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

April 28, 1992

Ms. Judith Krivit
Admin. Office of United States Courts
Rules Committee Admin. Support Office
Room 626
1120 Vermont Ave, N.W.
Washington, D.C. 20544

(202) 633-6021

Dear Judy:

I spoke with Joe yesterday about circulating these materials to the Criminal Rules Committee. Could you get these out at your earliest convenience? As you can see, Judge Hodges is asking the members to contact him about any possible changes by May 7, 1992. Thanks.

Cordially

Dave

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

ROBERT E KEETON
CHAIRMAN

JOSEPH F SPANIOL, JR
SECRETARY

CHAIRMEN OF ADVISORY COMMITTEES
KENNETH F RIPPLE
APPELLATE RULES

SAM C POINTER, JR
CIVIL RULES

WILLIAM TERRELL HODGES
CRIMINAL RULES

EDWARD LEAVY
BANKRUPTCY RULES

BY FAX

April 15, 1992

MEMORANDUM TO JUDGE HODGES

SUBJECT: April 23-24, 1992, Criminal Rules Meeting

If the case you are trying does not conclude in time for you to attend the meeting of the Criminal Rules Committee on April 23-24, 1992, I believe it would be appropriate for you to designate a member of the Committee to preside in your absence. I hope you will be able to attend, at least on the second day.

Joe

Joseph F. Spaniol, Jr.
Secretary

cc: Honorable Robert E. Keeton

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

ROBERT E. KEETON
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CRIMINAL RULES
EDWARD LEAVY
BANKRUPTCY RULES

March 19, 1992

Ms. Judith Krivit
Admin. Office of United States Courts
Rules Committee Admin. Support Office
Room 626
1120 Vermont Ave, N.W.
Washington, D.C. 20544

(202) 633-6021

Dear Judy:

Enclosed is the remainder of the materials for the Agenda book for the Criminal Rules Committee meeting in April. Please note that I made some corrections to the first page of the Agenda; on the original copy I had omitted references to Rules 40 and 41.

Also, please note that although I am still awaiting "official" subcommittee reports on Items II-C-2 and II-C-3, I have prepared materials which should be placed at those tabs now. If and when we receive reports, those can be distributed separately to the Committee members who can then place them in the appropriate places in the book.

If you have any questions, please do not hesitate to contact me. I will be leaving tomorrow afternoon for the weekend but can be reached at (512) 997-6847 (Fredericksburg, Texas).

Cordially,

David A. Schlueter
Professor of Law

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

March 10, 1992

Ms. Judith Krivit
Admin. Office of United States Courts
Rules Committee Admin. Support Office
Room 626
1120 Vermont Ave, N.W.
Washington, D.C. 20544

(202) 633-6021

Dear Judy:

Enclosed is the first installment of the agenda materials for the April meeting of the Criminal Rules Committee. I expect that this will constitute the bulk of them; I hope to send the remainder to you next week. I have indicated on the top of each memo, etc. which agenda item it relates to.

If you have any questions please call me at (512) 436-3308.

Cordially,

David A. Schlueter
Reporter

(Draft proposals submitted by Judge Keeton.)
April 23, 1992

DRAFT 1

RULE 84

(b) Technical and Conforming Amendments. - The Judicial Conference of the United States may amend these rules or the explanatory notes to correct errors in grammar, spelling, cross-references, or typography, or to make changes essential to conforming with statutory amendments, or to make other similar technical or conforming changes of form or style.

DRAFT 2

RULE 84

(b) Technical and Conforming Amendments. - The Judicial Conference of the United States may amend these rules or the explanatory notes to correct errors or inconsistencies in grammar, spelling, cross-references, typography, or style, or to make changes essential to conforming with statutory amendments.

File
Crim Rules

SECRETARY
Anthony R Palermo
700 Midtown Tower
Rochester, NY 14604

AMERICAN BAR ASSOCIATION
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5000

February 24, 1992

Honorable Robert E. Keeton, Chair
Committee on Rules of Practice and
Procedure
Judicial Conference of the United States
Washington, D.C. 20544

Dear Judge Keeton:

Thank you for your letter of January 30 in response to my letter concerning the position taken by the American Bar Association at its August 1991 meeting with respect to megatrials. By copy of this letter, I am referring your letter to the appropriate entities of the Association.

Thank you for your interest.

Sincerely,

Anthony R. Palermo

Anthony R. Palermo

5171f

cc: Carl O. Bradford
Ronald L. Seeger
Robert D. Evans
Andrew L. Sonner
Rya W. Zobel
Laurie Robinson
Wantland L. Sandel, Jr.

COMMITT ON RULES OF PRACTICE AND P' CEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

ROBERT E KEETON
CHAIRMAN

JOSEPH F SPANIOL, JR
SECRETARY

CHAIRMEN OF ADVISORY COMMITTEES
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WILLIAM TERRELL HODGES
CRIMINAL RULES
EDWARD LEAVY
BANKRUPTCY RULES

April 16, 1992

MEMORANDUM TO THE ADVISORY COMMITTEE ON THE FEDERAL RULES OF CRIMINAL PROCEDURE

SUBJECT: April 23-24, 1992, Criminal Rules Meeting

Professor Schlueter has asked us to send you the enclosed additional materials for consideration at the Committee meeting on April 23-24, 1992. Please add them to the binders previously sent to you, and please remember to bring the binders with you when you come to the meeting.

Joseph F. Spaniol, Jr.
Secretary

Enclosure

cc: Honorable Robert E. Keeton
Professor David A. Schlueter

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

ROBERT E. KEETON
CHAIRMAN

JOSEPH F. SPANIOL, JR.
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WILLIAM TERRELL HODGES
CRIMINAL RULES
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BANKRUPTCY RULES

April 14, 1992

Ms. Judith Krivit
Admin. Office of United States Courts
Rules Committee Admin. Support Office
Room 626
1120 Vermont Ave, N.W.
Washington, D.C. 20544

(202) 633-6021

Dear Judy:

Here are some additional materials for next week's meeting of the Advisory Committee on Criminal Rules. Could you please send these out to the members? Thanks.

I do not anticipate any additional matters.

Cordially,

Dave Schlueter

MEMO TO: **Advisory Committee on Criminal Rules**

FROM: **Dave Schlueter, Reporter**

RE: **Additional Materials for April 1992 Meeting**

DATE: **April 14, 1992**

Enclosed are two additional matters for the Committee's upcoming meeting. The first relates to the pending amendments to Federal Rules of Evidence 702 and 705, which are being handled by the Civil Rules Committee. And the second relates to an issue being considered by the Standing Committee on promulgation of local rules.

AGENDA

AGENDA
CRIMINAL RULES COMMITTEE
MEETING

April 23-24, 1992
Washington, D.C.

I. PRELIMINARY MATTERS

A. Introductions and Comments.

B. Approval of Minutes of November 1991, Meeting.

II. CRIMINAL RULES UNDER CONSIDERATION

A. Rules Approved by the Supreme Court and Effective on December 1, 1991. (No Memo).

1. Rule 16(a)(1)(A), Disclosure of Evidence by the Government.

2. Rule 35(b), Reduction of Sentence.

3. Rule 35(c), Correction of Sentence Errors.

4. Rules 32, 32.1, 46, 54(a), and 58, Technical Amendments.

B. Rules Published for Public Comment. (Memo).

1. Rule 16(a), Discovery of Experts.

2. Rule 12.1, Production of Statements.

3. Rule 26.2, Production of Statements.

4. Rule 26.3, Mistrial.

5. Rule 32(f), Production of Statements.

6. Rule 32.1, Production of Statements.

7. Rule 40, Commitment to Another District.

8. Rule 41, Search and Seizure.

9. Rule 46, Production of Statements.

10. Rule 8, Rules Governing § 2255 Hearings.

C. **Reports by Subcommittees on Rules of Criminal Procedure and Rules of Evidence.**

1. Rule 5, Time Limit for Hearings by Magistrate, Follow-Up Report by Subcommittee and Possible Amendments to Rules 3 and 4. (Memo).

2. Rule 32, Allocution Rights of Victims. Follow-Up Report by Subcommittee. (Memo).

3. Federal Rules of Evidence Amendments. (Memo).

D. **Other Criminal Procedure Rules Under Consideration by the Advisory Committee.**

1. Rule 6(e), DOJ Proposal to Amend. (Memo).

2. Rule 11, Guilty Pleas Before Magistrate Judges and Proposal to Advise Accused of Possible Deportation. (Memos).

3. Rule 16, Proposal to Consider Changes to Federal Criminal Discovery Practices. (Memo).

4. Rule 16(a)(1)(A). Disclosure of Statements Made by Organizational Defendants. (Memo).

5. Rule 29(b), DOJ Proposal to Permit Judge to Delay Ruling on Motion for Aquittal (Memo).

6. Rule 32(e), DOJ Proposal to Repeal Provision. (Memo).

7. Rule 49, Proposal to Specify Paper for Filing. (Memo).

8. Rule 59, Proposal to Authorize Judicial Conference to Correct Technical Errors. (Memo).

9. The Rules in General, Handling Megatrials, ABA Resolution. (Memo).

III. EVIDENCE RULES UNDER CONSIDERATION

A. Proposal to Create Separate Rules of Evidence Advisory Committee. (No Memo).

B.. Evidence Rules Approved by Supreme Court and Effective December 1, 1991. (No Memo).

1. Fed. R. Evid. 404(b), Notice Provision.

C. Evidence Rules Circulated by Civil Rules Committee.

1. Rules 703, 705, Testimony by Experts. (No Memo).

IV. MISCELLANEOUS.

V. DESIGNATION OF TIME AND PLACE OF NEXT MEETING.

Item I-A

ADVISORY COMMITTEE ON CRIMINAL RULES

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Item I-B

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Minutes of November 1991 Meeting in Tampa, Florida

DATE: March 8, 1992

Attached are the minutes of the Advisory Committee's meeting in Tampa, Florida on November 7, 1991.

MINUTES
ADVISORY COMMITTEE
FEDERAL RULES OF CRIMINAL PROCEDURE

November 7, 1991
Tampa, Florida

The Advisory Committee on the Federal Rules of Criminal Procedure met in Tampa, Florida on November 7, 1991. These minutes reflect the actions taken at that meeting.

CALL TO ORDER

Judge Hodges called the meeting to order at 9:00 a.m. on Thursday, November 7, 1991 at the United States Courthouse in Tampa, Florida. The following persons were present for all or a part of the Committee's meeting:

Hon. Wm. Terrell Hodges, Chairman
Hon. Sam A. Crow
Hon. James DeAnda
Hon. Robinson O. Everett
Hon. Daniel J. Huyett, III
Hon. John F. Keenan
Hon. Harvey E. Schlesinger
Prof. Stephen A. Saltzburg
Mr. John Doar, Esq.
Mr. Tom Karas, Esq.
Mr. Edward Marek, Esq.
Mr. Roger Pauley, Jr., designee of Mr. Robert S. Mueller III, Assistant Attorney General

Professor David A. Schlueter
Reporter

Also present at the meeting were Judge Robert Keeton, Chairman of the Standing Committee on Rules of Practice and Procedure, Mr. William Wilson, Standing Committee member acting as liaison to the Advisory Committee, Mr. David Adair, Ms. Ann Gardner, and Mr. John Robiej of the Administrative Office of the United States Courts, and Mr. James Eaglin from the Federal Judicial Center. Judge D. Lowell Jensen, a newly appointed member of the Committee, was not able to attend.

I. INTRODUCTIONS AND COMMENTS

Judge Hodges welcomed the attendees and noted that all of the members were present with the exception of a new member, Judge D. Lowell Jensen, who had just been appointed to the Committee but was not able to attend due to previously scheduled commitments. Judge Hodges also noted

that Judges Everett and Huyett would be departing the Committee and on behalf of the Committee, thanked them for their diligent efforts and contributions.

II. PUBLIC HEARINGS ON PENDING AMENDMENTS

Judge Hodges gave a brief report on proposed amendments to various rules which had been approved by the Standing Committee at its July meeting: Rule 16(a)(Discovery of Expert), Rule 12.1(Production of Statements), Rule 23.3(Mistrial), Rule 26.2(Production of Statements), Rule 32(f)(Production of Statements), Rule 32.1(Production of Statements), Rule 40(a)(Appearance Before Federal Magistrate Judge), Rule 41(c)(2)(Warrant Upon Oral Testimony), Rule 46(Production of Statements), and Rule 8 of the Rules Governing § 2255 Hearings(Production of Statements at Evidentiary Hearing).

The proposed amendments had been published and distributed for comment by the public. Although a public hearing had been scheduled, which would immediately proceed the Committee's meeting, no persons had given the requisite notice of an intention to speak at the hearing. Therefore, the hearing was not held. Judge Hodges commented further on the fact that at least one person was scheduled to appear at the Committee's January 17, 1992 hearing in Los Angeles. Thus, that hearing would apparently be held.

III. APPROVAL OF MINUTES

The Committee reviewed the minutes of its May 1991 meeting in San Francisco and several corrections were noted. On page 6, the words, "sources of" were added at the end of the 11th line. And the reference to "Judge Keeton" on page 8, line 5, was amended to reflect Judge Keenan's name. Judge DeAnda moved that the minutes be approved as amended. Judge Crow seconded the motion which carried by a unanimous vote.

IV. CRIMINAL RULE AMENDMENTS UNDER CONSIDERATION

A. Rules Approved by the Supreme Court and Pending Before Congress

The Reporter informed the Committee that the Supreme Court had approved amendments to Rules 16(a)(1)(A)(Disclosure of Evidence by the Government), Rule 35(b)(Reduction of Sentence) and Rule 35(c)(Correction of Sentence Errors). The Court had also approved minor

technical amendments in Rules 32, 32.1, 46, 54(a), and 58. All of these amendments were scheduled to take effect on December 1, 1991 unless Congress took affirmative action to amend or delay them.

B. Rules Approved by the Standing Committee and Circulated for Public Comment

[This matter was discussed in conjunction with the scheduled Public Hearings on the proposed amendments, as noted supra.]

C. Reports by Subcommittees on Rules of Criminal Procedure

1. Rules 3, 4, and 5, Oral Arrest Warrants and Time Limit for Hearing by Magistrate.

At the Committee's May 1991 meeting the Chair had appointed a subcommittee consisting of Judge Schlesinger (Chair), Mr. Marek and Mr. Pauley to draft amendments to Rules 3 and 4 to permit submission of complaints and requests for arrest warrants by facsimile transmission. Judge Schlesinger informed the Committee that in the process of considering such amendments, a suggestion had been made by Mr. Marek that perhaps Rule 5 should be amended to reflect the Supreme Court's recent decision in County of Riverside v. McLaughlin, 111 S.Ct. 1661 (1991). He pointed out that the case indicated that normally a person who has been arrested without a warrant should have a probable cause determination made by a magistrate within 48 hours. Mr. Marek suggested that Rule 5 should be amended to require an appearance before a magistrate within 24 hours. If that limitation was added, he explained, then providing for expedited handling of arrest warrants by use of facsimile machines would assist law enforcement officers in meeting the time limits. He suggested that it would be better to first address the issue of Rule 5 and noted that Riverside recognized that judicial determination of probable cause can arise in wide variety of settings, from a more formal hearing to a very informal ex parte proceeding. He added that these hearings may take several days to conduct, depending on when the defendant was arrested and the schedule of the judicial officer.

Mr. Pauley urged that the Committee defer any action on Rule 5. He explained that United States Attorneys were working on procedural rules to implement Riverside and that it would be better to await application of those rules and further caselaw refinement of the rule announced in

Riverside. He added that Rule 41, as written, could support telephonic arrest warrants. Mr. Marek disagreed with that assessment and concluded that Rule 41 would be distorted if it applied to the typical arrests.

During an ensuing discussion on possible remedies or sanctions for violation of Rule 5, several members noted that potential civil liabilities would be implicated. Professor Saltzburg observed that the lack of any real sanctions made discussion of Rule 5 important. He agreed with Mr. Pauley that it would be better not to be too quick to amend Rule 5 because it apparently was more protective than the Constitution. He moved that the Subcommittee be continued and that it study the possible amendments of Rules 3, 4, and 5 and report to the Committee at its Spring 1992 meeting. The motion, which was seconded by Mr. Marek, carried by a unanimous vote.

2. Rule 6(e), Secrecy of Grand Jury Proceedings.

At its May 1991 meeting, the Committee had considered a letter from Judge Pratt raising concerns about whether Rule 6(e) should be amended to better protect grand jury secrecy. As a result of the discussion, Judge Hodges had appointed a subcommittee consisting of Judge Keenan (chair), Judge Crow, Mr. Doar, and Mr. Pauley. Judge Keenan reported that the subcommittee had conducted an exhaustive review of pertinent Department of Justice guidelines on grand jury secrecy and a report of the New York Bar Association on the same subject. It was the unanimous view of the subcommittee that no amendment to Rule 6(e) was required. It also believed that the current guidelines and directives were sufficient and that a court could rely upon its contempt powers if it learned that the Rule had been violated. Mr. Pauley added that the Department of Justice finds grand jury leaks to be abhorrent and that an office in the Department handles these matters. He also pointed out that the Department did have some other legitimate interests at stake in divulging certain grand jury information to other offices and noted that at some point the Department might suggest amendments to Rule 6. Judge Crow noted his concurrence in Judge Keenan's observations. Judge Hodges indicated that the report of the subcommittee would be treated as a motion which had been seconded. It was thereafter adopted by unanimous vote. Judge Hodges observed that it would be appropriate for the Administrative Office to inform Judge Pratt of the Committee's action.

3. Congressional Amendments to Rules of Criminal Procedure and Evidence.

A subcommittee consisting of Judge Huyett (Chair), Judge Everett, Mr. Karas, and Professor Saltzburg had been appointed at the Committee's May 1991 meeting to study and report on the status of Congressional attempts to amend both the Rules of Criminal Procedure and Evidence. Judge Huyett noted that Professor Saltzburg had provided the subcommittee with a detailed analysis of the various proposals, a number of which had appeared in more than one piece of pending legislation. Professor Saltzburg provided a brief overview of the proposed amendments and the subcommittee's recommendations. The subcommittee favored making Federal Rule of Evidence 412 applicable to all criminal and civil cases but was generally opposed to the other proposed amendments. Following some additional brief introductory comments, the Committee considered several of the proposed amendments in more detail.

a. Proposed Amendments to Federal Rule of Evidence 412 (The "Rape Shield" Rule):

Professor Saltzburg briefly noted that the proposed Congressional amendments contained three parts. First, reputation and opinion evidence of an alleged victim's past sexual behavior would be inadmissible in all criminal cases. Second, another amendment would apply the rule in civil as well as criminal cases. Another amendment would permit an interlocutory appeal by the government or the alleged victim.

Professor Saltzburg moved that the Committee amend Rule 412 to make it applicable in all criminal and civil cases but that the amendment not contain any provision for an interlocutory appeal. Mr. Pauley seconded the motion.

Professor Saltzburg noted that Rule 412 was a rule which had originated in Congress and that the Advisory Committee had never approved or rejected the language. Judge Keeton indicated that it was appropriate for the Committee to act on this rule but that he was concerned about the proliferation of specific provisions and possible problems of interrelating the character evidence rules. Professor Saltzburg pointed out that there was a strong case for making the rule applicable to all civil and criminal cases. Judge Everett noted that the military had adopted Federal Rule of Evidence 412 and that it would be appropriate to combine into one rule the civil and criminal provisions. He also expressed concern about constitutional challenges to the inability of a defendant to present opinion and reputation evidence of the alleged victim.

Mr. Marek expressed opposition to the concept of extending the rape shield protections any further. He noted that Rule 403 is generally adequate and that so few cases would be affected by the proposed amendment. Professor Saltzburg observed that although there may be few cases, the applicable rules of evidence have taken on great social significance.

In a discussion about what, if any, notice provisions should be included, Judge Schlesinger observed that it would beneficial to include in one rule of evidence all of the various notice provisions affecting the admissibility of evidence. Judge Keeton noted that although there seemed to be merit in such a suggestion, he believed that the various notice provisions are indeed different.

Judge Keenan indicated that he believed it would be important to act decisively in this area lest Congress enact an unworkable rule. Judge Keeton joined in that observation, noting that adoption of Professor Saltzburg's motion would do that and that it is important that any proposed amendments be processed through the Rules Enabling Act. Mr. Adair and Mr. Pauley provided a brief update on the status of the pending amendment in Congress and observed that there might be a chance that the rape shield amendments would not be considered until Spring 1992.

Judge Everett pointed out that in considering amendments to Rule 412, the Committee should give consideration to including a constitutional escape clause for opinion and reputation evidence. Mr. Wilson, however, questioned whether doing that would create an exception which would swallow the general rule of exclusion.

The motion to amend Rule 412 ultimately carried by an 8-1 vote and the Reporter was asked to give some priority to drafting appropriate language for the amendment.

b. Proposed Rules of Evidence 413, 414, and 415 (Women's Equal Opportunity Act).

Professor Saltzburg pointed out that Congress was considering adding several rules of evidence which would in effect create exceptions to Rule 404(b) by expressly permitting introduction of a person's prior sexual activity. Noting that the subcommittee was opposed to the proposed rules, he moved that the Committee oppose those amendments. Judge Keenan seconded the motion.

Mr. Pauley argued that the rules reflected studies

which show that sexual offenders and child molesters have a higher incidence of repeating their behavior and noted that this sort of evidence would probably be admissible under Rule 404(b). Judge Keeton observed that Rule 404(b) does not permit introduction of past incidents to show a defendant's propensity, whereas these proposed amendments would permit such evidence. Judge Keenan expressed concern that this type of evidence would apparently be admissible even if the defendant had been acquitted of those prior acts. Mr. Wilson also expressed concern that it appeared that the Rules would increase the likelihood that an innocent person would be convicted. But Mr. Pauley responded that the proposed rules would increase the likelihood of convicting a guilty person. Mr. Marek pointed out that the Rules would permit, or encourage, more litigation about the underlying prior acts and Judge Hodges questioned whether there was a real need for the proposed rules.

Judge Everett noted that this evidence is usually barred because it is dangerous. He noted the contrast of the proposed amendments to Rule 412, which would block the introduction of prior sexual acts of a victim, and these proposed amendments which would highlight the defendant's prior sexual acts. He also observed that although a limiting instruction may not always be effective does not mean that the rule should be effectively abandoned for certain sexual offenders.

Judge DeAnda observed that the proposed rules would not limit the prosecution to introducing this evidence in rebuttal; the defendant's past sexual acts could be introduced in the prosecution's case-in-chief.

Professor Saltzburg indicated that although this evidence would be relevant, on balance these rules should be rejected. He noted that codification of the rules of evidence makes it more difficult for counsel to argue that the courts should make common-law exceptions to the rules. Here, the proposed amendments were designed to accomplish that purpose. He added that there might be an argument that sexual offenders are different than other offenders and that the Committee should be open to considering information from the Department of Justice which indicates that indeed those offenders should be treated differently in the rules of evidence. But the information before the Committee was insufficient to support endorsement of the proposed amendments.

The Committee voted 8-1 to express opposition to the amendments.

c. Rule 413 (Clothing of Victim).

Professor Saltzburg informed the Committee that Congress was considering the addition of Rule of Evidence 413 which would bar any evidence of a victim's clothing to show that the victim incited or invited the offense. He opined that this amendment would go too far and that other existing rules of evidence, such as Rules 401 and 403 would cover this point. After citing several brief examples to show how this rule might be illogically applied, he moved that the Committee oppose this amendment. Judge Keenan seconded the motion, which carried by a unanimous vote.

d. Good Faith Exception; Foreign Business Records; Rule 501; and Criminal Voir Dire Demonstration Act.

Professor Saltzburg moved that the Committee adopt the remainder of the Subcommittee's report which addressed several additional items. The motion was seconded.

Professor Saltzburg pointed out that Congress was considering an amendment which would admit a foreign record of a regularly conducted activity under the business records exception if a foreign certification attested to the specified requirements. He noted that Rule 36 of the Civil Rules of Procedure made this amendment unnecessary and that the matter should be referred to the Civil Rules Committee.

Regarding a proposed "demonstration" in selected districts of counsel-conducted voir dire of potential jurors, the subcommittee recommended that the Advisory Committee take no position. Mr. Pauley indicated that the Department of Justice is opposed to the plan. Mr. Marek urged the Committee to affirmatively support the plan in light of increased importance of voir dire, especially in light of increased capital litigation in federal court.

Professor Saltzburg also recommended that the Committee defer taking action on a proposed good faith exception pending in Congress which would extend to warrantless searches. Deferral, he added, would be consistent with the position of the Judicial Conference which is that this matter is one for the courts to decide.

He also noted that Congress was considering an amendment to Rule of Evidence 501 which would create an accountant-lawyer-client privilege. Noting that there are no other codified privileges in the Rules of Evidence, he

urged the Committee to oppose this amendment.

The motion to adopt the remainder of the Subcommittee's report passed by a vote of 9-0, with one abstention by Mr. Pauley.

