerations associated with forfeiture of property held as tenants by the entirety, the government does not object to a modification of the Restraining Order to release this one property from restraint." The court made no other statement regarding the release of the restraint of property held as a tenancy by the entirety. The quoted statement clearly does not serve to distinguish Swank Corp. from In Re Assets of Tom Billman with respect to forfeiture of "substitute assets" in which a spouse claims a legal interest.

<sup>40</sup>In Re Billman, 915 F.2d 916, 920 (4th Cir. 1990), cert. denied sub nom. McKinney v. United States, \_\_\_ U.S. \_\_\_, 111 S. Ct. 2258 (1991); United States v. Ginsburg, 773 F.2d 798, 800-803 (7th Cir. 1985), cert. denied, 475 U.S. 1011 (1986).

United States, 440 U.S. 247, 153 (1979). Certainly, the criminal forfeiture phase of the criminal prosecution and the post-conviction substitution of assets proceedings are not "identical causes of action." The first is a cause of action to forfeit "tainted" assets of a criminal defendant while the second seeks to forfeit "other property of the defendant" because the tainted property is unavailable for forfeiture.

Moreover, "[r]es judicata prevents litigation of "all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." Brown v. Felsen, 442 U.S. 127, 131 (1979). Obviously, the substitution of assets in satisfaction of a money judgment of forfeiture was not a "ground" that was "available" to the United States until after the jury returned its verdict of forfeiture. Such a ground could not have been "asserted or determined" until after: (1) the jury returned a verdict of forfeiture; and (2) a court determined that the property ordered forfeited was unavailable for forfeiture for one of the enumerated reasons. The government asserted this "ground" or "cause of action" at the first opportunity after it realized that there were no other assets of Tom Henry against which to satisfy the forfeiture judgment. Finally, the "defense" of whether a third-party owner of property subject to forfeiture had a protected property interest under 21 U.S.C. § 853(n)(6)(A)-(B) clearly was not "available" -- nor was it asserted or

determined -- when the jury returned its forfeiture verdict in the criminal case.<sup>41</sup>

One final point must be clarified regarding Jo-Ann Henry's res judicata argument. Henry alleges in her brief that the United States "conceded that the jury verdict was res judicata and that the property at 101 Ewing Court as a substitute asset was not otherwise forfeitable." (Appellant's brief at 25). That is absolutely incorrect.<sup>42</sup>

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<sup>41</sup>A related doctrine to that of res judicata is collateral estoppel.

The doctrine of collateral estoppel, or issue preclusion, applies if three requirements are met. First, the issue in the prior trial must have been identical. Second, the issue must actually have been litigated. Third, it must have been necessary and essential to the judgment on the merits. Conviction in a prior criminal trial, therefore, does not, ipso facto, collaterally estop claimants from contesting the forfeiture.

United States v. Three Tracts On Beaver Creek, 994 F.2d 287, 290 (6th Cir. 1993) (civil forfeiture action).

Inasmuch as the issue in the criminal forfeiture in the instant case was the forfeitability of the residence as the proceeds of Tom Henry's illegal activity, and the issues in the ancillary hearing are whether the residence is "other property" of Tom Henry and whether Jo-Ann Henry held a superior right, title or interest in the residence at the time of the commission of Tom Henry's illegal acts, the doctrine of collateral estoppel is inapplicable.

<sup>42</sup> The full statement from the source relied upon by Henry belies this assertion:

The fact that the jury did not forfeit the residence and adjacent lot is irrelevant in the forfeiture of assets by substitution, as evident from [the United States District

III. THE ANCILLARY HEARING STATUTE IS CONSTITUTIONAL AND THEREFORE VIOLATES NEITHER THE FIFTH NOR THE SEVENTH AMENDMENT

A. Introduction

21 U.S.C. § 853(n)(2), a subsection of the so-called "ancillary hearing" statute at issue in this case, provides that such hearings "shall be held before the court alone, without a jury. (emphasis added). Jo-Ann Henry challenges the constitutionality of this provision under both the Seventh Amendment and the Fifth Amendment. (Appellant's Brief at 26- 27). These challenges are entirely without merit for reasons stated below.

B. No right to jury trial in ancillary hearings.

As noted previously, the ancillary hearing procedure was created by Congress in 1984 to afford judicial protection to the legal interests of certain third-parties in property previously ordered forfeited to the United States.<sup>43</sup> The need for such a procedure arose because the effect of a criminal forfeiture order is to vest title to the forfeited property in the United States as of the date the crime giving rise to the forfeiture was

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Court's] forfeiture of the adjacent lot as a substitute asset. The jury's failure to forfeit the residence/adjacent lot does not operate as a bar to the substitution of those assets to satisfy the money forfeiture  
... ."

(Emphasis added; R. 418; Government's Reply to Jo-Ann Henry's Response to Government's Motion for Reconsideration).

<sup>43</sup> See S. Rep. No. 225, 98th Cong., 2d Sess. at 207-09, reprinted in 1984 U.S.C.C.A.N. 3182, 3390-92.



committed.<sup>44</sup> In other words, the United States was deemed to be the outright owner of forfeited property as of the date the underlying crime was committed.

Prior to the enactment of the ancillary hearing provisions, persons holding legal interests in property subject to forfeiture, however innocent, were afforded no direct statutory right to judicial protection of their interests. Their only recourse, at least in the first instance, was to file a petition for remission or mitigation of the forfeiture with the Attorney General, seeking in essence a "pardon" of their property interest as a matter of executive grace.<sup>45</sup> This scheme, in which forfeiture was ordered without regard to the innocence of third-party property owners, was not only quite commonplace but was held to be entirely constitutional as well.<sup>46</sup>

In 1984, Congress expressed "concern" over "strict application of [this] principle of discretionary, non-reviewable administrative decisions on third party claims in the criminal forfeiture context." S. Rep. No. 225, 98th Cong., 2d Sess. at 208, reprinted in 1984 U.S.C.C.A.N. at 3391. The Department of

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<sup>44</sup>This legal effect, commonly referred to as the "relation-back" doctrine has its origin in the common law. See United States v. Stowell, 133 U.S. 1, 16-17 (1890). This common law relation-back doctrine was codified as part of the drug forfeiture statute in 1984. See 21 U.S.C. § 853(c). See also S. Rep. No. 225, 98th Cong., 2d Sess. at 200, reprinted in 1984 U.S.C.C.A.N. at 3383.

<sup>45</sup> See S. Rep. No. 225, 98th Cong., 2d Sess. at 207, reprinted in 1984 U.S.C.C.A.N. at 3390. Decisions on such petitions were entirely discretionary and not subject to judicial review. Id.

<sup>46</sup>Calero-Toledo, 416 U.S. at 680-90.

Justice agreed that parties holding certain legal interests in forfeited property should be entitled to a judicial determination of their claims. Id. Congress, with the active support of the Department of Justice, thereafter enacted the ancillary hearing procedures now codified at 21 U.S.C. § 853(n). Id.

These procedures follows upon entry of the order of forfeiture which, as previously explained, has the legal effect of vesting in the United States outright ownership of the forfeited property as of the date of the act giving rise to the forfeiture. The government, as outright owner, is required to publish or serve notice of the forfeiture order and its intent to dispose of the property. 21 U.S.C. § 853(n)(1). Any person holding a legal interest in the property must file, within a specified time, a "petition . . . for a hearing to adjudicate the validity of his alleged interest in the property." 21 U.S.C. § 853(n)(2). The court then holds a hearing on the petition(s) and may afford relief to a petitioner, in the form of amending the order of forfeiture, if the petitioner proves by a preponderance of the evidence either that he: (1) held an interest in the property that was superior to that of the defendant "at the time of the commission of the act giving rise to the forfeiture;" or (2) is a bona fide purchaser for value of an interest in the property who was, at the time of the purchase, reasonably without cause to believe that the property was subject to forfeiture. 21 U.S.C. § 853(1)(6)(A)-(B). Once the court disposes of all petitions, or if no petition is filed, the United

States is deemed to have "clear title" to the property that is subject to the order of forfeiture and "may warrant good title to any subsequent purchaser." 21 U.S.C. § 853(1)(7).

**b. The constitutional source of petitioners' objection.**

Jo-Ann Henry correctly cites the Seventh Amendment as the constitutional source applicable in this case. (Appellant's Brief at 28). The post-conviction "ancillary hearing" under the criminal forfeiture statutes is more in the nature of a civil proceeding than a criminal prosecution.<sup>47</sup> As such, the basis for asserting a constitutional right to a jury trial in such a

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<sup>47</sup>See United States v. Lavin, 942 F.2d 177, 181-82 (3d Cir. 1991) ("a hearing to adjudicate the validity of a third party's interest in forfeitable property is not a criminal prosecution, i.e., an action commenced by the government to secure a sentence of conviction for criminal conduct" (emphasis added)).

proceeding would be the Seventh Amendment,<sup>48</sup> which provides as follows:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. Const. Amend. VII.

The Seventh Amendment, however, "was never intended to establish the jury as the exclusive mechanism for fact-finding in civil cases."<sup>49</sup> Indeed, the purpose of the Seventh Amendment, as stated on its face, was simply to preserve the right to jury

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<sup>48</sup>The Sixth Amendment provides a right to a trial by jury in criminal cases and is facially limited only to "the accused" (i.e., the defendant) in such cases: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . . ." The Supreme Court has strictly confined the protections afforded by this amendment to criminal proceedings against an accused. See United States v. Zucker, 161 U.S. 475, 481 (1896) ("The sixth amendment relates to prosecution of an accused person, which is technically criminal in its nature"). Moreover, even in criminal prosecutions, the Sixth Amendment right to a jury trial ceases upon conviction or acquittal. See Cabana v. Bullock, 474 U.S. 376, 384 (1986) ("A defendant in a criminal case has the right to have a jury determine his guilt or innocence"). The constitutional right does not extend beyond entry of the judgment of conviction to such post-conviction proceedings as: sentencing, McMillan v. Pennsylvania, 477 U.S. 79, 93 (1986); Cabana, 474 U.S. at 385-86; probation revocation, United States v. Czajak, 909 F.2d 20-24 (1st Cir. 1990) (citing cases); or entry of orders of restitution, United States v. Solderling, 970 F.2d 529, 534 n.11 (9th Cir. 1992), cert. denied sub nom. Solderling v. FDIC, 113 S. Ct. 2446 (1993).

Jo-Ann Henry is not now and never was "the accused" in any "criminal prosecution." Moreover, the ancillary hearing is held only after entry of a judgment of conviction. Hence, she clearly has no Sixth Amendment right to a jury trial in the post-conviction ancillary hearing.

<sup>49</sup>Atlas Roofing Co. v. OSHA, 430 U.S. 442, 460 (1977).

trial where it existed at common law at the times the Bill of Rights was adopted and not "to require a jury trial where none was required before."<sup>50</sup> To be sure, the Seventh Amendment right "extends beyond the common law forms of action recognized at [the] time" the Bill of Rights was adopted;<sup>51</sup> but it is equally true that the right does not extend to: (1) actions against the United States;<sup>52</sup> (2) actions commenced by the United States; and (3) actions at equity.<sup>53</sup>

The government submits, for the following reasons, that the Seventh Amendment does not apply to post-conviction ancillary proceedings in criminal forfeiture cases. First, the ancillary proceeding constitutes an action against the United States as to which there is no statutory right to a jury trial. Alternatively, if the post-conviction ancillary proceeding is viewed as an action commenced by the United States, it is an action to enforce a "public right" as to which the Seventh Amendment has no application. Finally, regardless of who is properly viewed as commencing the ancillary proceeding, it stands as a proceeding in equity, analogous to a "quiet title" action, to which the Seventh Amendment does not apply. These arguments are discussed below.

**c. Ancillary hearings are actions commenced by the**

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<sup>50</sup>Id. at 459.

<sup>51</sup>Curtis v. Loether, 415 U.S. 189, 193 (1974).

<sup>52</sup>See Lehman v. Nakshian, 453 U.S. 156, 160-162 (1981) (citing cases).

<sup>53</sup> Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 41 and 53 (1989) (enforcement of public right and actions at equity).

petitioner against the United States.

It is clear from both the statutory language and legislative history of 21 U.S.C. § 853(n) that the ancillary proceeding is, in fact and in effect, an action commenced against the United States as owner of the property.<sup>54</sup> The Supreme Court has long held that the Seventh Amendment has no application to suits against the United States, except as Congress has expressly and unequivocally consented to a jury trial.<sup>55</sup> Indeed, "[w]hen

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<sup>54</sup>For example, subsection 853(n)(1) requires the government to publish or serve notice of the order of forfeiture and "of its intent to dispose of the property." (Emphasis added). In response to this notice, third parties holding legal interests in the forfeited property may, within a specified time, file a "petition" with the court "for a hearing to adjudicate the validity of [the] alleged interest in the property." 21 U.S.C. § 853(n)(2) (emphasis added). The petitioner is considered the party seeking relief as is clear from the requirement that the petition set forth, inter alia, "the relief sought," 21 U.S.C. § 853(n)(3), and bears both the burden of proof and the burden of producing evidence at the hearing. 21 U.S.C. § 853(n)(4), (5). The government, by contrast, appears "in defense of its claim" and "may present evidence and witnesses in rebuttal" to the petitioner's evidence. 21 U.S.C. § 853(n)(4). Where the petitioner prevails, the court affords relief by amending the order of forfeiture previously entered. Id.

The legislative history of 21 U.S.C. § 853(n) confirms that the ancillary hearing is in fact and in essence an action against the United States. For example, it characterizes "claims to criminally forfeited property" as being "in essence, . . . challenges to the validity of the forfeiture order" from which the government derives its title. S. Rep. No. 225, 98th Cong., 2d Sess., at 208, reprinted in 1984 U.S.C.C.A.N. at 3391. It notes that the burden of proof is on the petitioner and that the petitioner "will prevail if his claim falls into one of [the] two categories" set forth in subsection 853(n)(6). Id. S. Rep. No. 225, at 209, reprinted in 1984 U.S.C.C.A.N. at 3392 (emphasis added). Finally, it notes that "[a] third party who fails to obtain relief under the new ancillary hearing" may still file a petition for remission or mitigation of the forfeiture with the Attorney General. Id.

<sup>55</sup>See Lehman v. Nakshian, 453 U.S. at 160-62 (citations, internal quotations, and footnotes omitted).

Congress has waived the sovereign immunity of the United States, it has almost always conditioned that waiver upon a plaintiff's relinquishing any claim to a jury trial."<sup>56</sup> In fact, "[t]he appropriate inquiry . . . is whether Congress clearly and unequivocally departed from its usual practice in this area, and granted a right to trial by jury . . . ."<sup>57</sup>

Here, Congress not only has not departed from its "usual practice;" it has "clearly" and "unequivocally" and affirmatively stated that "[t]he hearing [in an ancillary proceeding] shall be held before the court alone, without a jury." 21 U.S.C. § 853(n)(2) (emphasis added). As previously noted (supra at 33), prior to 1984, Congress afforded no statutory protection to the interests of third parties. This scheme, which effectively relegated third parties to seeking a discretionary "pardon" of their property interest from the Attorney General, was entirely constitutional. See Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680-90 (1974). By creating the ancillary proceeding in criminal forfeiture cases, Congress, for the first time, enabled third parties with legal interests in the property to file post-conviction petitions challenging the validity of the forfeiture order and seeking judicial relief in protecting their interests. This limited waiver of sovereign immunity, in keeping

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<sup>56</sup>Id.

<sup>57</sup>Id. at 162 (emphasis added). Accord United States v. Testan, 424 U.S. 392, 399 (1976); Galloway v. United States, 319 U.S. 372, 388-89 (1943); United States v. Sherwood, 312 U.S. 584, 586 (1941); Wickwire v. Reinecke, 275 U.S. 101, 105 (1927); McElrath v. United States, 102 U.S. 426, 440 (1880).

with the "usual practice," specified that the petition would be heard by the Court without a jury. This limitation clearly does not contravene the Seventh Amendment.

- d. Alternatively, if the ancillary hearing is considered an action commenced by the United States, it is an action to enforce a public right to which the Seventh Amendment does not apply.

Assuming arguendo, that the ancillary hearing procedure is an action commenced by the United States, it may only be described as an action to enforce a "public right" -- the public's right, title and interest in property ordered forfeited. It is well-established that the Seventh Amendment does not apply to such actions.

The Supreme Court, in a case relied upon by Jo-Ann Henry (Appellant's Brief at 28), has recognized that "Congress may effectively supplant a common-law cause of action carrying with it a right to a jury trial with a statutory cause of action shorn of a jury trial right if that statutory action inheres in, or lies against, the Federal Government in its sovereign capacity."<sup>58</sup> This doctrine, commonly referred to as the "public rights" doctrine, also has been summarized as follows:

At least in cases in which "public rights" are being litigated -- e.g., cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact -- the Seventh Amendment does not prohibit Congress from assigning the factfinding function [to

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<sup>58</sup>Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 53 (1989).



the court or an administrative agency sitting without a jury].<sup>59</sup>

The Supreme Court has stated that:

[I]f a statutory cause of action is legal in nature, the question whether the Seventh Amendment permits Congress to assign its adjudication to a tribunal that does not employ juries as factfinders requires the same answer as the question of whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal.<sup>60</sup>

As previously noted, Congress constitutionally could -- and did -- assign the determination of third party claims to forfeited property to the discretion of the Attorney General prior to 1984. The Attorney General, in reviewing such claims, sought to protect the rights of innocent third parties to the forfeited property. However, the fact-finding function was committed entirely to the Attorney General.