4. Rule 32, Allocution Rights of Victims.

Judge DeAnda noted that at the Committee's May 1991 meeting, Judge Hodges had asked him to chair a subcommittee consisting of Judge Everett, Professor Saltzburg, and Mr. Marek to review pending legislation which would amend Rule 32 by providing a victim's right of allocution in sentencing of violent crimes or sexual abuse. He informed the Committee that after considering the matter, the subcommittee had come to the conclusion that the amendment was not necessary. He explained that the subcommittee believed that the issue would rarely arise, the trial judge could give little effective weight to the victim's testimony under the sentencing guidelines, and there did not appear to be any good, non-political, reasons for supporting the amendment. Judge Hodges indicated that the report, expressing opposition to the amendments, would be treated as a motion which had been seconded.

Mr. Pauley pointed out that the proposal, which had been included in the President's Violent Crime Bill, was limited to a narrow class of offenses, that the amendment would not overburden the trial courts, and that there were significant symbolic and practical reasons for the amendment. He pointed out that the sentence within the applicable range could be affected by a victim's testimony. Additionally, it would be unfair to permit victim testimony in capital sentencing, as approved by the Supreme Court, and not permit other victims the same right.

Judge Hodges questioned whether there was not already a provision in the applicable legislation which requires that a victim be apprised of the status of a case. Mr. Pauley noted that the fact that the probation officer might interview the victim is not the same as permitting the victim to testify before the court. Discussion then turned to the issue of appropriate notice to the victim. Mr. Pauley expressed the view that notice could be easily given although Judge Hodges observed that there might be a problem with a victim simply showing up in court without anyone being aware of the victim's presence. Turning to the language of the proposed amendment, Judge Hodges queried whether it would be appropriate to permit release of _in camera_ material to the victim. Mr. Wilson indicated that he agreed with the proposition that because of public

perceptions, victims should be heard.

Mr. Marek observed that there might be problems with notice and timing of a victim's testimony and that some consideration should be given to the potential relationship between the proposed amendment and the Supreme Court's decision in Burns v. United States, ____ U.S. ____ (June 13, 1991) which requires the judge to give reasonable notice before the sentencing hearing of an intent to depart from the sentencing guidelines.

Judge DeAnda observed that after listening to the views of the other members, he believed that the proposed amendment would present a symbolic effort which would not have much adverse impact on the sentencing proceedings. Judge Huyett agreed, noting that it is important that victims not feel as though they have been excluded from the judicial process. Although there would be potential mechanical problems with the amendment, the option of whether or not to testify should belong to the victim. Judge Hodges indicated that he generally agreed with that view and Professor Saltzburg noted that the amendment would not give the victim the right to testify, but only to be apprised of the ability to do so. Mr. Pauley indicated that the Department of Justice was not seeking the support of the Committee on the amendment to Rule 32 but urged it to support the concept underlying the amendment.

Judge DeAnda ultimately made a substitute motion that the Committee support the concept reflected in the Congressional amendment to Rule 32 and that the matter be resubmitted to the subcommittee to work on a draft amendment which would address the issues raised in the Committee's discussion.

In additional discussion of the motion, Judge Schlesinger suggested that any amendments to Rule 32 be short and to the point. On this point, Judge Keeton suggested that words such as "reasonable notice having been given..." could be used. Judge Hodges encouraged the subcommittee to give thought to the practical procedural problems associated with the issue.

The Committee thereafter unanimously approved the amended motion to resubmit the matter to the subcommittee for preparation and submission of a proposed amendment to Rule 32 for consideration at the Spring 1992 meeting.

Mr. Marek raised again the issue of potential notice problems presented by Burns v. United States, ____ U.S. ____ (June 13, 1991). He noted that that case makes it harder for a judge to sua sponte depart from the guidelines and

that a potential solution might be to amend Rule 32 to require the prosecution to give notice of an intent to request an upward departure from the guidelines. Judge Hodges indicated that the Committee had previously considered the problem of timing when it considered amendments to Rule 32 several years earlier. Mr. Pauley indicated that the Department of Justice would prefer a longer notice period and a requirement that notice be filed with both parties. He added that it would be better to await further caselaw developments. Judge Keeton indicated that any notice requirements should be simply stated so as not to create a trap for the unwary.

D. Other Rules Under Consideration by the Advisory Committee

1. Rule 11, Guilty Pleas before Magistrate Judges.

Judge Hodges explained that he had originally raised the issue of whether United States Magistrate Judges should be permitted to accept guilty pleas. He noted that the Supreme Court's decision in Peretz v. United States, 111 S.Ct. 2661 (1991) permitted magistrate judges to conduct voir dire in a felony case, if delegated to do so and if the parties consented. He observed, however, that in light of Peretz a magistrate judge could probably hear a guilty plea as long as the district court actually adjudicated guilt. Thus, there was probably no need to amend Rule 11 at this point.

2. Rule 16(a)(1)(A), Statements of Organizational Defendants.

The Reporter indicated that the Criminal Justice Section of the American Bar Association was seeking approval through the ABA House of Delegates for certain amendments to the Rules of Criminal Procedure. He noted that while the suggested amendments did not yet reflect official ABA policy, the Committee could, if it wished, treat the proposals as any other proposals which might be submitted by the public. The first proposed change was in Rule 16, which would provide for production of statements by organizational defendants.

Judge Hodges offered some additional general comments which noted some of the problems of interpreting Rule 16, as written, to apply to organizational defendants. Judge Schlesinger thereafter moved that an amendment to Rule 16 be drafted by the Reporter for the Committee's consideration at its Spring 1992 meeting. Mr. Doar seconded the motion.

Additional discussion focused on the fact that the amendment should generally place organizational defendants in the same position as individual defendants. Mr. Pauley indicated that the Solicitor General was apparently of the view that the current Rule 16 adequately covers organization defendants. He added that some consideration should be given to reconciling any amending language in Rule 16 with Title 18 which includes a definition of "organization." Professor Saltzburg expressed the view that the amendment should cover disclosure of "vicarious admissions," such as statements by co-conspirators. Judge Keeton agreed that Rule 16 was in need of some clarification with regard to organizational defendants and that they should be placed in the same position as other defendants.

The motion carried by a 6-3 vote.

3. Rule 16(a)(1)(D), Disclosure of Expert.

The Reporter indicated that the subject of the ABA proposed amendment to Rule 16, regarding disclosure of expert witnesses, had already been the subject of a proposed amendment which was currently out for public comment. No motion was made concerning this proposal.

4. Rule 16(a)(1)(E), Codification of Brady.

The Committee was informed by the Reporter that the ABA had also proposed a codification of Brady and that the Committee had previously considered and rejected a similar proposal a year earlier. Mr. Marek indicated that the ABA's final position on this proposal would be significant and although he was not moving adoption of the proposal at this time, he believed that the matter was important. Professor Saltzburg noted that some United States Attorneys have taken the position that Brady does not extend to sentencing; Mr. Pauley responded that he has assumed that it does extend to sentencing. No motion was made on this proposal.

5. Rule 17(c), Issuance of Subpoena.

The ABA proposals also included a provision for amending Rule 17 to permit expedited delivery of materials in discovery. After briefly reviewing the proposal, no motion was forthcoming.

6. Rule 29(b), Ruling on Motion for Acquittal.

Judge Schlesinger moved that the Committee adopt the Department of Justice's proposed amendment to Rule 29(b). The amendment would permit the court to delay ruling on the motion for judgment of acquittal until after the verdict. Mr. Pauley seconded the motion.

Mr. Pauley explained that the Department had originally submitted this amendment in 1983 and that it had been published for public comment. And although the Advisory Committee ultimately abandoned any amendment, several recent cases emphasized the need for permitting the trial court to defer ruling on motions for judgment of acquittal. He noted that although the rule does not currently permit deferral, several trial judges have done so. He also observed that in some cases, the motions require some deliberation and research. Rather than delaying the trial, the judge should be permitted to continue with the case while considering what action to take on the motion.

Judge Hodges queried whether there might be a self-incrimination problem with the defendant's need to know the judge's ruling before deciding whether to take the stand. Mr. Marek expressed concern that the proposed amendment had been abandoned in 1983 after fairly strenuous objections from the bar and that nothing had really changed in the interim to support the amendment. He pointed out that even assuming the amendment had merit, the trial judge should explicitly be limited to considering only the evidence as it existed at the close of the government's case. Professor Saltzburg voiced agreement with that position but suggested that judge should be limited to considering the evidence submitted at the time of the motion.

Thereafter, Judge Schlesinger amended his motion to read that the Committee should adopt the concepts reflected in the Department of Justice's proposal but that the amendment should be redrafted to reflect the Committee's views about the state of the evidence at the time of the motion. Mr. Pauley concurred in the amendment to the motion, which carried by a 4-3 vote with 2 members abstaining.

7. Proposals Concerning Handling of Megatrials.

Judge Hodges informed the Committee that the American Bar Association House of Delegates had passed a resolution in August 1991 which recommends that the Committee "encourage the United States District Courts to fashion remedies in appropriate individual cases..." regarding

handling of "megatrials." Noting that such trials do pose special problems, he observed that implementation of the ABA's position was beyond the jurisdiction of the Committee. Judge Keeton addressed the jurisdiction problem and indicated that the matter could be referred to the Standing Committee rather than attempting at this point to amend any particular rules of procedure. Judge Hodges indicated that his report to the Standing Committee would include a reference to this issue.

8. Rules Requiring Technical Amendments.

The Reporter indicated that a number of technical amendments had been noted by the law revision council of the House Judiciary Committee. Judge Keeton noted that although a number of the amendments are typographical errors, the Judicial Conference is concerned that too many errors will be considered "technical" and that the Rules Enabling Act will be diluted. He therefore recommended that the amendments be handled as any other amendments. Mr. Pauley moved approval of the technical amendments and Judge Crow seconded the motion which carried by a unanimous vote:

> Rule 32.1(a)(1): The word "probably" should be "probable." And the word "the" preceding the words, "authority pursuant to 28 U.S.C. § 636..." should be deleted.
>
> Rule 35: The word "government" should not be capitalized. The word "subsection" should be "subdivision."
>
> Rule 40(f): The word "therefore" should be changed to "therefor."
>
> Rule 54: The reference to "Canal Zone Code" should be deleted. And the word "Court" should be inserted before the words "of Guam."

V. EVIDENCE RULES UNDER CONSIDERATION

The Reporter indicated that Congress had taken no action on the Committee's proposed amendment to Rule 404(b) and that barring any last minute action, that amendment would go into effect on December 1, 1991. He also informed the Committee that the Civil Rules Committee would be handling the public comments on its proposed amendments to Rules of Evidence 702 and 705.

Noting the need for some systematic review of the Rules

of Evidence, the Reporter recommended that a subcommittee be formed to consider the possibility of amending the Rules of Evidence. He indicated that the subcommittee could determine what, if any, amendments were appropriate and present drafts to the Committee at its Spring 1992 meeting. Judge Keeton informed the Committee that although there had been some discussion about forming a separate Evidence Advisory Committee, no action had yet been taken in that direction and that there was merit to the Committee taking affirmative steps to reviewing the rules of evidence. Judge Hodges thereafter appointed the following members to serve on the evidence subcommittee: Professor Saltzburg (Chair), Judge Crow, Judge DeAnda, Judge Keenan, Mr. Doar, and Mr. Pauley.

VI. MISCELLANEOUS AND DESIGNATION OF TIME AND PLACE OF NEXT MEETING

The Committee noted that this would be Mrs. Ann Gardner's last meeting in view of the fact that she is retiring from the Administrative Office. Her long and faithful years of service to the Committee were fondly recognized with a standing ovation and many expressions of thanks by the members.

Judge Hodges announced that the next meeting of the Committee will be held in Washington, D.C. on April 23 and 24, 1992.

The meeting adjourned at 4:30 p.m. on November 7th.

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Proposed Amendments to Rules of Criminal Procedure; Public Comments

DATE: March 19, 1992

Written comments have been received on a number of the Rules which were circulated for public comment last summer. Attached is a copy of the proposed amendments as they were published and circulated. What follows, is a brief summary of those comments. On the assumption that the written comments have been distributed individually to the Committee, and in order to conserve paper, I am not re-circulating the written comments at this point. I will have them at the Committee meeting in April, however.

Rule 12.1, Production of Statements: There were no written comments on this proposed amendment.

Rule 16(a)(1), Disclosure of Experts: This particular amendment generated a number of comments which are summarized in an attached memo. Although there was general support for the proposed amendment, several commentators raised the issue of the scope of the rule, i.e. whether civil discovery would be broader and preferred, the lack of a specific timing requirement, the relationship of the proposed amendment to other provisions within Rule 16, and the difficulty of knowing in advance of trial what expert testimony would be presented.

These issues are worth discussion and perhaps some changes are appropriate. However, it should be noted that the Committee's initial proposal was re-written by the Standing Committee at its July 1991 meeting to conform to Civil Rule 26, which was also out for public comment. Any major changes would pose problems of conforming to the civil version, absent compelling reasons for a different rule in criminal cases. For purposes of comparison, a copy of the proposed civil rule is also attached.

Finally, although the American Bar Association has not filed any "comments" on the proposed amendments to Rule 16, it has forwarded to the Committee its version of the Rule, which was officially adopted by the ABA House of Delegates in January; it has also apparently made that same material available to members of Congress.

Rule 26.2, Production of Statements: There was general support for this provision although one comment (NY Bar Assoc) pointed out that similar disclosure requirements

should be made for motions to dismiss indictments under Rule 12(b)(1) and motions for new trials under Rule 33. That same organization pointed out the problems of disclosure for pretrial detention hearings and hearings under § 2255 where the statements may be difficult to assemble. It also encouraged some change in the Jencks Act; in the meantime it recommended that the Committee Note encourage voluntary disclosure before the statements are presented at trial. The Los Angeles Chapter of the Federal Bar Association raised questions about the definition of "privileged information" and recommended that that term be further explained or clarified, and that the remedy for violations are inadequate.

Rule 26.3, Mistrial: There was only one written comment addressing this provision (NY City Bar Assoc), and it supported the change.

Rule 32(f), Production of Statements: Only one comment addressed this particular amendment and it was apparently in the context of the problem discussed above in Rule 26.2, regarding disclosure of privileged information. The Los Angeles Chapter of the Federal Bar Association pointed out that disclosure of the victim's full statement might be hampered, for example, where it contained privileged information.

Rule 32.1, Production of Statements: There were no comments directly addressing this particular amendment.

Rule 40, Commitment to Another District (FAX): Only one commentator addressed this proposed amendment. The Los Angeles Chapter of the Federal Bar Assoc. recommended that the amendment require prompt nonfacsimile transmission of the original documents so that they may be included as court documents.

Rule 41, Search and Seizure (FAX): As noted for Rule 40, supra, the Los Angeles Chapter of the Federal Bar Association has recommended that the original documents be promptly forwarded by nonfacsimile means.

Rule 46, Production of Statements: There was only one comment addressing this particular amendment; as noted supra, the NY City Bar Assoc. noted that disclosure of statments in conjunction with detention hearings might present problems for the prosecution because at the early stages of the trial process the statements may be difficult to assemble.

Rule 8, Rules Governing § 2255 Hearings: Only one comment was received on this proposed amendment. The NY City Bar Assoc. pointed out the difficulties of assembling statements of witnesses who testified perhaps years earlier.

PRELIMINARY DRAFT
OF PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 12. Pleadings and Motions Before Trial; Defenses and Objections

* * * * *

(i) PRODUCTION OF STATEMENTS AT SUPPRESSION HEARING. Except as herein provided, rule 26.2 shall apply at a hearing on a motion to suppress evidence under subdivision (b)(3) of this rule. For purposes of this subdivision, a law enforcement officer shall be deemed a witness called by the government ~~, and upon a claim of privilege the court shall excise the portions of the statement containing privileged matter~~.

COMMITTEE NOTE

The amendment in subdivision (i) is one of a series of contemporaneous amendments to Rules 26.2, 32(f), 32.1, 46, and Rule 8 of the Rules Governing § 2255 Hearings, which extended Rule 26.2, Production of Statements of Witnesses, to other proceedings or hearings conducted under the Rules of Criminal Procedure. Language was added to Rule 26.2(c) which explicitly states that the trial court may excise privileged matter from the requested witness statements. That change to Rule 26.2 rendered similar language in Rule 12(i) redundant.

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

Rule 16. Discovery and Inspection

(a) DISCLOSURE OF EVIDENCE BY THE GOVERNMENT.

(1) *Information Subject to Disclosure.*

* * * * *

(E) EXPERT WITNESSES. Upon request of a defendant, the government shall disclose to the defendant any evidence which the government may present at trial under Rules 702, 703, or 705 of the Federal Rules of Evidence. This disclosure shall be in the form of a written report prepared and signed by the witness that includes a complete statement of all opinions to be expressed and the basis and reasons therefor, the data or other information relied upon in forming such opinions, any exhibits to be used as a summary of or support for such opinions, and the qualifications of the witness.

(2) *Information Not Subject to Disclosure.* Except as provided in paragraphs (A), (B), ~~and~~ (D), and (E) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents

made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.

* * * * *

(b) DISCLOSURE OF EVIDENCE BY THE DEFENDANT.

(1) *Information Subject to Disclosure.*

* * * * *

(C). EXPERT WITNESSES. If the defendant requests disclosure under subdivision (a)(1)(E) of this rule, upon compliance with the request by the government, the defendant, on request of the government, shall provide the government with a written report prepared and signed by the witness that includes a complete statement of all opinions to be expressed and the basis and reasons therefor, the data or other information relied upon in forming such opinions, any exhibits to be used as a summary of or support for such opinions, and the qualifications of the witness.

* * * * *

COMMITTEE NOTE

The addition of subdivisions (a)(1)(E) and (b)(1)(C) expand federal criminal discovery by requiring notice and disclosure, respectively, of the identities of expert witnesses, what they are expected to testify to, and the bases of their testimony. The amendment tracks closely with similar language in Federal Rule of Civil Procedure 26 and is intended to reduce the element of surprise which often results from unexpected expert testimony, reduce the need for continuances, and to provide the opponent with a fair opportunity to test the merit of the expert's testimony through focused cross-examination. See Eads, Adjudication by Ambush: Federal Prosecutors' Use of Nonscientific Experts in a System of Limited Criminal Discovery, 67 N. Carolina L. Rev. 577, 622 (1989).

Like other provisions in Rule 16, subdivision (a)(1)(E) requires the government to disclose certain information regarding its expert witnesses if the defendant first requests the information. Once the requested information is provided, the government is entitled, under (b)(1)(C) to reciprocal discovery of the defendant's information from the defendant.

With increased use of both scientific and nonscientific expert testimony, one of the most basic discovery needs of counsel is to learn that an expert is expected to testify. See Gianelli, Criminal Discovery, Scientific Evidence, and DNA, 44 Vand. L. Rev. 793 (1991); Symposium on Science and the Rules of Legal Procedure, 101 F.R.D. 599 (1983). This is particularly important where the expert is expected to testify on matters which touch on new or controversial techniques or opinions. The amendment is intended to meet this need by first, requiring notice of the expert's identity and qualifications which in turn will permit the requesting party to interview the prospective witness in preparation for trial and determine whether in fact the witness is

an expert within the definition of Federal Rule of Evidence 702. Like Rule 702, which generally provides a broad definition of who qualifies as an "expert," the amendment is broad in that it includes both scientific and nonscientific experts and does not distinguish between those cases where the expert will be presenting testimony on novel scientific evidence. The rule does not extend, however, to witnesses who may offer only lay opinion testimony under Federal Rule of Evidence 701.

Secondly, the requesting party is entitled to disclosure of the substance of the expected testimony. This provision is intended to permit more complete pretrial preparation by the requesting party. For example, this should inform the requesting party whether the expert will be providing only background information on a particular issue or whether the witness will actually offer an opinion.

Thirdly, and perhaps most importantly, the requesting party is to be informed of the grounds of the bases of the expert's opinion, including identification of other experts upon whom the testifying expert may be relying. Rule 16(a)(1)(D) covers disclosure and access to any results or reports of mental or physical examinations and scientific testing. But the fact that no formal written reports have been made does not necessarily mean that an expert will not testify at trial. At least one federal court has concluded that this provision did not otherwise require the government to disclose the identity of its expert witnesses where no reports had been prepared. See, e.g., United States v. Johnson, 713 F.2d 654 (11th Cir. 1983), cert. denied, 484 U.S. 956 (1984)(there is no right to witness list and Rule 16 was not implicated because no reports were made in the case). The amendment should remedy that problem. Without regard to whether a party would be entitled to the underlying bases for expert testimony under other provisions of Rule 16, the amendment requires disclosure the bases relied upon. That would necessarily cover not only written and oral reports, tests, reports, and investigations, but any information which might be recognized as legitimate basis for an opinion under Federal Rule of Evidence 703, including opinions of other experts.

As with other discovery requests under Rule 16, subdivision (d) is available to either side to seek ex parte a protective or modifying order concerning requests for information under (a)(1)(E) or (b)(1)(C).

Rule 26.2. Production of Statements of Witnesses

* * * * *

(c) PRODUCTION OF EXCISED STATEMENT. If the other party claims that the statement contains privileged information or matter that does not relate to the subject matter concerning which the witness has testified, the court shall order that it be delivered to the court in camera. Upon inspection, the court shall excise the portions of the statement that are privileged or that do not relate to the subject matter concerning which the witness has testified, and shall order that the statement with such material excised, be delivered to the moving party. Any portion of the statement that is withheld from the defendant over the defendant's objection shall be preserved by the attorney for the government, and, in the event of a conviction and an appeal by the defendant, shall be made available to the appellate court for the

purpose of determining the correctness of the decision to excise the portion of the statement.

(d) RECESS FOR EXAMINATION OF STATEMENT. Upon delivery of the statement to the moving party, the court, upon application of that party, may recess the proceedings ~~in the trial~~ for the examination of such statement and for preparation for its use in the ~~trial~~ proceedings.

* * * * *

(g) SCOPE OF RULE. Subdivisions (a)-(d) and (f) of this rule shall apply at a suppression hearing held pursuant to Rule 12, at trial pursuant this rule, at sentencing pursuant to Rule 32(f), at hearings to revoke or modify probation or supervised release held pursuant to Rule 32.1(c), at detention hearings held pursuant to Rule 46(i), and at an evidentiary hearing held pursuant to Section 2255 of Title 28, United States Code.

COMMITTEE NOTE

The addition of subsection (g), which describes the scope of the Rule, recognizes other contemporaneous amendments in the Rules of Criminal Procedure which extend the application of Rule 26.2 to other proceedings. Those changes are thus consistent with the extension of

Rule 26.2 in 1983 to suppression hearings conducted pursuant to Rule 12. See Rule 12(i).

In extending Rule 26.2 to suppression hearings in 1983, the Committee offered several reasons. First, production of witness statements enhances the ability of the court to assess the credibility of the witnesses and thus assist the court in making accurate factual determinations at suppression hearings. Second, because witnesses testifying at a suppression hearing may not necessarily testify at the trial itself, waiting until after a witness testifies at trial before requiring production of that witness's statement would be futile. Third, the Committee believed that it would not work to leave the suppression issue open until trial, where Rule 26.2 would then be applicable. Finally, one of the central reasons for requiring production of statements at suppression hearings was the recognition that by its nature, the results of a suppression hearing have a profound and ultimate impact on the issues presented at trial.

The reasons given in 1983 for extending Rule 26.2 to a suppression hearing are equally compelling with regard to other adversary type hearings which ultimately depend on accurate and reliable information. That is, there is a continuing need for information affecting the credibility of witnesses who present testimony or written statements which are considered by the court in making its decision. And that need exists without regard to whether the witness is presenting testimony or an affidavit at a pretrial hearing, at a trial, or at a post-trial proceeding.

As noted in the 1983 Advisory Committee Note to Rule 12(i), the courts have generally declined to extend the Jencks Act, 18 U.S.C. § 3500, beyond the confines of actual trial testimony. That result will be obviated by the addition of Rule 26.2(g) and amendments to the Rules noted in that new subdivision.

Although amendments to Rules 32, 32.1, 46, and Rule 8 of the Rules Governing Proceedings under 28 U.S.C. § 2255 specifically address the requirement of producing a witness's statement, Rule 26.2 has become known as the

central "rule" requiring production of statements. Thus, the references in the Rule itself will assist the bench and bar in locating other Rules which include similar provisions.

The amendment to Rule 26.2 and the other designated Rules is not intended to require production of a witness' statement before the witness actually testifies or before the witness' affidavit is presented to the court.

Minor conforming amendments have been made to subsection (d) to reflect that Rule 26.2 will be applicable to proceedings other than the trial itself. And language has been added to subsection (c) to recognize explicitly that privileged matter may be excised from the witness's prior statement.

Rule 26.3 Mistrial

Before ordering a mistrial, the court shall provide an opportunity for the government and for each defendant to comment on the propriety of the order, including whether each party consents or objects to a mistrial, and to suggest any alternatives.

COMMITTEE NOTE

Rule 26.3 is a new rule designed to reduce the possibility of an erroneously ordered mistrial which could produce adverse and irretrievable consequences. The rule is not designed to change in any way the substantive law governing mistrials but instead is directed at providing both sides with an opportunity to

place on the record their views about the proposed order declaring a mistrial. In particular, the court must give each side an opportunity to state whether it objects or consents to the order. But the Rule does not require each side to state its position.