By creating the ancillary hearing procedure in 1984, Congress did no more than to provide an avenue by which third-parties could obtain a judicial, instead of a purely executive, discretionary and administrative determination, of their claims.<sup>61</sup> Because Congress previously and validly assigned this determination to the discretion of the Attorney General, it is clear that, in creating the judicial, non-jury, ancillary hearing

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<sup>59</sup>Atlas Roofing Co., Inc. v. OSHA, 430 U.S.442, 450 (1977).

<sup>60</sup>Granfinanciera, S.A. v. Nordberg, 492 U.S. at 53-54.

<sup>61</sup>S. Rep. No. 225, 98th Cong., 2d Sess. at 207-09, reprinted in 1984 U.S.C.C.A.N. 3182, 3390-92.

provision, it acted fully within its authority under the Seventh Amendment as interpreted in the "public rights" cases.

- e. Regardless of who commences the ancillary hearing proceeding, such proceedings are most analogous to quiet title actions, actions at equity to which the Seventh Amendment does not apply.

The Supreme Court has consistently distinguished between actions at law, as to which the Seventh Amendment right to jury trial is implicated, and actions at equity, as to which there is no right to a jury trial.<sup>62</sup> In applying this distinction for purposes of the Seventh Amendment, the Court has developed the following test:

To determine whether a statutory action is more similar to cases that were tried in courts of law than to suits tried in courts of equity . . . , the Court must examine both the nature of the cause of action and of the remedy sought. First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature.<sup>63</sup>

The second stage of this analysis is more important than the first.<sup>64</sup>

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<sup>62</sup>See, e.g., Wooddell v. Intern. Broth. of Elec. Workers, \_\_\_ U.S. \_\_\_, 112 S. Ct. 494, 497-98, \_\_\_ L.Ed.2d \_\_\_ (1991); Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry, 494 U.S. 558, 564-65 (1990); Granfinanciera, S.A. v. Nordberg, 492 U.S. at 40-42; Tull v. United States, 481 U.S. 412, 417 (1987); Parsons v. Bedford, 3 Pet. 433, 477 (1830).

<sup>63</sup>Tull v. United States, 481 U.S. at 417-18 (citations and footnote omitted).

<sup>64</sup>Wooddell v. Intern. Broth. of Elec. Workers, \_\_\_ U.S. at \_\_\_, 112 S. Ct. at 498 (citing cases).

This Court long ago held that the lienor's challenge to a forfeiture proceeding was "in the nature of an intervening petition in equity." Missouri Inv. Corp. v. United States, 32 F.2d 511 (6th Cir. 1929). More recently, at least one district court relied upon this case in holding that third party actions to protect legal interests in property declared forfeited to the United States under the criminal forfeiture provisions of RICO, prior to the enactment of the ancillary hearing provisions, were analogous to actions in equity and, therefore, no right to trial by jury applies to such actions.<sup>65</sup> This conclusion is clearly correct as applied to third party petitions in the ancillary hearing process for the following reasons.

As noted earlier, the ancillary hearing procedure commences after the order of forfeiture has vested in the United States all right, title, and interest in forfeited property as of the date of commission of the crime giving rise to forfeiture. 21 U.S.C. § 853(c) and (n)(1). If the petitioner prevails, the court amends the order of forfeiture accordingly. Id. The final subsection of the ancillary hearing procedure states that:

Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed . . . , the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

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<sup>65</sup>Schwartz v. United States, 582 F. Supp. 224, 227 (D. Md. 1984) ("Having determined that the plaintiff states a cause of action in equity, the Court rules that he is not entitled to a jury trial under the Seventh Amendment").

21 U.S.C. § 853(n)(7) (emphasis added). It is clear from the procedures employed in the ancillary hearing process generally and from the provisions of the last subsection in particular, that the process is most akin to a "quiet title" action -- an action at equity.

Suits to quiet title or to remove clouds on title developed from what were anciently termed bill **quia timet** or bills of peace, actions that originated in and appertained to court of chancery. A bill **quia timet** served "to remove a cloud upon title" so as "to prevent future litigation respecting the property by removing existing causes of controversy as to its title."<sup>66</sup> The Supreme Court has acknowledged that "[b]ills **quia timet** . . . belong to the ancient jurisdiction in equity" and became part of "the jurisdiction in equity of the courts of the United States."<sup>67</sup> Clearly, the courts of the United States, sitting in equity, have jurisdiction to remove clouds upon title.<sup>68</sup> A suit to quiet title, being a purely equitable

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<sup>66</sup>Holland v. Challen, 110 U.S. 15, 18, 20 (1884). Accord Sharon v. Tucker, 144 U.S. 533, 543 (1892). Bills **quia timet** "are in the nature of writs of prevention, to accomplish the ends of precautionary justice." Story, Equity Jurisprudence § 826 (1886).

<sup>67</sup>McConihay v. Wright, 121 U.S. 201, 206 (1887).

<sup>68</sup>A "quiet title" action against the United States, under 28 U.S.C. § 2409a, is tried by the court without a jury. See 28 U.S.C. § 2409a(f). See also Reynolds v. First National Bank of Crawfordsville, 112 U.S. 405, 410 (1884); Humble Oil & Refining Co. v. Sun Oil Co., 191 F.2d 705, 718 (5th Cir. 1951) (citing cases), cert. denied, 342 U.S. 920 (1952).

proceeding both currently and when the Bill of Rights was adopted, does not require a jury trial in federal courts.<sup>69</sup>

It is clear that the ancillary hearing proceeding -- which serves both to protect legal interest of third parties in property ordered forfeited and to vest in the government clear title and the ability to warrant good title to subsequent transferees -- is most analogous in its nature to quiet title actions or, specifically, bills *quia timet*.<sup>70</sup> Such actions were actions in equity both in the 18th-century courts of England and in current practice in the United States. Thus, the first part of the Supreme Court test regarding application of the Seventh Amendment militates against a right to trial by jury.

Moreover, the remedy afforded by the ancillary hearing is akin to equitable remedies in quiet title actions. The Supreme Court long ago observed that courts have substantial discretion in fashioning such remedies in providing protection to property owners.<sup>71</sup> Indeed, courts have devised various and creative

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<sup>69</sup>Id.; Inland Steel Products Co. v. MPH Manufacturing Corp., 25 F.R.D. 238, 242 (N.D. Ill. 1951); Getler v. Beckman, 769 P.2d 714, 717 (Mont. 1989).

<sup>70</sup>Interestingly, where Congress vested the courts with authority to remit or mitigate forfeitures, as it has for violations of the internal revenue laws relating to liquor, actions by third-party owners to protect their interests were considered actions in equity. See Missouri Investment Corp. v. United States, 32 F.2d 511 (6th Cir. 1929) (per curiam) (emphasis added). See also Florida Dealers and Growers Bank v. United States, 279 F.2d 673, 677-78 (5th Cir. 1960) ("Good conscience and equity are controlling considerations") (citing cases). Petitions for remission or mitigation of forfeitures in such actions are addressed to the court. 18 U.S.C. § 3617(a).

<sup>71</sup>Sharon v. Tucker, 144 U.S. at 544-45 and 547-48.

means of "doing equity" so as to protect the interests of third parties in quiet title actions.<sup>72</sup>

The ancillary hearing provisions similarly invest courts with broad discretion to "amend the order of forfeiture" so as to protect prevailing third parties, while vesting clear title in the United States. See 21 U.S.C. § 853(n)(6)-(7). For example, a court may amend an order of forfeiture so as to require sale of the property and payment to a prevailing third party of the value of its interest<sup>73</sup> -- just as the District Court did in this case by ordering that \$23,951.20 be returned to Jo-Ann Henry. Indeed, there are no limits to the means that the court may employ in amending the order of forfeiture so as to "do equity" to statutorily protected property interests. It follows that the second, and more important, part of the Supreme Court's test also militates against finding a right to a jury trial in an ancillary proceeding.

### C. No Violation of Due Process in the Ancillary Hearing

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<sup>72</sup>See, e.g., Klugh v. United States, 818 F.2d 294, 299-300 (4th Cir. 1987) (in quiet title action, government must pay prevailing party "just compensation" for party's interest in condemned property); Dennison Brick & Tile Co. v. Chicago Trust Co., 286 F. 818, 822 (6th Cir. 1923) (state court, in quiet title action, may, if it finds mortgage interest valid, subject the property to payment of the mortgage by foreclosure and sale). See generally 74 C.J.S. Quieting Title §§ 93-102 (1951) (collecting cases).

<sup>73</sup>See United States v. Reckmeyer, 628 F. Supp. 616, 622 (E.D. Va. 1986) (amending order of criminal forfeiture under 21 U.S.C. § 853 to require that forfeited trucks be sold and that the government pay secured lienholder principal and interest owing on trucks).

Jo-Ann Henry also complains that the non-jury determination of property rights under 21 U.S.C. § 853(n) violates the Due Process Clause of the Fifth Amendment. (See Appellant's Brief at 27). She cites the fact that in civil forfeitures involving seizures on land, and in the criminal forfeiture phase of the criminal prosecution, issues of fact are tried to a jury. (Id. at 30). For reasons already stated and for additional reasons set forth below, Congress acted squarely within its constitutional authority in providing for non-jury determinations of third party petitions in the ancillary proceeding.

In a criminal prosecution, the jury hears the evidence relating to forfeiture and determines "the extent of the interest or property subject to forfeiture, if any." Fed. R. Crim. P. 31(e). The order of forfeiture, entered upon return of the verdict of forfeiture in the criminal case, has the legal effect of vesting all right, title and interest to the forfeited property in the United States. The United States is thereafter considered the outright owner of the forfeited property and, until 1984, 21 U.S.C. § 853 did not provide for a judicial determination of third party rights in forfeited property. Such third parties were relegated to filing petitions for remission or mitigation of the forfeiture with the Attorney General.<sup>74</sup> It is clear that this scheme, which omitted any possibility for a

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<sup>74</sup>See S. Rep. No. 225, 98th Cong., 2d Sess. at 207, reprinted in 1984 U.S.C.C.A.N. at 3390.

judicial determination as to the interests of innocent third parties, was entirely constitutional.<sup>75</sup>

In 1984, Congress acted to provide judicial protection for certain third parties by enacting the ancillary hearing provisions. The effect of this enactment was to create an entirely new statutory right, allowing certain third parties with legal interests to file petitions challenging the forfeiture order in a procedure akin to a quiet title action. Given that this new procedure affords even greater procedural protections than formerly existed, notwithstanding the bar on jury trials. Hence, it can hardly be said to violate due process. This is true even though property owners in certain other forms of forfeiture litigation are afforded jury trials.<sup>76</sup> Indeed, where "lawsuits have been allowed only because of a change in executive and legislative policy, not by operation of common law principles," the denial of a jury trial in such actions contra-

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<sup>75</sup>See Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 683-89 (1974) (reviewing cases).

<sup>76</sup>See United States v. One 1976 Mercedes Benz 280S, 618 F.2d 453, 456-69 (7th Cir. 1980) (Congress is free to fashion new types of remedy, such as a special equity court or an administrative tribunal, where a jury trial may validly be withheld; however, if Congress simply creates a new statutory right, without providing a special statutory proceeding for enforcement, and relegates parties to their common-law remedies, then the ordinary incident of jury trials in common law actions applies); United States v. One Parcel of Real Estate at 1012 Germantown Road, 963 F.2d 1496 (11th Cir. 1992) (jury trial in a civil in rem forfeiture action); and United States v. Real Property At 2101, Etc. Maple Street, 750 F.Supp. 817 (E.D. Mich. 1990) (property owner had Seventh Amendment right to jury trial with respect to in rem civil forfeiture action against property which allegedly was used to facilitate violations of Title 21).



venes neither due process, equal protection nor the Seventh Amendment.<sup>77</sup> Hence, it seems abundantly clear that the statutory provision barring jury trials in ancillary hearings contravenes neither the Due Process Clause nor any other consitutional guarantee.

#### CONCLUSION

For the above stated reasons, the order of the district court should be affirmed.

Respectfully submitted,

John M. Roberts  
United States Attorney  
Middle District of Tennessee

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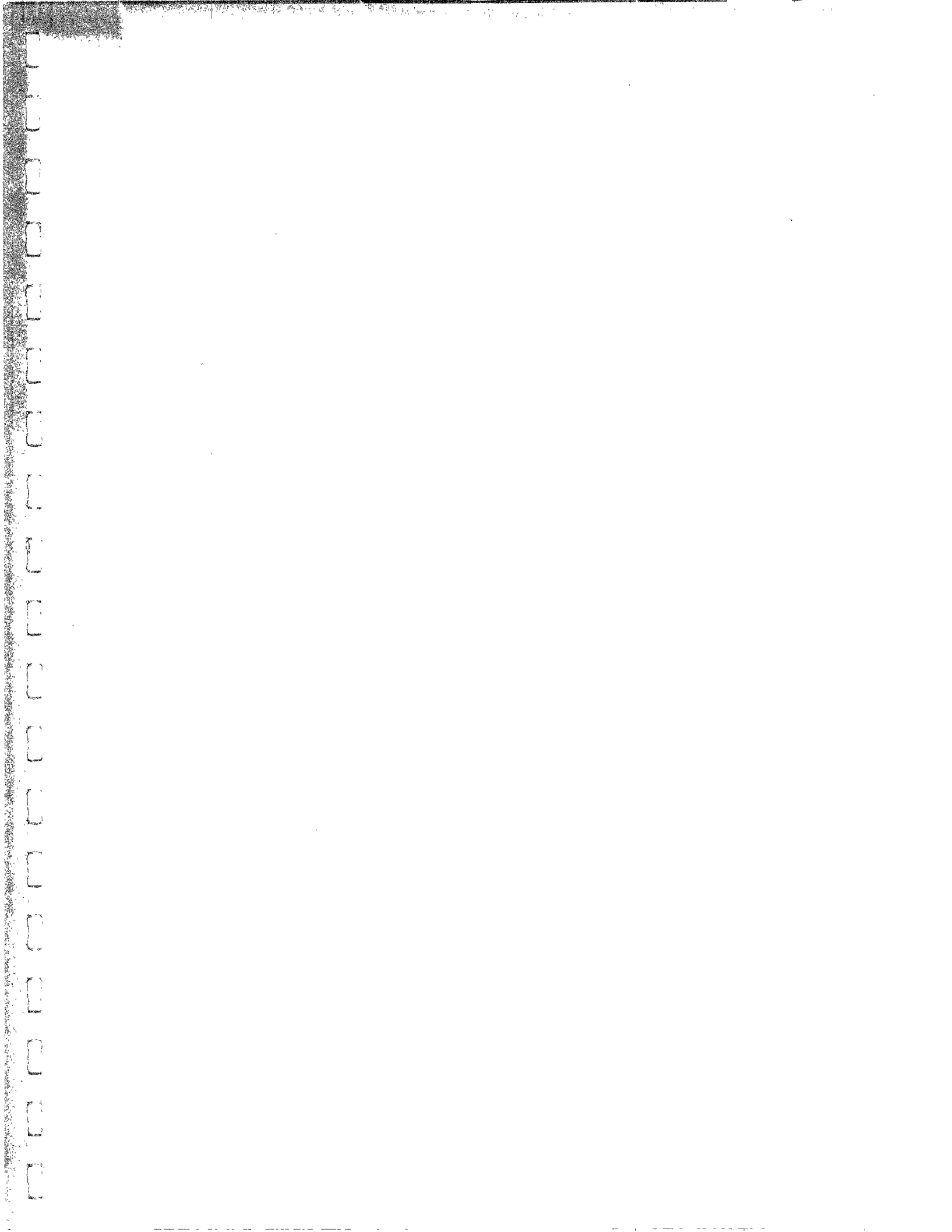
Wendy Hildreth Goggin  
Assistant U.S. Attorney  
Middle District of Tennessee

Harry S. Harbin  
Assistant Director  
Asset Forfeiture Office  
Criminal Division  
U.S. Department of Justice  
Washington, D.C.

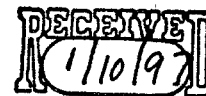
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<sup>77</sup>Arango v. Guzman Travel Advisors, 761 F.2d 1527, 1534-35 (11th Cir), cert. denied sub nom. Arango v. Compania Dominicana de Aviacion, 474 U.S. 995 (1985). Accord Ducharme v. Merrill-National Laboratories, 574 F.2d 1307, 1310-11 (5th Cir.) (per curiam), cert. denied, 439 U.S. 1002 (1978) (Congress violated neither due process, equal protection, or the Seventh Amendment by allowing a jury trial in an action by the United States on an indemnity claim asserted against a manufactureer and distributor of swine flu vaccine, while providing for a non-jury trial in an action against the United States by a private individual who had suffered a reaction to the vaccine).









*Reed & Hostage*

*Attorneys at Law*

*2828 Pennsylvania Avenue, N.W.*

*Suite 200*

*Washington, D.C. 20007-3763*

*202-625-1226*

*Fax: 202-338-8650*

*Terrance G. Reed*  
*Christopher A. Hostage\**

*Counsel*  
*James V. McGowan\*\**

\*ALSO ADMITTED IN MARYLAND

\*\*NOT ADMITTED IN WASHINGTON, DC  
ADMITTED IN ALASKA AND OREGON

**96-CR-12**

January 6, 1997

Secretary  
Committee on Rules of Practice and Procedure  
Administrative Office of the United States Courts  
Washington, D.C. 20544

Dear Mr. Secretary:

I am responding to a letter from John K. Rabiej to me soliciting commentary on the Department of Justice's proposed forfeiture amendments to Rule 32 of the Rules of Criminal Procedure. In general, I disagree with the Department's assessment that the current Rules are anachronistic and must be repealed, although some rule improvements could be made. While some of the Department's suggestions are worthy of consideration, several pose problems that should be examined prior to adoption. Some Department proposals, such as the abolition of existing jury trial rights on forfeiture issues for criminal defendants, may exceed the scope of the Rules Enabling Act, 28 U.S.C. § 2072(b) insofar as they abridge or modify substantive rights. Accordingly, I have identified those proposals which may pose such problems.

**I. Elimination of the Current Jury Trial Right is Inappropriate.**

The Department apparently desires to eliminate the jury trial rights currently available to defendants under Rule 32. While the Supreme Court did recently hold, in Libretti v. United States, 116 S. Ct. 356 (1995), that a defendant did not have a constitutional right to a jury determination of criminal forfeiture issues, the Court did repeatedly indicate that a defendant possessed a statutory right to a jury determination of forfeiture issues. *Id.* at 367-68. If true, it is not clear on what basis the Department would have the Committee simply eliminate this statutory jury trial right.

Moreover, the preservation of jury trial rights in forfeiture matters has a long and illustrious history in this country. One of the grievances of the colonists against British rule was that the colonists were deprived of jury trial rights in forfeiture proceedings, as opposed to their English counterparts. A prominent Boston criminal defense lawyer by the name of John Adams defended a Boston merchant by the name of John Hancock and his seized schooner Liberty when they were accused of smuggling Madeira wine into Boston. A centerpiece of Adams's defense of Hancock was that the Admiralty Acts which deprived colonists of jury trial rights were unlawful in that they denied colonists, but not Englishmen, of this historic right. In turn, Adams's opening argument listing this grievance would be published throughout the colonies, and would be one of many sparks igniting the Rebellion. See generally John Adams, *Argument and Report*, in 2 *Legal Papers of John Adams* 172-219 (L. Kinvin Wroth & Hillier B. Zobel eds., 1965).

The reasons for the colonists' mistrust were obvious--forfeited goods would benefit the Crown far away. The distrust of the British administration for American juries was perhaps understandable, but such distrust is not a part of our legacy. Powell, *Jury Trial of Crimes*, 23 Wash. & Lee L. Rev. 1, 8-10 (1966) (arguing that jury trial right is an important bulwark for freedoms).

Public skepticism about the government motivations for forfeiture persist to this day, and these concerns have even found voice in the Supreme Court. *United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 502 (1993) (protection of neutral decision making particularly important when Government has direct pecuniary interest in outcome of proceeding). In addition, the scope of criminal forfeiture is frequently tied to the scope and extent of a defendant's criminal acts, and having the same trier of fact will eliminate the possibility of inadvertent error in defining the scope of justifiable forfeitures. Finally, I am unaware of any groundswell of concern from federal judges, or even from line prosecutors, about any administrative difficulties caused by jury determinations of forfeiture issues. Hence, even assuming that the Committee were inclined to overrule the Supreme Court's identification of a statutory jury trial right in *Libretti*, such a step would not be justified.

## **II. The Accurate Forfeiture Fact-Finding Now Compelled by Existing Rules is not an "Unnecessary Anachronism," as the Department Now Suggests.**

The Department proposes to repeal Rules 7(c)(2), 31(e), and 32(d)(2) and to substitute for these three rules the more vague language of proposed Rule 32.2. The three existing rules make clear that (a) the indictment must allege "the extent of the [defendant's] interest subject to forfeiture (Rule 7(c)(2)), (b) a special verdict must be returned as to "the extent of the interest or property subject to forfeiture" (Rule 31(e)), and (c) the judgment of criminal forfeiture must authorize the Attorney General to seize "the interest or property subject to forfeiture on terms that the court considers proper." (Rule 32(d)(2)). The Department proposes that these three interrelated rules be replaced by a general rule stating that no property shall be forfeited unless

the indictment alleges "that the defendant or defendants have an interest in property that is subject to forfeiture in accordance with the applicable statute." Proposed Rule 32.2(a). In addition, the Department has proposed replacing Rule 32(d)(2)'s requirement that a judgment authorize seizures "on terms that the court considers proper," with a mandatory seizure provision in Proposed Rule 32.2(b).

According to the Department, the existing Rule requirements that the "extent of" a defendant's property which is subject to forfeiture be set forth in the indictment and in a special verdict are "unnecessary anachronisms." Obviously, Rule 7(c)(2) and Rule 31(e) are aimed at providing notice to the defendant of the extent of the government's forfeiture allegations, and at securing a jury verdict on the extent of the interest subject to forfeiture in accordance with the evidence. This is especially important in criminal forfeiture cases because, unlike civil forfeiture proceedings in which there is no question about the scope of the potential forfeiture (because the property is seized), the scope of the potential forfeiture is derivative of the scope of the defendant's criminal conduct. See generally Reed & Gill, RICO Forfeitures, Forfeitable 'Interests,' and Procedural Due Process, 62 N.C.L. Rev. 57, 59-75 (1983) (describing historical differences between civil and criminal forfeiture).

Currently, a defendant receives notice of the extent of alleged forfeiture in the indictment, and the trial is the place where the fact and scope of forfeiture is adjudicated. In place of this existing practice, the government has proposed to take forfeiture issues out of the criminal trial, and have such matters adjudicated in post-trial proceedings. The government's proposed Rule 32.2(a) would require that the government only need allege, in an indictment, that the defendant had some property subject to forfeiture, leaving identification of what property is allegedly subject to forfeiture until post-trial proceedings. Similarly, the Department would strip the jury of any role in determining the "extent" of any property subject to forfeiture. In place of the existing Rules and procedures, the government would shift the notice and adjudication procedures for a criminal forfeiture from the trial to post-trial proceedings. This proposal would be a dramatic departure from existing procedures, affecting both the defendant and interested third parties, and it is surprising that the Department has not acknowledged the degree to which it is seeking a change from the current statutory procedures.

According to the Department, taking criminal forfeiture adjudication out of the criminal trial and placing it into post-trial proceedings is appropriate because "the ancillary [post-trial] proceeding has become the forum for determining the extent of the defendant's forfeitable interest." Department Explanation, at 7. This cannot be correct as a technical matter, of course, because the applicable statutes prohibit a convicted defendant from asserting a legal interest in forfeited property in the ancillary post-trial proceedings. 18 U.S.C. § 1963(l)(2); 21 U.S.C. § 853(n)(2). Indeed, Congress went so far as affirmatively to prohibit courts from consolidating any third party ancillary hearing with any petition filed by a defendant. 18 U.S.C. § 1963(l)(4); 21 U.S.C. § 853(n)(4).

A fair reading of these statutory provisions, and the applicable legislative history, reveals

that Congress, when it enacted these post-trial procedural provisions, contemplated that the fact and scope of a defendant's forfeiture would be adjudicated during the prior criminal trial, and not in the post-trial ancillary proceedings. See, e.g., S. Rep. 225, 98th Cong., 1st Sess. 207-08 (1984) (explaining that post-trial proceedings are for resolution of third party claims), reprinted in 1984 U.S. Code Cong. & Ad. News 1. The role given the jury in returning special verdicts under Rule 31(e) is consistent with, and reinforces, this procedural scheme. Indeed, the post-trial proceedings were created because Congress agreed with the Department that some due process was needed for third party interest who are precluded by law from participating in the criminal trial. Id. See, e.g., 18 U.S.C. § 1963(I); 21 U.S.C. § 853(k).

Thus, current statutory procedures preclude the use of the existing post-trial ancillary proceedings as a means to adjudicate the defendant's forfeiture. Rather, the scope of a defendant's forfeiture is adjudicated as a part of the criminal trial.<sup>1</sup> In addition, I am unfamiliar with any existing practice in the federal courts whereby adjudication of the extent of a defendant's forfeiture is postponed until the ancillary proceedings. The post-trial proceedings are structured to address the concerns, if any, of third parties, and indeed the criterion for third party forfeiture relief are inapposite to the statutory criterion for imposition of criminal forfeiture upon a defendant. Compare 18 U.S.C. § 1963(I)(6) with 18 U.S.C. § 1963(a). Accordingly, the existing Rules can hardly be labeled "anachronistic" on the alleged ground that "the ancillary proceeding has become the forum for determining the extent of the defendant's forfeitable interests." Department Explanation, at 7. The existing Rules are consistent with the Congressional choice to have the extent of a defendant's forfeiture identified in the indictment and adjudicated at trial.

The Department further suggests that the potential overlap of evidence between the trial and the third party ancillary proceeding counsels in favor of combining the two proceedings. Department Explanation, at 8. Congress, however, anticipated this very issue, and provided by statute that, at an ancillary hearing, "the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture." 18 U.S.C. § 1963(I)(5); 21 U.S.C. § 853(n)(5). Of course, some overlap of evidence is inevitable between the trial and ancillary proceedings, but this is the foreseeable consequence of the fact that third parties are statutorily barred from participating at any earlier time, and hence the ancillary proceeding is their first (and only) opportunity to present any evidence or challenge that of the government. See, e.g., United States v. Reckmeyer, 836 F.2d 200, 206 (4th Cir. 1987) (due process requires that third parties be permitted to contest issues at ancillary proceedings). Because third parties have not been indicted or convicted--both of which are prerequisites for imposition of a criminal forfeiture--it is only fair that they be given a reasonable post-trial opportunity for addressing the government's contentions that they should suffer a loss of their property. That there may be some duplication of evidence between the trial and the ancillary proceeding is a small concession to the

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<sup>1</sup> Federal courts have held, however, that a third party may seek to adjudicate the validity, vel non, of the criminal forfeiture in an ancillary proceeding. See, e.g., United States v. Douglas, 55 F.3d 584, 588 n. 14 (11th Cir. 1995).



due process rights of third parties.

Finally, the Department's suggested repeal of the language of existing Rule 32(d)(2) from language authorizing post-forfeiture order seizures "on terms that the court considers proper," to language compelling the court to issue a seizure order, is inadvisable. The Department's desire to eliminate this Rule provision is hard to understand, as Congress has affirmatively provided, in the context of criminal forfeitures for drug offenses, that forfeiture orders shall authorize seizures "upon such terms and conditions as the court shall deem proper." 21 U.S.C. § 853(g). Consistency alone, therefore, suggests that this language be retained. As a general matter, many situations can arise where an immediate government seizure of property after a verdict is inappropriate, such as where the seizure may immediately impair the interests of third parties.

A classic example is the family home in which the unconvicted spouse has a legally protectible interest exempt from forfeiture. See, e.g. United States v. Lester, 85 F.3d 1409 (9th Cir. 1996). In the civil forfeiture context, the Supreme Court has held that the Fifth Amendment's Due Process Clause prohibits the government from seizing a home without affording a prior adversarial judicial hearing. United States v. James Good Real Property, 114 S. Ct. 492 (1993). The same result should apply in this context, and the existing Rule 32(d)(2) makes clear that federal courts have the statutory flexibility to accommodate such competing interests when ordering the seizure of forfeited property. The Department has offered no explanation for why federal courts should be prohibited from setting proper terms upon any seizure for forfeiture purposes, and Congress has affirmatively mandated that Attorney General must make "due provision for the rights of any innocent person," in executing its seizure authority. 18 U.S.C. § 1963(f);

In summary, the existing Rules 7(c)(2), 31(e), and 32(d)(2) are still providing the needed, and useful, procedures for the criminal forfeiture determinations that Congress has mandated. If Congress should choose to restructure criminal forfeitures such that jury trial rights are denied, defendants are denied notice of the forfeiture the government is actually seeking until after conviction, and forfeiture adjudications are all conducted post-trial, then the Department's proposed Rule changes may have some merit. Until then, however, the existing rules are appropriate, and cannot be considered "anachronistic."

### **III. The Department Correctly Urges the Committee to Clarify the Rules Applicable to Ancillary Proceedings.**

In Proposed Rule 32.2(d), the Department generally proposes that the existing Rules make clear that civil procedures apply to the conduct of ancillary proceedings. I support such a rule, and I further agree with the Department as to the current need for such a rule, although that is not the Rule being proposed by the Department in Rule 32.2(d). The Department's proposed rule would selectively incorporate only portions of two civil rules (Rules 12 and 56). For example,

Proposed Rule 32.2(d)(1) identifies only a few grounds for the filing of a motion to dismiss (Rule 32.2(d)(1), and bars discovery until after resolution of a motion to dismiss (Rule 32.2(2)). While the Department would make the summary judgment provisions of Fed. R. Civ. P. 56 available, it would be available only if the court had previously allowed discovery. Id.

There is no reason to reinvent the wheel on these matters. Civil forfeiture proceedings are conducted, with limited inapplicable exceptions, under the Federal Rules of Civil Procedure. The government has not identified any reason why third party ancillary proceedings should not be conducted under the same civil rules. The Department's proposed language would appear to limit the availability of the civil rules to the third party petitioner and court alike. Accordingly, the proposed language should be changed in favor of simply making the federal rules of civil procedure applicable to ancillary proceedings.

#### **IV. The Proposed Substitute Asset Forfeiture Authorization Is Inappropriate.**

Finally, the Department proposes in Rule 32.2(f) to authorize the government to obtain the forfeiture of substitute assets "at any time" upon the motion of the government. Substitute assets forfeiture is the forfeiture of wholly legitimate assets of a defendant which is authorized by statute when a defendant has, by act or omission, rendered forfeitable assets unavailable for forfeiture. The proposed Rule would enable the federal government to reopen criminal proceedings at any time in order to forfeit a defendant's wholly legitimate assets. Because substitute assets are, by definition, wholly legitimate assets, as to which the defendant (and third parties) have legal interests, placing a permanent cloud over such assets would be detrimental to defendant and third party alike. Indeed, the Department might contend that the language of its proposed Rule would overcome otherwise applicable statutes of limitation. According to the government, this provision would also give federal courts permanent jurisdiction over the assets of a defendant such that the government could at any time seek substitute assets forfeiture. Notions of finality alone, much less a prudent consideration of the jurisdictional limitations on a federal court, would dictate that any such expansion of court forfeiture power be statutorily authorized before it is endorsed by Rule.

#### **Conclusion**

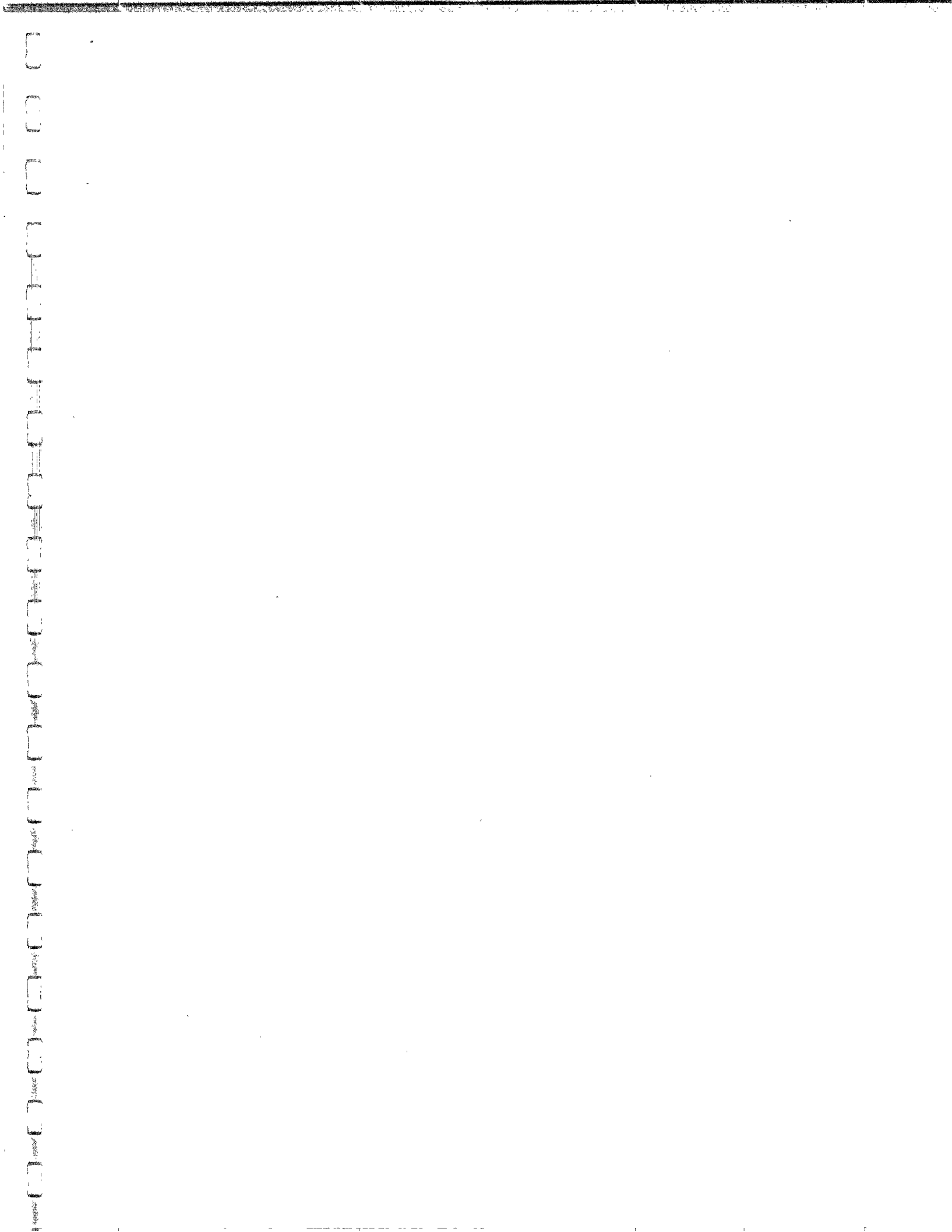
For the foregoing reasons, many of the Department's proposed rule changes are not warranted at this time. At a minimum, the Committee should be reluctant to adopt the proposed procedures which are at variance with existing statutory law. If the Committee desires any further comment on other proposed rule language, I would be happy to respond.