Recently several cases have held that retrial of a defendant was barred by the Double Jeopardy Clause of the Constitution because the trial court had abused its discretion in declaring a mistrial. See United States v. Dixon, 913 F.2d 1305 (8th Cir. 1990); United States v. Bates, 917 F.2d 388 (9th Cir. 1990). In both cases the appellate courts concluded that the trial court had acted precipitously and had failed to solicit the views of the parties as to the necessity of a mistrial and the feasibility of any alternative action. The new Rule is designed to remedy that situation.

The Committee regards the Rule as a balanced and modest procedural device which could benefit both the prosecution and the defense. While the Dixon and Bates decisions adversely affected the government's interest in prosecuting the defendants on serious crimes, the new Rule could also benefit defendants. The Rule also ensures that the defendant has the opportunity to dissuade a judge from declaring a mistrial in a case where granting one would not be an abuse of discretion, but the defendant believes that the prospects for a favorable outcome before that particular court or jury are stronger than they would be at a retrial.

Rule 32. Sentence and Judgment

* * * * *

(f) Production of Statements at Sentencing Hearing.

(1) In General. Rule 26.2 (a)-(d), (f) shall apply at a sentencing hearing under this rule.

(2) Sanctions for Failure to Produce Statement. If a party elects not to comply with an order pursuant to Rule 26.2(a) to deliver a statement to the moving party, the court shall not consider the affidavit or testimony of the witness in sentencing.

COMMITTEE NOTE

The addition of subsection (f) to Rule 32 is one of a number of contemporaneous amendments extending Rule 26.2 to hearings and proceedings other than the trial itself. The amendment to Rule 32 specifically codifies the result in cases such as United States v. Rosa, 891 F.2d 1074 (3d. Cir. 1989). In that case the defendant pleaded guilty to a drug offense. During sentencing the defendant unsuccessfully attempted to obtain Jencks Act materials relating to a co-accused who testified as a government witness at sentencing. In concluding that the trial court erred in not ordering the government to produce its witness' statement, the court stated:

> We believe the sentence imposed on a defendant is the most critical stage of criminal proceedings, and is, in effect, the "bottom-line" for the defendant, particularly where the defendant has pled guilty. This being so, we can perceive no purpose in denying the defendant the ability to effectively cross-examine a government witness where such testimony may, if

> accepted, add substantially to the defendant's sentence. In such a setting, we believe that the rationale of Jencks v. United States...and the purpose of the Jencks Act would be disserved if the government at such a grave stage of a criminal proceeding could deprive the accused of material valuable not only to the defense but to his very liberty. Id. at 1079.

The court added that the defendant had not been sentenced under the new Sentencing Guidelines and that its decision could take on greater importance under those rules. Under Guideline sentencing, said the court, the trial judge has less discretion to moderate a sentence and is required to impose a sentence based upon specific factual findings which need not be established beyond a reasonable doubt. Id at n. 3.

Although the Rosa decision only decided the issue of access by the defendant to Jencks material, the amendment parallels Rules 26.2 (applying Jencks Act to trial) and 12(i) (applying Jencks Act to suppression hearing) in that both the defense and the prosecution are entitled to Jencks material.

Production of a statement is triggered by the witness' oral testimony or the presentation of the witness' affidavit. If neither is presented, no production is required. The sanction provision rests on the assumption that the proponent of the witness' affidavit or testimony has deliberately elected to withhold relevant material.

Rule 32.1. Revocation or Modification of Probation or Supervised Release

* * * * *

(c) PRODUCTION OF STATEMENTS

(1) In General. Rule 26.2(a)-(d) and (f) shall apply at any hearing under this rule.

(2) Sanctions for Failure to Produce Statement. If a party elects not to comply with an order pursuant to Rule 26.2(a) to deliver a statement to the moving party, the court shall not consider the affidavit or testimony of the witness.

COMMITTEE NOTE

The addition of subdivision (c) is one of several amendments which extend Rule 26.2 to Rules 32(f), 32.1, 46, and Rule 8 of the Rules Governing Proceedings under 28 U.S.C. § 2255. As noted in the Committee Note to Rule 26.2, the central purpose of extending that Rule to other hearings and proceedings rests heavily upon the compelling need for accurate information affecting the credibility of witnesses who have presented evidence. While that need is certainly clear in a trial on the merits, it is equally compelling and perhaps more so, in other pretrial and post-trial proceedings in which both the prosecution and defense have high interests at stake. In the case of revocation or modification of probation or supervised release proceedings, not only is the defendant's liberty interest at stake, but the government also has a stake in protecting the interests of the community.

Providing for production of witness statements at hearings conducted pursuant to Rule 32.1 will enhance the procedural due process which the rule now provides and which the Supreme Court required in Morrissey v. Brewer, 408 U.S. 471 (1972) and Gagnon v. Scarpelli, 411 U.S. 778 (1973). Access to prior statements of a witness will enhance the ability of both the defense and prosecution to test the credibility of the other side's witnesses under Rule 32.1(a)(1), (a)(2), and (b) respectively, and thus will assist the court in assessing credibility.

Production of a witness's statement is triggered by the witness' testimony or presentation of the written affidavit. If neither is presented, production is not required.

Rule 40. Commitment to Another District

(a). APPEARANCE BEFORE FEDERAL MAGISTRATE. If a person is arrested in a district other than that in which the offense is alleged to have been committed, that person shall be taken without unnecessary delay before the nearest available federal magistrate. Preliminary proceedings concerning the defendant shall be conducted in accordance with Rules 5 and 5.1, except that if no preliminary examination is held because an indictment has been returned or an information filed or because the defendant elects to have the preliminary examination conducted in the district in which the prosecution is pending, the person

shall be held to answer upon a finding that such person is the person named in the indictment, information or warrant. If held to answer, the defendant shall be held to answer in the district court in which the prosecution is pending, provided that a warrant is issued in that district if the arrest was made without a warrant, upon production of the warrant or a certified copy thereof. The warrant or certified copy may be produced by facsimile transmission.

* * * * *

COMMITTEE NOTE

The amendment to subdivision (a) is intended to expedite the process of determining where a defendant will be held to answer by permitting facsimile transmission of a warrant or a certified copy of the warrant. The amendment recognizes that there has been an increased reliance by the public in general, and the legal profession in particular, on accurate and efficient transmission of important legal documents by facsimile machines.

Rule 41. Search and Seizure

* * * * *

(c) ISSUANCE AND CONTENTS.

* * * * *

(2) *Warrant Upon Oral Testimony.*

(A) GENERAL RULE. If the circumstances make it reasonable to dispense with a written affidavit, a Federal magistrate judge may issue a warrant based, in whole or in part, upon sworn ~~oral~~ testimony communicated by telephone or other appropriate means ~~.~~ , including facsimile transmission.

* * * * *

COMMITTEE NOTE

The amendment to Rule 41(c)(2)(A) is intended to expand the authority of magistrates and judges in considering oral requests for search warrants. It also recognizes the value and increased dependance of the public generally on facsimile machines to efficiently and accurately transmit written information. It should thus have the effect of encouraging law enforcement officers to seek a warrant, especially in those cases where it is necessary or desirable to supplement oral telephonic communications by written materials which may now be transmitted electronically as well.

The Committee considered amendments to Rule 41(c)(2)(B), Application, Rule 41(c)(2)C), Issuance, and Rule 41(g), Return of Papers to Clerk, but determined that permitting use of facsimile machines in those instances would not save time and would present problems and questions concerning the need to preserve facsimile copies.

Rule 46. Release from Custody

* * * * *

(i) PRODUCTION OF STATEMENTS.

(1) In General. Rule 26.2(a)-(d) and (f) shall apply at a detention hearing held pursuant to 18 U.S.C. § 3144.

(2) Sanctions for Failure to Produce Statement. If a party elects not to comply with an order pursuant to Rule 26.2(a) to deliver a statement to the moving party, the court shall not consider the affidavit or testimony of witness at the detention hearing.

COMMITTEE NOTE

The addition of subdivision (i) to this Rule is one of a series of similar amendments to Rules 26.2, 32, 32.1, and Rule 8 of the Rules Governing Proceedings Under 28 U.S.C. § 2255 which now extend Rule 26.2 to other proceedings and hearings. As pointed out in the Committee Note to the amendment to Rule 26.2, without regard to whether a witness' testimony or affidavit is being considered at a pretrial proceeding, at the trial itself, or at a post-trial proceeding, there is continuing and compelling need to assess the credibility and reliability of information relied upon by the court. Production of a witness's prior statements directly furthers that goal.

The need for reliable information is no less crucial in a proceeding to determine whether a defendant should

be released from custody. The issues decided at pretrial detention hearings are important to both a defendant and the community. For example, a defendant charged with criminal acts may be incarcerated prior to an adjudication of guilt without bail on grounds of future dangerousness which is not subject to proof beyond a reasonable doubt. Although the defendant clearly has an interest in remaining free prior to trial, the community has an equally compelling interest in being protected from potential criminal activity committed by persons awaiting trial.

In upholding the constitutionality of pretrial detention based upon dangerousness, the Supreme Court in United States v. Salerno, 481 U.S. 739 (1986), stressed the existence of procedural safeguards in the Bail Reform Act. The Act provides for the right to counsel and the right to cross-examine adverse witnesses. See, e.g., 18 U.S.C. § 3142(f)(right of defendant to cross-examine adverse witness). Those safeguards, said the Court, are "specifically designed to further the accuracy of that determination." 481 U.S. at 751. The Committee believes that requiring the production of a witness' statement will further enhance the fact-finding process.

Given the fact that in the case of pretrial detention hearings held very early in the prosecution of a case, a particular witness' statement may not yet be on file, it may be difficult to locate and produce that statement. Or the parties may not even be aware that a statement exists. The amendment nonetheless envisions that reasonable efforts should be made to locate such statements, assuming that they in fact exist. If a witness' statement is not discovered until after the pretrial detention hearing, the court may reopen the proceeding if the statement would have a material bearing on the court's decision regarding detention. See 18 U.S.C. § 3142(f).

RULES GOVERNING PROCEEDINGS IN THE UNITED STATES DISTRICT COURT UNDER § 2255 OF TITLE 28, UNITED STATES CODE

Rule 8. Evidentiary Hearing

* * * * *

(d) Production of Statements at Evidentiary Hearing.

(1) In General. Federal Rule of Criminal Procedure 26.2(a)-(d), and (f) shall apply at an evidentiary hearing under these rules.

(2) Sanctions for Failure to Produce Statement. If a party elects not to comply with an order pursuant to Federal Rule of Criminal Procedure 26.2(a) to deliver a statement to the moving party, the court shall not consider the affidavit or testimony of the witness at the evidentiary hearing.

COMMITTEE NOTE

The amendment to Rule 8 is one of a series of parallel amendments to Federal Rules of Criminal Procedure, 32, 32.1, and 46 which extend the scope of Rule 26.2 (Production of witness statements) to proceedings other than the trial itself. The amendments are grounded on the compelling need for accurate and

credible information in making decisions concerning the defendant's liberty. See the Advisory Committee Note to Rule 26.2(g). A few courts have recognized the authority of a judicial officer to order production of prior statements by a witness at a § 2255 hearing, see, e.g., United States v. White, 342 F.2d 379, 382, n.4 (4th Cir. 1959). The amendment to Rule 8, however, now grants explicit authority to do so.

The amendment is not intended to require production of a witness's statement before the witness actually presents oral testimony or the witness' affidavit is presented to the court for its consideration.

*U.S. GOVERNMENT PRINTING OFFICE: 1991 - 525, 518/60671

ADVISORY COMMITTEE ON
FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENT TO RULE 16(a)(1)(A)

I. SUMMARY OF COMMENTS: Rule 16(a)(1)(E)

The Committee received comments from six individuals or organizations which generally supported the proposed amendments. Several offered suggested changes concerning the scope of the disclosure requirement and the timing requirements.

II. LIST OF COMMENTATORS: Rule 16(a)(1)(E)

1. Robert Garcia, Prof., Los Angeles, CA., 3-18-92
2. Robert L. Hess, Esq., Los Angeles, CA, 1-24-92
3. Benedict P. Kuehne, Esq., Miami, Fla., 11-18-92
4. Lawrence B. Pedowitz, Esq., New York, N.Y., 2-15-92
5. Charles Pereyra-Suarez, Esq., Los Angeles, CA, 2-14-92
6. Myrna S. Raeder, Prof., Los Angeles, CA, 1-31-92

III. COMMENTS: Rule 16(a)(1)(E)

Robert Garcia
Law Professor
Los Angeles, CA
FEb. 26, 1992

Professor Garcia supports the proposed amendment but concludes that it suffers from several limitations. First, the rule should require government notice without a request from the defense. Second, the government should be required to make its disclosure a reasonable time before trial and before any suppression hearings. Third, the government should be required to provide as much discovery in criminal as in civil cases. He believes that proposed amendments to Civil Rule 26 and Rule of Evidence 702 will provide greater notice in civil cases. He also notes that the rule should explicitly provide procedures for permitting the defense

ample time to prepare its case in light of the government disclosures, including a provision for deposing expert witnesses.

Robert L. Hess
Committee Chair, Los Angeles Chapter of FBA
Los Angeles, CA
Jan. 24, 1992

Mr. Hess has submitted a report from the Los Angeles Chapter of the Federal Bar Association which questions the need for the amendment to Rule 16; the issue of disclosure of experts has not been a problem in the Central District of California. In fact, the requirement might work to the disadvantage of the defense which will normally not have the resources to compile the report required by the proposed amendment. The amendment also requires the defense to make pretrial assessments of what, if any, expert testimony will be offered -- something that it may not always be able to do in terms of cost and strategy.

Benedict P. Kuehne
Private Practice
Miami,. Fla
Oct. 28, 1991

The commentator generally supports the proposed amendment to Rule 16 in that it will promote broader discovery and discourage trial by ambush.

Lawrence B. Pedowitz, Esq.
Chair, Assoc. of N.Y. Bar
New York, N.Y.

Mr. Pedowitz has submitted a report from the Criminal Law Committee of the Association of the Bar of New York City. That report generally supports the proposed amendment to Rule 16 but suggests that it be expanded to parallel similar provisions in Civil Rule 26. It also questions whether the disclosure should apply to non-traditional expert witnesses and notes the problems that could arise from the prosecution's good-faith failure to supply disclosure where it decides during trial, for example, to present expert testimony.

Charles Pereyra-Suarez
Federal Courts Committee, LA County Bar Assoc.
Los Angeles, CA
Feb. 14, 1992

This commentator endorses the report filed by the Los Angeles Chapter of the Federal Bar Association, supra.

Myrna S. Raeder
Law Professor
Los Angeles, CA
Jan. 31, 1992

Professor Raeder generally supports the proposed amendment but suggests that first, the amendment be changed to reflect last minute decisions to present expert testimony and. Second, to discourage intentional delay the rule should be amended to require a specific time for compliance. Third, she is concerned about the requirement that a complete statement of all opinions be included; she perceives a potential problem with litigation over whether the expert may be permitted to vary his or her testimony from the "script" in the disclosure. Finally, she questions the possible relationship with this amendment and Rule 16(a)(1)(D) and 16(a)(1)(B), which require disclosure of reports and examinations and tests. She suggests that the issue be, at a minimum, addressed in the accompanying commentary.

Paragraph (9) is revised to enhance the court's powers in utilizing a variety of procedures to facilitate settlement, such as through mini-trials, mediation, and nonbinding arbitration. The revision of paragraph (9) should be read in conjunction with the revision later added to the subdivision, authorizing the court to direct that the parties or their representatives or insurers attend a settlement conference or participate in special proceedings designed to foster settlement. Cf. G. Heileman Brewing Co. v. Oat Mfg. Co., 871 F.2d 1016 (7th Cir. 1989); Strandell v. Jackson County, 838 F.2d 884 (7th Cir. 1987).

Parties should not be forced by the court into settlements, and the lack of interest of a party to participate in settlement discussions may be a signal that the time and expense involved in pursuing settlement may be unproductive. Nevertheless, the court should have the power in appropriate cases to require parties to participate in proceedings that may indicate to them--or their adversaries--the wisdom of resolving the litigation without resort to a full trial on the merits. Of course the court should not impose unreasonable burdens on a party as a device to extract settlement, such as by requiring officials with broad responsibilities to attend a settlement conference involving relatively minor matters.

New paragraphs (13) and (14) are added to call attention to the opportunities for structuring of trial under Rule 42 and under revised Rules 50 and 52.

Paragraph (15) is also new. It supplements the power of the court to limit the extent of evidence under Rules 403 and 611(a) of the Federal Rules of Evidence, which typically would be invoked as a result of developments during trial. Limits on the extent of evidence established at a conference in advance of trial provide the parties with a better opportunity to determine priorities and exercise selectivity in presenting evidence than when limits are imposed during trial. Any such limits must be reasonable under the circumstances, and ordinarily the court should impose them only after receiving appropriate submissions from the parties outlining the nature of the testimony expected to be presented through various witnesses and exhibits, and the expected duration of direct and cross-examination.

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

(a) Required Disclosures; ~~Discovery Methods~~ to Discover Additional Matter.

(1) Initial Disclosures. Except in actions exempted by local rule or when otherwise ordered, each party shall, without awaiting a discovery request, provide to every other party:

(A) the name and, if known, the address and telephone number of each individual likely to have information that bears significantly on any claim or defense, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are likely to bear significantly on any claim or defense;

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Unless the court otherwise directs or the parties otherwise stipulate with the court's approval, these disclosures shall be made (i) by a plaintiff within 30 days after service of an answer to its complaint; (ii) by a defendant within 30 days after serving its answer to the complaint; and, in any event, (iii) by any party that has appeared in the case within 30 days after receiving from another party a written demand for accelerated disclosure accompanied by the demanding party's disclosures. A party is not excused from disclosure because it has not fully completed its investigation of the case, or because it challenges the sufficiency

of another party's disclosures, or, except with respect to the obligations under clause (iii), because another party has not made its disclosures.

(2) **Disclosure of Expert Testimony.**

(A) In addition to the disclosures required in paragraph (1), each party shall disclose to every other party any evidence that the party may present at trial under Rules 702, 703, or 705 of the Federal Rules of Evidence. This disclosure shall be in the form of a written report prepared and signed by the witness which includes a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information relied upon in forming such opinions; any exhibits to be used as a summary of or support for such opinions; the qualifications of the witness; and a listing of any other cases in which the witness has testified as an expert at trial or in deposition within the preceding four years.

(B) Unless the court designates a different time, the disclosure shall be made at least 90 days before the date the case has been directed to be ready for trial, or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(A), within 30 days after the disclosure made by such other party. These disclosures are subject to the duty of supplementation under subdivision (e)(1).

(C) By local rule or by order in the case, the court may alter the type or form of disclosures to be made with respect to particular experts or categories of experts, such as treating physicians.

(3) **Pretrial Disclosures.** In addition to the disclosures required in the preceding paragraphs, each party shall provide to every other party the following information regarding the evidence that the disclosing party may present at trial other than solely for impeachment purposes:

(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;

(B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken by stenographic means, a transcript of the pertinent portions of such deposition testimony; and

(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise directed by the court, these disclosures shall be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, other parties shall serve and file (i) any objections that deposition testimony designated under subparagraph (B) cannot be used under Rule 32(a) and (ii) any objection to the admissibility of the materials identified under subparagraph (C). Objections not so made, other than under Rules 402-03 of the Federal Rules of Evidence, shall be deemed waived unless excused by the

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Rules 3, 4 & 5: Report of Subcommittee

DATE: March 10, 1992

At its last meeting in Tampa, the Committee considered the question of whether any amendments should be made to Rules 3, 4, and 5 regarding arrests and review by a magistrate in light of the Supreme Court's decision in County of Riverside. After some discussion, the Committee resubmitted the issue to the subcommittee for further monitoring and consideration. Attached is a letter from Judge Schlesinger indicating that after further study, the subcommittee has recommended that no further consideration be given to the issue.

United States District Court
Middle District of Florida
United States Courthouse
80 North Hughey Avenue
Orlando, Florida 32801

Chambers of
Harvey E. Schlesinger
United States District Judge

March 4, 1992

(407) 648-6545
FTS 820-6545

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

Dear David:

This follows our telephone conversation of March 3.

Since the conclusion of our last meeting, at the end of every month I have electronically shepardized *County of Riverside* and have found no reported cases of any significance through the end of February.

In response to my communication, Ed Merek reports that at this time he does not believe any time limits should be reflected in Rule 5(a). He, therefore, no longer believes that Rules 3 and 4 need to be amended to provide an explicit telephonic arrest warrant procedure.

Roger Pauley has not been able to get input from the United States Attorney's Committee because they have not met as of this date. His feelings are the same as those expressed at the Fall meeting that there is no need to amend Rules 3, 4, and 5(a).

I make it unanimous. The Sub-Committee recommends no further consideration be given to this matter.

Sincerely yours,

Harvey

Item II-C-2

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Amendments to Rule 32

DATE: March 18, 1992

At the direction of the Advisory Committee, a subcommittee, chaired by Judge DeAnda has been considering the possibility of amending Rule 32 to provide for victims' allocution during sentencing. In the meantime, Judge Hodges has prepared a draft amendment which would make other changes to Rule 32.

Pending a report from the subcommittee, Judge Hodges' draft is attached for the full Committee's consideration. Please note that there are actually two drafts attached; one is a marked copy showing the changes and the other is a "clean" copy showing the rule as it would appear if it were amended.

This matter will be on the agenda for the April meeting in Washington, D.C.

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

ROBERT E. KEETON
CHAIRMAN

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WILLIAM TERRELL HODGES
CRIMINAL RULES
EDWARD LEAVY
BANKRUPTCY RULES

March 3, 1992

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

Re: Amendment of Rule 32, F. R. Cr. P.

Dear Dave:

As briefly discussed during our telephone conversation earlier this week, I am enclosing proposed rewrites of Rule 32. One copy is in the legislative format with new material underlined and deleted material stricken through. The other copy is a "clean" draft showing how the rule would read if the amendments were implemented. Also enclosed is a copy of a letter I have written to Judge DeAnda with particular reference to those new provisions of the rule affecting victim allocution rights - - the issue under consideration by his subcommittee.

As you will see, although the nature of the proposed changes results in a complete redrafting of the existing rule, the changes are not as drastic as they might seem. Essentially, all of the existing provisions of the rule are carried forward, except subsection (e) which would be repealed, and the additions fall into two categories: (1) incorporation of the approach taken by the model local rule recommended by the Probation and Criminal Law Committee in 1987 concerning presentence investigation procedures in Guidelines cases; and (2) victim allocution rights.

The first of these additions establishes a 60 day timetable for the preparation of the PSI report and the resolution of disputes by the probation officer in advance of the sentencing hearing so as to relieve the fact finding burden on the district court or, at least, to narrow and identify the issues remaining to be resolved.

The second category of amendments, relating to victim allocution rights, is further explained in my letter to Judge DeAnda.

Let's discuss this by phone next week.

Warm personal regards.

Cordially,

Wm. Terrell Hodges

enclosures

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
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BANKRUPTCY RULES

March 3, 1992

Honorable James DeAnda, Chief Judge
United States District Court
Southern District of Texas
11144 U. S. Courthouse
515 Rusk Avenue
Houston, TX 77002

Re: Amendment of Rule 32, F. R. Cr. P

Dear Jim:

Pursuant to our telephone conversation yesterday I am enclosing proposed redrafts of Rule 32. One copy is in a legislative format with new material underlined and with lines drawn through the material to be deleted. The other copy is a "clean" draft of the rule as it would read if the amendments were implemented. As you will see, these proposals constitute a substantial rewording of the present rule. However, except for repeal of subdivision (e), the essential provisions of the existing rule are all carried forward; the changes fall into two categories: (1) incorporation of the presentencing procedures embodied in the model local rule recommended in 1987 by the Committee on Criminal Law and Probation; and (2) the addition of victim allocution rights.

Your principal interest and that of your subcommittee centers on the provisions relating to victim allocution rights. These provisions will be found at subsections (a)(1)(D) and (c)(4)(A) and (B). As you well know, the present rule already requires the probation officer to include in presentence investigation reports "verified information stated in a nonargumentative style containing an assessment of the . . . impact upon . . . any individual against whom the offense has been committed." This is presently subdivision (c)(2)(D) of the existing rule. The proposed amendment, in effect, would simply require the probation officer to provide a copy of the victim impact portion of the PSI to any individual victim identified as such by the probation officer in

deciding what to include in that portion of the PSI. In other words, insofar as identification of "victims" is concerned, the proposed amended rule would create no new burden on the probation officer of any kind. Also, the proposed amendment contains an escape provision, i.e., the Court may excuse the giving of notice for good cause. (The comment following the amended rule might include as an example of good cause the existence of hundreds of victims of a massive fraud, etc.). Subdivision (c)(4)(B) of the proposed amended rule would also require, as a precondition to being heard at the sentencing hearing, that the victim submit to the probation officer at least 15 days before the sentencing hearing a written request to be heard at the hearing. Any such request, of course, would be made known to the parties and to the Court as a part of the probation officer's addendum to the PSI.

Please let me and/or Dave Schlueter know early next week what you and/or your subcommittee think of this proposal. I will be out of the office the remainder of this week, but would be happy to discuss the matter with you on the telephone early next week if you wish.

Warm personal regards.

Cordially,

Wm. Terrell Hodges

enclosures
c: Professor David A. Schlueter

Hodges
2nd Draft
3-3-92

Rule 32. Sentence and Judgment

(a) SENTENCE.

(1) *Imposition of Sentence.* When a presentence investigation and report is ordered pursuant to subdivision (c)(1), sentence shall be imposed ~~without unnecessary delay,~~ at the end of 60 days from the finding of guilt, but the court may advance the sentencing hearing for good cause, or when there is a factor important to the sentencing determination that is not then capable of being resolved, postpone the imposition of sentence for a reasonable time until the factor is capable of being resolved. ~~Prior to the sentencing hearing, the court shall provide the counsel for the defendant and the attorney for the Government with notice of the probation officer's determination, pursuant to the provisions of subdivision (e)(2)(B), of the sentencing classifications and sentencing guideline range believed to be applicable to the case. At the sentencing hearing, the court shall afford the counsel for the defendant and the attorney for the Government an opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence.~~ Before imposing sentence, the court shall ~~also--~~

~~(A) determine that the defendant and defendant's counsel have had the opportunity to read and discuss the presentence investigation report made available pursuant to subdivision (e)(3)(A) or summary thereof made available pursuant to subdivision (e)(3)(B);~~

~~(B)~~ (A) afford counsel for the defendant an opportunity to speak on behalf of the defendant; ~~and~~

~~(C)~~ (B) address the defendant personally and determine if the defendant wishes to make a statement and to present any information in mitigation of the sentence~~.~~;

(C) Afford the attorney for the Government an equivalent opportunity to speak to the court; and

(D) Afford any individual victim or victims who have made a timely request pursuant to subdivision (c)(4)(B) an opportunity to speak to the court.

Upon a motion that is jointly filed by the defendant and by the attorney for the Government, the court may hear in camera such a statement by the defendant, counsel for the defendant, or the attorney for the Government.

(2) *Notification of Right To Appeal.* After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of the defendant's right to appeal, including any right to appeal the sentence, and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere, except that the court shall advise the defendant of any right to appeal the sentence. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant.

(b) JUDGMENT.

(1) *In General.* A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason

is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

(2) *Criminal Forfeiture.* When a verdict contains a finding of property subject to a criminal forfeiture, the judgment of criminal forfeiture shall authorize the Attorney General to seize the interest or property subject to forfeiture, fixing such terms and conditions as the court shall deem proper.

(c) PRESENTENCE INVESTIGATION.

(1) *When Made.* ~~A probation officer shall make a presentence investigation and report to the court before the imposition of sentence u~~Unless the court finds that there is in the record information 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 court shall direct the probation officer to make a presentence investigation and report to the court before the imposition of sentence.

Except with the written consent of the defendant, the report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or nolo contendere or has been found guilty.

(2) *Report.* The report of the presentence investigation shall contain--

(A) information about the history and characteristics of the defendant, including prior criminal record, if any, financial condition, and any circumstances affecting the defendant's

behavior that may be helpful in imposing sentence or in the correctional treatment of the defendant;

(B) The classification of the offense and of the defendant under the categories established by the Sentencing Commission pursuant to section 994(a) of title 28, that the probation officer believes to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1); and an explanation by the probation officer of any factors that may indicate that a sentence of a different kind or of a different length from one within the applicable guideline would be more appropriate under all the circumstances;

(C) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2);

(D) verified information stated in a nonargumentative style containing an assessment of the financial, social, psychological, and medical impact upon, and cost to, any individual against whom the offense has been committed;

(E) unless the court orders otherwise, information concerning the nature and extent of nonprison programs and resources available for the defendant; and

(F) such other information as may be required by the court.

(3) *Disclosure and Resolution of Disputes*.

(A) ~~At least 10 days before imposing sentence,~~ Not less than 25 days before the sentencing hearing, unless this minimum period is waived by the defendant, the ~~court~~ probation officer shall provide the defendant, ~~and~~ the defendant's counsel and the attorney for the Government, with a copy of the report of the presentence investigation, including any report and recommendation resulting from a study ordered by the court pursuant to 18 U.S.C. 3552(b). ~~, including the information required by subdivision (e)(2) but not including any final recommendation as to sentence, and not to the extent that in the opinion of the court the report contains diagnostic opinions which, if disclosed, might seriously disrupt a program of rehabilitation; or sources of information obtained upon a promise of confidentiality; or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons. The court shall afford the defendant and the defendant's counsel an opportunity to comment on the report and, in the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in it.~~

~~(B) If the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (e)(3)(A) of this rule, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant and the defendant's counsel an opportunity to comment thereon. The statement may be made to the parties in camera.~~

(B) Within 10 days thereafter, the parties shall communicate in writing to the probation officer and to each other any objections either may have as to any material information, sentencing classifications, sentencing guideline ranges, and policy statements contained in or omitted from the report of the presentence investigation. After receiving any such objections the probation officer may conduct any further investigation and make any revisions to the presentence report that the probation officer deems appropriate, and may require the defendant, the defendant's counsel and the attorney for the Government to meet with the probation officer to discuss unresolved factual and legal issues.

~~(C) Any material which may be disclosed to the defendant and the defendant's counsel shall be disclosed to the attorney for the government.~~

(C) Not later than 5 days before the sentencing hearing the probation officer shall submit the presentence report to the court together with an addendum setting forth any unresolved objections and the probation officer's comments concerning such objections. Any revisions made to the presentence report, and the addendum, shall be furnished by the probation officer at the same time to the defendant, the defendant's counsel and the attorney for the Government.

(D) Except for any objection made under subdivision (c)(3)(B) that has not been resolved, the report of the presentence investigation may be accepted by the court as accurate. For good cause shown, the court may allow a new objection to be raised at any time before the imposition of sentence.

(E) ~~(D) If the comments of the defendant and the defendant's counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentence investigation report or the summary of the report or part thereof,~~ At the sentencing hearing the court shall determine the unresolved objections to the presentence report, if any, and may, in the discretion of the court, permit the parties to introduce testimony or other evidence concerning such objections. [T]he court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. A written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report thereafter made available to the Bureau of Prisons.

(F) The court may direct the probation officer, in making disclosure of the presentence report pursuant to subdivision (c)(3)(A), to withhold (i) the probation officer's recommendation, if any, as to sentence; (ii) sources of information obtained upon a promise of confidentiality; (iii) diagnostic opinions which, if disclosed, might seriously disrupt a program of rehabilitation; or (iv) any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons. Any factual information so withheld, and upon which the court intends to rely in determining sentence, shall be summarized for the parties orally or in writing before the determination

of any objections to the presentence report pursuant to subdivision (c)(3)(E). The summary may be made to the parties in camera.

~~(E) The reports of studies and recommendations contained therein made by the Director of the Bureau of Prisons pursuant to 18 U.S.C. § 3552(b) shall be considered a presentence investigation within the meaning of subdivision (c)(3) of this rule.~~

(4) *Individual Victims.*

(A) At the time a copy of the report of the presentence investigation is provided to the parties pursuant to subdivision (c)(3)(A), the probation officer, unless excused by the court for good cause, shall also provide notice to any individual against whom the offense has been committed. The notice shall contain (i) a copy of that part of the report of the presentence investigation prepared pursuant to subdivision (c)(2)(D); (ii) the time and place of the sentencing hearing; and (iii) a statement describing the right of such individual to speak at the sentencing hearing if a request to do so is made pursuant to subdivision (c)(4)(B).

(B) Subject to reasonable limitations established by the court, an individual victim or victims receiving notice from the probation officer pursuant to subdivision (c)(4)(A) may appear and be heard at the sentencing hearing pursuant to subdivision (a)(1)(D) if such individual, within 10 days after such notice from the probation officer, makes a written request to do so. The request shall be submitted to the probation officer who shall provide copies to the defendant, the defendant's counsel and the attorney for the Government.

Such request shall also be included in the addendum to the presentence report submitted to the court pursuant to subdivision (c)(3)(C).

(d) PLEA WITHDRAWAL. If a motion for withdrawal of a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.

~~(e) PROBATION. After conviction of an offense not punishable by death or by life imprisonment, the defendant may be placed on probation if permitted by law.~~

~~[(f) REVOCATION OF PROBATION.] (Abrogated Apr. 30, 1979, eff. Dec. 1, 1980)~~

Hodges
First Draft
3-3-92

Rule 32. Sentence and Judgment

(a) SENTENCE.

(1) *Imposition of Sentence.* When a presentence investigation and report is ordered pursuant to subdivision (c)(1), sentence shall be imposed at the end of 60 days from the finding of guilt, but the court may advance the sentencing hearing for good cause, or when there is a factor important to the sentencing determination that is not then capable of being resolved, postpone the imposition of sentence for a reasonable time until the factor is capable of being resolved. Before imposing sentence, the court shall --

(A) afford counsel for the defendant an opportunity to speak on behalf of the defendant;

(B) address the defendant personally and determine if the defendant wishes to make a statement and to present any information in mitigation of the sentence;

(C) Afford the attorney for the Government an equivalent opportunity to speak to the court; and

(D) Afford any individual victim or victims who have made a timely request pursuant to subdivision (c)(4)(B) an opportunity to speak to the court.

Upon a motion that is jointly filed by the defendant and by the attorney for the Government, the court may hear in camera such a statement by the defendant, counsel for the defendant, or the attorney for the Government.

(2) *Notification of Right To Appeal.* After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of the defendant's right to appeal, including any right to appeal the sentence, and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere, except that the court shall advise the defendant of any right to appeal the sentence. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant.

(b) JUDGMENT.

(1) *In General.* A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

(2) *Criminal Forfeiture.* When a verdict contains a finding of property subject to a criminal forfeiture, the judgment of criminal forfeiture shall authorize the Attorney General to seize the interest or property subject to forfeiture, fixing such terms and conditions as the court shall deem proper.

(c) PRESENTENCE INVESTIGATION.

(1) *When Made.* Unless the court finds that there is in the record information 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 court shall direct the probation officer to make a presentence investigation and report to the court before the imposition of sentence.

Except with the written consent of the defendant, the report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or nolo contendere or has been found guilty.

(2) *Report.* The report of the presentence investigation shall contain--

(A) information about the history and characteristics of the defendant, including prior criminal record, if any, financial condition, and any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in the correctional treatment of the defendant;

(B) The classification of the offense and of the defendant under the categories established by the Sentencing Commission pursuant to section 994(a) of title 28, that the probation officer believes to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1); and an explanation by the probation officer of any factors that may indicate that a sentence of a different kind or of a different length from one within the applicable guideline would be more appropriate under all the circumstances;

(C) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2);

(D) verified information stated in a nonargumentative style containing an assessment of the financial, social, psychological, and medical impact upon, and cost to, any individual against whom the offense has been committed;

(E) unless the court orders otherwise, information concerning the nature and extent of nonprison programs and resources available for the defendant; and

(F) such other information as may be required by the court.

(3) *Disclosure and Resolution of Disputes.*

(A) Not less than 25 days before the sentencing hearing, unless this minimum period is waived by the defendant, the probation officer shall provide the defendant, the defendant's counsel and the attorney for the Government, with a copy of the report of the presentence investigation, including any report and recommendation resulting from a study ordered by the court pursuant to 18 U.S.C. 3552(b).

(B) Within 10 days thereafter, the parties shall communicate in writing to the probation officer and to each other any objections either may have as to any material information, sentencing classifications, sentencing guideline ranges, and policy statements contained in or omitted from the report of the presentence investigation. After receiving any such objections the probation officer may conduct any further investigation and make any revisions to the presentence report that the probation officer deems appropriate, and may require the defendant, the defendant's counsel and the attorney for the Government to meet with the probation officer to discuss unresolved factual and legal issues.

(C) Not later than 5 days before the sentencing hearing the probation officer shall submit the presentence report to the court together with an addendum setting forth any unresolved objections and the probation officer's comments concerning such objections. Any revisions made to the presentence report, and the addendum, shall be furnished by the probation officer at the same time to the defendant, the defendant's counsel and the attorney for the Government.

(D) Except for any objection made under subdivision (c)(3)(B) that has not been resolved, the report of the presentence investigation may be accepted by the court as accurate. For good cause shown, the court may allow a new objection to be raised at any time before the imposition of sentence.

(E) At the sentencing hearing the court shall determine the unresolved objections to the presentence report, if any, and may, in the discretion of the court, permit the parties to introduce testimony or other evidence concerning such objections. The court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. A written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report thereafter made available to the Bureau of Prisons.

(F) The court may direct the probation officer, in making disclosure of the presentence report pursuant to subdivision (c)(3)(A), to withhold (i) the probation officer's

recommendation, if any, as to sentence; (ii) sources of information obtained upon a promise of confidentiality; (iii) diagnostic opinions which, if disclosed, might seriously disrupt a program of rehabilitation; or (iv) any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons. Any factual information so withheld, and upon which the court intends to rely in determining sentence, shall be summarized for the parties orally or in writing before the determination of any objections to the presentence report pursuant to subdivision (c)(3)(E). The summary may be made to the parties in camera.

(4) *Individual Victims.*

(A) At the time a copy of the report of the presentence investigation is provided to the parties pursuant to subdivision (c)(3)(A), the probation officer, unless excused by the court for good cause, shall also provide notice to any individual against whom the offense has been committed. The notice shall contain (i) a copy of that part of the report of the presentence investigation prepared pursuant to subdivision (c)(2)(D); (ii) the time and place of the sentencing hearing; and (iii) a statement describing the right of such individual to speak at the sentencing hearing if a request to do so is made pursuant to subdivision (c)(4)(B).

(B) Subject to reasonable limitations established by the court, an individual victim or victims receiving notice from the probation officer pursuant to subdivision (c)(4)(A) may appear and be heard at the sentencing hearing pursuant to subdivision (a)(1)(D) if such

individual, within 10 days after such notice from the probation officer, makes a written request to do so. The request shall be submitted to the probation officer who shall provide copies to the defendant, the defendant's counsel and the attorney for the Government. Such request shall also be included in the addendum to the presentence report submitted to the court pursuant to subdivision (c)(3)(C).

(d) PLEA WITHDRAWAL. If a motion for withdrawal of a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Proposed Amendments to the Federal Rules of Evidence; Action of Subcommittee

DATE: March 19, 1992

At the Advisory Committee's Fall 1991 meeting, Judge Hodges appointed a subcommittee, chaired by Professor Saltzburg, to consider the possibility of amending the Federal Rules of Evidence. As reflected in the attached materials, that subcommittee is currently considering several proposed amendments to the evidence rules.

Pending a report from the subcommittee on what, if any, amendments it will propose, Professor Saltzburg has suggested that the various proposals be circulated to the entire Committee for its consideration.

This matter will be on the agenda for the Spring meeting in April.

The George Washington University
WASHINGTON DC

THE NATIONAL LAW CENTER

March 8, 1992

MEMORANDUM

TO: EVIDENCE SUBCOMMITTEE

FROM: STEVE SALTZBURG

RE: SUGGESTED AMENDMENTS BY DAVE SCHLUETER

Introduction

Dave did a service for all of us in drafting four proposed amendments. He and I talked about the importance of having some evidence issues on the full committee agenda for the April meeting. He took a first shot at drafting several proposals, and I am following up with this memorandum. For reasons stated herein, I propose we amend both Rules 412 and 804, and that we do not recommend the amendments Dave drafted for Rules 407 and 801. Moreover, my proposed amendments to Rules 412 and 804 take a different form from those which Dave circulated. My reasons are also stated herein. I had proposed a conference call of the subcommittee and will attempt to arrange that once this memorandum is circulated, unless it appears that none is needed.[1]

---

[1] Dave also circulated a proposal from DEA to create a hearsay exception for laboratory analysis of drugs. It seems clear that this recommendation should be referred to the Department of Justice, particularly to Roger Pauley, for review. Surely, any amendment would not focus solely on DEA. A question would arise as to whether the FBI laboratory or other labs should be covered and as to whether any exception should be limited to certain kinds of

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Rule 407

Dave proposes amending the subsequent remedial measure rule to add "strict liability" to the issues for which subsequent repairs may not be used as proof. I believe that this is a bad idea. The fact is that in a true "strict liability" jurisdiction, the evidence either is irrelevant or vitally important so that it ought to be admitted.

It is irrelevant if a manufacturer or distributor is liable for any defect regardless of fault and the availability of safer alternatives. Any subsequent change would not be necessary to prove a defect. If liability is strict, the entire focus is on whether there was some problem at the time of manufacturer or distribution. In a true strict liability jurisdiction, then, it is possible that subsequent repair evidence is totally irrelevant and should be excluded under Rule 402.

In other jurisdictions, a manufacturer or distributor might be liable if a product was defective as long as there is some alternative safer way to produce the product. In such a jurisdiction, a subsequent remedial measure may be critical evidence of an alternative way of production and ought not to be excluded.

---

tests or expanded to cover a variety of items. Some objections to a proposed exception might be based on the line of cases which suggests that Congress intended to prohibit such an exception when it adopted Rule 803 (8)(B) and (C). This line of cases has not been accepted in all circuits and is problematic for a variety of reasons. Because the Committee would want to know how broadly or narrowly an exception might be written, reference to DOJ in the first instance seems logical.

These are only two possibilities. In many jurisdictions today the line between so-called strict liability and negligence is fuzzy. A manufacturer or distributor is not held strictly liable unless the product was unreasonably dangerous based on the state of the art when it was produced. In these jurisdictions, arguably subsequent remedial measures should be excluded for the same reasons they are excluded in negligence cases.

The bottom line is that the evidence issues involving subsequent repairs in products cases are intertwined with substantive tort law in ways that makes a single rule a bad idea. Thus, a simple amendment such as the one that Dave proposes does not do justice to the various differences in substantive law that exist around the country.

Rule 412

The draft that Dave sent does not capture the actual vote of the full committee which was to make Rule 412 applicable in all civil and criminal cases. We have to be careful, however, in making changes. Some evidence will be more likely to be admissible in certain civil settings than in a sexual assault criminal prosecution. For example, evidence in a sexual harassment case concerning "invited advances" might be relevant and admissible. The more I thought about the rule, the more thought we ought to rewrite it to make it shorter and clearer. I have proposed a redraft as follows:

Rule 412. Victim's Past Sexual Behavior of Predisposition

(a) Evidence of a victim's past sexual behavior or

predisposition is not admissible in any civil or criminal proceeding except as provided in subdivision (b).

(b) Evidence of a victim's past sexual behavior or predisposition may be admitted under the following circumstances:

(1) evidence of specific instances of sexual behavior with persons other than the person whose sexual misconduct is alleged if offered to prove that another person was the source of semen or injury;

(2) evidence of specific instances of sexual behavior with the person whose sexual misconduct is alleged if offered to prove consent;

(3) evidence of specific instances of sexual behavior if offered under circumstances in which exclusion would deny the person whose sexual misconduct is alleged a fair trial;

(4) evidence of reputation or opinion evidence when character is an element of a claim or defense.

(c) No evidence covered by this rule shall be admitted unless the party offering it files a motion under seal, not less than 15 days prior to trial or at such other time as the court may direct, seeking leave to offer the evidence at trial. The motion must describe with particularity the evidence and the purposes for which it is offered. The court shall permit any other party as well as the victim to be heard in camera on the motion and shall determine whether the

evidence will be admitted, the conditions of admissibility and the form in which the evidence may be admitted. The court may permit a motion to be made under seal during trial if a party claims good cause for not making a pretrial motion, and the court may consider the motion if it finds good cause shown. The motion and the record of any in camera proceeding shall remain under seal during the course of all further proceedings both in the trial and appellate courts.

For me such an amendment would simplify a rule that is overly complex and would make the job of the trial court more understandable. The changes would clarify the role of the court but would not substantially diminish the protection given to the victim. Indeed, the changes might enhance the protection which the victim receives, particularly in the requirement that the motion be made and kept under seal.[2]

Rule 801 (d)(2)

The proposal that Dave makes is to pick up an issue left open by the Supreme Court in Bourjaily, i.e., whether some independent evidence of conspiracy (or agency in the (D) counterpart to (E)) is required before a vicarious admission may be used under the

[2] It is true that the draft I have prepared would establish that the court is making determinations under a relevancy analysis and balancing probative value against prejudicial effect rather than deciding whether the court believes the victim or the alleged offender as the court apparently may do under Rule 412 as it is written. This part of Rule 412 is confusing to many, however, and to others is of dubious constitutional validity.

coconspirator's exemption from the hearsay rule (or under the agency exemption). As many of you know, I argued the case for the defendant in Bourjaily and believe that, on the merits, the independent evidence requirement is a good one. The Committee briefly considered whether to propose a reinstatement of the requirement and decided not to do it.

Dave's proposed change seems to me to be a move that might backfire. At some point, I think the committee should consider in more detail the Bourjaily issue and consider the impact that the same analysis has in civil rights cases, particularly in the employment context. But, I do not think that the amendment is helpful. It says that there must be "some independent evidence." Not only has the Supreme Court left the issue open, but there is also a case to be made that if we are going to enter the arena, we ought to say how much independent evidence we have in mind. Otherwise, I would prefer leaving the issue for trial and appellate courts to grapple with. An amendment might cut off debate without providing any clear guidance or benefit.

This is why I believe the amendment is not a good idea.

Rule 804 (a)

We have had a lot of interest in a child hearsay rule, even though we have not been able to find many cases in which 803 (1), (2), (4), and 804 (b)(5) have worked badly. Dave has proposed amending Rule 804 in two ways to accommodate child hearsay. I believe that we can "fix" any problem that exists much more simply. The proposal that I make would include but not be limited to young

children. I suggest we amend Rule 804 (a)(4) as follows:

> (4) is unable to be present or to testify at the hearing because of death, [or] then existing physical or mental illness or infirmity, or there is a substantial likelihood that testimony would result in physical, psychological or emotional trauma; or

This change would leave 804 (b)(5) as the standard to be satisfied if a sufficient showing of unavailability were made. The change would not arbitrarily use an age cutoff and would, therefore, recognize the problems of retarded or emotionally handicapped adults.[3]

Conclusion

Perhaps a good way to begin would be to have the subcommittee circulate tentative views on the amendments. If we all agree, we can avoid even a conference call. If we disagree we can decide how to proceed. I have prepared a form which I would ask each member to fill out and send to the other subcommittee members. It refers to the original proposals which Dave Schlueter drafted and the two modifications which I am circulating in this memorandum. Neither Dave nor I want to confine suggestions to those we have made. Any other proposals are most welcome.

---

[3] I do not mean to suggest that confrontation problems would not arise. It is not possible to avoid all confrontation attacks when an existing rule is expanded. But, to the extent that the findings which would have to be made under Rule 804 (a) demonstrate harm to a declarant, it would seem that there is no reason to conclude that harm to a 15 year old or to a 30 year old with the mental ability of six is more tolerable than harm to an 11 year old.

EVIDENCE SUBCOMMITTEE FORM

1. With respect to Rule 407, my view on the proposed amendment is:

Oppose it _____ Favor it _____

Favor something else (indicate what) _____

2. With respect to Rule 412, my view is

Oppose both Schlueter and Saltzburg amendments _____

Favor Schlueter amendment _____ Favor Saltzburg amendment _____

Favor something else (indicate what) _____

3. With respect to Rule 801 (d), my view on the proposed amendment is:

Oppose it _____ Favor it _____

Favor something else (indicate what) _____

4. With respect to Rule 804 (a), my view is

Oppose both Schlueter and Saltzburg amendments _____

Favor Schlueter amendment _____ Favor Saltzburg amendment _____

Favor something else (indicate what) _____

_____
Name

PLEASE CIRCULATE THIS FORM TO ALL OTHER MEMBERS OF THE SUBCOMMITTEE, CHIEF JUDGE HODGES AND DAVE SCHLUETER

FEDERAL RULES OF EVIDENCE

Rule 407. Subsequent Remedial Measures.

When after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove strict liability, negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasiblity of precautionary measures, if controverted, or impeachment.

COMMITTEE NOTE

Since the promulgation of Rule 407, there has been considerable litigation and debate concerning the issue of whether the rule is applicable in products liability cases where the cause of action is based, in whole or in part, on strict liability. *See generally Emerging Problems Under the Federal Rules of Evidence* 57-59 (D. Schlueter, ed)(2d ed. 1991 ABA). And because numerous states have adopted some form of Rule 407, the debate has not been limited to federal caselaw. *See* G. Joseph & S. Saltzburg, 1 *Evidence in America: The Federal Rules in the States* §§ 17-1 - 17-5 (1987) The problem seems particularly acute where multiple causes of action, including negligence and strict liablity, are alleged in the same case.