Yours truly,

A handwritten signature in cursive script, reading "Terrance G. Reed". The signature is written in dark ink and is positioned above the printed name.

Terrance G. Reed







12/9/96

FACSIMILE  
(703) 548-8935

ENGLISH & SMITH  
ATTORNEY AT LAW  
COURTHOUSE SQUARE  
526 KING STREET, SUITE 213  
ALEXANDRIA, VIRGINIA 22314

TELEPHONE  
(703) 548-8911

December 5, 1996

Secretary  
Committee on Rules of Practice and Procedure  
Administrative Office of the United States Courts  
Washington, DC 20544

Dear Mr. Secretary:

On November 28, 1996, John K. Rabiej wrote to me asking for my comments on the Justice Department's preliminary draft of a new Rule 32.2, which would govern criminal forfeiture proceedings. The following comments reflect my views. You should also consider these comments as an official response of the National Association of Criminal Defense Lawyers. (I am Co-Chair of NACDL's Forfeiture Abuse Task Force, which speaks for NACDL on forfeiture issues.)

This is not the first time NACDL has commented on the DOJ's still-evolving proposal. E.E. ("Bo") Edwards, Co-Chair of the Forfeiture Abuse Task Force, wrote to Judge Jensen to criticize an earlier, less radical version of the DOJ draft. NACDL still adheres to the position taken in that letter.

I. We opposed DOJ's earlier draft as an effort to limit the jury's role in determining the scope of a criminal forfeiture. Now, the DOJ proposes to *completely abolish* the right to have a jury decide on the criminal forfeiture aspect of the case. NACDL is, frankly, appalled by this proposal and will do its best to prevent it from becoming law. The DOJ must know that Congress would laugh at its proposal. DOJ is therefore trying to sneak it through this Committee without anyone noticing and without a democratic vote. We plan to let key congressmen and Senators know what's going on. We would urge you to consult with members of the House and Senate Judiciary Committees before adopting the DOJ's proposal to abolish the historic right to have a jury decide on criminal forfeiture. We doubt that many members of those committees would support the DOJ proposal, at least if they are informed of the arguments against it.

The DOJ has not offered a single, good reason for abolishing the jury trial right. Libretti v. United States, 116 S.Ct. 356 (1995) says nothing about the policy question presented here. It merely holds, *quite incorrectly*, that there is no constitutional right to a jury verdict in a criminal forfeiture case. This important issue was not among the questions presented in Libretti and the Court decided it in an off-hand, cavalier manner that completely ignored the ample historical evidence to the contrary presented in Libretti's brief.

The Court's unexplained conclusion that there is no constitutional right to a jury trial in a criminal forfeiture case occupies a mere paragraph or two in a lengthy opinion devoted to other issues. We have attached to this letter pertinent pages from Libretti's opening and reply briefs, which discuss the historic, common law right to a jury verdict in a criminal forfeiture case.<sup>1</sup> The United States' brief in Libretti contains nothing to the contrary. So before scrapping this precious right, the Committee ought to take a close look at the historical evidence -- the evidence the Supreme Court and the government shamelessly ignored.

The reason the government doesn't like jury trials is that juries sometimes refuse to forfeit homesteads or personal property out of sympathy for the defendant's family's plight. The government considers such displays of humanity an intolerable interference with its forfeiture program. But if the English Crown could tolerate such displays of humanity by English and colonial juries, so can the mighty United States Government in 1996.

The DOJ "Explanation of Rule 32.2" states at page 6: "Traditionally, juries do not have a role in sentencing other than in capital cases, and elimination of that role in criminal forfeiture cases would streamline criminal trials." This statement simply ignores all the historical evidence collected in the Libretti briefs. Moreover, six or seven states (including Virginia) allow juries to sentence defendants in all felony cases, not merely capital cases.

The DOJ does not explain how its proposal would "streamline" criminal trials. Does the DOJ assume that judges would not need to hear as much evidence as a jury to make the same factual determinations? Or is the DOJ proposing that the "hearing" conducted by the judge alone to determine what property is subject to forfeiture would be in the nature of a sentencing hearing rather than a bench trial? The language of proposed Rule 32.2(b) suggests that this is what DOJ has in mind. In other words, the defendant would not only be denied the right to a jury trial, *he would also be denied the right to a trial of any kind* on the issue of forfeiture! Instead, the government could establish its forfeiture case as it would any other

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<sup>1</sup> Libretti was very ably represented in the Supreme Court by Professor Sara S. Beale of Duke University School of Law, a distinguished scholar.



sentencing issue -- by affidavit, proffer or whatever. This is mind-boggling, to put it mildly.

The DOJ "Explanation of Rule 32.2" continues as follows: "Undoubtedly, it is confusing for a jury to be instructed regarding a different standard of proof in the second phase of the trial. . ." According to the DOJ, the government's burden of proof in a criminal forfeiture is merely preponderance of the evidence. That too is incorrect. The government's burden of proof in all federal criminal forfeiture cases is beyond a reasonable doubt. The government selectively cites several incorrectly decided cases to the contrary, all of which simply ignore Congress' clear intent to require proof beyond a reasonable doubt. Not only is the legislative intent clear; most cases have held that the burden of proof is beyond a reasonable doubt. *See e.g., United States v. Pelullo*, 14 F.3d 881, 902-06 (3d Cir. 1994); *United States v. \$814,254.76 in U.S. Currency*, 51 F.3d 207, 211 (9th Cir. 1995) (criminal forfeiture under 18 U.S.C. §982(a) requires proof beyond a reasonable doubt); *United States v. Pryba*, 674 F. Supp. 1518, 1520-21 (E.D.Va. 1987), *affirmed*, 900 F.2d 748 (4th Cir.), *cert. denied*, 498 U.S. 924 (1990) (beyond a reasonable doubt standard applies to RICO forfeitures); *United States v. Cauble*, 706 F.2d 1322, 1347 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984) (RICO). *See also* 18 U.S.C. §1467(c)(1) (requiring the government to meet the beyond-a-reasonable-doubt burden for criminal forfeitures in federal obscenity prosecutions); *Sullivan v. Louisiana*, 113 S.Ct. 2078, 2081 (1993) ("It is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. . . In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.").

In fact, before the government decided that it was in its interest to ignore the clear legislative history, the government conceded that the government's burden of proof under §853 is also beyond a reasonable doubt. *See United States v. Dunn*, 802 F.2d 646, 647 (2d Cir. 1986), *cert. denied*, 480 U.S. 931 (1987) (agreeing with government's position that burden of proof is beyond a reasonable doubt). The Senate report on the 1984 legislation which included §853 repeatedly demonstrates Congress' understanding that the government's overall burden of proof under §853, as well as under the amended RICO forfeiture provisions, would remain beyond a reasonable doubt. *United States v. Elgersma*, 929 F.2d at 1547-48 (discussing legislative history). *See also* H.R.Rep. No. 845, 98th Cong., 2d Sess. 18, 38 (1984) (adopting the Justice Department's request for language that criminal forfeiture must be established by proof beyond a reasonable doubt in both the RICO and the §853 statutes).

It is improper for the Executive Branch to not only ignore Congress' intent and pertinent case law, but to attempt to overrule Congress by larding its "Explanation of Rule 32.2" with misleading statements about the burden of proof. If Congress wants to lower the burden of proof to preponderance of the evidence it can do so. That would be extremely odd since

Chairman Henry J. Hyde's bill to reform civil asset forfeiture would *raise* the burden of proof for *civil* forfeiture to clear and convincing evidence. Surely, Congress doesn't want a lower burden in a criminal forfeiture than in a civil forfeiture.

The DOJ's second "problem" with the current Rule 31(e) is the scope of the determination that must be made prior to entering an order of forfeiture. Its position on this point is also specious. The plain language of Rule 31(e), which accurately reflects the historic, common law jury's role, requires the jury to determine "the extent of the interest or property subject to forfeiture, if any." United States v. Ham, 58 F.3d 78 (4th Cir. 1995) is correct and the DOJ cites nothing to the contrary. The present Rule is "an unnecessary anachronism" in DOJ's view because the court sitting without a jury can determine the extent of the defendant's interest in the property during the ancillary hearing. This merely reflects the DOJ's devaluation of the right to a jury trial. Moreover, where no third party files a claim, the DOJ would automatically forfeit the property in its entirety, without a determination by jury *or* judge that any of the property belongs to the defendant. As we argued in Mr. Edward's letter to Judge Jensen, this proposal would invite abuse and further curtail the rights of innocent third parties with an interest in the allegedly forfeitable property.

II. Proposed Rule 32.2(a) tracks current Rule 7(c)(2). Although the courts have generally held that Rule 7(c)(2) does not require the indictment or information to itemize the property alleged to be subject to forfeiture, we think the plain language of Rule 7(c)(2) does require that and the amended Rule ought to require it. Otherwise, the grand jury cannot serve as a check on the prosecutor's power to restrain or seize property without probable cause. The criminal forfeiture statutes authorize the government to restrain or seize property upon the return of an indictment alleging that specific property is subject to forfeiture. The *only* check on the prosecutor's already awesome power to seize or restrain a defendant's assets when he is most in need of them to defend himself or to support his family is the grand jury. The DOJ is asking Congress to vastly expand its criminal forfeiture powers and to allow it to restrain or seize substitute (*i.e.*, untainted) assets, again based solely on the return of an indictment against the defendant alleging forfeiture. Although the requirement that the grand jury pass on each item of property allegedly subject to forfeiture is a totally inadequate safeguard for property rights, it is the *only* safeguard in the current statutory scheme. That is why the DOJ wants to abolish it and why we are opposed to the DOJ's plan. Rather, the Committee should clarify that, despite judicial decisions to the contrary, *only* property specifically named in the indictment may be forfeited.<sup>2</sup>

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<sup>2</sup> It may be justifiable to have a different rule for substitute assets, at least where the need for substitution is not apparent until it is no longer practical to obtain a superseding

III. The remainder of the DOJ proposal is not objectionable. It is also not particularly important. I would suggest the following minor changes.

Proposed Rule 32.2(d)(2) gives the court discretion to permit discovery in accordance with the civil rules. The right to a fair proceeding should not be discretionary. I would change the pertinent words to read "the court shall permit the parties to conduct discovery in accordance with the Federal Rules of Civil Procedure where such discovery is necessary or desirable to resolve factual issues. . ."

Proposed Rule 32.2(f) should safeguard the defendant's and interested third parties' rights to be heard on the question of forfeiting substitute property. I suggest adding the following at the end of subparagraph (f): "Unless the motion for substitution of property is uncontested, the court shall conduct an evidentiary hearing to resolve any genuine issue of material fact. All persons who have an interest in the property to be substituted shall receive notice from the government and have an opportunity to be heard on the propriety of the proposed forfeiture of substitute property." Under the DOJ draft it appears that the prosecutor could seek an order forfeiting substitute property based on an *ex parte* showing.

I hope you find these comments helpful. Please keep me informed of the progress of the DOJ proposal. This is vitally important to the NACDL. We would like to comment on future drafts as well.

Sincerely,



David B. Smith

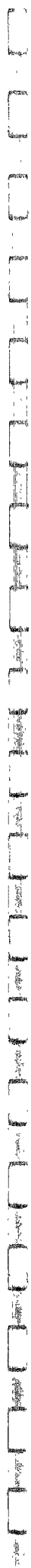
DBS/kpm

cc: Leslie Hagin, Legislative Director  
NACDL  
E.E. ("Bo") Edwards  
Richard J. Troberman  
Professor Sara S. Beale  
Terrence Reed

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indictment.





הנהגת הרכב

No. 94-7427

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In The  
**Supreme Court of the United States**  
October Term, 1995

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JOSEPH V. LIBRETTI, JR.,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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On Writ Of Certiorari  
To The United States Court Of Appeals  
For The Tenth Circuit

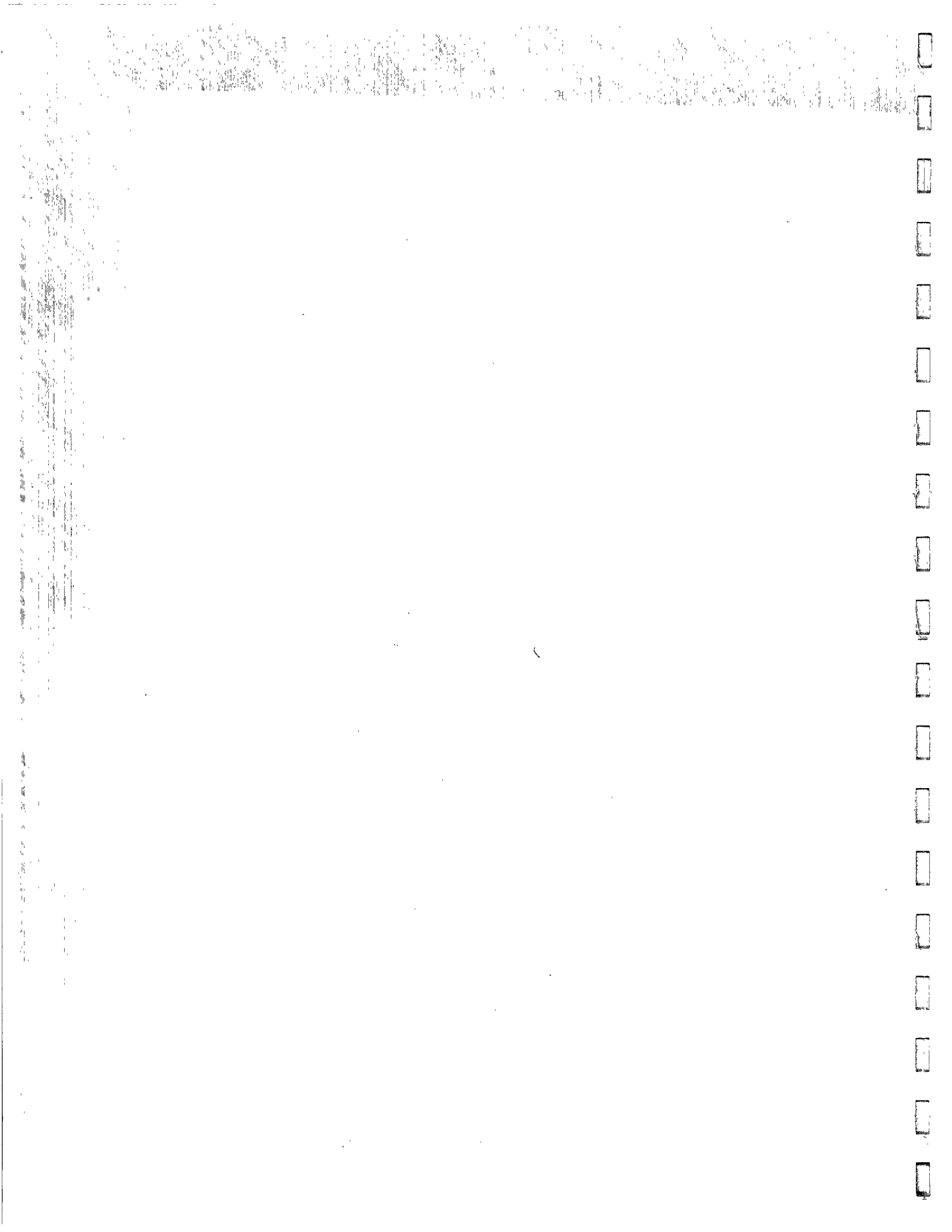
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**BRIEF FOR THE PETITIONER**

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*Of Counsel:*  
PAUL K. SUN, JR.  
SMITH HELMS MULLISS  
& MOORE, L.L.P.  
316 West Edenton Street  
Post Office Box 27525  
Raleigh, North Carolina  
27611  
Telephone: 919-755-8720

SARA SUN BEALE  
(Appointed by this Court)  
*Counsel of Record*  
Duke University School  
of Law  
Science Drive & Towerview  
Road  
Post Office Box 90360  
Durham, North Carolina  
27708-0360  
Telephone: 919-613-7091  
*Counsel for Petitioner*





guilty plea nor his plea agreement expressly relinquished that right.

**A. At Common Law the Issue of Criminal Forfeiture Was Submitted to the Jury.**

Common law juries in both England and the American colonies made findings on criminal forfeiture. Reference works used by English judges and court personnel during the seventeenth and eighteenth centuries record the standard charge to the jury on the issue of forfeiture. For example, in 1799 *The Crown Circuit Companion* instructed that once the jury had finished deliberating, the clerk should advise them as follows:

*Look upon the prisoner; you that are sworn, what say you, is he guilty of the felony whereof he stands indicted, or not guilty? If they say Guilty, then the clerk asks them, What lands or tenements, goods or chattels, he (the prisoner) had at the time of the felony committed, or any time since?*

Thomas Dogherty, *The Crown Circuit Companion* 21-22 (1799) (emphasis in original). This charge was little changed from the charge recommended more than a century earlier in *The Office of the Clerk of Assize and The Office of the Clerk of the Peace* 71-72 (1676) (microformed in Wing, *Early English Books*, 1641-1700, reel 829).

In his *History of the Pleas of the Crown*, Sir Matthew Hale reports:

The usage was always upon a presentment of homicide before the coroner, or of flight for the same, or upon a conviction of felony by the petit jury, or the finding of a flight for the same, to charge the inquest or jury to enquire, what goods and chattels he hath, and where they are . . . .