The amendment provides that the general rule of exclusion of remedial measures will apply in any case where the cause of action is based upon strict liability. To the extent that the amendment now covers products liability cases, it adopts what has emerged as the majority rule in the federal courts. *See, e.g.*, Hardy v. Chemetron Co., 628 F.2d 848 (5th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981); Cann v. Ford Motor Co., 658 F.2d 54 (2d Cir. 1981); Oberst v. International Havester Co., 640 F.2d 863 (7th Cir. 1980); Werner v. UpJohn Co., 628 F.2d 848 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981). *Cf.* Robbins v. Farmers Union Grain Terminal Ass'n, 552 F.2d 788 (8th Cir. 1977).

FEDERAL RULES OF EVIDENCE

The amendment, however, is not limited to the traditional products liability cases and would cover, for example, handling of dangerous materials where a party may be held strictly liable.

Given the debate and the split among the circuits over the issue, the Committee believed that the need for clarification and consistency required specific mention of the issue in the rule itself. As before, even assuming the rule would otherwise preclude admission of subsequent remedial measures in a products liability case, one of the stated exceptions might apply.

FEDERAL RULES OF EVIDENCE

Rule 412. Sex Offense Cases; Relevance of Victim's Past Behavior.

(a) Notwithstanding any other provision of law, in a ~~criminal~~ case in which a person is accused of sexual misconduct as defined in subdivision (d) ~~an offense under chapter 109A of title 18, United States Code~~, reputation or opinion evidence of the past sexual behavior of an alleged victim of such misconduct ~~offense~~ is not admissible.

(b) Notwithstanding any other provision of law, in a ~~criminal~~ case in which a person is accused of sexual misconduct as defined in subdivision (d) ~~an offense under chapter 109A of title 18, United States Code~~, evidence of a victim's past sexual behavior, other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is --

(1) admitted in accordance with subdivisions (c)(1) and (c)(2) and is constitutionally required to be admitted; or

(2) admitted in accordance with subdivision (c) and is evidence of --

(A) past sexual behavior with persons other than the person accused of sexual misconduct, offered by the person accused upon the issue of whether the person accused

was or was not, with respect to the alleged victim, the source of semen or injury; or

(B) past sexual behavior with the person accused and is offered by the person accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which such sexual misconduct ~~offense~~ is alleged.

(c)(1) If the person accused of ~~committing~~ sexual misconduct ~~an offense under chapter 109A of title 18, United States Code~~ intends to offer under subdivision (b) evidence of specific instances of the alleged victim's past sexual behavior, the person accused shall make a written motion to offer such evidence not later than fifteen days before the date on which the trial in which such evidence is offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case. Any motion under this paragraph shall be served on all other parties and on the alleged victim.

(2) The motion described in paragraph (1) shall be accompanied by a written offer of proof. If the court

FEDERAL RULES OF EVIDENCE

46 determines that the offer of proof contains evidence
47 described in subdivision (b), the court shall order a
48 hearing in chambers to determine if such evidence is
49 admissible. At such hearing the parties may call witnesses,
50 including the alleged victim, and offer relevant evidence.
51 Notwithstanding subdivision (b) of rule 104, if the
52 relevancy of the evidence which the accused seeks to offer
53 in the trial depends upon the fulfillment of a condition of
54 fact, the court, at the hearing in chambers or at a
55 subsequent hearing in chambers scheduled for such purpose,
56 shall accept evidence on the issue of whether such condition
57 of fact is fulfilled and shall determine such issue.
58 (3) If the court determines on the basis of the hearing
59 described in paragraph (2) that the evidence which the
60 accused seeks to offer is relevant and that the probative
61 value of such evidence outweighs the danger of unfair
62 prejudice, such evidence shall be admissible in the trial to
63 the extent an order made by the court specifies evidence
64 which may be offered and areas with respect to which the
65 alleged victim may be examined or cross-examined.
66 (d) For purposes of this rule, the term "past sexual
67 behavior" means sexual behavior other than the alleged
68 sexual misconduct. The term "sexual misconduct" means
69 sexual behavior with respect to which an offense under

FEDERAL RULES OF EVIDENCE

chapter 109A of title 18, United States Code is alleged. and includes, but is not limited to, sex harrassment or discrimination or gender bias claims.

COMMITTEE NOTE

The amendments to Rule 412 make it applicable to both criminal and civil cases where a person has been accused of sexual misconduct, a term defined in subdivision (d). Thus, a victim of sexual harrassment or other misconduct in a civil case may block disclosure of his or her prior sexual activity, unless if falls into one of the familiar exceptions.

The Committee believed that although the greatest utility for Rule 412 arises in criminal cases, there are those instances in which a victim of sexual misconduct should be able to rely upon this rule in an appropriate civil case. The rationale underlying Rule 412 has been that victims of sexual misconduct should not be discouraged from coming forward for fear that their sexual activity or reputation will become the focus of the trial. Because such victims may seek civil remedies in addition to testifying in a criminal case, the Committee believed that a strong case could be made that the protections of the Rule should be extended to civil cases as well, where a person has been accused of sexual misconduct. In amending the rule, the Committee considered the limited jurisdiction of the federal courts, which generally do not handle the traditional family law litigation, and the fact that normally a person's sexual history is not relevant for any reason in a federal case.

The rule has not been changed insofar as it recognizes that the constitution may require admission of a victim's prior sexual behavior. While the usual case would arise in a criminal case where the defendant argues that the rule interferes with the right to confrontation or due process, those arguments could also arise in a civil case.

The term "sexual misconduct" is defined in subdivision (d) to include not only criminal conduct but also conduct which would give rise to civil liability, e.g., sexual

harrassment. The examples given are not exhaustive and could include, for example, civil sexual assault. In those cases where a party is not alleged to have engaged in sexual misconduct, the victim's prior sexual behavior would generally be irrelevant, or otherwise inadmissible under Rule 403.

FEDERAL RULES OF EVIDENCE

Rule 801. Definitions.

* * * * *

(d) Statements which are not hearsay. A statement is not hearsay if --

* * * * *

(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a conspirator of a party during the course and in furtherance of the conspiracy Before admitting statements under subdivisions (d)(2)(D) and (d)(2)(E), the court must find that there is some independent evidence establishing the agency, employment, or conspiracy.

COMMITTEE NOTE

The amendment makes two changes in Rule 801. First, as recognized by the Court in *Boujaily v. United States*, 483 U.S. 171 (1987), there has been considerable debate on the issue of whether, and to what extent, the proponent of a co-conspirator statement under under 801(d)(2)(E) could rely upon the statement itself to establish that a conspiracy

existed at the time of the statement. The Court in *Boujaily* indicated that the proponent could use the offered statement for that purpose but did not decide the question of whether any other independent evidence would be required. 483 U.S. at 181. Subsequent decisions have demonstrated a reluctance to rely solely on the statements in deciding whether a foundation has been laid. *See, e.g.*, United States v. Smith, 893 F.2d 1573 (9th Cir. 1990)(independent evidence offered); *United States v. Jaramillo-Montoya*, 834 F.2d 276 (2d Cir. 1987)(statements considered with independent evidence sufficient to establish conspiracy). The amendment reflects the *Boujaily* decision that the statements of a conspirator may be considered by the court in deciding whether the exemption exists. But the amendment also is intended to make clear that some independent evidence should be offered.

While most of the caselaw has focused on foundation questions relating to co-conspirator statements, the same problem potentially exists with statements offered in subdivision (d)(2)(D), where the proponent would have to establish an underlying agency or employment. Thus, the amendment of requiring some independent evidence is extended to that exemption as well. *See, e.g.*, Merrick v. Farmers Ins. Group, 892 F.2d 1434 (9th Cir. 1990)(statements of agents properly excluded where proponent failed to show underlying agency relationship).

The second change focuses on the issue of timing and follows the developing caselaw which indicates that in most cases the trial court should require the proponent to first lay the foundation for the admissions before actually presenting them. *See, e.g.*, *United States v. Ferra*, 900 F.2d 1057 (7th Cir. 1990)(most of time it is better to make a preliminary determination rather than deciding the issue on a mistrial motion). Under the amendment the trial court is required to decide first whether the underlying agency, employment, or conspiracy existed before admitting the statements into evidence. This should avoid problems associated with the jury hearing about statements which are later declared to be inadmissible, and which may lead to declaring a mistrial.

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Proposed Hearsay Exception for Child-Victim

DATE: April 9, 1991

For the last several years, Congress has considered a number of proposed amendments which would specifically add a hearsay exception for child victims. Most recently, Congress considered adding Rule 803.1 in the 1990 Crime Bill which would have created such an exception. A copy of that proposed amendment is attached. The proposal was deleted from the final version and instead, Congress adopted a statutory amendment providing for alternatives for in-court testimony of child witnesses

Although approximately 40 states have some provision for child victim statements, no such provision exists in the Federal Rules of Evidence. The state practices and provisions vary widely. Uniform Rule of Evidence 807 covers the issue but no state has adopted the model rule in its entirety.

At the November 1990 meeting the Committee decided to consider the issue and the Reporter was asked to prepare a draft for further discussion.

Attached is a rough draft of an amendment to Federal Rule of Evidence 804 and a brief Committee Note, along with a copy of materials from Joseph and Saltzburg's Evidence in America: The Federal Rules in the States which includes a discussion of how the states have addressed the issue.

Rule 804. Hearsay Exceptions; Declarant Unavailable

(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant --

* * * * *

(6) is a child witness under the age of 12 and the court determines that requiring the child to testify would present a substantial likelihood of physical, psychological, or emotional trauma to the child.

* * * * *

(b) The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * * * *

(4a) Statement of Child Victim. A statement made by a child under the age of 12 describing any sexual, molestation, or child abuse offense against that child and the court determines that the circumstances of the making of the statement indicate that it is trustworthy. A statement may not be admitted under this exception unless the proponent makes known to adverse party sufficiently in advance of the trial or the hearing to provide the adverse

party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

COMMITTEE NOTE

The amendment to Rule 804 is generally modelled after portions of Uniform Rule of Evidence 807 and is designed to fill a perceived gap in Federal Evidence. Although no State has adopted Uniform Rule 807, a majority of the States have adopted some variation of that Rule in either their Rules of Evidence or in statutory form. The effect of these adoptions has been that hearsay statements by child victims or witnesses may be admitted if certain procedural prerequisites are met.

The child-victim exception has been included in Rule 804 to avoid confrontation clause problems, especially in criminal cases. See Idaho v. Wright, ____ U.S. ____, 110 S.Ct. 3139, 3147 (1990). To that end, Rule 804(a) has been amended to recognize that when children testify the State has a compelling interest in not subjecting them to physical, psychological, or emotional trauma which may accompany in-court testimony. See Maryland. Craig, 110 S.Ct. 3157, 3167 (1990). Thus, if the trial court determines that requiring the child to testify in court will create a substantial likelihood of such harm, the child may be declared "unavailable" for any of the exceptions under Rule 804.

Unlike Uniform Rule 807, the amendment does not include any detailed procedural requirements, other than a notice requirement, as conditions precedent to admission of a child-victim's hearsay statment. Instead, the Rule leaves to the trial court the task of considering the surrounding circumstances of the making of the statement in determining whether the hearsay statement is trustworthy. As noted by the Court in Idaho v. Wright, the Constitution does not impose a "fixed set of procedural prerequisites to the admission of such statements at trial" and in some cases procedural requirements as conditions precedent might be inappropriate or unnecessary. 110 S.Ct. at 3148.

The Rule is limited to statements by children who have been victims of sexual offenses, molestation offenses, or child-abuse offenses. No attempt has been to identify any particular specific offenses but instead leaves the issue

open for legislative developments. The amendment is not intended to include statements by a child witness which describe an offense committed against a third person.

The notice provision in subdivision (4a) is identical to the one in the residual hearsay exception provision in subdivision (5)

The amendment is not intended to preclude use of any other hearsay exception which might be available, such as excited utterances under Rule 803(2) or statements made for the purpose of medical diagnosis or treatment.

CHAPTER 61A. RULE 807

§ 61A.1. Text of Uniform Rule.

Uniform Rule 807:

CHILD VICTIMS OR WITNESSES

(a) A hearsay statement made by a minor who is under the age of [12] years at the time of trial describing an act of sexual conduct or physical violence performed by or with another on or with that minor or any [other individual] [parent, sibling or member of the familial household of the minor] is not excluded by the hearsay rule if, on motion of a party, the minor, or the court and following a hearing [in camera], the court finds that (i) there is substantial likelihood that the minor will suffer severe emotional or psychological harm if required to testify in open court; (ii) the time, content, and circumstances of the statement provide sufficient circumstantial guarantees of trustworthiness; (iii) the statement was accurately recorded by audio-visual means; (iv) the audio-visual record discloses the identity and at all times includes the images and voices of all individuals present during the interview of the minor; (v) the statement was not made in response to questioning calculated to lead the minor to make a particular statement or is clearly shown to be the minor's statement and not the product of improper suggestion; (vi) the individual conducting the interview of the minor is available at trial for examination or cross-examination by any party; and (vii) before the recording is offered into evidence, all parties are afforded an opportunity to view it and are furnished a copy of a written transcript of it.

(b) Before a statement may be admitted in evidence pursuant to subsection (a) in a criminal case, the court shall, at the request of the defendant, provide for further questioning of the minor in such manner as the court may direct. If the minor refuses to respond to further questioning or is otherwise unavailable, the statement made pursuant to subsection (a) is not admissible under this rule.

(c) The admission in evidence of a statement of a minor pursuant to subsection (a) does not preclude the court from permitting any party to call the minor as a witness if the interests of justice so require.

(d) In any proceeding in which a minor under the age of [12] years may be called as a witness to testify concerning an act of sexual conduct or physical violence performed by or with another on or with that minor or any [other individual] [parent, sibling or member of the familial household of the minor], if the court finds that there is a substantial likelihood that the minor will suffer severe emotional or psychological harm if required to testify in open court, the court may, on motion of a party, the minor or the court, order that the testimony of the minor be taken by deposition recorded by audio-visual means or by contemporaneous examination and cross-examination in another place under the supervision of the trial judge and

communicated to the courtroom by closed-circuit television. Only the judge, the attorneys for the parties, the parties, individuals necessary to operate the equipment, and any individual the court finds would contribute to the welfare and well-being of the minor may be present during the minor's testimony. If the court finds that placing the minor and one or more of the parties in the same room during the testimony of the minor would contribute to the likelihood that the minor will suffer severe emotional or psychological harm, the court shall order that the parties be situated so that they may observe and hear the testimony of the minor and may consult with their attorneys, but the court shall ensure that the minor cannot see or hear them, except, within the discretion of the court, for purposes of identification.

(e) The requirements for admissibility of a statement under this rule do not preclude admissibility of the statement under any other exception to the hearsay rule.

There is no Federal Rule corresponding to Uniform Rule 807.

§ 61A.2. State Adoption and Variations.

No state has adopted Uniform Rule 807, which was adopted by the National Conference of Commissioners on Uniform State Laws in August 1986. Forty-one states have, however, promulgated rules or enacted statutes that parallel it in: (1) creating a hearsay exception for certain statements made by child witnesses; (2) permitting the trial testimony of certain child witnesses to be taken on closed-circuit television instead of live at trial; or (3) allowing the testimony of certain child witnesses to be videotaped for replay at trial.

Hearsay Exception.

Twenty-six states have adopted hearsay exceptions for statements made by children who are victims of, or witnesses to, physical abuse, sexual abuse or other crimes.[1] Nineteen states

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1. ARIZ. REV. STAT. §§ 13-1416, 13-4251 and 13-4252; ARK. R. EVID. 803(25); COLO. REV. STAT. § 13-25-129; FLA. STAT. ANN. § 90.803(23); GA. CODE § 24-3-16; HAWAII R. EVID. 616; ILL. ANN. STAT. ch. 37, § 704-6(4)(c) and ch. 38, § 115-10; IND. CODE ANN. §§ 31-6-15 and 35-37-4-6; IOWA CODE §§ 232.96(6) and 910A.14; KAN. STAT. ANN. §§ 22-3433 and 60-460(dd); KY. REV. STAT. § 421.350; LA. REV. STAT. § 15:440.1-440.5; 15 ME. REV. STAT. § 1205; MINN. STAT. §§ 260.156 and 595.02, subd. 3; MO. REV. STAT. §§ 491.075 and 492.304; NEV. REV. STAT. § 51.385; 10 OKLA. STAT. § 1147, 12 OKLA. STAT. § 2803.1 and 22 OKLA. STAT. § 752; 42 PA. CONS. STAT. § 5986; R.I. GEN. LAWS §§ 14-1-68 and 40-11-7.2; S.D. COD. LAWS § 19-16-38; TENN. CODE § 24-7-116; TEX. CODE CRIM. PROC. arts. 38.071-38.072; TEX. CIV. STAT. art. 6252-13a, § 13B; TEX. FAM. CODE § 54.031;

limit the hearsay exception to statements made by victims, while seven extend it as broadly as the Uniform Rule to include statements made by non-victim witnesses.[2] The maximum ages of the children whose statements may be received varies widely, ranging from less than ten years[3] up to eighteen or twenty-one years.[4] Sixteen enactments include the Uniform Rule requirement that the statement be audiovisually recorded to fall within the exception;[5] in one other state videotaping the statement is optional.[6] Under most of the enactments, the subject matter of the statement is strictly limited to reporting acts of physical violence or sexual abuse.

The standards that the courts must apply to determine admissibility diverge substantially. Unlike the Uniform Rule (and unlike the closed-circuit television and videotaped testimony enactments discussed below), very few of the hearsay exceptions direct the court to consider the potential harm that the child might suffer if he or she were required to testify in open court.[7] In most states, the court need only consider whether the time, content and circumstances of the child's statement provide sufficient circumstantial guarantees of trustworthiness to warrant admission.[8] Some rules and statutes, however, require that more detailed criteria be considered. These criteria often require the judge to

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UTAH CODE § 76-5-411; VT. R. EVID. 804a; WASH. REV. CODE § 9A.44.120; and WIS. STAT. ANN § 908.08.

2. The seven states with witness statutes are Arizona, Iowa, Oklahoma, Texas, Utah, Vermont and Wisconsin. The remaining 19 states listed in note 1 *supra* restrict the exception to victims' statements.

3. *See, e.g.*, the Arizona (§ 13-1416), Arkansas, Indiana, Minnesota, Nevada, South Dakota, Vermont and Washington provisions as cited in note 1 *supra*.

4. *See* the Illinois (ch. 37, § 706-6(4)(c)), Kansas (§ 60-460(dd)) and Missouri (§ 232.96) statutes cited in note 1 *supra*.

5. *See* the Arizona (§ 13-4252), Hawaii, Kansas (§ 22-3433), Kentucky, Louisiana, Missouri (§ 232.96), Oklahoma (tit. 10, § 1147(A); tit. 22, § 752), Rhode Island (both statutes), Tennessee, Texas (CODE CRIM. PROC. art. 38.071, § 5; Civ. Stat. art. 6252-13a, § 13(B)(a); FAM. CODE § 54.031), Utah and Wisconsin provisions cited in note 1 *supra*.

6. Indiana.

7. *See, e.g.*, the Indiana, Maine and Texas (CODE CRIM. PROC. art. 38.071, § 8(a)) provisions (note 1 *supra*), which do impose that requirement. The requirement may also be constitutionally imposed in criminal cases. *See* the discussion of Coy v. Iowa, 108 S. Ct. 2798 (1988), in § 61A.3 *infra*.

8. *See, e.g.*, the Colorado, Florida, Georgia, Indiana, Iowa, Kansas (§ 60-460(dd)), Minnesota, Missouri, Nevada, Oklahoma (tit. 12, § 2803.1)), Pennsylvania, South Dakota, Texas (CODE CRIM. PROC. art. 38.072), Vermont and Washington provisions cited in note 1 *supra*.

weigh such factors as the age and maturity of the child; the circumstances surrounding the statement; the nature and duration of the offense; the relationship of the child to the offender or to the party offering the statement; whether the statement was made in response to leading questions; and, if the statement was audiovisually recorded, whether every voice on the tape is identified, whether the interviewer is available for cross-examination at trial, and whether the defense has been afforded an opportunity to view the tape prior to its admission.[9] Maine has a unique requirement that the statement be made in such a fashion as to afford a criminal defendant the right to cross-examine.[10] Since the Maine statute also requires that the statement be court ordered and be taken before a judicial officer, the "statement" it contemplates is effectively a deposition.

The states also differ as to whether the child must be available to testify at trial before his or her hearsay statement may be received. This has obvious impact on the question, discussed below, whether admission of the statement violates a criminal defendant's confrontation rights. Nine enactments require that the child be available as a precondition to admission of the statement,[11] and two others provide that the child may be called to testify at trial.[12] Ten statutes excuse the child from appearing at trial if he or she is "unavailable,"[13] although nine of these provisions require additional corroboration before the statement may be admitted in this circumstance.[14] Two enactments excuse the child from testifying,[15] while seven do not address the issue.[16]

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9. *See, e.g.*, the Arizona (§ 13-4252), Arkansas, Hawaii, Kansas (§ 22-3433), Kentucky, Louisiana, Oklahoma (tit. 10, § 1147(A) and tit. 22, § 752), Tennessee, Texas (CODE CRIM. PROC. arts. 38.071-38.072) and Washington provisions cited in note 1 *supra*.

10. 15 ME. REV. STAT. § 1205(2).

11. *See* the Arizona (§ 13-4252), Georgia, Kansas (§ 22-3433), Kentucky, Louisiana (§ 15:440.5), Missouri (§ 492.304), Tennessee, Texas (CODE CRIM. PROC. art. 38.072) and Vermont provisions cited in note 1 *supra*.

12. Under the Hawaii Rule, either party may summon the child to testify. Conversely, one Louisiana statute (§ 15:440.5(A)) provides only that the prosecutor may require the child's testimony.

13. *See* the Arizona (§ 13-1416), Colorado, Florida, Indiana, Kansas (§ 40-460(dd)), Minnesota, Nevada, Oklahoma (tit. 12, § 2803.1; tit. 22, § 752) and South Dakota statutes cited in note 1 *supra*. "Unavailab[ility]" is usually defined (if at all) much as it is in FED. R. EVID. 804(a).

14. All but the Kansas statute cited in the preceding footnote.

15. *See* the Arkansas and Texas (CODE CRIM. PROC. art. 38.071, § 5) provisions cited in note 1 *supra*.

16. *See* the Iowa, Maine, Missouri, Oklahoma (tit. 10, § 1147(A)), Pennsylvania, Washington and Wisconsin provisions cited in note 1 *supra*.

The Louisiana statute rather cryptically states that: "Nothing in this Section shall be construed to prohibit the defendant's right of confrontation."[17]

Closed-Circuit Television.

Twenty-three states permit children to testify at trial by way of closed-circuit television, instead of taking the stand in open court.[18] Eleven statutes permit any child witness in select proceedings to testify on specific subjects by way of closed-circuit television;[19] thirteen permit only child victims (or children who are the subject of dependency or neglect proceedings) to testify in that fashion.[20] The subject matter of the testimony is sometimes confined to certain acts of sexual abuse or physical violence. As in the case of the hearsay exceptions discussed above, the closed-circuit television enactments vary widely in setting the maximum ages of the children to whose testimony they apply. The gamut runs from less than ten years[21] to seventeen years of age.[22]

The standards that the courts must apply to determine whether a minor's testimony may be taken by closed-circuit television also differ substantially. Ten states do not articulate precise criteria for the judge to apply. Eight of these set forth no criteria at all,[23]

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17. LA. REV. STAT. § 15:440.5(B).

18. ALA. CODE § 15-25-3; ARIZ. REV. STAT. § 13-4253; CAL. PENAL CODE § 1347; CONN. GEN. STAT. § 54-86g; FLA. STAT. ANN. § 92.54; GA. CODE § 17-8-55; HAWAII R. EVID. 616; IND. CODE §§ 31-6-16 and 35-37-4-8; IOWA CODE § 910A.14; KAN. STAT. ANN. § 22-3434; KY. REV. STAT. ANN. § 421.350(3); LA. REV. STAT. ANN. § 15:283; MD. CTS. & JUD. PROC. CODE § 9-102; MASS. GEN. LAWS ANN. ch. 278, § 16D; N.J. REV. STAT. § 2A:84A-32.4; N.Y. CRIM. PROC. L. §§ 65.00-65.30; OHIO REV. CODE §§ 2907.41 and 2151.3511; 10 OKLA. STAT. § 1147 and 22 OKLA. STAT. § 753; 42 PA. CONS. STAT. § 5985; R.I. GEN. LAWS § 11-37-13.2; TEX. CODE CRIM. PROC. art. 38.071 and TEX. CIV. STAT. art. 6252-13a, § 13B; UTAH CODE § 77-35-15.5; and VT. R. EVID. 807.

19. *See* the Alabama, Arizona, California, Florida, Iowa, Massachusetts, New Jersey, New York, Oklahoma (tit. 10, § 1147(A)), Pennsylvania and Utah provisions cited in note 18 *supra*.

20. *See* the Connecticut, Georgia, Hawaii, Indiana, Kansas, Kentucky, Louisiana, Maryland, Ohio, Oklahoma (tit. 22, § 753), Rhode Island, Texas (CODE CRIM. PROC. art. 38.071, § 3) and Vermont provisions cited in note 17 *supra*. The total exceeds 23 (the number of states with closed-circuit testimony provisions) because, as note 18 reflects, some states have more than one enactment.

21. *See* the Indiana provision set forth in note 18 *supra*.

22. *See* the Maryland and Rhode Island statutes cited in note 18 *supra*.

23. *See* the Arizona, Connecticut, Hawaii, Iowa, Kansas, Kentucky, Louisiana and Oklahoma provisions cited in note 18 *supra*.

"(IV) subject to clause (iv), the parties; and

"(V) other persons whose presence is determined by the court to be necessary to the welfare and well-being of the child.

"(iv) If the preliminary finding of inability under clause (i) is based on evidence that the child is unable to testify in the physical presence of one of the parties, the court may order that the party, including a party represented pro se, be excluded from the room in which the deposition is conducted. If the court orders that a party be excluded from the deposition room, the court shall order that the party be provided with a means of private, contemporaneous communication with the party's attorney during the deposition.

"(C) If at the time of trial the court finds that the child is unable to testify as for a reason described in subparagraph (B)(i), the court may admit into evidence the child's videotaped deposition in lieu of the child's testifying at the trial. The court shall support a ruling under this subparagraph with findings on the record.

"(D) Upon timely receipt of notice that new evidence has been discovered after the original videotaping and before or during trial, the court, for good cause shown, may order an additional videotaped deposition. The testimony of the child shall be restricted to the matters specified by the court as the basis for granting the order.

"(E) In connection with the taking of a videotaped deposition under this paragraph, the court may enter a protective order for the purpose of protecting the privacy of the child.

"(F) The videotape of a deposition taken under this paragraph shall be destroyed 5 years after the date on which the trial court entered its judgment, but not before a final judgment is entered on appeal including Supreme Court Review. The videotape shall become part of the court record and be kept by the court until it is destroyed.

"(c) COMPETENCY EXAMINATIONS.

"(1) *Effect of Federal Rules of Evidence.* Nothing in this subdivision shall be construed to abrogate rule 601 of the Federal Rules of Evidence.

"(2) *Presumption.* A child is presumed to be competent.

"(3) *Requirement of Written Motion.* A competency examination regarding a child witness may be conducted by the court only upon written motion and offer of proof of incompetency by a party.

"(4) *Requirement of Compelling Reasons.* A competency examination regarding a child may be conducted only if the court determines, on the record, that compelling reasons exist. A child's age alone is not a compelling reason.

"(5) *Persons Permitted to be Present.* The only persons who may be permitted to be present at a competency examination are—

"(A) the judge;

"(B) the attorneys for the parties;

"(C) a court reporter; and

"(D) persons whose presence, in the opinion of the court, is necessary to the welfare and well-being of the child, including the child's attorney, guardian ad litem, or adult attendant.

"(6) *Not Before Jury.* A competency examination regarding a child witness shall be conducted out of the sight and hearing of a jury.

"(7) *Direct Examination of Child.* Examination of a child related to competency shall normally be conducted by the court on the basis of questions submitted by the attorneys for the parties including a defendant acting as an attorney pro se. The court may permit an attorney but not a defendant acting as an attorney pro se to examine a child directly on competency if the court is satisfied that the child will not suffer emotional trauma as a result of the examination.

"(8) *Appropriate Questions.* The questions asked at the competency examination of a child shall be appropriate to the age and developmental level of the child, shall not be related to the issues at trial, and shall focus on determining the child's ability to understand and answer simple questions.

"(9) *Psychological and Psychiatric Examinations.* Psychological and psychiatric examinations to assess the competency of a child witness shall not be ordered without a showing of compelling need.

"(d) PRIVACY PROTECTION.

"(1) *Confidentiality of Information.* (A) A person acting in a capacity described in subparagraph (B) in connection with a civil proceeding shall—

"(i) keep all documents that disclose the name or any other information concerning a child in a secure place to which no person who does not have reason to know their contents has access; and

"(ii) disclose documents described in clause (i) or the information in them that concerns a child only to persons who, by reason of their participation in the proceeding, have reason to know such information.

"(B) Subparagraph (A) applies to—

"(i) all employees of any government agency that may become connected with the case, including employees of the Department of Justice, any law enforcement agency involved in the case, and any person hired by the government to provide assistance in the proceeding;

"(ii) employees of the court;

"(iii) the parties and employees of the parties, including the attorneys for the parties and persons hired by the parties or an attorney for a party to provide assistance in the proceeding; and

"(iv) members of the jury.

"(2) *Filing Under Seal.* All papers to be filed in court that disclose the name of or any other information concerning a child shall be filed under seal without necessity of obtaining a court order. The person who makes the filing shall submit to the clerk of the court—

"(A) the complete paper to be kept under seal; and

"(B) the paper with the portions of it that disclose the name of or other information concerning a child redacted, to be placed in the public record.

"(3) *Protective Orders.* (A) On motion by any person the court may issue an order protecting a child from public disclosure of the name of or any other information concerning the child in the course of the proceedings, if the court determines that there is a significant possibility that such disclosure would be detrimental to the child.

"(B) A protective order issued under subparagraph (A) may—

"(i) provide that the testimony of a child witness, and the testimony of any other witness, when the attorney who calls the witness has reason to anticipate that the name of or any other information concerning a child may be divulged in the testimony, be taken in a closed courtroom; and

"(ii) provide for any other measures that may be necessary to protect the privacy of the child.

"(4) *Disclosure of Information.* This subdivision does not prohibit disclosure of the name of or other information concerning a child to a party, an attorney for a party, a multidisciplinary child abuse team, a guardian ad litem, or an adult attendant, or to anyone to whom, in the opinion of the court, disclosure is necessary to the welfare and well-being of the child.

"(e) CLOSING THE COURTROOM.—When a child testifies the court may order the exclusion from the courtroom of all persons, including members of the press, who do not have a direct interest in the case. Such an order may be made if the court determines on the record that requiring the child to testify in open court would cause substantial psychological harm to the child or would result in the child's inability to effectively communicate.

"(f) GUARDIAN AD LITEM.

"(1) *In General.* The court may appoint a guardian ad litem for a child who was a victim of, or a witness to, a crime involving abuse or exploitation to protect the best interests of the child. In making the appointment, the court shall consider a prospective guardian's background in, and familiarity with, the judicial process, social service programs, and child abuse issues. The guardian ad litem shall not be a person who is or may be a witness in a proceeding involving the child for whom the guardian is appointed.

"(2) *Duties of Guardian Ad Litem.* A guardian ad litem may attend all the depositions, hearings, and trial proceedings in which a child participates, and make recommendations to the court concerning the welfare of the child. (The extent of access to grand jury materials is limited to the access routinely provided to victims and their representatives.) The guardian ad litem may have access to all reports, evaluations and records, except attorney's work product, necessary to effectively advocate for the child. A guardian ad litem shall marshal and coordinate the delivery of resources and special services to the child. A guardian ad litem shall not be compelled to testify in any court action or proceeding concerning any information or opinion received from the child in the course of serving as a guardian ad litem.

"(3) *Immunities.* A guardian ad litem shall be presumed to be acting in good faith and shall be immune from civil and criminal liability for complying with the guardian's lawful duties described in subpart (2).

"(g) ADULT ATTENDANT.—A child testifying at or attending a judicial proceeding shall have the right to be accompanied by an adult attendant to provide emotional support to the child. The court, at its discretion, may allow the adult attendant to remain in close physical proximity to or in contact with the child while the child testifies. The court may allow the adult attendant to hold the child's hand or allow the child to sit on the adult attendant's lap throughout the course of the proceeding. An adult attendant shall not provide the child with an answer to any question directed to the child during the course of the child's testimony or otherwise prompt the child.".

(c) EVIDENCE.—The Federal Rules of Evidence are amended by inserting after rule 803 the following new rule:

"Rule 803.1 Child Victims' and Child Witnesses' Testimony

"(a) Hearsay exception for out-of-court statements—

"(1) In general.—An out-of-court statement made by a child of less than 13 years of age concerning conduct related to alleged completed or attempted crimes of sexual abuse, physical abuse, or exploitation of the child or concerning a crime against another person witnessed by the child that is not otherwise admissible in a judicial proceeding is not excluded by the hearsay rule if—

"(A) the child testifies at the proceeding, or testifies by means of videotaped deposition or closed-circuit television, and at the time of the taking of the testimony is sub-

ject to cross-examination concerning the out-of-court statement;

"(B) the court finds that the child's out-of-court statement possesses particularized guarantees of trustworthiness; and

"(C) the court finds that the child is unable to testify effectively for any of the following reasons:

"(i) The child persistently refuses to testify despite the court's request to do so.

"(ii) The child is unable to testify because of fear, failure of memory, or similar circumstances.

"(iii) There is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying in open court or by means of videotaped deposition or closed-circuit television.

"(iv) The child suffers a mental or other infirmity.

"(v) A privilege precludes taking the child's testimony in open court or by means of videotaped deposition or closed-circuit television.

"(vi) The child has died or is absent from the jurisdiction.

"(2) Guarantees of trustworthiness.—In determining whether a statement possesses particularized guarantees of trustworthiness under paragraph (1)(B), the court may consider—

"(i) the child's knowledge of the event;

"(ii) the age and maturity of the child;

"(iii) the degree of certainty that the statement was in fact made by the child;

"(iv) any apparent motive the child may have had to falsify or distort the event, including bias, corruption, or coercion;

"(v) the timing of the child's statement;

"(vi) whether more than one person heard the statement;

"(vii) whether the child was suffering pain or distress when making the statement;

"(viii) the nature and duration of any alleged abuse;

"(ix) whether the child's young age makes it unlikely that the child fabricated a statement that represents a graphic, detailed account beyond the child's experience;

"(x) whether the statement has internal consistency or coherence and uses terminology appropriate to the child's age;

"(xi) whether the statement is spontaneous or directly responsive to questions;

"(xii) whether the statement is suggestive due to improperly leading questions; and

"(xiii) whether extrinsic evidence exists to show the defendant's opportunity to commit the act complained of in the child's statement.

"(3) Notice.—The proponent of the admission of an out-of-court statement shall notify the adverse party of the proponent's intention to offer the statement and of the content of the statement sufficiently in advance of the proceeding to provide the adverse party with a fair opportunity to prepare a response to the statement before the proceeding at which it is to be offered.

"(4) Findings.—The court shall support with findings on the record any rulings pertaining to the child's inability and the trustworthiness of an out-of-court statement.

"(b) Testimonial aids.—The court may permit a child to use anatomical dolls, puppets, drawings, mannequins, or any other demonstrative device the court deems appropriate for the purpose of assisting a child in testifying.".

(d) Violation of Rule Regarding Disclosure.—

(1) Punishment as contempt.—Chapter 21 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"§ 403. Protection of the privacy of child victims and child witnesses

"A violation of rule 43.1(d)(1) of the Federal Rules of Civil Procedure or rule 52.1(d)(1) of the Federal Rules of Criminal Procedure shall constitute a criminal contempt classified as a Class A misdemeanor.".

(2) Technical amendment.—The chapter analysis for chapter 21, United States Code, is amended by adding at the end thereof the following new item:

"403. Protection of the privacy of child victims and child witnesses.".

SEC. 1574. CHILD ABUSE REPORTING.

(a) In General.—A person who, while engaged in a professional capacity or activity described in subsection (b) on Federal land or in a federally operated (or contracted) facility, learns of facts that give reason to suspect that a child has suffered an incident of child abuse, shall as soon as possible make a report of the suspected abuse to the agency designated under subsection (d).

(b) Covered Professionals.—Persons engaged in the following professions and activities are subject to the requirements of subsection (a):

(1) Physicians, dentists, medical residents or interns, hospital personnel and administrators, nurses, health care practitioners, chiropractors, osteopaths, pharmacists, optometrists, podiatrists, emergency medical technicians, ambulance drivers, undertakers, coroners, medical examiners, and alcohol or drug treatment personnel.

(2) Religious healers, persons rendering spiritual treatment through prayer, and persons licensed to practice the healing arts.

(3) Psychologists, psychiatrists, and mental health professionals.

(4) Social workers, licensed or unlicensed marriage, family, and individual counselors.

(5) Teachers, teacher's aides or assistants, school counselors and guidance personnel, school officials, and school administrators.

(6) Child care workers and administrators.

(7) Law enforcement personnel, judges, probation officers, criminal prosecutors, and juvenile rehabilitation or detention facility employees.

(8) Foster parents.

(9) Commercial film and photo processors.

(c) Definitions.—For the purposes of this section—

(1) the term "child abuse" means the physical or mental injury, sexual abuse or exploitation, negligent treatment, or maltreatment of a child;

(2) the term "exploitation" means child pornography or child prostitution;

(3) the term "sexual abuse" includes the employment, use, persuasion, inducement, enticement, or coercion of child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children;

(4) the term "sexually explicit conduct" means actual or simulated—

(A) sexual intercourse, including sexual contact in the manner of genital-genital, oral-genital, anal-genital, or oral anal contact, whether between persons of the same or of opposite sex;

(B) bestiality;

(C) masturbation;

(D) lascivious exhibition of the genitals or pubic area of a person or animal; or

(E) sadistic or masochistic abuse; and

(5) the term "sexual contact" means the intentional touching, either directly or through clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify sexual desire of any person.

(d) Agency Designated to Receive Report and Action to be Taken.—For all Federal lands and all federally operated (or contracted) facilities in which children are cared for or reside, the Attorney General shall designate an agency to receive and investigate the reports described in subsection (a). By formal written agreement, the designated agency may be a non-Federal agency. When such reports are received by social services or health care agencies, and involve allegations of sexual abuse, serious physical injury, or life-threatening neglect of a child, there shall be an immediate referral of the report to a law enforcement agency with authority to take emergency action to protect the child. All reports received shall be promptly investigated, and whenever appropriate, investigations shall be conducted jointly by social services and law enforcement personnel, with a view toward avoiding unnecessary multiple interviews with the child.

(e) Reporting Form.—In every federally operated (or contracted) facility, and on all Federal lands, a standard written reporting form, with instructions, shall be disseminated to all mandated reporter groups. Use of the form shall be encouraged, but its use shall not take the place of the immediate making of oral reports, telephonically or otherwise, when circumstances dictate.

(f) Immunity for Reporting and Associated Actions.—All persons who, acting in good faith, make a report by subsection (a), or otherwise provide information or assistance in connection with a report, investigation, or legal intervention pursuant to a report, shall be immune from civil and criminal liability arising out of such actions. There shall be a presumption that any such persons acted in good faith. If a person is sued because of the person's performance of one of the above functions, and the defendant prevails in the litigation, the court may order that the plaintiff pay the defendant's legal expenses.

(g) Criminal Penalty for Failure to Report.—(1) Chapter 110 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"§ 2258. Failure to report child abuse

"A person who, while engaged in a professional capacity or activity described in subsection (b) of section 502 of the Victims of Child Abuse Act of 1990 on Federal land or in a federally operated (or contracted) facility, learns of facts that give reason to suspect that a child has suffered an incident of child abuse, as defined in subsection (c) of that section, and fails to make a timely report as required by subsection (a) of that section, shall be guilty of a Class B misdemeanor.".

(2) The chapter analysis for chapter 110, United States Code, is amended—

(A) by amending the catchline to read as follows:

"CHAPTER 110—SEXUAL EXPLOITATION AND OTHER ABUSE OF CHILDREN";

and

(B) by adding at the end thereof the following new item:

"2258. Failure to report child abuse.".

(3) The item relating to chapter 110 in the part analysis for part 1 of title 18, United States Code, is amended to read as follows:

"110. Sexual exploitation and other abuse of children ..... 2251".

(h) Civil Liability for Failure to Report.—(1) A person who fails to make a report when required under subsection (a) shall be liable to a child who, after the time

MEMORANDUM

TO: Criminal Rules Committeee

FROM: Dave Schlueter

RE: Congressional Consideration of Amendment to FRE 803 for Child Abuse Statements

DATE: May 16, 1989

Congress is currently considering H.R. 170 which would amend Federal Rule of Evidence 803 by adding a hearsay exception for child abuse statements. The new exception would replace the current 803(24) and that exception would in turn be renumbered as 803(25). The Bill is attached.

The proposal seems unnecessary and generally tracks a similar proposed hearsay exception considered and rejected some time ago by the Committee. The current exceptions, in particular the residual hearsay exception, should give proponents sufficient latitude in dealing with child abuse victims.

101ST CONGRESS
1ST SESSION

H. R. 170

To amend the Federal Rules of Evidence to provide an explicit exception in certain child abuse cases.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 3, 1989

Mr. FISH introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend the Federal Rules of Evidence to provide an explicit exception in certain child abuse cases.

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 "Child Abuse Court Reform Act of 1988".

SEC. 2. HEARSAY EXCEPTION AMENDMENT.

Rule 803 of the Federal Rules of Evidence is amended by inserting after paragraph 23 the following:

"(24) DECLARATIONS OF A CHILD RELATING TO SEXUAL OR OTHER PHYSICAL ABUSE.—A statement

of a child under the age of 14 years regarding the sexual or other physical abuse of that child, if the court finds the statement has circumstantial guarantees of trustworthiness equivalent to those of statements admissible under other hearsay exceptions, and that there is a substantial likelihood that the child would suffer serious emotional or psychological harm if required to testify regarding such sexual abuse. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.".

SEC. 3. CONFORMING AMENDMENT.

Rule 803 of the Federal Rules of Evidence is amended by redesignating paragraph (24) as paragraph (25).

SEC. 4. CLERICAL AMENDMENT.

The table of contents for the Federal Rules of Evidence is amended by striking out the item relating to paragraph (24) and inserting in lieu thereof the following:

"(24) Declarations of a child relating to sexual or other physical abuse.
"(25) Other exceptions.".

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No. 90–6113

RANDALL D. WHITE, PETITIONER *v.* ILLINOIS

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FOURTH DISTRICT

Syllabus

No. 90–6113. Argued November 5, 1991—Decided January 15, 1992

At petitioner White's trial on charges related to a sexual assault upon S. G., a 4-year-old girl, the trial court ruled that testimony recounting S. G.'s statements describing the crime that was offered by her babysitter, her mother, an investigating officer, an emergency room nurse, and a doctor was admissible under state-law hearsay exceptions for spontaneous declarations and for statements made in the course of securing medical treatment. The trial court also denied White's motion for a mistrial based on S. G.'s presence at trial and failure to testify. White was found guilty by a jury, and the Illinois Appellate Court affirmed his conviction, rejecting his Sixth Amendment Confrontation Clause challenge that was based on *Ohio* v. *Roberts*, 448 U. S. 56. The court concluded that this Court's later decision in *United States* v. *Inadi*, 475 U. S. 387, foreclosed any rule requiring that, as a necessary antecedent to the introduction of hearsay testimony, the prosecution must either produce the declarant at trial or show that the declarant is unavailable.

Held: The Confrontation Clause does not require that, before a trial court admits testimony under the spontaneous declaration and medical examination exceptions to the hearsay rule, either the prosecution must produce the declarant at trial or the trial court must find that the declarant is unavailable.

(a) This Court rejects the argument of the United States as *amicus curiae* that the Confrontation Clause's limited purpose is to prevent the abusive practice of prosecuting a defendant through the presentation of *ex parte* affidavits, without the affiants ever being produced at trial, that the only situation in which the Clause would apply to the introduction of out-of-court statements admitted under an accepted hearsay exception would be those few cases where the statement was in the character of such an *ex parte* affidavit, and that S. G. was not a "witness against" White within the meaning of the Clause because her statements did not fit this description. Such a narrow reading of the Clause, which would virtually eliminate its role in restricting the admission of hearsay testimony, is foreclosed by this Court's decisions, see, *e. g.*, *Mattox* v. *United States*, 156 U. S. 237, and comes too late in the day to warrant reexamination.

(b) Although *Roberts* contains language that might suggest that the Confrontation Clause generally requires that a declarant be produced at trial or be found unavailable before his out-of-court statement may be admitted into evidence, such an expansive reading was negated by the Court's decision in *Inadi*, *supra*, at 392–400. As *Inadi* recognized with respect to co-conspirator statements, the evidentiary rationale for admitting testimony regarding such hearsay as spontaneous declarations and statements made in the course of receiving medical care is that such out-of-court declarations are made in contexts that provide substantial guarantees of their trustworthiness. But those same factors that contribute to the statements' reliability cannot be recaptured by later in-court testimony. A statement that has been offered in a moment of excitement—without the opportunity to reflect on the consequences of one's exclamation—may justifiably carry more weight with a trier of fact than a similar statement offered in the relative calm of a courtroom. Similarly, a statement made in the course of procuring medical services, where the declarant knows that a false statement may cause misdiagnosis or mistreatment, carries special guarantees of credibility that a trier of fact may not think replicated by courtroom testimony. Where proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied. Establishing a generally applicable unavailability rule would have few practical benefits while imposing pointless litigation costs.

(c) White misplaces his reliance on *Coy* v. *Iowa*, 487 U. S. 1012, and *Maryland* v. *Craig*, 497 U. S. ___, from which he draws a general rule that hearsay testimony offered by a child should be permitted only upon a showing of necessity—*i. e.*, in cases where necessary to protect the child's physical and psychological well-being. Those cases involved only the question of what *in-court* procedures are constitutionally required to guarantee a defendant's confrontation rights once a child witness is testifying, and there is no basis for importing their "necessity requirement" into the much different context of out-of-court declarations admitted under established exceptions to the hearsay rule.

198 Ill. App. 3d 641, 555 N. E. 2d 1241, affirmed.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, STEVENS, O'CONNOR, KENNEDY, and SOUTER, JJ., joined, and in which SCALIA and THOMAS, JJ., joined except for the discussion rejecting the United States' proposed reading of the "witness against" Confrontation Clause phrase. THOMAS, J., filed an opinion concurring in part and concurring in the judgment, in which SCALIA, J., joined.

THE CHIEF JUSTICE delivered the opinion of the Court.

In this case we consider whether the Confrontation Clause of the Sixth Amendment requires that, before a trial court admits testimony under the "spontaneous declaration" and "medical examination" exceptions to the hearsay rule, the prosecution must either produce the declarant at trial or the trial court must find that the declarant is unavailable. The Illinois Appellate Court concluded that such procedures are not constitutionally required. We agree with that conclusion.

Petitioner was convicted by a jury of aggravated criminal sexual assault, residential burglary, and unlawful restraint. Ill. Rev. Stat., ch.38, ¶¶ 12–14, 19–3, 10–3, (1989). The events giving rise to the charges related to the sexual assault of S. G., then four years old. Testimony at the trial established that in the early morning hours of April 16, 1988, S. G.'s babysitter, Tony DeVore, was awakened by S. G.'s scream. DeVore went to S. G.'s bedroom and witnessed petitioner leaving the room and petitioner then left the house. 6 Tr. 10–11. DeVore knew petitioner because petitioner was a friend of S. G.'s mother, Tammy Grigsby. *Id.*, at 27. DeVore asked S. G. what had happened. According to DeVore's trial testimony, S. G. stated that petitioner had put his hand over her mouth, choked her, threatened to whip her if she screamed and had "touch[ed] her in the wrong places." Asked by DeVore to point to where she had been touched, S. G. identified the vaginal area. *Id.*, at 12–17.

Tammy Grigsby, S. G.'s mother, returned home about 30 minutes later. Grigsby testified that her daughter appeared "scared" and a "little hyper." *Id.*, at 77–78. Grigsby proceeded to question her daughter about what had happened. At trial, Grigsby testified that S. G. repeated her claims that petitioner choked and threatened her. Grigsby also testified that S. G. stated that petitioner "put his mouth on her front part." *Id.*, at 79. Grigsby also noticed that S. G. had bruises and red marks on her neck that had not been there previously. *Id.*, at 81. Grigsby called the police.

Officer Terry Lewis arrived [illegible] minutes later, roughly 45 minutes after S. G.'s scream [illegible] first awakened DeVore. Lewis questioned S. G. alone in the kitchen. At trial, Lewis' summary of S. G.'s statement indicated that she had offered essentially the same story as she had first reported to DeVore and to Grigsby, including a statement that petitioner had "used his tongue on her in her private parts." *Id.*, at 110–112.

After Lewis concluded his investigation, and approximately four hours after DeVore first heard S. G.'s scream, S. G. was taken to the hospital. She was examined first by Cheryl Reents, an emergency room nurse, and then by Dr. Michael Meinzen. Each testified at trial and their testimony indicated that, in response to questioning, S. G. again provided an account of events that was essentially identical to the one she had given to DeVore, Grigsby, and Lewis.

S. G. never testified at petitioner's trial. The State attempted on two occasions to call her as a witness but she apparently experienced emotional difficulty on being brought to the courtroom and in each instance left without testifying. App. at 14. The defense made no attempt to call S. G. as a witness and the trial court neither made, nor was it asked to make, a finding that S. G. was unavailable to testify. 6 Tr. 105–106.