1 Matthew Hale, *History of the Pleas of the Crown* 363 (1778 ed.). Similarly, in describing what property was subject to forfeiture, William Hawkins reported that the question whether a trust created by the accused was forfeitable "is to be left to a Jury on the whole Circumstances of the Case, and

shall never be presumed by the Court where it is not expressly found." 2 William Hawkins, *Pleas of the Crown 1716-21* 450 (1721 ed.).

The English authorities also suggest that the harsh remedy of forfeiture was not popular with juries, and efforts to nullify forfeiture by a verdict finding no property were common. See *The Crown Circuit Companion*, *supra* p. 42, at 22 (jury commonly found no property); *The Office of the Clerk of the Assize and The Office of the Clerk of the Peace*, *supra* p. 42, at 72 (same); cf. 4 William Blackstone, *Commentaries* \*387 (reprinted Dennis & Co. 1965) (St. George Tucker ed., Phila. 1803) (juries would seldom find flight because forfeiture was viewed as too severe a penalty for that offense).

Although the colonial record is sparse, there is evidence that the common law practice of submitting the issue of forfeiture to the jury was followed in the American colonies, and that colonial juries on occasion employed this authority to prevent unjust forfeitures. Juries in colonial New York heard the prosecutions arising out of the Leisler Rebellion and returned verdicts finding no forfeitable lands, tenements, or chattels for any of those convicted, though forfeitable properties were subsequently identified by a writ of enquiry. Julius Goebel & T. Raymond Naughton, *Law Enforcement in Colonial New York* 713 (1944). In fact, colonial juries in New York "almost invariably reported no lands, tenements, or chattels upon conviction." *Id.* at 715. This was true even in the case of a merchant who was not without means. *Id.* It appears that juries were reluctant to "cast upon the county the support of a convict's wife and family." *Id.* at 717. The New York colonial records also reveal at least one instance where officials brought baseless treason charges to raise revenue by forfeiture.<sup>33</sup>

33. Goebel and Naughton report Lord Cornbury's charge that the treason prosecution of Bayard and Hutchins was brought "in order that the debts of the Province might be satisfied from the forfeitures." Julius Goebel & T. Raymond Naughton, *supra*, at 714. The Order in Council reversed the sentences and subsequent acts of assembly restored the defendants' property. *Id.*

Criminal forfeitures were rare in this country during the first 180 years after adoption of the federal constitution, but there is evidence that the common law practice of trying criminal forfeiture to the jury carried forward into state law. Sitting as circuit justice and applying the Rhode Island constitution, Justice Curtis concluded that in a criminal forfeiture prosecution

the owner would be entitled to a trial by jury, and to have the accusation, relied upon to work the forfeiture, set forth substantially, in accordance with the rule of the common law, so that he could discern its nature and cause.

*Greene v. Briggs*, 10 F. Cas. 1135, 1142 (C.C. D. R.I. 1852) (No. 5,764).

**B. The Sixth Amendment Incorporates the Common Law Right to a Jury Determination of the Property Subject to Criminal Forfeiture.**

The purpose of the right to trial by jury is "to prevent oppression by the Government" and to provide a "safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968) (footnote omitted). As developed more fully at pp. 27-29, *supra*, the potential for raising enormous revenues by forfeiture naturally gives rise to a danger of governmental overreaching. Historically the jury has served as a safeguard against such governmental oppression.

The standard for determining when a jury trial is required is the common law. As Justice Powell observed, "[t]he reasoning that runs throughout this Court's Sixth Amendment precedents is that, in amending the Constitution to guarantee the right to jury trial, the framers desired to preserve the jury safeguard as it was known to them at common law." *Johnson v. Louisiana*, 406 U.S. 366, 370-71 (1972) (Powell, J., dissenting in Nos. 69-5035 and 69-5046) (footnote omitted). While some of this Court's opinions have departed from the common law precedents in defining the characteristics of trial

by jury,<sup>34</sup> this Court the Sixth Amendment that safeguard would

The historical re the determination of ture was submitted t colonies, and that ju important check on determination of the nal forfeiture should prosecution for pur guarantees the right tions." U.S. Const.,

**C. Rule 31(e) Requiring and Extension of Forfeiture.**

The Sixth Amendment criminal forfeiture i which requires a sp interest or property; verdict provisions a Notes of the Advis ment. Indeed, forfe Federal Rules of Cr As described more 31(e) and compani the common law tr notice, trial, and a which the Rules tr

<sup>34</sup> See, e.g., *Willard* evidence that framers me characteristics of the jury." Sixt

by jury,<sup>34</sup> this Court has not retreated from the principle that the Sixth Amendment guarantees a jury trial in cases where that safeguard would have been available at common law.

The historical record discussed above makes it clear that the determination of the property subject to criminal forfeiture was submitted to the jury in England and the American colonies, and that jury verdicts finding no property placed an important check on government authority. Accordingly, the determination of the property, if any, that is subject to criminal forfeiture should be recognized to be a part of the criminal prosecution for purposes of the Sixth Amendment, which guarantees the right to a jury trial "in all criminal prosecutions." U.S. Const., amend. VI.

**C. Rule 31(e) Supplements the Sixth Amendment By Requiring a Special Jury Verdict on the Nature and Extent of Property Subject to Criminal Forfeiture.**

The Sixth Amendment right to a jury determination of criminal forfeiture is supplemented by Fed. R. Crim. P. 31(e), which requires a special jury verdict on "the extent of the interest or property subject to forfeiture, if any." Special verdict provisions are rare in criminal cases. 18 U.S.C. App., Notes of the Advisory Committee on Rules - 1972 Amendment. Indeed, forfeiture is the only matter on which the Federal Rules of Criminal Procedure require a special verdict. As described more fully above, *see supra* pp. 15-21, Rule 31(e) and companion amendments to Rules 7 and 32 reflect the common law tradition that a defendant had the right to notice, trial, and a special jury finding on criminal forfeiture, which the Rules treat as an element of criminal liability.

<sup>34</sup> See, e.g., *Williams v. Florida*, 399 U.S. 78, 99 (1970) (since there is no evidence that framers meant to "equate the constitutional and common-law characteristics of the jury," Sixth Amendment does not require jury unanimity).

No. 94-7427

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In The  
**Supreme Court of the United States**  
October Term, 1995

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JOSEPH V. LIBRETTI, JR.,  
*Petitioner,*  
vs.

UNITED STATES OF AMERICA,  
*Respondent.*

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On Writ Of Certiorari To The United States  
Court Of Appeals For The Tenth Circuit

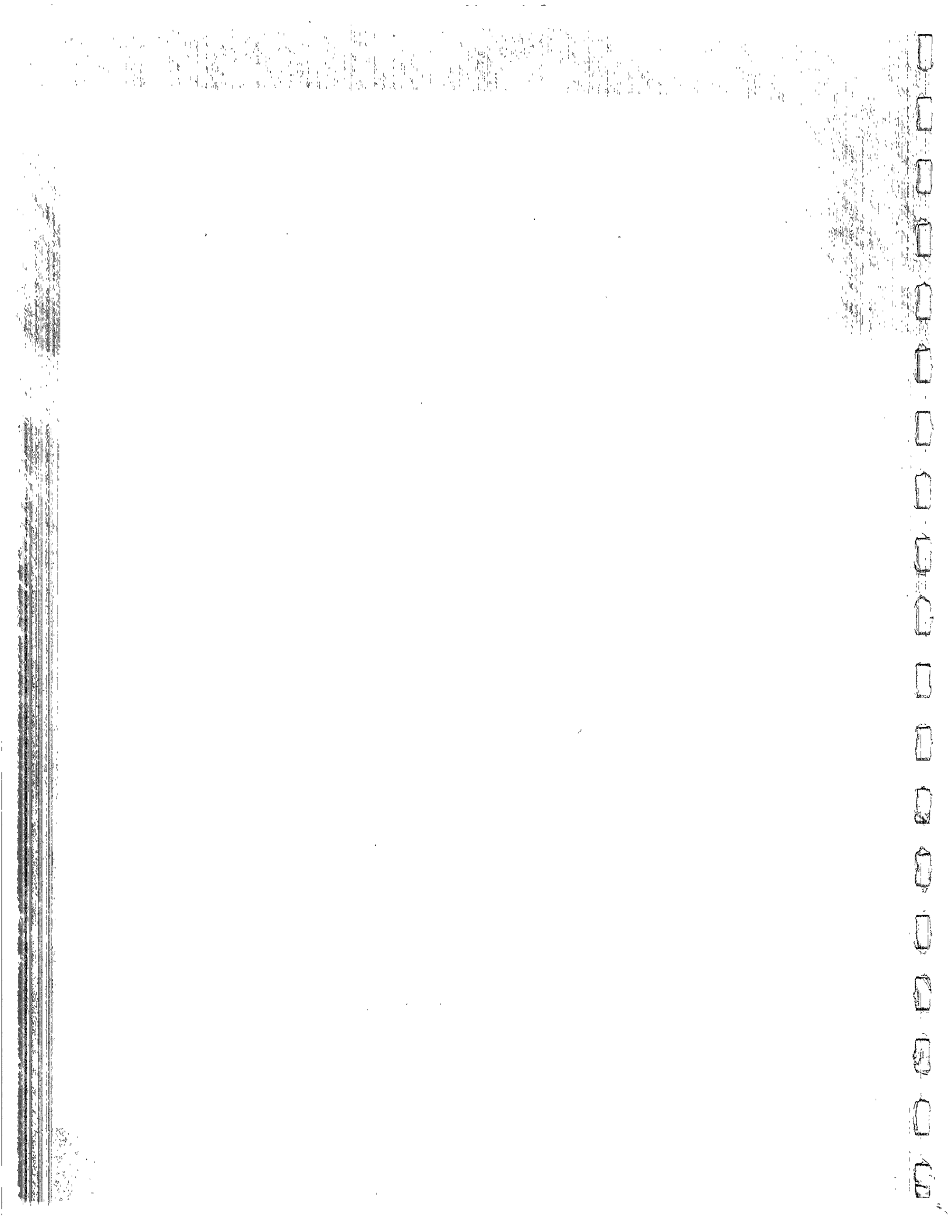
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REPLY BRIEF FOR THE PETITIONER

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*Of Counsel:*  
PAUL K. SUN, JR.  
SMITH HELMS MULLISS &  
MOORE, L.L.P.  
316 West Edenton Street  
Post Office Box 27525  
Raleigh, North Carolina  
27611  
Telephone: 919-755-8720

SARA SUN BEALE  
(Appointed by this Court)  
*Counsel of Record*  
Duke University School of  
Law  
Science Drive &  
Towerview Road  
Post Office Box 90360  
Durham, North Carolina  
27708-0360  
Telephone: 919-613-7091  
*Counsel for Petitioner*



## II. THE RIGHT TO A JURY DETERMINATION OF CRIMINAL FORFEITURE CAN BE EXTINGUISHED ONLY BY A KNOWING AND INTELLIGENT WAIVER

1. Petitioner's opening brief demonstrates the uniform English and colonial practice of submitting the issue of criminal forfeiture to the jury, and that this historic practice is embraced in the Sixth Amendment. Pet. Br. 42-44. The government seeks to minimize the importance of the historic record, arguing (U.S. Br. 40) that the jury's "limited role was to determine what assets the defendant owned," and that this "modest function" was not deemed a fundamental right of the defendant. The only authority the government cites in support of this argument is a brief passage in a student note.<sup>5</sup> Neither this note nor the government's brief responds to the evidence (Pet. Br. 43) that English and colonial juries frequently found that the accused owned no property despite their knowledge of such property. This evidence demonstrates that in criminal forfeiture cases the jury served its constitutional function of checking government oppression and abuse.<sup>6</sup>

<sup>5</sup> The only authority the note cites in support of this position is Julius Goebel and T. Raymond Naughton, *Law Enforcement in Colonial New York* (1944). Goebel and Naughton speculated that the requirement of a jury finding of the offender's forfeitable property "was possibly intended to simplify the settlement of Crown rights." *Id.* at 711 (emphasis added). They cited no authority in support of this passing comment.

<sup>6</sup> The jury's power to temper the law with its own sense of fairness and justice is an important feature of our constitutional system, with deep roots in English and colonial history. One of the earliest reported examples is *Bushell's Case*, 124 Eng. Rep. 1006 (1670), named after the foreman of the jury that was fined and held in contempt after it acquitted William Penn and William Meade. The court granted Bushell's habeas corpus petition, accepting his contention that jurors could not lawfully be detained merely because their verdict was unacceptable to the

Even if the government could produce some evidence that the jury once served only as a device to facilitate forfeiture by identifying properties to be seized, the metamorphosis of the jury in forfeiture cases would merely parallel its development in other contexts. For example, the original purposes of the grand jury "were to increase the number of criminal prosecutions, to enhance the king's authority, and indirectly to raise revenue for the Crown, which received the property forfeited by persons convicted of crimes." Sara S. Beale and William C. Bryson, *Grand Jury Law and Practice* § 1:02, at 5 (1984) (endnotes omitted).<sup>7</sup> The grand jury's eventual development into an independent institution that won praise as an important safeguard of individual liberty demonstrates that such a lay body, once constituted, may take on functions not originally foreseen.

The ability to resist government oppression is the hallmark of the jury and a primary justification for the jury clause of the Sixth Amendment and the grand jury clause of the Fifth Amendment. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968) (jury a safeguard against corrupt or overzealous prosecutor and complacent or biased judge); *Wood v. Georgia*, 370 U.S. 375, 390 (1962)

trial judge. Other well known examples of jury independence during the colonial period were the acquittals of John Peter Zenger (who was represented by Alexander Hamilton) and of the defendants charged in connection with the Boston Tea Party. For a general discussion of jury nullification, see Jack B. Weinstein, *Considering Jury "Nullification": When May and Should a Jury Reject the Law to Do Justice*, 30 Am. Crim. L. Rev. 239 (1993).

<sup>7</sup> Indeed, some scholars trace the heritage of both the grand and petit jury back to a jury-like body employed by William the Conqueror to compile the Domesday Book, which listed all landowners and showed the value and extent of their holdings. I Frederick Pollack and Frederick Maitland, *The History of English Law* 143 (2d ed. 1923). This appears to be a close corollary of the function attributed by the government to the jury in forfeiture cases.

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(grand jury a primary security against hasty, malicious, and oppressive prosecutions). By refusing to identify forfeitable property, common law juries performed this function, and this common law heritage shows that the right to have a jury determine criminal forfeiture is an aspect of the Sixth Amendment right to trial by jury.<sup>8</sup> Cf. *Greene v. Briggs*, 10 F. Cas. 1135, 1142 (C.C.D.R.I. 1852) (No. 5,674) (trial by jury required under state constitution if statute permits criminal forfeiture).

2. The Framers intended to preserve the jury as it existed at common law (Pet. Br. 44-45), where it served as an important safeguard in forfeiture cases. The American colonists recognized the importance of requiring a jury

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<sup>8</sup> The government suggests (U.S. Br. 21 n. 8) that recognition of a Sixth Amendment right to a jury trial of criminal forfeiture would necessarily require that forfeitability be established beyond a reasonable doubt. Yet the decisions cited by the government, *Sullivan v. Louisiana*, 113 S. Ct. 2078 (1993), and *United States v. Gaudin*, 115 S. Ct. 2310 (1995), had no occasion to address whether forfeiture might be an exception to the general rule that the jury verdict required by the Sixth Amendment is a verdict beyond a reasonable doubt. In any event, recognition of a requirement of proof beyond a reasonable doubt in criminal forfeiture proceedings would impose no undue burden on the government. RICO forfeitures presently require proof beyond a reasonable doubt. E.g., *United States v. Pelullo*, 14 F.3d 881, 901-06 (3d Cir. 1994). CCE forfeitures were originally subject to the requirement of proof beyond a reasonable doubt, though several courts have concluded that legislation enacted in 1984 reduced the government's burden to a preponderance. For a discussion of these cases and an argument that Section 853 did not alter the burden of proof, see 2 David B. Smith, *Prosecution and Defense of Forfeiture Cases* ¶ 14.03 (1992) (since Congress rejected earlier bill to lower burden of proof for criminal forfeiture and enacted other explicit provisions regarding burden of proof, courts have erred in assuming that Congress altered overall burden of proof for criminal forfeiture without any express statutory language or reference to this action in the legislative history).

trial in cases that might lead to civil forfeiture. Parliament extended the jurisdiction of the admiralty courts to cases involving seizures under the trade and navigation acts in response to the nullification of these laws by local juries, and this extension of admiralty jurisdiction led to "vigorous protests in America." 5 J. Moore, *Federal Practice* ¶ 38.35[2] (2d ed. 1995); see Carl Ubbelohde, *The Vice-Admiralty Courts and the American Revolution* 16 (1960) (most common sanction for violation of trade laws was forfeiture of ships and cargoes). One of the chief complaints of the First Continental Congress was English revenue statutes that "subvert[ed] . . . the right of trial by jury, by substituting in their place trials in Admiralty and Vice-Admiralty courts, where single Judges preside, holding their Commissions during pleasure." 1 Jour. Cong. 93 (Oct. 21, 1774) (message to the inhabitants of the British colonies); see also *Jackson v. The Steamboat Magnolia*, 61 U.S. (20 How.) 296, 322, 331 (1857) (Campbell, J., dissenting) (one of the reasons colonists took up arms was their opposition to "the enlarged authority of [admiralty] courts, their interference with the common law right of trial by jury, and their offensive use of the laws and course of proceeding adopted from Roman tyrants").

The government has advanced no reason to believe that the colonists who protested the absence of a jury in forfeiture proceedings before the admiralty courts would have agreed with the suggestion (U.S. Br. 40) that the right to have criminal forfeiture determined by a jury is not of constitutional importance. There is no merit to the government's suggestion (U.S. Br. 39-40 & n. 15) that the jury's role was constitutionally insignificant because criminal forfeiture was mandatory rather than discretionary. Civil forfeiture also was mandatory. The jury's function was the same in civil and criminal forfeiture cases, and the Framers' actions indicate their understanding that this function was of constitutional magnitude. Cf. *United States v. The Betsey and Charlotte*, 8 U.S. (4 Cranch)

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443, 446 n. 1 (1808) (admiralty jurisdiction protected governmental revenues, avoiding "great danger" of "caprice of juries").

3. The decisions holding that the Sixth Amendment does not require the jury to impose the death sentence (U.S. Br. 39-41) have no bearing on this case. The death penalty cases demonstrate only that the contours of the right guaranteed by the Sixth Amendment are determined by history rather than contemporary usage. The statutes giving the jury sentencing authority in death penalty cases are of relatively recent origin. The first statute providing for jury discretion in capital murder cases was enacted by Tennessee in 1838. American Law Institute, *Model Penal Code and Commentaries* § 210.6 commentary, at 129 (1980). Prior to that time, death was the exclusive and mandatory penalty for many crimes. *Id.* The mandatory nature of the death penalty was qualified by the sentencing judge's authority to reprieve the defendant and recommend that he be pardoned. See J.M. Beat- tie, *Crime and the Courts in England 1660-1800* 409, 420 (1986). Since the jury had no similar discretion, it could shield defendants from the death penalty only by finding them not guilty or guilty only of a lesser offense. See *id.* at 406, 408, 419-21.

Accordingly, the death penalty decisions cited by the government do no more than keep the Sixth Amendment within its historic boundaries. The same analysis applies to *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), since there is no historic precedent for requiring the jury to find facts that determine the sentence to be imposed within the range provided for by the offense. *McMillan* and the death penalty cases have no bearing where, as here, the common law required submission of the matter in question to the jury.

4. If this Court concludes that the Sixth Amendment does not protect the right to a jury trial on forfeiture, the government argues (U.S. Br. 44-49) that the right to a special jury verdict under Rule 31(e) is no different than a myriad of other rights that are extinguished by a guilty



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

**FROM: Professor Dave Schlueter, Reporter**

**RE: Technical Amendment to Rule 54(a)**

**DATE: March 4, 1997**

As noted in Mr. Pauley's attached letter, Rule 54(a) should be amended to delete the reference to the Canal Zone court. I am attaching a copy of that rule, with proposed change.











U. S. Department of Justice  
*Criminal Division*

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Washington, D.C. 20530

October 25, 1996

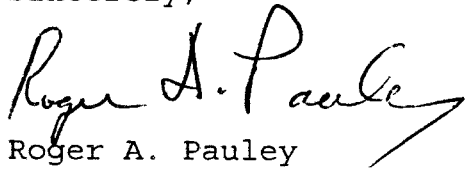
Professor David A. Schlueter  
St. Mary's University of San Antonio  
School of Law  
One Camino Santa Maria  
San Antonio, Texas 78284

Dear David:

I write to bring to your attention two technical matters that I believe the Advisory Committee should take care of at some point. One is found in Rule 11, which the Committee will be considering in any event at its next meeting. Rule 11(a)(1) states, in part, that if "a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty." (emphasis supplied) It seems clear that the term "corporation" is too narrow and that the Rule properly applies to any "organization, as defined in 18 U.S.C. 18, that may fail to appear, including partnerships unions, and other legal entities. You may recall that the Committee recently addressed the same problem in two other Rules that improperly used "corporation" when "organization" was the appropriate term. See Rules 16(a)(1) and 43(c)(1).

The other technical matter concerns the Canal Zone. The reference in Rule 54(a) to the United States District Court for the Canal Zone is obsolete. That court has not existed for more than a decade.

Sincerely,

  
Roger A. Pauley







### **Rule 54. Application and Exception**

1           (a) COURTS. These rules apply to all criminal proceedings in the United States  
2     District Courts; in the District of Guam; in the District Court for the Northern Mariana  
3     Islands, except as otherwise provided in articles IV and V of the covenant provided by the  
4     Act of March 24, 1976 (90 Stat. 263); in the District Court of the Virgin Islands; ~~and~~  
5     ~~(except as otherwise provided in the Canal Zone) in the United States District Court for~~  
6     ~~the District of the Canal Zone~~; in the United States Courts of Appeals; and in the Supreme  
7     Court of the United States; except that the prosecution of offenses in the District Court of  
8     the Virgin Islands shall be by indictment or information as otherwise provided by law.

### **COMMITTEE NOTE**

      The amendment to Rule 54(a) is a technical amendment removing the reference to the court in the Canal Zone, which no longer exists.





LEONIDAS RALPH MECHAM  
Director

ADMINISTRATIVE OFFICE OF THE  
UNITED STATES COURTS

CLARENCE A. LEE, JR.  
Associate Director

WASHINGTON, D.C. 20544

JOHN K. RABIEJ  
Chief  
Rules Committee Support Office

February 20, 1997  
*Via Facsimile*

MEMORANDUM TO JUDGES JENSEN AND SMITH

SUBJECT: *Forfeiture Proceedings in Comprehensive Crime Act*

I am attaching section 314 of the Omnibus Crime Control Act of 1997 (S. 3), which creates a federal offense prohibiting chemical weapons. A major part of the section sets up an elaborate criminal forfeiture process. In the past, we have not commented on legislative bills that set up separate forfeiture proceedings for distinct offenses. But you may wish to consider commenting on it for this bill.

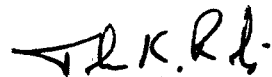
First, the bill could be used as precedent for future expansion regarding other offenses which may be at odds with proposals under the Criminal Rules Committee's consideration. For example, a third party has no right to a jury for claims to the forfeitable property in this bill. In addition, if a rule amendment, which sets up a uniform criminal forfeiture proceeding, is proposed by the Criminal Rules Committee, we would have to consider whether it supersedes section 314. In the event, it may be wise to alert Congress to this possibility.

Section 314 also exempts the forfeiture proceedings from the Federal Rules of Evidence and directly amends Rule 1101(d)(3). The Evidence Rules Committee had considered, but deferred, explicitly extending the evidence rules to forfeiture proceedings.

The agency is considering its response to Congress on the many judiciary-related provisions contained in the bill, including the rules-related provisions. We are still exploring whether a single comprehensive letter from Judge Kazen, chair of the Criminal Law Committee, or individual letters from the Conference committees should be sent to the Hill. Hearings and serious consideration of this bill will not

occur sooner than the summer. But we may want to present our position early in the game.

I am also sending to you section 602, which amends Criminal Rule 35(b). It is virtually identical to section 821 in the same bill. Apparently Congress really wants this one.

A handwritten signature in black ink, appearing to read "J.K. Rabiej". The signature is stylized with a large, sweeping initial "J" and a distinct "K".

John K. Rabiej

Attachment

cc: Honorable Alicemarie H. Stotler  
Professor David A. Schlueter  
Professor Daniel J. Capra  
Professor Daniel R. Coquillette



1           “(3) DEATH.—Whoever engages in conduct  
2 prohibited by this subsection, and as a result of such  
3 conduct directly or proximately causes the death of  
4 any person, including any public safety officer performing  
5 duties, shall be subject to the death penalty,  
6 or imprisoned for not less than 20 years or for life,  
7 fined under this title, or both.”.

8 **SEC. 314. CHEMICAL WEAPONS RESTRICTIONS.**

9           (a) IN GENERAL.—Section 2332c of title 18, United  
10 States Code, is amended—

11               (1) in subsection (a), by inserting after paragraph  
12 (2) the following:

13               “(3) RESTRICTIONS.—

14                       “(A) IN GENERAL.—Whoever without lawful  
15 authority knowingly develops, produces, acquires, stockpiles,  
16 retains, transfers, owns, or possesses any chemical weapon,  
17 or knowingly assists, encourages or induces any person to do  
18 so, or attempts or conspires to do so, shall be  
19 punished under paragraph (2).  
20

21                       “(B) JURISDICTION.—The United States  
22 has jurisdiction over an offense under this paragraph if—  
23

24                               “(i) the prohibited activity takes place  
25 in the United States; or

1           “(ii) the prohibited activity takes  
2           place outside the United States and is  
3           committed by a national of the United  
4           States.

5           “(C) ADDITIONAL PENALTY.—The court  
6           shall order any person convicted of an offense  
7           under this paragraph to pay to the United  
8           States any expenses incurred incident to the  
9           seizure, storage, handling, transportation, and  
10          destruction or other disposition of property  
11          seized for violation of this section.”;

12          (2) by adding at the end the following:

13          “(c) CRIMINAL FORFEITURE.—

14               “(1) PROPERTY SUBJECT TO CRIMINAL FOR-  
15          FEITURE.—A person who is convicted of an offense  
16          under this section shall forfeit to the United States  
17          the interest of that person in—

18               “(A) any chemical weapon, including any  
19          component thereof;

20               “(B) any property, real or personal, con-  
21          stituting or traceable to gross profits or other  
22          proceeds obtained from such offense; and

23               “(C) any property, real or personal, used  
24          or intended to be used to commit or to promote  
25          the commission of the offense.

1           “(2) THIRD PARTY TRANSFERS.—

2                   “(A) IN GENERAL.—All right, title, and in-  
3           terest in property described in subsection (a) of  
4           this section vests in the United States upon the  
5           commission of the act giving rise to forfeiture  
6           under this section.

7                   “(B) FORFEITURE.—Except as provided in  
8           subparagraph (C), any property referred to in  
9           subparagraph (A) that is subsequently trans-  
10          ferred to a person other than the defendant  
11          may be the subject of a special verdict of for-  
12          feiture and thereafter shall be ordered forfeited  
13          to the United States.

14                  “(C) EXCEPTION.—The property referred  
15          to in subparagraph (B) shall not be ordered for-  
16          feited if the transferee establishes in a hearing  
17          conducted pursuant to subsection (l) that the  
18          party is a bona fide purchaser for value of such  
19          property who, at the time of purchase, was rea-  
20          sonably without cause to believe that the prop-  
21          erty was subject to forfeiture under this section.

22           “(3) PROTECTIVE ORDERS.—

23                   “(A) IN GENERAL.—Upon application of  
24          the United States, the court may enter a re-  
25          straining order or injunction, require the execu-

1           tion of a satisfactory performance bond, or take  
2           any other action to preserve the availability of  
3           property described in subsection (a) for forfeit-  
4           ure under this section—

5                 “(i) upon the filing of an indictment  
6                 or information—

7                         “(I) charging a violation of this  
8                         chapter for which criminal forfeiture  
9                         may be ordered under this section;  
10                        and

11                       “(II) alleging that the property  
12                       with respect to which the order is  
13                       sought would, in the event of convic-  
14                       tion, be subject to forfeiture under  
15                       this section; or

16                       “(ii) prior to the filing of an indict-  
17                       ment or information referred to in clause  
18                       (i), if, after providing notice to persons ap-  
19                       pearing to have an interest in the property  
20                       and opportunity for a hearing, the court  
21                       determines that—

22                       “(I) there is a substantial prob-  
23                       ability that the United States will pre-  
24                       vail on the issue of forfeiture and that  
25                       failure to enter the order will result in

1 the property being destroyed, removed  
2 from the jurisdiction of the court, or  
3 otherwise made unavailable for forfeit-  
4 ure; and

5 “(II) the need to preserve the  
6 availability of the property through  
7 the entry of the requested order out-  
8 weighs the hardship on any party  
9 against whom the order is to be en-  
10 tered;

11 except that an order entered pursuant to  
12 subparagraph (B) shall be effective for a  
13 period not to exceed 90 days, unless ex-  
14 tended by the court for good cause shown  
15 or unless an indictment or information de-  
16 scribed in this subparagraph has been  
17 filed.

18 “(B) TEMPORARY RESTRAINING OR-  
19 DERS.—

20 “(i) IN GENERAL.—A temporary re-  
21 straining order under this subsection may  
22 be entered upon application of the United  
23 States without notice or opportunity for a  
24 hearing when an information or indictment  
25 has not yet been filed with respect to the

1 property, if the United States dem-  
2 onstrates that there is probable cause to  
3 believe that—

4 “(I) the property with respect to  
5 which the order is sought would, in  
6 the event of conviction, be subject to  
7 forfeiture under this section; and

8 “(II)(aa) exigent circumstances  
9 exist that place the life or health of  
10 any person in danger; or

11 “(bb) that provision of notice will  
12 jeopardize the availability of the prop-  
13 erty for forfeiture.

14 “(ii) EXPIRATION.—A temporary re-  
15 straining order described in clause (i) shall  
16 expire not later than 10 days after the  
17 date on which the order is entered, un-  
18 less—

19 “(I) the order is extended for  
20 good cause shown; or

21 “(II) the party against whom it  
22 is entered consents to an extension for  
23 a longer period.

24 “(iii) HEARING.—A hearing requested  
25 concerning an order entered under this

1 paragraph shall be held at the earliest possible time and prior to the expiration of  
2 the temporary order.  
3

4 “(C) INAPPLICABILITY OF FEDERAL  
5 RULES OF EVIDENCE.—The court may receive  
6 and consider, at a hearing held pursuant to this  
7 paragraph, evidence and information that would  
8 otherwise be inadmissible under the Federal  
9 Rules of Evidence.

10 “(d) WARRANT OF SEIZURE.—

11 “(1) IN GENERAL.—The Government of the  
12 United States may request the issuance of a warrant  
13 authorizing the seizure of property subject to forfeiture  
14 under this section in the same manner as provided  
15 for a search warrant.

16 “(2) DETERMINATIONS BY COURT.—The court  
17 shall issue a warrant authorizing the seizure of the  
18 property referred to in paragraph (1) if the court determines  
19 that there is probable cause to believe  
20 that—

21 “(A) the property to be seized would, in  
22 the event of conviction, be subject to forfeiture;  
23 and

1           “(B) an order under subsection (c) may  
2           not be sufficient to ensure the availability of the  
3           property for forfeiture.

4           “(e) ORDER OF FORFEITURE.—The court shall order  
5           forfeiture of property referred to in subsection (a) if the  
6           trier of fact determines, by a preponderance of the evi-  
7           dence, that the property is subject to forfeiture.

8           “(f) EXECUTION.—

9           “(1) IN GENERAL.—Upon entry of an order of  
10          forfeiture or temporary restraining order under this  
11          section, the court shall authorize the Attorney Gen-  
12          eral to seize all property ordered forfeited or re-  
13          strained on such terms and conditions as the court  
14          determines to be appropriate.

15          “(2) ACTIONS BY COURT.—Following entry of  
16          an order declaring the property forfeited, the court  
17          may, upon application of the United States, enter  
18          such appropriate restraining orders or injunctions,  
19          require the execution of satisfactory performance  
20          bonds, appoint receivers, conservators, appraisers,  
21          accountants, or trustees, or take any other action to  
22          protect the interest of the United States in the prop-  
23          erty ordered forfeited.

24          “(3) OFFSET.—Any income accruing to or de-  
25          rived from property ordered forfeited under this sec-



1       tion may be used to offset ordinary and necessary  
2       expenses to the property that—

3               “(A) are required by law; or

4               “(B) are necessary to protect the interests  
5       of the United States or third parties.

6       “(g) DISPOSITION OF PROPERTY.—

7               “(1) IN GENERAL.—Following the seizure of  
8       property ordered forfeited under this section, the At-  
9       torney General shall, making due provision for the  
10      rights of any innocent persons—

11              “(A) destroy or retain for official use any  
12      article described in paragraph (1) of subsection  
13      (a); and

14              “(B) retain for official use or direct the  
15      disposition of any property described in para-  
16      graph (2) or (3) of subsection (a) by sale or  
17      any other commercially feasible means.

18              “(2) REVERSION PROHIBITED.—With respect to  
19      the forfeiture, any property right or interest not ex-  
20      ercisable by, or transferable for value to, the United  
21      States shall expire and shall not revert to the de-  
22      fendant, nor shall the defendant or any person act-  
23      ing in concert with the defendant or on behalf of the  
24      defendant be eligible to purchase forfeited property  
25      at any sale held by the United States.

1           “(3) RESTRAINT OF SALE OR DISPOSITION.—

2           Upon application of a person, other than the defend-  
3           ant or person acting in concert with the defendant  
4           or on behalf of the defendant, the court may restrain  
5           or stay the sale or disposition of the property pend-  
6           ing the conclusion of any appeal of the criminal case  
7           giving rise to the forfeiture, if the applicant dem-  
8           onstrates that proceeding with the sale or disposition  
9           of the property will result in irreparable injury,  
10          harm, or loss to the applicant.

11          “(h) AUTHORITY OF ATTORNEY GENERAL.—With re-  
12          spect to property ordered forfeited under this section, the  
13          Attorney General may—

14               “(1) grant petitions for mitigation or remission  
15               of forfeiture, restore forfeited property to victims of  
16               a violation of this section, or take any other action  
17               to protect the rights of innocent persons that—

18                       “(A) is in the interest of justice; and

19                       “(B) is not inconsistent with this section;

20               “(2) compromise claims arising under this sec-  
21               tion;

22               “(3) award compensation to persons providing  
23               information resulting in a forfeiture under this sec-  
24               tion;

1           “(4) direct the disposition by the United States,  
2           under section 616 of the Tariff Act of 1930 (19  
3           U.S.C. 1616a), of all property ordered forfeited  
4           under this section by public sale or any other com-  
5           mercially feasible means, making due provision for  
6           the rights of innocent persons; and

7           “(5) take such appropriate measures as are  
8           necessary to safeguard and maintain property or-  
9           dered forfeited under this section pending the dis-  
10          position of that property.