Petitioner objected on hearsay grounds to DeVore, Grigsby, Lewis, Reents, and Meinzen being permitted to testify regarding S. G.'s statements describing the assault. The trial court overruled each objection. With respect to DeVore, Grigsby, and Lewis the trial court concluded that the testimony could be permitted pursuant to an Illinois hearsay exception for spontaneous declarations.[1] Petitioner's objections to Reents' and Meinzen's testimony was similarly overruled, based on both the spontaneous declaration exception and an exception for statements made in the course of securing medical treatment.[2] The trial court also denied petitioner's motion for a mistrial based on S. G.'s "presence [and] failure to testify." App. 14.

Petitioner was found guilty by a jury, and the Illinois Appellate Court affirmed his conviction. It held that the trial court operated within the discretion accorded it under state law in ruling that the statements offered by DeVore, Grigsby and Lewis qualified for the spontaneous declaration exception and in ruling that the statements offered by Reents and Meinzen qualified for the medical examination exception. 198 Ill. App. 3d 641, —— – ——, 555 N. E. 2d 1241, 1246–1251 (1990). The court then went on to reject petitioner's Confrontation Clause[3] challenge, a challenge based principally on language contained in this Court's decision in *Ohio* v. *Roberts*, 448 U. S. 56 (1980). It concluded that our later decision in *United States* v. *Inadi*, 475 U. S. 387 (19[illegible] foreclosed any rule requiring that, as a necessary antecedent to the introduction of hearsay testimony, the prosecution must either produce the declarant at trial or show that the declarant is unavailable. The Illinois Supreme Court denied discretionary review, and we granted certiorari, 500 U. S. —— 1991), limited to the constitutional question whether permitting the challenged testimony violated petitioner's Sixth Amendment Confrontation Clause right.[4]

We consider as a preliminary matter an argument not considered below but urged by the United States as *amicus curiae* in support of respondent. The United States contends that petitioner's Confrontation Clause claim should be rejected because the Confrontation Clause's limited purpose is to prevent a particular abuse common in 16th and 17th century England: prosecuting a defendant through the presentation of *ex parte* affidavits, without the affiants ever being produced at trial. Because S. G.'s out-of-court statements do not fit this description, the United States suggests that S. G. was not a "witness against" petitioner within the meaning of the Clause. The United States urges this position, apparently in order that we might further conclude that the Confrontation Clause generally does not apply to the introduction of out-of-court statements admitted under an accepted hearsay exception. The only situation in which the Confrontation Clause would apply to such an exception, it argues, would be those few cases where the statement sought to be admitted was in the character of an *ex parte* affidavit, *i.e.*, where the circumstances surrounding the out-of-court statement's utterance suggest that the statement has been made for the principal purpose of accusing or incriminating the defendant.

Such a narrow reading of the Confrontation Clause, which would virtually eliminate its role in restricting the admission of hearsay testimony, is foreclosed by our prior cases. The discussions in these cases, going back at least as far as *Mattox* v. *United States*, 156 U. S. 237 (1895), have included historical examination of the origins of the Confrontation Clause, and of the state of the law of evidence existing at the time the Sixth Amendment was adopted and later. We have been careful "not to equate the Confrontation Clause's prohibitions with the general rule prohibiting the admission of hearsay statements," *Idaho* v. *Wright*, (1990) 497 U. S. ——, —— (slip op. 6–7) (citations omitted). Nonetheless we have consistently sought to "stee[r] a middle course," *Roberts, supra*, at 68, n.9, that recognizes that "hearsay rules and the Confrontation Clause are generally designed to protect similar values," *California* v. *Green*, 399 U. S. 149, 155 (1970), and "stem from the same roots." *Dutton* v. *Evans*, 400 U. S. 74, 86 (1970). In *Mattox* itself, upon which the Government relies, the Court allowed the recorded testimony of a witness at a prior trial to be admitted. But, in the Court's view, the result was justified not because the hearsay testimony was unlike an *ex parte* affidavit, but because it came within an established exception to the hearsay rule. We think that the argument presented by the Government comes too late in the day to warrant reexamination of this approach.[5]

We therefore now turn to petitioner's principal conten-

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[1]The spontaneous declaration exception applies to "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." 198 Ill. App. 3d 641, ——, 555 N. E. 2d 1241, 1246 (1990). (Decision of the Illinois Appellate Court for the Fourth District).

[2]Illinois Rev. Stat., ch. 38, ¶115–13 (1989), provides:

"In a prosecution for violation of Section 12–13, 12–14, 12–15 or 12–16 of the 'Criminal Code of 1961', statements made by the victim to medical personnel for purposes of medical diagnosis or treatment including descriptions of the cause of symptom, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment shall be admitted as an exception to the hearsay rule."

[3]"In all criminal prosecutions, the accused shall enjoy the right to . . . . be confronted with the witnesses against him . . . . ." U. S. Const., Amdt. VI.

[4]We take as a given, therefore, that the testimony properly falls within the relevant hearsay exceptions.

[5]We note also that the position now advanced by the United States has been previously considered by this Court but gained the support of only a single Justice. See *Dutton, supra*, 400 U.S., at 93–100 (Harlan, J., concurring).

tion that our prior decision in *Roberts* requires that his conviction be vacated. In *Roberts* we considered a Confrontation Clause challenge to the introduction at trial of a transcript containing testimony from a probable-cause hearing, where the transcript included testimony from a witness not produced at trial but who had been subject to examination by defendant's counsel at the probable-cause hearing. In the course of rejecting the Confrontation Clause claim in that case, we used language that might suggest that the Confrontation Clause generally requires that a declarant either be produced at trial or be found unavailable before his out-of-court statement may be admitted into evidence. However, we think such an expansive reading of the Clause is negated by our subsequent decision in *Inadi, supra*.

In *Inadi* we considered the admission of out-of-court statements made by a co-conspirator in the course of the conspiracy. As an initial matter, we rejected the proposition that *Roberts* established a rule that "no out-of-court statement would be admissible without a showing of unavailability." 475 U. S., at 392. To the contrary, rather than establishing "a wholesale revision of the law of evidence" under the guise of the Confrontation Clause, *ibid.*, we concluded that "*Roberts* must be read consistently with the question it answered, the authority it cited, and its own facts." *Id.*, at 394. So understood, *Roberts* stands for the proposition that unavailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding. *Ibid.*

Having clarified the scope of *Roberts*, the Court in *Inadi* then went on to reject the Confrontation Clause challenge presented there. In particular, we refused to extend the unavailability requirement established in *Roberts* to all out-of-court statements. Our decision rested on two factors. First, unlike former in-court testimony, co-conspirator statements "provide evidence of the conspiracy's context that cannot be replicated, even if the declarant testifies to the same matters in court," *Inadi*, 475 U. S., at 395. Also, given a declarant's likely change in status by the time the trial occurs, simply calling the declarant in the hope of having him repeat his prior out-of-court statements is a poor substitute for the full evidentiary significance that flows from statements made when the conspiracy is operating in full force. *Ibid.*

Second, we observed that there is little benefit, if any, to be accomplished by imposing an "unavailability rule."[6] Such a rule will not work to bar absolutely the introduction of the out-of-court statements; if the declarant either is unavailable, or is available and produced for trial, the statements can be introduced. *Id.*, at 396. Nor is an unavailability rule likely to produce much testimony that adds meaningfully to the trial's truth-determining process. *Ibid.* Many declarants will be subpoenaed by the prosecution or defense, regardless of any Confrontation Clause requirement, while the Compulsory Process Clause[7] and evidentiary rules permitting a defendant to treat witnesses as hostile will aid defendants in obtaining a declarant's live testimony. *Id.*, at 396–398. And while an unavailability rule would therefore do little to improve the accuracy of factfinding, it is likely to impose substantial additional burdens on the factfinding process. The prosecution would be required to repeatedly locate and keep continuously available each declarant, even when neither the prosecution nor the defense has any interest in calling the witness to the stand. An additional inquiry would be injected into the question of admissibility of evidence, to be litigated both at trial and on appeal. *Id.*, at 398–399.

These observations, although expressed in the context of evaluating co-conspirator statements, apply with full force to the case at hand. We note first that the evidentiary rationale for permitting hearsay testimony regarding spontaneous declarations and statements made in the course of receiving medical care is that such out-of-court declarations are made in contexts that provide substantial guarantees of their trustworthiness.[8] But those same factors that contribute to the statements' reliability cannot be recaptured even by later in-court testimony. A statement that has been offered in a moment of excitement — without the opportunity to reflect on the consequences of one's exclamation — may justifiably carry more weight with a trier of fact than a similar statement offered in the relative calm of the courtroom. Similarly, a statement made in the course of procuring medical services, where the declarant knows that a false statement may cause misdiagnosis or mistreatment, carries special guarantees of credibility that a trier of fact may not think replicated by courtroom testimony. They are thus materially different from the statements at issue in *Roberts*, where the out-of-court statements sought to be introduced were themselves made in the course of a judicial proceeding, and where there was consequently no threat of lost evidentiary value if the out-of-court statements were replaced with live testimony.

The preference for live testimony in the case of statements like those offered in *Roberts* is because of the importance of cross examination, "the greatest legal engine ever invented for the discovery of truth." *Green*, 399 U. S., at 158. Thus courts have adopted the general rule prohibiting the receipt of hearsay evidence. But where proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied.

We therefore think it clear that the out-of-court statements admitted in this case had substantial probative value, value that could not be duplicated simply by the declarant later testifying in court. To exclude such probative statements under the strictures of the Confrontation

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[6] By "unavailability rule," we mean a rule which would require as a predicate for introducing hearsay testimony either a showing of the declarant's unavailability or production at trial of the declarant.

[7] "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." U. S. Const., Amdt. VI.

[8] Indeed, it is this factor that has led us to conclude that "firmly rooted" exceptions carry sufficient indicia of reliability to satisfy the reliability requirement posed by the Confrontation Clause. See *Idaho* v. *Wright*, 497 U. S. ——, —— (1990) (Slip op. ——); *Bourjaily* v. *United States*, 483 U. S. 171, 182–184 (1987). There can be no doubt that the two exceptions we consider in this case are "firmly rooted." The exception for spontaneous declarations is at least two centuries old, see 6 J. Wigmore, Evidence, §1747, 195 (J. Chadbourn rev. 1976), and may date to the late 17th century. See *Thompson* v. *Trevanion*, 90 Eng. Rep. 179 (K. B. 1694). It is currently recognized under the Federal Rules of Evidence, Rule 803(2), and in nearly four-fifths of the States. See Brief of *Amici Curiae* for the State of California, et al., pp. 15–16, n.4 (collecting state statutes and cases). The exception for statements made for purposes of medical diagnosis or treatment is similarly recognized in the Federal Rules of Evidence, Rule 803(4), and is equally widely accepted among the States. See Brief of *Amici Curiae* for the State of California, et al., at 31–32, n.13 (same).

Clause would be the height of wrong-headedness, given that the Confrontation Clause has as a basic purpose the promotion of the " 'integrity of the factfinding process.' " *Coy* v. *Iowa*, 487 U. S. 1012, 1020 (1988) (quoting *Kentucky* v. *Stincer*, 482 U. S. 730, 736 (1987). And as we have also noted, a statement that qualifies for admission under a "firmly rooted" hearsay exception is so trustworthy that adversarial testing can be expected to add little to its reliability. *Wright*, 497 U. S., at —— (slip op. 13). Given the evidentiary value of such statements, their reliability, and that establishing a generally applicable unavailability rule would have few practical benefits while imposing pointless litigation costs, we see no reason to treat the out-of-court statements in this case differently from those we found admissible in *Inadi*. A contrary rule would result in exactly the kind of "wholesale revision" of the laws of evidence that we expressly disavowed in *Inadi*. We therefore see no basis in *Roberts* or *Inadi* for excluding from trial, under the aegis of the Confrontation Clause, evidence embraced within such exceptions to the hearsay rule as those for spontaneous declarations and statements made for medical treatment.

As a second line of argument, petitioner presses upon us two recent decisions involving child-testimony in child-sexual assault cases, *Coy* v. *Iowa*, *supra*, and *Maryland* v. *Craig*, 497 U. S. —— (1990). Both *Coy* and *Craig* required us to consider the constitutionality of courtroom procedures designed to prevent a child witness from having to face across an open courtroom a defendant charged with sexually assaulting the child. In *Coy* we vacated a conviction that resulted from a trial in which a child witness testified from behind a screen, and in which there had been no particularized showing that such a procedure was necessary to avert a risk of harm to the child. In *Craig* we upheld a conviction that resulted from a trial in which a child witness testified via closed circuit television after such a showing of necessity. Petitioner draws from these two cases a general rule that hearsay testimony offered by a child should be permitted only upon a showing of necessity — *i.e.*, in cases where necessary to protect the child's physical and psychological well-being.

Petitioner's reliance is misplaced. *Coy* and *Craig* involved only the question of what *in-court* procedures are constitutionally required to guarantee a defendant's confrontation right once a witness is testifying. Such a question is quite separate from that of what requirements the Confrontation Clause imposes as a predicate for the introduction of out-of-court declarations. *Coy* and *Craig* did not speak to the latter question. As we recognized in *Coy*, the admissibility of hearsay statements raises concerns lying at the periphery of those that the Confrontation Clause is designed to address, 487 U. S., at 1016. There is thus no basis for importing the "necessity requirement" announced in those cases into the much different context of out-of-court declarations admitted under established exceptions to the hearsay rule.

For the foregoing reasons, the judgment of the Illinois Appellate Court is

Affirmed.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, concurring in part and concurring in the judgment.

The Court reaches the correct result under our precedents. I write separately only to suggest that our Confrontation Clause jurisprudence has evolved in a manner that is perhaps inconsistent with the text and history of the Clause itself. The Court unnecessarily rejects, in dicta, the United States' suggestion that the Confrontation Clause in general may not regulate the admission of hearsay evidence. See *ante*, at 4–5. The truth may be that this Court's cases unnecessarily have complicated and confused the relationship between the constitutional right of confrontation and the hearsay rules of evidence.

The Confrontation Clause provides simply that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U. S. Const., Amdt. 6. It is plain that the critical phrase within the Clause for purposes of this case is "witnesses against him." Any attempt at unraveling and understanding the relationship between the Clause and the hearsay rules must begin with an analysis of the meaning of that phrase. Unfortunately, in recent cases in this area, the Court has *assumed* that *all* hearsay declarants are "witnesses against" a defendant within the meaning of the Clause, see, *e. g.*, *Ohio* v. *Roberts*, 448 U. S. 56 (1980); *Lee* v. *Illinois*, 476 U. S. 530 (1986); *Idaho* v. *Wright*, 497 U. S. —— (1990), an assumption that is neither warranted nor supported by the history or text of the Confrontation Clause.

There is virtually no evidence of what the drafters of the Confrontation Clause intended it to mean. See *California* v. *Green*, 399 U. S. 149, 176, n. 8 (1970) (Harlan, J., concurring); *Dutton* v. *Evans*, 400 U. S. 74, 95 (1970) (Harlan, J., concurring in result); Baker, The Right to Confrontation, The Hearsay Rules, and Due Process—A Proposal for Determining When Hearsay May be Used in Criminal Trials, 6 Conn. Law Rev. 529, 532 (1974). The strictest reading would be to construe the phrase "witnesses against him" to confer on a defendant the right to confront and cross-examine only those witnesses who actually appear and testify at trial. This was Wigmore's view:

> "The net result, then, under the constitutional rule, is that, so far as testimony is required under the hearsay rule to be taken infrajudicially, *it shall be taken in a certain way*, namely, subject to cross-examination—not secretly or ex parte away from the accused. The Constitution does not prescribe what kinds of testimonial statements (dying declarations or the like) shall be given infrajudicially—this depends on the law of evidence for the time being—but only what mode of procedure shall be followed—i.e., a cross-examining procedure—in the case of such testimony as is required by the ordinary law of evidence to be given infrajudicially." 5 J. Wigmore, Evidence §1397, p. 159 (J. Chadbourn rev. 1974) (footnote omitted) (emphasis modified).

The Wigmore view was endorsed by Justice Harlan in his opinion concurring in the result in *Dutton* v. *Evans*, *supra*, at 94. It also finds support in the plain language of the Clause. As JUSTICE SCALIA recently observed:

> "The Sixth Amendment does not literally contain a prohibition upon [hearsay] evidence, since it guarantees the defendant only the right to confront the 'witnesses against him.' As applied in the Sixth Amendment's context of a prosecution, the noun 'witness'—in 1791 as today—could mean either (a) one 'who knows or sees any thing; one personally present' or (b) 'one who gives testimony' or who 'testifies,' *i.e.*, '[i]n *judicial proceedings*, [one who] make[s] a solemn declaration under oath, for the purpose of establishing or making proof of

> some fact to a court.' 2 N. Webster, An American Dictionary of the English Language (1828) (emphasis added). See also J. Buchanan, Linguae Britannicae Vera Pronunciatio (1757). The former meaning (one 'who knows or sees') would cover hearsay evidence, but is excluded in the Sixth Amendment by the words following the noun: 'witnesses *against him*.' The phrase obviously refers to those who give testimony against the defendant at trial." *Maryland* v. *Craig*, 497 U. S. ——, —— (1990) (dissenting opinion).

The difficulty with the Wigmore-Harlan view in its purest form is its tension with much of the apparent history surrounding the evolution of the right of confrontation at common law and with a long line of this Court's precedent, discussed below. For those reasons, the pure Wigmore-Harlan reading may be an improper construction of the Confrontation Clause.

Relevant historical sources and our own earlier decisions, nonetheless, suggest that a narrower reading of the Clause than the one given to it since 1980 may well be correct. In 16th-century England, magistrates interrogated the prisoner, accomplices, and others prior to trial. These interrogations were "intended only for the information of the court. The prisoner had no right to be, and probably never was, present." 1 J. Stephen, A History of the Criminal Law of England 221 (1883). At the trial itself, "proof was usually given by reading depositions, confessions of accomplices, letters, and the like; and this occasioned frequent demands by the prisoner to have his 'accusers,' *i.e.*, the witnesses against him, brought before him face to face . . . ." *Id.*, at 326. See also 5 Wigmore, *supra*, §1364, at 13 ("there was . . . no appreciation at all of the necessity of calling a person to the stand as a witness"; rather, it was common practice to obtain "information by consulting informed persons not called into court"); 9 W. Holdsworth, History of English Law 227–229 (3d ed. 1944). The infamous trial of Sir Walter Raleigh on charges of treason in 1603 in which the Crown's primary evidence against him was the confession of an alleged co-conspirator (the confession was repudiated before trial and probably had been obtained by torture) is a well-known example of this feature of English criminal procedure. See Pollitt, The Right of Confrontation: Its History and Modern Dress, 8 J. Pub. L. 381, 388–389 (1959); 1 Stephen, *supra*, at 333–336; 9 Holdsworth, *supra*, at 216–217, 226–228.

Apparently in response to such abuses, a common-law right of confrontation began to develop in England during the late 16th and early 17th centuries. 5 Wigmore, *supra*, §1364, at 23; Pollitt, *supra*, at 389–390. Justice Story believed that the Sixth Amendment codified some of this common law, 3 J. Story, Commentaries on the Constitution of the United States 662 (1833), and this Court previously has recognized the common-law origins of the right. See *Salinger* v. *United States*, 272 U. S. 542, 548 (1926) ("The right of confrontation did not originate with the provision in the Sixth Amendment, but was a common-law right having recognized exceptions"). The Court consistently has indicated that the primary purpose of the Clause was to prevent the abuses which had occurred in England. See *Mattox* v. *United States*, 156 U. S. 237, 242 (1895) ("The primary object of the [Confrontation Clause] was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness . . ."); *California* v. *Green*, 399 U. S., at 156 ("It is sufficient to note that the particular vice that gave impetus to the confrontation claim was the practice of trying defendants on 'evidence' which consisted solely of *ex parte* affidavits or depositions secured by the examining magistrates, thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact"); *id.*, at 179 (Harlan, J., concurring) ("From the scant information available it may tentatively be concluded that the Confrontation Clause was meant to constitutionalize a barrier against flagrant abuses, trials by anonymous accusers, and absentee witnesses"); *Dutton* v. *Evans*, 400 U. S., at 94 (Harlan, J., concurring in result) (the "paradigmatic evil the Confrontation Clause was aimed at" was "trial by affidavit").

There appears to be little if any indication in the historical record that the exceptions to the hearsay rule were understood to be limited by the simultaneously evolving common-law right of confrontation. The Court has never explored the historical evidence on this point.[1] As a matter of plain language, however, it is difficult to see how or why the Clause should apply to hearsay evidence as a general proposition. As Justice Harlan observed:

> "If one were to translate the Confrontation Clause into language in more common use today, it would read: 'In all criminal prosecutions, the accused shall enjoy the right to be present and to cross-examine the witnesses against him.' Nothing in this language or in its 18th-century equivalent would connote a purpose to control the scope of the rules of evidence. The language is particularly ill-chosen if what was intended was a prohibition on the use of any hearsay . . . ." *Id.*, at 95 (opinion concurring in result).

The standards that the Court has developed to implement its assumption that the Confrontation Clause limits admission of hearsay evidence have no basis in the text of the Sixth Amendment. Ever since *Ohio* v. *Roberts*, 448 U. S. 56 (1980), the Court has interpreted the Clause to mean that hearsay may be admitted only under a "firmly rooted" exception, *id.*, at 66, or if it otherwise bears "particularized guarantees of trustworthiness," *ibid.* See, *e. g.*, *Idaho* v. *Wright*, 497 U. S., at ——; *Bourjaily* v. *United States*, 483 U. S. 171, 183 (1987). This analysis implies that the Confrontation Clause bars only unreliable hearsay. Although the historical concern with trial by affidavit and anonymous accusers does reflect concern with the reliability of the evidence against a defendant, the Clause makes no distinction based on the reliability of the evidence presented. Nor does it seem likely that the drafters of the Sixth Amendment intended to permit a defendant to be tried on the basis of *ex parte* affidavits found to be reliable. Cf. U. S. Const., Art. III, § 3 ("No person shall be convicted of Treason unless on the Testimony of two Witnesses to the

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[1] The only recent decision to address this question explicitly was *Ohio* v. *Roberts*, 448 U. S. 56 (1980), in which the Court simply stated that "[t]he historical evidence leaves little doubt, however, that the Clause was intended to exclude some hearsay." *Id.*, at 63 (citing *California* v. *Green*, 399 U. S. 149, 156–157 (1970)). The cited passage in *Green* simply reiterates the previously noted point that the right of confrontation evolved as a response to the problem of trial by affidavit. Thus, the statement in *Roberts* that "the Clause was intended to exclude *some* hearsay" is correct as far as it goes (affidavits and depositions are hearsay), but the opinion should not be read as having established that the drafters intended the Clause to encompass *all* hearsay, or even hearsay in general.

same overt Act, or on Confession in Open Court"). Reliability is more properly a due process concern. There is no reason to strain the text of the Confrontation Clause to provide criminal defendants with a protection that due process already provides them.

The United States, as *amicus curiae*, has suggested that the Confrontation Clause should apply only to those persons who provide in-court testimony or the functional equivalent, such as affidavits, depositions, or confessions that are made in contemplation of legal proceedings. This interpretation is in some ways more consistent with the text and history of the Clause than our current jurisprudence, and it is largely consistent with our cases. If not carefully formulated, however, this approach might be difficult to apply, and might develop in a manner not entirely consistent with the crucial "witnesses against him" phrase.

In this case, for example, the victim's statements to the investigating police officer might be considered the functional equivalent of in-court testimony because the statements arguably were made in contemplation of legal proceedings. Attempts to draw a line between statements made in contemplation of legal proceedings and those not so made would entangle the courts in a multitude of difficulties. Few types of statements could be categorically characterized as within or without the reach of a defendant's confrontation rights. Not even statements made to the police or government officials could be deemed automatically subject to the right of confrontation (imagine a victim who blurts out an accusation to a passing police officer, or the unsuspecting social-services worker who is told of possible child abuse). It is also not clear under the United States' approach whether the declarant or the listener (or both) must be contemplating legal proceedings. The United States devotes little attention to the application of its proposed standard in this case.

Thus, we are faced with a situation in which the text of the Sixth Amendment supports the Wigmore-Harlan view but history and our earlier cases point away from that strictest reading of the text. Despite this tension, I believe it is possible to interpret the Confrontation Clause along the lines suggested by the United States in a manner that is faithful to both the provision's text and history. One possible formulation is as follows: The federal constitutional right of confrontation extends to any witness who actually testifies at trial, but the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions. It was this discrete category of testimonial materials that was historically abused by prosecutors as a means of depriving criminal defendants of the benefit of the adversary process, see, *e. g.*, *Mattox* v. *United States*, 156 U. S. 237, 242–243 (1895), and under this approach, the Confrontation Clause would not be construed to extend beyond the historical evil to which it was directed.