11          “(i) BAR ON INTERVENTION.—Except as provided in  
12          subsection (l), no party claiming an interest in property  
13          subject to forfeiture under this section may—

14               “(1) intervene in a trial or appeal of a criminal  
15               case involving the forfeiture of that property under  
16               this section; or

17               “(2) commence an action at law or equity  
18               against the United States concerning the validity of  
19               the alleged interest of that party in the property  
20               subsequent to the filing of an indictment or informa-  
21               tion alleging that the property is subject to forfeit-  
22               ure under this section.

23          “(j) JURISDICTION TO ENTER ORDERS.—Each dis-  
24          trict court of the United States shall have jurisdiction to

1 enter an order of forfeiture under this section without re-  
2 gard to the location of any property that—

3 “(1) may be subject to forfeiture under this sec-  
4 tion; or

5 “(2) has been ordered forfeited under this sec-  
6 tion.

7 “(k) DEPOSITIONS.—In order to facilitate the identi-  
8 fication and location of property declared forfeited under  
9 this section and to facilitate the disposition of petitions  
10 for remission or mitigation of forfeiture, after the entry  
11 of an order declaring property forfeited to the United  
12 States under this section, the court may, upon application  
13 of the United States, order that—

14 “(1) the testimony of any witness relating to  
15 the property forfeited be taken by deposition; and

16 “(2) any designated book, paper, document,  
17 record, recording, or other material that is not privi-  
18 leged be produced at the same time and place, and  
19 in the same manner, as provided for the taking of  
20 depositions under rule 15 of the Federal Rules of  
21 Criminal Procedure.

22 “(l) THIRD PARTY INTERESTS.—

23 “(1) IN GENERAL.—

24 “(A) NOTICE.—Following the entry of an  
25 order of forfeiture under this section, the Unit-

1 ed States Government shall publish notice of  
2 the order and of the intent of the Government  
3 to dispose of the property in such manner as  
4 the Attorney General may direct.

5 “(B) DIRECT WRITTEN NOTICE.—In addi-  
6 tion to providing the notice described in sub-  
7 paragraph (A), the Government may, to the ex-  
8 tent practicable, provide direct written notice to  
9 any person known to have alleged an interest in  
10 the property that is the subject of the order of  
11 forfeiture as a substitute for published notice as  
12 to those persons so notified.

13 “(2) PETITION BY PERSON OTHER THAN DE-  
14 FENDANT.—

15 “(A) IN GENERAL.—Any person, other  
16 than the defendant, who asserts a legal interest  
17 in property that has been ordered forfeited to  
18 the United States pursuant to this section may  
19 petition the court for a hearing to adjudicate  
20 the validity of his alleged interest in the prop-  
21 erty not later than the earlier of—

22 “(i) the date that is 30 days after the  
23 final publication of notice; or

1                   “(ii) the date that is 30 days after the  
2                   receipt of notice by the person under para-  
3                   graph (1).

4                   “(B) REQUIREMENTS FOR HEARING.—A  
5                   hearing described in subparagraph (A) shall be  
6                   held before the court without a jury.

7                   “(3) REQUIREMENTS FOR PETITION.—A peti-  
8                   tion referred to in paragraph (2) shall—

9                   “(A) be signed by the petitioner under  
10                  penalty of perjury; and

11                  “(B) set forth—

12                   “(i) the nature and extent of the peti-  
13                   tioner’s right, title, or interest in the prop-  
14                   erty;

15                   “(ii) the time and circumstances of  
16                   the petitioner’s acquisition of the right,  
17                   title, or interest in the property;

18                   “(iii) the relief sought; and

19                   “(iv) any additional facts supporting  
20                   the petitioner’s claim.

21                  “(4) DATE; CONSOLIDATION.—

22                   “(A) DATE OF HEARING.—The hearing on  
23                   a petition referred to in paragraph (2) shall, to  
24                   the extent practicable and consistent with the

1 interests of justice, be held not later than 30  
2 days after the filing of the petition.

3 “(B) CONSOLIDATION.—The court may  
4 consolidate the hearing on the petition with a  
5 hearing on any other petition filed by a person  
6 other than the defendant under this subsection.

7 “(5) ACTIONS AT HEARINGS.—

8 “(A) IN GENERAL.—At a hearing referred  
9 to in paragraph (4)—

10 “(i) the petitioner may testify and  
11 present evidence and witnesses on his or  
12 her own behalf, and cross-examine wit-  
13 nesses who appear at the hearing; and

14 “(ii) the Government may present evi-  
15 dence and witnesses in rebuttal and in de-  
16 fense of its claim to the property that is  
17 the subject and cross-examine witnesses  
18 who appear at the hearing.

19 “(B) CONSIDERATION BY COURT.—In ad-  
20 dition to considering testimony and evidence  
21 presented at the hearing, the court shall con-  
22 sider the relevant portions of the record of the  
23 criminal case that resulted in the order of for-  
24 feiture.

1           “(6) AMENDMENT OF ORDER OF FORFEIT-  
2           URE.—If, after holding a hearing under this sub-  
3           section, the court determines that a petitioner has  
4           established by a preponderance of the evidence  
5           that—

6                   “(A)(i) the petitioner has a legal right,  
7                   title, or interest in the property that is the sub-  
8                   ject of the hearing; and

9                   “(ii) that right, title, or interest renders  
10                  the order of forfeiture invalid in whole or in  
11                  part because the right, title, or interest—

12                   “(I) was vested in the petitioner rath-  
13                   er than the defendant; or

14                   “(II) was superior to any right, title,  
15                   or interest of the defendant at the time of  
16                   the commission of the acts which gave rise  
17                   to the forfeiture of the property under this  
18                   section; or

19                   “(B) the petitioner is a bona fide pur-  
20                   chaser for value of the right, title, or interest  
21                   in the property and was at the time of purchase  
22                   reasonably without cause to believe that the  
23                   property was subject to forfeiture under this  
24                   section;



1 the court shall amend the order of forfeiture in ac-  
2 cordance with its determination.

3 “(7) ACTIONS OF COURT AFTER DISPOSITION  
4 OF PETITION.—After the disposition of the court of  
5 all petitions filed under this subsection, or if no such  
6 petitions are filed after the expiration of the period  
7 specified in paragraph (2), the United States—

8 “(A) shall have clear title to property that  
9 is the subject of the order of forfeiture; and

10 “(B) may warrant good title to any subse-  
11 quent purchaser or transferee.

12 “(m) CONSTRUCTION.—This section shall be liberally  
13 construed in such manner as to effectuate the remedial  
14 purposes of this section.

15 “(n) SUBSTITUTE ASSETS.—

16 “(1) IN GENERAL.—In accordance with para-  
17 graph (2), the court shall order the forfeiture of  
18 property of a defendant other than property de-  
19 scribed in subsection (a) if, as a result of an act or  
20 omission of the defendant, any of the property of the  
21 defendant that is described in subsection (a)—

22 “(A) cannot be located upon the exercise of  
23 due diligence;

24 “(B) has been transferred or sold to, or  
25 deposited with, a third party;

1           “(C) has been placed beyond the jurisdic-  
2           tion of the court;

3           “(D) has been substantially diminished in  
4           value; or

5           “(E) has been commingled with other  
6           property which cannot be divided without dif-  
7           ficulty.

8           “(2) VALUE OF PROPERTY.—The value of any  
9           property subject to forfeiture under paragraph (1)  
10          shall not exceed the value of property of the defend-  
11          ant with respect to which subparagraph (A), (B),  
12          (C), (D), or (E) of paragraph (1) applies.”; and

13          (3) by amending the section heading to read as  
14          follows:

15       **“SEC. 2332c. USE AND STOCKPILING OF CHEMICAL WEAP-**  
16       **ONS.”.**

17       (b) CONFORMING AMENDMENT TO FEDERAL RULES  
18       OF EVIDENCE.—Section 1101(d)(3) of the Federal Rules  
19       of Evidence is amended by striking “; and proceedings  
20       with respect to release on bail or otherwise” and inserting  
21       “, proceedings with respect to release on bail or otherwise;  
22       and proceedings under section 2232c(c)(3) of title 18,  
23       United States Code (except that the rules with respect to  
24       privilege under subsection (c) of this section also shall  
25       apply).”.

1 (c) CONFORMING AMENDMENT.—The chapter analy-  
2 sis for chapter 113B of title 18, United States Code, is  
3 amended by striking the item relating to section 2332b  
4 and inserting the following:

“2332c. Use and stockpiling of chemical weapons.”.

5 **Subtitle B—International**  
6 **Terrorism**

7 **SEC. 321. MULTILATERAL SANCTIONS.**

8 (a) POLICY ON ESTABLISHMENT OF SANCTIONS RE-  
9 GIMES.—

10 (1) POLICY.—Congress urges the President to  
11 commence immediately after the date of enactment  
12 of this Act diplomatic efforts, in appropriate inter-  
13 national fora (including the United Nations) and bi-  
14 laterally, with allies of the United States, to estab-  
15 lish, as appropriate, a multilateral sanctions regime  
16 against each country that the Secretary of State de-  
17 termines under section 6(j) of the Export Adminis-  
18 tration Act of 1979 (50 U.S.C. App. 2405(j)) to  
19 have repeatedly provided support for acts of inter-  
20 national terrorism.

21 (2) REPORT.—The President shall include in  
22 the annual report on patterns of global terrorism  
23 prepared under section 143 a description of the ex-  
24 tent to which the diplomatic efforts referred to in

1 and Export Act (21 U.S.C.960(b)(2)(H)) is amend-  
2 ed by—

3 (A) striking “10 grams or more of meth-  
4 amphetamine,” and inserting “5 grams or more  
5 of methamphetamine,”; and

6 (B) striking “100 grams or more of a mix-  
7 ture or substance containing a detectable  
8 amount of methamphetamine” and inserting  
9 “50 grams or more of a mixture or substance  
10 containing a detectable amount of methamphet-  
11 amine”.

12 **SEC. 602. REDUCTION OF SENTENCE FOR PROVIDING USE-**  
13 **FUL INVESTIGATIVE INFORMATION.**

14 Section 3553(e) of title 18, United States Code, sec-  
15 tion 994(n) of title 28, United State Code, and Rule 35(b)  
16 of the Federal Rules of Criminal Procedure are each  
17 amended by striking “substantial assistance in the inves-  
18 tigation or prosecution of another person who has commit-  
19 ted an offense” and inserting “substantial assistance in  
20 an investigation of any offense or substantial assistance  
21 in an investigation or prosecution of another person who  
22 has committed an offense”.

23 **SEC. 603. IMPLEMENTATION OF A SENTENCE OF DEATH.**

24 (a) IN GENERAL.—Section 3596(a) of title 18, Unit-  
25 ed States Code, is amended—



LEONIDAS RALPH MECHAM  
Director

ADMINISTRATIVE OFFICE OF THE  
UNITED STATES COURTS

CLARENCE A. LEE, JR.  
Associate Director

WASHINGTON, D.C. 20544

JOHN K. RABIEJ  
Chief  
Rules Committee Support Office

February 4, 1997  
*Via Facsimile*

MEMORANDUM TO JUDGE D. LOWELL JENSEN AND PROFESSOR DAVID A. SCHLUETER

SUBJECT: *Omnibus Crime Control Act of 1997*

For your information, I am attaching sections 501, 502, 505, and 821 of the Omnibus Crime Control Act of 1997 (S. 3), which was introduced by Senator Hatch on January 21, 1997. Each section affects the Criminal Rules.

Section 501 would amend Criminal Rule 24(b) to equalize the number of peremptory challenges available to the prosecution and the defendant. Section 502 would amend Rule 23(b) to permit juries of six on the request of the defendant and the approval of the court and the government. Section 505 would restructure the composition of the criminal and standing rules committees to include equal numbers of prosecutors and "defense-oriented practitioners." Finally, section 821 would amend Rule 35(b) to permit consideration of the defendant's "substantial assistance in an investigation of any offense or the prosecution of another person who has committed an offense" when reviewing a motion to reduce a sentence under the rule. (Proposed amendments to Rule 35(b) on another matter have been published for comment.)

After conferring with our Legislative Affairs Office, I will contact you to discuss our response and its timing. In the meantime, I will keep you posted on developments involving this legislation.

A handwritten signature in black ink, appearing to read "John K. Rabiej".

John K. Rabiej

Attachments

cc: Honorable Alicemarie H. Stotler  
Professor Daniel R. Coquillette



105TH CONGRESS  
1ST SESSION

**S.** 3

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IN THE SENATE OF THE UNITED STATES

Mr. HATCH (for himself \_\_\_\_\_  
\_\_\_\_\_) introduced the following bill; which was read twice  
and referred to the Committee on \_\_\_\_\_

---

Mr. LOTT  
Mr. ABRAHAM  
Mr. ALLARD  
Mr. ASHCROFT  
Mr. CRAIG  
Mr. D'AMATO  
Mr. DeWINE  
Mr. DOMENICI  
Mr. ENZI  
Mr. FAIRCLOTH  
Mr. GORTON  
Mr. GRAMS  
Mr. GRASSLEY  
Mr. HAGEL  
Mr. HELMS  
Mr. HUTCHINSON  
Mr. KYL  
Mr. MURKOWSKI  
Mr. NICKLES  
Mr. ROBERTS  
Mr. SMITH  
Mr. THOMAS  
Mr. THURMOND  
Mr. WARNER  
Mr. COVERDELL

**A BILL**

To provide for fair and accurate criminal trials, reduce violent juvenile crime, promote accountability by juvenile criminals, punish and deter violent gang crime, reduce the fiscal burden imposed by criminal alien prisoners, promote safe citizen self-defense, combat the importation, production, sale, and use of illegal drugs, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

4 (a) **SHORT TITLE.**—This Act may be cited as the  
5 “Omnibus Crime Control Act of 1997”.

1 receives the training offered, whichever comes  
2 first.”.

3 **SEC. 424. SELF DEFENSE FOR VICTIMS OF ABUSE.**

4 Section 922(s)(1)(B) of title 18, United States Code,  
5 is amended—

6 (1) by striking “the transferee has” and insert-  
7 ing “the transferee—

8 “(i) has”; and

9 (2) by adding at the end the following: “or

10 “(ii) is named as a person protected  
11 under a court order described in subsection  
12 (g)(8).”.

13 **TITLE V—CRIMINAL**  
14 **PROCEDURE IMPROVEMENTS**  
15 **Subtitle A—Equal Protection for**  
16 **Victims**

17 **SEC. 501. THE RIGHT OF THE VICTIM TO AN IMPARTIAL**  
18 **JURY.**

19 Rule 24(b) of the Federal Rules of Criminal Proce-  
20 dure is amended by striking “the government is entitled  
21 to 6 peremptory challenges and the defendant or defend-  
22 ants jointly to 10 peremptory challenges” and inserting  
23 “each side is entitled to 10 peremptory challenges”.

24 **SEC. 502. JURY TRIAL IMPROVEMENTS.**

25 (a) JURIES OF 6.—



1 (1) IN GENERAL.—Rule 23(b) of the Federal  
2 Rules of Criminal Procedure is amended—

3 (A) by striking “JURY OF LESS THAN  
4 TWELVE JURIES” and inserting the following:  
5 “(b) NUMBER OF JURORS.—

6 “(1) IN GENERAL.—Except as provided in sub-  
7 section (2), juries”; and

8 (B) by adding at the end the following:

9 “(2) JURIES OF 6.—Juries may be of 6 upon  
10 request in writing by the defendant with the ap-  
11 proval of the court and the consent of the govern-  
12 ment.”.

13 (2) ALTERNATE JURORS.—Rule 24(c) of the  
14 Federal Rules of Criminal Procedure is amended by  
15 inserting after the first sentence the following: “In  
16 the case of a jury of 6, the court shall direct that  
17 not more than 3 jurors in addition to the regular  
18 jury be called and impanelled to sit as alternate ju-  
19 rors.”.

20 (b) CAPITAL CASES.—Section 3593(b) of title 18,  
21 United States Code, is amended by striking the last sen-  
22 tence and inserting the following: “A jury impanelled pur-  
23 suant to paragraph (2) may be made of 6 upon request  
24 in writing by the defendant with the approval of the court  
25 and the consent of the government. Otherwise, such jury

1 shall be made of 12, unless, at any time before the conclu-  
2 sion of the hearing, the parties stipulate, with the approval  
3 of the court, that it shall consist of a lesser number.”.

4 **SEC. 503. REBUTTAL OF ATTACKS ON THE CHARACTER OF**  
5 **THE VICTIM.**

6 Rule 404(a)(1) of the Federal Rules of Evidence is  
7 amended by inserting before the semicolon the following:  
8 “, or, if an accused offers evidence of a pertinent trait  
9 of character of the victim of the crime, evidence of a perti-  
10 nent trait of character of the accused offered by the pros-  
11 ecution”.

12 **SEC. 504. USE OF NOTICE CONCERNING RELEASE OF OF-**  
13 **FENDER.**

14 Section 4042(b) of title 18, United States Code, is  
15 amended by striking paragraph (4).

16 **SEC. 505. BALANCE IN THE COMPOSITION OF RULES COM-**  
17 **MITTEES.**

18 Section 2073 of title 28, United States Code, is  
19 amended—

20 (1) in subsection (a)(2), by adding at the end  
21 the following: “On each such committee that makes  
22 recommendations concerning rules that affect crimi-  
23 nal cases, including the Federal Rules of Criminal  
24 Procedure, the Federal Rules of Evidence, the Fed-  
25 eral Rules of Appellate Procedure, the Rules Govern-

1 ing Section 2254 Cases, and the Rules Governing  
2 Section 2255 Cases, the number of members who  
3 represent or supervise the representation of defend-  
4 ants in the trial, direct review, or collateral review  
5 of criminal cases shall not exceed the number of  
6 members who represent or supervise the representa-  
7 tion of the Government or a State in the trial, direct  
8 review, or collateral review of criminal cases.”; and

9 (2) in subsection (b), by adding at the end the  
10 following: “The number of members of the standing  
11 committee who represent or supervise the represen-  
12 tation of defendants in the trial, direct review, or  
13 collateral review of criminal cases shall not exceed  
14 the number of members who represent or supervise  
15 the representation of the Government or a State in  
16 the trial, direct review, or collateral review of crimi-  
17 nal cases.”.

## 18 **Subtitle B—Firearms**

### 19 **SEC. 521. MANDATORY MINIMUM SENTENCES FOR CRIMI-** 20 **NALS POSSESSING FIREARMS.**

21 Section 924(c) of title 18, United States Code, is  
22 amended—

23 (1) by striking “(c)” and all that follows  
24 through “(2)” and inserting the following:

1 (d) ANIMAL ENTERPRISE TERRORISM.—Section  
2 43(b)(2) of title 18, United States Code, is amended by  
3 inserting “or may be sentenced to death” after “impris-  
4 oned for life or for any term of years”; and

5 (e) RACKETEERING.—Section 1952(a)(3)(B) of title  
6 18, United States Code, is amended by inserting “or may  
7 be sentenced to death” after “imprisoned for any term of  
8 years or for life”.

9 **SEC. 811. VIOLENCE DIRECTED AT DWELLINGS IN INDIAN**  
10 **COUNTRY.**

11 Section 1153(a) of title 18, United States Code, is  
12 amended by inserting “or 1363” after “section 661”.

13 **Subtitle B—Courts and Sentencing**

14 **SEC. 821. ALLOWING A REDUCTION OF SENTENCE FOR**  
15 **PROVIDING USEFUL INVESTIGATIVE INFOR-**  
16 **MATION ALTHOUGH NOT REGARDING A PAR-**  
17 **TICULAR INDIVIDUAL.**

18 Section 3553(e) of title 18, United States Code, sec-  
19 tion 994(n) of title 28, United States Code, and Rule  
20 35(b) of the Federal Rules of Criminal Procedure are each  
21 amended by striking “substantial assistance in the inves-  
22 tigation or prosecution of another person who has commit-  
23 ted an offense” and inserting “substantial assistance in  
24 an investigation of any offense or the prosecution of an-  
25 other person who has committed an offense”.

**SECRETARY**

Donna C. Willard-Jones  
124 E. 7th Avenue  
Anchorage, Alaska 99501  
E-mail Address:  
willarddd@aol.com

**AMERICAN BAR ASSOCIATION**

**Office of the Secretary**  
750 North Lake Shore Drive  
Chicago, Illinois 60611  
(312) 988-5160  
FAX: (312) 988-5153

September 20, 1996

Honorable D. Lowell Jensen  
Chairman, Advisory Committee on  
Criminal Rules  
Judicial Conference of the U. S.  
U.S. District Court  
1301 Clay Street  
Oakland, California 94612

Re: Compassionate Release and Alternate Sentencing  
for Non-Violent HIV Offenders

Dear Judge Jensen:

At the meeting of the House of Delegates of the American Bar Association held August 5-6, 1996, the enclosed resolution was adopted upon recommendation of the Section of Individual Rights, and the National Lesbian & Gay Law Association. Thus, this resolution now states the official policy of the Association.

We are transmitting it for your information and whatever action you think appropriate. Please advise if you need any further information, have any questions or if we can be of any assistance. Such inquiries should be directed to my Chicago office.

Sincerely yours,

Donna C. Willard-Jones

DWJ/rmf

enclosure

cc: Abby R. Rubenfield  
Ellen F. Rosenblum  
Robert D. Evans  
Allan H. Terl



## AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES  
AUGUST 5-6, 1996

**RESOLVED**, That the American Bar Association supports compassionate release of terminally ill prisoners and endorses adoption of administrative and judicial procedures for compassionate release consistent with the "Administrative Model for Compassionate Release Legislation" and the "Judicial Model for Compassionate Release Legislation," each dated April 1996; and

**FURTHER RESOLVED**, That the American Bar Association supports alternatives to sentencing for non-violent terminally ill offenders in which the court, upon the consent of the defense and prosecuting attorneys, and upon a finding that the defendant is suffering from a terminal condition, disease, or syndrome and is so debilitated or incapacitated as to create a reasonable probability that he or she is physically incapable of presenting any danger to society, and upon a finding that the furtherance of justice so requires, may accept a plea of guilty to any lesser included offense of any count of the accusatory instrument, to satisfy the entire accusatory instrument and to permit the court to sentence the defendant to a non-incarceratory alternative. In making such a determination, the court must consider factors governing dismissals in the interest of justice.





## RECOMMENDATION/APPENDIX

### ADMINISTRATIVE MODEL FOR COMPASSIONATE RELEASE LEGISLATION (April 1996)

(a) Authorization: The [Parole Commission] [Department of Corrections] shall be authorized to grant parole [release] of a[ny] prisoner, [at any time,] [irrespective of whether he or she is presently eligible for parole,] whose medical condition is terminal within the meaning of paragraph (b), below. [This section applies to any prisoner except...]

(b) Standard: If the [Parole Commission] [Department of Corrections] finds from the evidence that the prisoner is likely to die within one year or less, the [Parole Commission] [Department of Corrections] shall release the prisoner upon [medical parole] [conditional release] unless it finds by a preponderance of the evidence that the prisoner poses a danger of committing additional crimes, that the prisoner will not receive adequate care upon his or her release, or that [medical parole] [conditional release] would denigrate the seriousness of the offense.

(c) Application process: In order to apply for such relief, the prisoner or a medical officer of the Department of Corrections shall file an application for [medical parole] [conditional release] with the [Parole Commission] [Director of the Department of Corrections]. In the case of an application filed by a medical officer, the application shall be accompanied by an affidavit of the medical officer attesting to the nature of the prisoner's illness, the treatment he or she is receiving, the prognosis, and the extent of the prisoner's incapacitation from the illness. A copy of each such application shall be served on the prosecutor..

(d) Medical Report: Within [72 hours] after the filing of any application by a prisoner, the [Parole Commission] [Department of Corrections] shall refer the application to the medical unit of the Department of Corrections for a report concerning the nature of the prisoner's condition, the treatment he or she is receiving, and the prognosis. Within [five days], the medical unit shall forward the medical report to the [Parole Commission] [Director of the Department of Corrections]. These time lines are meant to ensure speedy review and must be adhered to. However, the prisoner's application should not fail simply because, due to extraordinary circumstances, the review time frames were not adhered to.

(e) Summary disposition of unmeritorious applications: Within [seven days] of receiving the medical report or affidavit, as the case may be, the [Parole Commission] [Department of Corrections] shall determine whether the application, on its face, demonstrates that relief may be warranted. If the face of the application clearly demonstrates that relief is unwarranted, the [Commission] [Department] may deny the application without a hearing or further proceedings, and within [seven days] shall notify the prisoner in writing of its decision to deny the application, setting forth its factual findings and a brief statement of the reasons for denying release.

(f) Procedure for hearing:

- (1) If the application demonstrates that the prisoner may be entitled to relief, the [Parole Commission] [Department of Corrections] shall set the case for hearing, which shall be held within the next [seven days] (unless the prisoner requests additional time).
- (2) Notice of the hearing shall be sent to the prosecutor and the victim(s), if any, of the offense(s) for which the prisoner is incarcerated, and the prosecutor and the victim(s) shall have the right to be heard at the hearing or in writing or both.
- (3) At the hearing, the prisoner shall be entitled to be represented by an attorney (at the prisoner's cost if there is any cost) or other representative. Rules of evidence shall not apply, and the evidence may be taken in the form of affidavit.

(g) Decision: Within [seven] days of the hearing, the [Parole Commission] [Department of Corrections] shall issue a written decision granting or denying [medical parole] [conditional release] and explaining the reasons therefore. If the [Parole Commission] [Department of Corrections] determines that [medical parole] [conditional release] is warranted, it shall impose as conditions of [parole] [release] at least the following:

- (1) that the prisoner not commit another crime;
- (2) that the prisoner maintain his or her residence;
- (3) that the prisoner maintain established reporting requirements with his or her parole officer;

and such other conditions as the [Parole Commission] [Department of Corrections] concludes are necessary or appropriate in the particular case, including the requirement that the prisoner undergo periodic re-examination of his or her medical condition.

(h) Review: If the [Parole Commission] [Department of Corrections] determines that [medical parole] [conditional release] is not warranted, the prisoner shall have the right to seek review of the decision in the court in which he or she was convicted; such review shall be limited to the question whether the [Parole Commission] [Department of Corrections] abused its discretion. The appeal shall be expedited and not subject to further review.

(i) Revocation of [medical parole] [conditional release]:

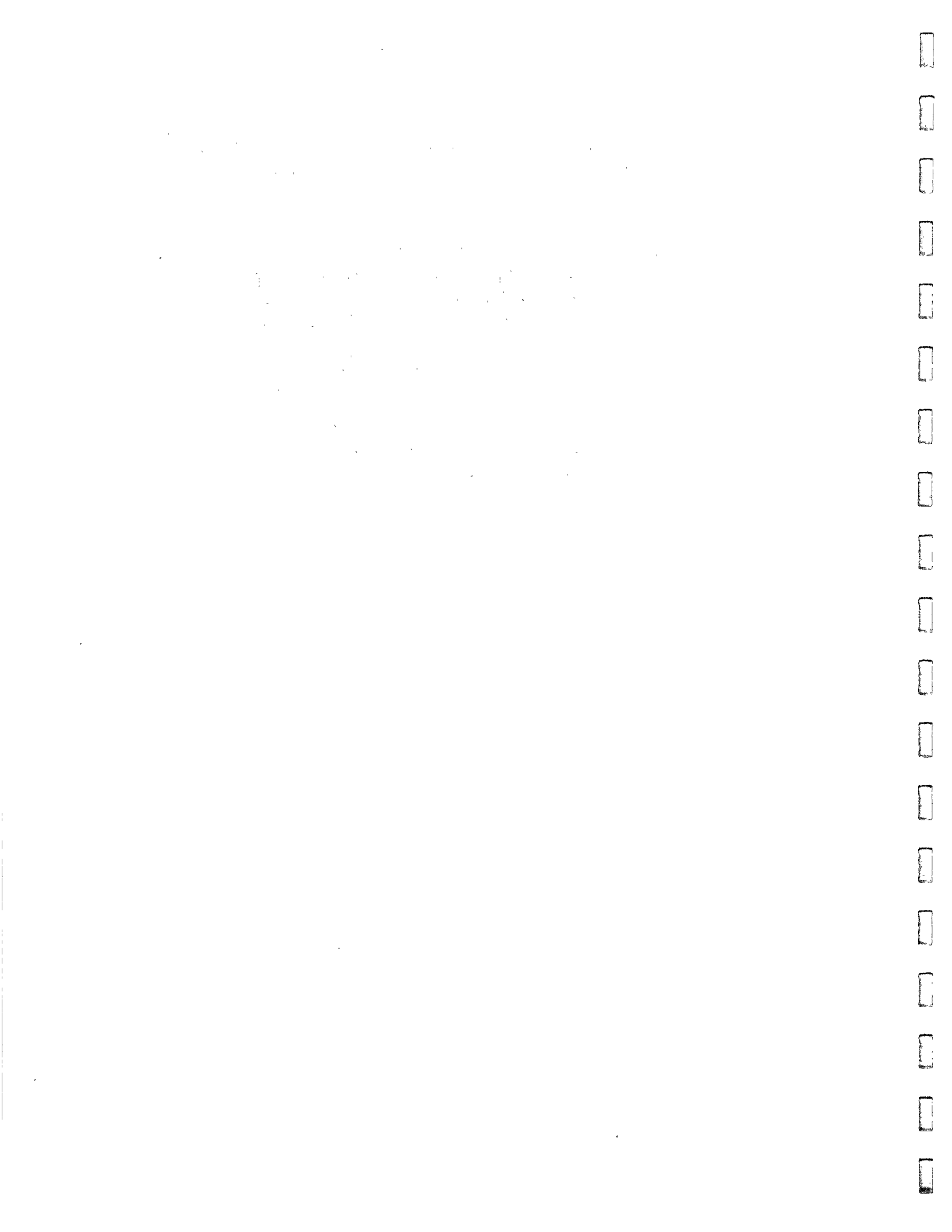
- (1) Violation of conditions of [medical parole] [conditional release]: If the prisoner violates any condition of [medical parole] [conditional release], his or her [medical parole] [conditional release] may be revoked in the same

manner as for other violations of [parole] [conditional release], and the prisoner returned to prison to serve his or her sentence. Credit for time spent on [medical parole] [conditional release] shall not be counted toward service of the sentence.

- (2) Prisoner no longer terminal: If after release the prisoner is determined not to be likely to die within one year, [medical parole] [conditional release] shall be revoked, and the prisoner shall be returned to prison to serve his or her sentence. Credit for time spent on [medical parole] [conditional release] shall be counted toward service of the sentence.

(j) Reapplication: Denial of relief under this section shall not preclude the prisoner from reapplying for relief if there is a change in his physical condition or other pertinent circumstances.

(k) Reporting requirements: The [Parole Commission] [Department of Corrections] shall maintain statistics regarding: the number of requests made for [medical parole] [conditional release], the number of such requests that were granted, the number of such requests that were denied and the grounds upon which each such petition was denied, and the date on which the prisoner died, if applicable. Within three months of the end of the [fiscal] [calendar] year, the [Parole Commission] [Department of Corrections] shall compile these statistics in an annual report that shall be made available to the public.



## RECOMMENDATION/APPENDIX

### JUDICIAL MODEL FOR COMPASSIONATE RELEASE LEGISLATION

(April 1996)

(a) Authorization: At any time after the defendant is sentenced, the court, on motion of the defendant or the Department of Corrections or on its own motion, and after notice to the prosecutor, may reduce a sentence of imprisonment to time served, or substitute for the unserved balance of a sentence of imprisonment a sentence of home confinement, probation, or supervised release, upon proof that the defendant has a medical condition that is critical. The court may reduce any sentence, whether or not the defendant has served any imposed minimum sentence, [except in the following cases...].

(b) Standard: If the court finds from the evidence that the defendant is likely to die within one year, the court shall reduce the prison sentence to time served, or substitute home confinement, probation, or supervised release, for the unserved balance of the prison sentence, unless it finds by a preponderance of the evidence that the defendant poses a danger of committing additional crimes, that the defendant will not receive adequate care upon his or her release, or that release would denigrate the seriousness of the offense.

(c) Motion: In the case of a motion filed by the defendant, the motion shall be accompanied by an affidavit of the medical officer attesting to the nature of the defendant's illness, the treatment he or she is receiving, the prognosis, and the extent of the defendant's incapacitation from the illness. A copy of each such application shall be served on the prosecutor.

(d) Procedure for hearing:

- (1) If the court determines that the defendant may be entitled to relief, the court shall set the motion for hearing in the next 10 calendar days, unless the defendant requests additional time.
- (2) Notice of the hearing shall be sent to the prosecutor and the victim(s), if any, of the offense(s) for which the prisoner is incarcerated, and the victim(s) shall have the right to be heard at the hearing or in writing or both.
- (3) Evidence may be taken in the form of affidavit.

(f) Decision: Within [10] days of the hearing, the court shall issue a written decision granting or denying the motion, setting forth its factual findings and explaining the reasons for its decision. If the court determines that relief is warranted, the court shall determine whether to reduce the prison sentence to time served, or instead to substitute a period of home confinement, probation, or supervised release. If the court chooses to substitute a period of probation or supervised release, the court shall impose as conditions of probation or release at least the following:

- (1) that the defendant not commit another crime;
- (2) that the defendant maintain his or her residence;
- (3) that the defendant maintain established reporting requirements with his or her probation officer;

and such other conditions as the court concludes are necessary or appropriate in the particular case.

(g) Review: If the court denies the motion, the defendant shall have the right to appeal, limited solely to the question whether the trial court, in denying the motion, abused its discretion.

(h) Revocation of release:

- (1) Violation of conditions of release: If the defendant violates any condition of release, his or her release may be revoked in the same manner as for other violations of probation or supervised release, and the defendant returned to prison to serve his or her sentence. Credit for time spent on release shall not be counted toward service of the sentence.
- (2) Defendant no longer late-stage terminal: If after release the defendant is determined not to be likely to die within one year, his or her release shall be revoked, and the defendant shall be returned to prison to serve his or her sentence. Credit for time spent on release shall be counted toward service of the sentence.

(i) New motion based on changed circumstances: Denial of relief under this section shall not preclude the defendant from filing a subsequent motion for relief if there is a change in his physical condition or other pertinent circumstances.

(j) Reporting requirements: The Department of Corrections shall maintain statistics regarding the number of requests made for conditional release, the number of such requests that were granted, the number of such requests that were denied, and the date the defendant died, if applicable. Within three months of the end of the [fiscal] [calendar] year, the Department of Corrections shall compile them in an annual report that shall be made available to the public. In order to facilitate the collection of relevant data, the court shall send to the Department of Corrections a copy of every motion for conditional release and of the decision on each such motion.