Such an approach would be consistent with the vast majority of our cases, since virtually all of them decided before *Ohio* v. *Roberts* involved prior testimony or confessions,[2] exactly the type of formalized testimonial evidence that lies at the core of the Confrontation Clause's concern. This narrower reading of the Confrontation Clause would greatly simplify the inquiry in the hearsay context. Furthermore, this interpretation would avoid the problem posed by the Court's current focus on hearsay exceptions that are "firmly rooted" in the common law. See *ante*, at 8, n.8. The Court has never explained the Confrontation Clause implications of a State's decision to adopt an exception not recognized at common law or one not recognized by a majority of the States. Our current jurisprudence suggests that, in order to satisfy the Sixth Amendment, the State would have to establish in each individual case that hearsay admitted pursuant to the newly created exception bears "particularized guarantees of trustworthiness," and would have to continue doing so until the exception became "firmly rooted" in the common law, if that is even possible under the Court's standard. This result is difficult to square with the Clause itself. Neither the language of the Clause nor the historical evidence appears to support the notion that the Confrontation Clause was intended to constitutionalize the hearsay rule and its exceptions. Although the Court repeatedly has disavowed any intent to cause that result, see, *e. g.*, *ante*, at 5; *Idaho* v. *Wright*, 497 U. S., at ——; *United States* v. *Inadi*, 475 U. S. 387, 393, n.5 (1986); *Dutton* v. *Evans*, 400 U. S., at 86; *California* v. *Green*, 399 U. S., at 155, I fear that our decisions have edged ever further in that direction.

For the foregoing reasons, I respectfully suggest that, in an appropriate case, we reconsider how the phrase "witness against" in the Confrontation Clause pertains to the admission of hearsay. I join the Court's opinion except for its discussion of the narrow reading of this phrase proposed by the United States.

GARY R. PETERSON, Asst. Def., Springfield, Ill. (DANIEL D. YUHAS, Dpty. Def., on the briefs) for petitioner; ARLEEN C. ANDERSON, Ill. Asst. Atty. Gen., Chicago, Ill. (ROLAND W. BURRIS, Ill. Atty. Gen., ROSALYN B. KAPLAN, Ill. Sol. Gen., TERENCE M. MADSEN, and DOUGLAS K. SMITH, Asst. Atty. Gen., on the briefs) for respondent; STEPHEN L. NIGHTINGALE, Asst. to Sol. Gen. (KENNETH W. STARR, Sol. Gen., ROBERT S. MUELLER III, Asst. Atty. Gen., and WILLIAM C. BRYSON, Dpty. Sol. Gen., on the briefs) for U.S. as amicus curiae supporting respondent.

Nos. 90–954 AND 90–1004

ROBERT C. RUFO, SHERIFF OF SUFFOLK COUNTY, ET AL., PETITIONERS
90–954 *v.*
INMATES OF THE SUFFOLK COUNTY JAIL ET AL.

THOMAS C. RAPONE, COMMISSIONER OF CORRECTION OF MASSACHUSETTS, PETITIONER
90–1004 *v.*
INMATES OF THE SUFFOLK COUNTY JAIL ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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[2] See, *e. g.*, *Reynolds* v. *United States*, 98 U. S. 145, 158–161 (1879) (testimony at prior trial); *Mattox* v. *United States*, 156 U. S. 237, 240–244 (1895) (same); *Motes* v. *United States*, 178 U. S. 458, 471–474 (1900) (testimony at "preliminary trial"); *Pointer* v. *Texas*, 380 U. S. 400, 406–408 (1965) (preliminary hearing testimony); *Douglas* v. *Alabama*, 380 U. S. 415, 418–420 (1965) (codefendant's confession); *Brookhart* v. *Janis*, 384 U. S. 1, 4 (1966) (same); *Barber* v. *Page*, 390 U. S. 719, 722–725 (1968) (preliminary hearing testimony); *Bruton* v. *United States*, 391 U. S. 123, 126–128, and n. 3 (1968) (codefendant's confession); *Roberts* v. *Russell*, 392 U. S. 293, 294–295 (1968) *(per curiam)* (same); *Berger* v. *California*, 393 U. S. 314, 314–315 (1969) *(per curiam)* (preliminary hearing testimony); *California* v. *Green*, 399 U. S., at 152 (preliminary hearing testimony and statement to police); *Mancusi* v. *Stubbs*, 408 U. S. 204, 213–216 (1972) (prior testimony).

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

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December 31, 1991

Aaron P. Hatcher III
Deputy Assistant Administrator
Office of Forensic Sciences
U.S. Department of Justice
Drug Enforcement Administration
Washington, D.C. 20537

Dear Mr. Hatcher:

Receipt is acknowledged of your letter of December 24, 1991, suggesting an amendment to the Federal Rules of Evidence of a formal business record in lieu of testimony by a Drug Enforcement Administration chemist.

Your letter is being referred to the Chairman and Reporter of the Judicial Conference Advisory Committee on the Federal Rules of Criminal Procedure. We will advise you of any action taken further by the Committee.

Sincerely yours,

Judith W. Krivit
for

Joseph F. Spaniol, Jr.
Secretary

cc: Honorable Robert E. Keeton
Honorable William Terrell Hodges
Professor David A. Schlueter

U.S. Department of Justice

Drug Enforcement Administration

Washington, D.C. 20537

DEC 24 1991

Committee on Rules of Practice
and Procedures
Administrative Office of the
United States Courts
Washington, D.C. 20544

Dear Secretary:

I am requesting a revision to the Federal Rules of Evidence (Rules) regarding admission into evidence of a formal business record (DEA Form 7) in lieu of testimony of the Drug Enforcement Administration (DEA) chemist who prepared the report. Advice from DEA's Chief Counsel, as set forth in the enclosed memorandum entitled "Acceptance of DEA Form 7 as Prima Facie Evidence," indicates that this revision would not be in violation of Rule 801 (the Hearsay Rule) nor would it violate the United States Constitution's Confrontation Clause.

By way of background information, let me review the DEA Form 7 (see enclosure) and direct your attention to specific portions. Items 1 through 18 are prepared by the United States law enforcement Special Agent submitting evidence to a DEA laboratory and are not a subject of concern under the present request. Items 19 through 39; however, are prepared by DEA laboratory personnel. Within this segment of the form, a major consideration to the court is the integrity of the evidence, as addressed in items 19 and 22, individuals handling the evidence (items 20, 23 and 34) and the chemical identity of the controlled substance(s) (items 25, 28-33). With each of these form items completed and attested to through signatures, there is little or no substantive value to verbal reiteration by a DEA chemist.

A past action by DEA relating to a similar set of circumstances will serve to illustrate other considerations of this problem. The Drug Enforcement Administration is tasked with chemically analyzing all drug evidence seized by the Washington D.C. Metropolitan Police Department. Due to the nature and volume of the seizures and subsequent prosecutions, DEA strongly encouraged the District of Columbia Government to explore alternatives to chemist's testimony. Subsequently, the District of Columbia passed legislation (D.C. Code Ann., paragraph 33-556 (1990)) making a chemist's report self-admitting. The

constitutionality of the statute was upheld by the D.C. Court of Appeals (Howard v. United States, 473 A.2d 835 (D.C. App. 1984); and Belton v. United States, 580 A.2d 1289 (D.C. App. 1990)). Guidelines established by this precedent could certainly be a starting point for a nationwide policy.

Implementation of this procedure would not preclude chemist's testimony, but in many instances would allow simple, self-evident facts to be introduced during a judicial proceeding without subtracting from a defendant's constitutional rights.

Should you require additional information, please contact Richard S. Frank, Associate Deputy Assistant Administrator, Office of Forensic Sciences, at (202) 307-8866. Your timely review of this matter will be greatly beneficial and appreciated.

Sincerely,

Aaron P. Hatcher III
Deputy Assistant Administrator
Office of Forensic Sciences

Enclosure

U.S.GPO: 1989-232-946

Read instructions on reverse before completing

REPORT OF DRUG PROPERTY COLLECTED, PURCHASED OR SEIZED

1 HOW OBTAINED (Check) ☐ Purchase ☐ Seizure ☐ Free Sample ☐ Lab Seizure ☐ Money Flashed ☐ Compliance Sample (Non Criminal) ☐ Other (Specify)

2 FILE NO

3 G DEPIDENTIFIER

4 FILE TITLE

5a WHERE OBTAINED (City State/Country)

5b DATE OBTAINED

6a REFERRING AGENCY (Name)

6b REFERRAL ☐ Case No OR ☐ Seizure No

7 DATE PREPARED

8 OFFICE SUBUNIT

9 Exhibit No	10 FDIN (8 characters)	11 ALLEGED DRUGS	12 MARKS OR LABELS (Describe fully)	APPROX GROSS QUANTITY 13 Seized	14 Submitted	15 Purchase Cost

16 WAS ORIGINAL CONTAINER SUBMITTED SEPARATE FROM DRUG ? ☐ NO (Included above) ☐ YES (If Yes enter exhibit no and describe original container fully)

REMARKS

17 SUBMITTED BY SPECIAL AGENT (Signature)

18 APPROVED BY (Signature & Title)

LABORATORY EVIDENCE RECEIPT REPORT

19 No PACKAGES

20 RECEIVED FROM (Signature & Date)

21 TITLE

22 SEAL ☐ Broken ☐ Unbroken

23 RECEIVED BY (Signature & Date)

24 TITLE

LABORATORY ANALYSIS/COMPARISON REPORT

25 ANALYSIS SUMMARY AND REMARKS

26 Exhibit No	27 Lab No	28 ACTIVE DRUG INGREDIENT (Established or Common Name)	WEIGHT PER UNIT ANALYZED 29 Strength	30 Measure	31 Unit	32 TOTAL NET	33 RESERVE

34 ANALYST (Signature)

35 TITLE

36 DATE COMPLETED

37 APPROVED BY

38 TITLE

39 LAB LOCATION

INSTRUCTIONS

I FOR EVIDENCE IN DEA CUSTODY

A Except under extenuating circumstances the agent who acquires the evidence will also prepare the DEA Form 7

B No more than three separate exhibits may be placed on a single DEA Form 7 with the following special conditions

1 A series of samples from the same bulk evidence (e g , subexhibits 1a through 1j) may be placed on the same DEA Form 7

2 Where an original container is being submitted separately, the drug substance and the container (e g Exhibit 1 and Subexhibit 1a) will be considered as two exhibits

3 Only exhibits acquired from the same defendant, or in the same location at the same time, and in the same investigation may be submitted on the same DEA Form 7

C Items 1 18 will be completed by the agent as follows

Item 1 Largely self-explanatory "Money Flashed" will be checked only where drugs were seized as the result of using a flashroll "Compliance Sample" will be checked for authentic samples, or requests for potency analysis or some other regulatory purpose

Items 2 5b Self-explanatory

Items 6a 6b Complete only if drugs were initially acquired by another agency This block must be completed for any evidence submitted under cases where the second GDEP character is "H", "J", or "T" (i e , initially acquired by INS, Customs or Coast Guard)

Items 7 11 Self-explanatory

Item 12 Specify the number and description of the containers included in the exhibit Describe fully any labels on the original containers and specify whether the seals were intact This entry may be continued in Item 16 if necessary Where any exhibit consists of a number of packages enter a description of each For samples extracted from bulk seizures enter "samples 1a through 1j in (describe the containers) "

Items 13 14 Item 13 will only be completed when it differs from Item 14 (e g bulk seizures) The amounts should be reported in such a manner that they can be quantified (i e , pounds", "kilograms", etc , not "bales", "spoons", etc)

Item 15 Complete only if the exhibit was acquired through an undercover purchase

Item 16 Self-explanatory

Remarks Enter the time and location of acquisition, the name of the defendant acquired from (if no identifiable defendant, so state), and the name of the acquiring agent(s) If requesting a ballistics examination, enter "BALLISTICS EXAMINATION REQUESTED"

Items 17 18 Enter typed names and signatures

D For evidence hand carried to the DEA laboratory, the transfer of custody (Items 19 24) will be completed by the agent and the Laboratory Evidence Technician

For evidence shipped to the DEA laboratory, leave Items 19 24 blank, and keep copy 6 for temporary placement in the case file Copies 1 through 5 will be forwarded to the DEA laboratory

E The DEA laboratory will enter the results of analysis in Items 25 - 39, and return copies 1 through 3 to the submitting office (distribution of the remaining copies will be made by the DEA laboratory see 7302 54) Copies 1 through 3 will be distributed to the appropriate case file by the submitting office. Upon receipt of its copy from the laboratory, the submitting office will purge Copy 6 from the case file

F. The mechanics of certain intelligence programs require that the laboratory extract a small sample from randomly selected exhibits for special analysis Exhibits sampled will be identified by the chemist with the notation "Portion Removed for Special Programs" on DEA Form 7

The results of these special analyses will be reported back to the originating office on a separate profile sheet (not concurrent with the return of DEA Form 7) Upon receipt of a profile sheet, attach it to the prosecutor's copy of DEA Form 7, or if the DEA Form 7 has already been forwarded to the prosecutor, forward it separately

II FOR EVIDENCE NOT IN DEA CUSTODY

A There are two circumstances in which drug evidence will be reported without actually being processed by a DEA laboratory

1 Where DEA participates in or contributes to an investigation that results in a drug acquisition by another agency, and DEA neither takes custody nor submits a sample to a DEA laboratory

2 Where another agency makes a significant seizure of drugs in an investigation in which DEA did not participate, did not take custody, nor is submitting a sample

For purposes of this reporting requirement, a significant seizure is any seizure which meets or exceeds the following criteria

(a) 1/2 kilogram heroin
(b) 50,000 dosage units of other narcotics (if of foreign origin)
(c) 1 kilogram cocaine
(d) 1 liter hashish oil
(e) 50 kilograms hashish
(f) 1,000 kilograms marijuana
(g) Any combination of Schedule II, III, IV or V legitimate pharmaceuticals totaling 50,000 dosage units

(Note Where, with DEA concurrence, Customs or INS refer any independent seizure to State or local authorities for prosecution, or Customs exercises its penalty assessment authority, no reporting is required.)

B In either of the above circumstances, an "INFORMATION ONLY DEA 7" will be prepared as follows

1. Type "INFORMATION ONLY" immediately above Item 3, GDEP Identifier

2 Complete Items 1 - 8 as appropriate.

3. Complete Items 10 - 16 as appropriate

4 Explain pertinent details of the acquisition in Remarks.

5 Complete Items 17 and 18

6 Distribute the "INFORMATION ONLY DEA 7" as follows.

Copy 1 - PES
Copy 3 - Originating office
The remaining copies may be discarded

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Survey of Judges on Use of Expert Witnesses

DATE: April 12, 1992

The Judicial Center has just completed a survey of federal judges on the issue of expert testimony in civil trials. That report/survey is enclosed for your information. As you can see, the study focuses to some extent on the proposed amendments to Rules of Evidence 702 and 705, which are being handled by the Civil Rules Committee. You may wish to include this material in your agenda books at the tab marked "II-C-3" (Report of Evidence Subcommittee).

THE FEDERAL JUDICIAL CENTER
DOLLEY MADISON HOUSE
1520 H STREET, N.W.
WASHINGTON, D.C. 20005

RESEARCH DIVISION

Writer's Direct Dial Number:
FTS/202 633-6341

April 2, 1992

Hon. William Terrell Hodges
Chairman, Advisory Committee on Criminal Rules
Chief Judge, United States District Court
United States Courthouse
Suite 108
611 North Florida Avenue
Tampa, Florida

Dear Judge Hodges:

The enclosed report presents preliminary findings of the Federal Judicial Center's survey on the characteristics of expert testimony in recent civil trials. This report focuses on the judges' perceptions of the problems with expert testimony, and their reactions to proposed changes to Rule 702 of the Federal Rules of Evidence and Rule 26 of the Federal Rules of Civil Procedure.

The survey also addresses the types of experts presenting testimony in recent civil trials, the issues addressed by expert testimony, and procedures for managing expert testimony. Information on responses concerning these topics is available at your request, and will be included in our final report of the results.

Copies of this report have been sent to Judge Keeton and Judge Pointer. Please let us know if you would like us to distribute this report to members of your committee.

Sincerely,

Joe S. Cecil

Molly T. Johnson

Molly Treadway Johnson

cc: Professor David A. Schlueter, Reporter
Joseph F. Spaniol, Jr., Secretary

PROBLEMS OF EXPERT TESTIMONY IN CIVIL TRIALS: PRELIMINARY FINDINGS

Joe S. Cecil

and

Molly Treadway Johnson

Division of Research

Federal Judicial Center

March 31, 1992

This report describes preliminary results of the Federal Judicial Center's survey on the characteristics of expert testimony in recent civil trials. First, we briefly describe the survey. Second, we report on the judges' perceptions of the problems with expert testimony. Third, we report on judges' reactions to proposed changes to Rule 702 of the Federal Rules of Evidence and Rule 26 of the Federal Rules of Civil Procedure. Finally, we include in an appendix judges' comments on the proposed amendments.

Survey of Federal District Court Judges

On November 25, 1991 a questionnaire was sent to all 518 active federal district court judges (other than rules committee members), seeking their views on expert testimony in civil trials. A postcard reminder was sent two weeks later, and a second letter with a replacement copy of the questionnaire was sent on January 17, 1992. To date, 64% have returned completed questionnaires to us. The analyses presented below are based on the first 318 responses we received.

In addition to the topics discussed below, the survey also addresses the types of experts presenting testimony in recent civil trials, the issues addressed by expert testimony, and procedures for managing expert testimony. Information on responses concerning these topics is available upon request, and will be included in our final report of the results.

Assessment of Problems with Expert Testimony.

Judges were presented with a list of problems that are often attributed to expert testimony and asked to indicate, on a 5-point scale, the frequency with which each occurs in civil cases involving expert testimony. Table 1 presents the list of problems ranked according to the mean frequency ratings assigned to them by respondents.

The most frequent problem is "Experts abandon objectivity and become advocates for the side that hired them." A number of judges chose to elaborate on this concern in responding to the open-ended questions. One judge noted, "The biggest problem is . . . that both sides can hire well-qualified experts who will say whatever is needed and thereby become advocates." Another judge criticized the "willingness of academics to sell their credentials to the highest bidder -- or at least for a high bid -- and testify in support of questionable propositions." A third judge mentioned the use of "'professional witness expert[s]' who will give any opinion the lawyer wants, especially in product liability cases."

The second most frequent problem is the "Excessive expense of party-hired experts." In comments, some judges merely noted that the cost of retaining experts appears to be exorbitant. One judge focused on pretrial problems, mentioning the "refusal of experts to write a report or to give a deposition without being paid a substantial fee." Other judges noted that experts often offer redundant testimony, thereby increasing both the expense and duration of trials.

The third and fourth most frequent problems -- "Conflict among experts that defies reasoned assessment" and "Expert testimony appears to be of questionable validity or reliability" -- relate to difficulty in making an informed assessment of expert testimony. Several judges reported that expert testimony is often in direct opposition, making it difficult to assess the basis of the disagreement. These judges usually noted the obligation of the attorney to make the evidence comprehensible. Other judges focused on testimony that goes beyond the foundation that has been prepared. Several judges objected to experts basing their testimony on facts or assumptions that are inconsistent with the case, and suggested that some attorneys rely on experts to introduce testimony that is otherwise inadmissible.

Table 1: Frequency of Problems with Expert Testimony in Civil Trials.

1. Experts abandon objectivity and become advocates for the side that hired them. (3.98)*
2. Excessive expense of party-hired experts. (3.48)
3. Conflict among experts that defies reasoned assessment. (3.08)
4. Expert testimony appears to be of questionable validity or reliability. (3.01)
5. Disparity in level of competence of opposing experts. (2.74)
6. Attorney(s) unable adequately to cross-examine expert(s). (2.72)
7. Failure of party(ies) to provide discoverable information concerning retained experts. (2.60)
8. Expert testimony comprehensible but does not assist the trier of fact. (2.50)
9. Expert testimony not comprehensible to the trier of fact. (2.42)
10. Delays in trial schedule caused by unavailability of expert(s). (2.29)
11. Indigent party unable to retain expert to testify. (2.13)
12. Expert(s) poorly prepared to testify. (2.05)

* The number in parentheses is the mean rating on a scale of 1 ("Very Infrequent") to 5 ("Very Frequent") of the frequency with which the judges observed this problem in civil cases involving expert testimony.

Opinions on Proposed Amendments

The final section of the survey asked judges to indicate their opinions on proposed amendments to the rules governing expert testimony in civil and criminal cases. Three of the amendments have been proposed by the Advisory Committee on Civil Rules, while the fourth has been proposed by the President's Council on Competitiveness. In particular, the survey asked about opinions on:

- an amendment to Rule 702 of the Federal Rules of Evidence that would require expert testimony to "substantially assist" (rather than merely assist) the trier of fact;

- an amendment to Rule 702 of the Federal Rules of Evidence that would require expert testimony to be "reasonably reliable";

- an amendment to Rule 702 of the Federal Rules of Evidence that would require expert testimony to be based on "widely accepted" theories, as proposed by the President's Council on Competitiveness; and,

- an amendment to Rule 26 of the Federal Rules of Civil Procedure that would require a party presenting expert testimony to provide other parties, in advance of trial, with a report describing the nature of the expected testimony and the qualifications of the proposed testifying expert.

In responding to each of the first three amendments, judges were given an opportunity to indicate whether they favored it for both civil and criminal cases, favored it for one type of case but not the other, opposed it for both types of cases, or were unsure of their preference (for the fourth amendment, they were asked if they favored or opposed it for civil cases, or were unsure). Many judges offered written comments about the proposed amendments, often providing an explanation for their opposition to the amendments. Summaries of the comments are presented here; the full text of the comments is set forth in Appendix A.

Table 2 shows the percentage and number of judges selecting each response option for the four proposed amendments. Both proposed amendments to Rule 702 presently before the Advisory Committee on Civil Rules were favored by a majority of judges, at least for civil cases. The proposal to require that expert testimony must be "reasonably reliable" received the most support; 62% of judges favored this amendment for both civil and criminal cases, while an additional 5% favored it for civil cases but opposed it for criminal cases. The comments were evenly distributed

between those favoring the amendment and those opposing it. Two judges indicated that they thought expert testimony is already required to be "reasonably reliable."

Slightly less support exists for the "substantially assist" amendment; 45% of judges favor of it for both civil and criminal cases, with an additional 11% favoring it for civil cases while opposing it for criminal cases. Over one-third of the judges (36%) opposed this amendment for both civil and criminal cases. Several judges who opposed this amendment expressed concern that this language would lead to arguments over the meaning of the word "substantially."

The proposed amendment to Rule 702 put forth by the President's Council on Competitiveness failed to attract the support of most judges. Those judges expressing a preference were almost evenly divided between those favoring the amendment (39% for civil and criminal cases) and those opposing the amendment (42%). An unusually high proportion of judges (14%) indicated that they were "not sure" of their opinion on this amendment, perhaps because they were less familiar with this proposal. Most of the comments expressed general opposition without raising specific problems. Several judges, however, expressed concern that the amendment would hamper the development and presentation of new scientific theories.

The Advisory Committee's proposed change to Rule 26(a)(2) of the Federal Rules of Civil Procedure, requiring early exchange of reports on anticipated expert testimony, received overwhelming support; 96% favored this amendment, while only 3% opposed it. The vast majority of judges who commented merely indicated that the practice of exchanging reports about testifying experts was already in effect in their courts, either by local rule or court orders.

Table 2. Opinions on Proposed Amendments

Proposed Change

a. Amend F.R.E. 702 to increase the threshold for admitting expert testimony by requiring that it "substantially assist" the trier of fact.

45% (141)	11% (33)	1% (2)	36% (113)	8% (24)
Favor for both civil & criminal cases	Favor for civil cases but oppose for criminal cases	Favor for criminal cases but oppose for civil cases	Oppose for both civil & criminal cases	Not sure

b. Amend F.R.E. 702 to add a requirement that expert evidence must be "reasonably reliable" in order to be admitted.

62% (194)	5% (17)	1% (2)	26% (80)	6% (19)
Favor for both civil & criminal cases	Favor for civil cases but oppose for criminal cases	Favor for criminal cases but oppose for civil cases	Oppose for both civil & criminal cases	Not sure

c. Amend F.R.E. 702 to require that expert testimony be based on "widely accepted" theories. A party would have to prove that its expert's opinion is based on an established theory that is supported by a significant portion of experts in the relevant field.

39% (121)	4% (13)	0.3% (1)	42% (132)	14% (45)
Favor for both civil & criminal cases	Favor for civil cases but oppose for criminal cases	Favor for criminal cases but oppose for civil cases	Oppose for both civil & criminal cases	Not sure

d. Amend Rule 26(a)(2) of the Federal Rules of Civil Procedure to require a party presenting expert testimony to provide other parties, in advance of trial, with a report describing the expert testimony to be presented, including the nature of the expected testimony and the qualifications of the person(s) who will testify.

96% (298)	3% (8)	2% (5)
Favor for civil cases	Oppose for civil cases	Not sure

Appendix A : Text of Comments on Proposed Amendments to Rules Governing Expert Testimony

General Comments on Proposed Amendments

"It is vital to adopt the proposed changes to the Federal Rules of Evidence."

"Experts are overutilized, but I do not believe the proposed amendments to Rule 702 are the answer to the problem. District Judges need to exercise their discretion to exclude expert testimony that is not sufficiently reliable or will not sufficiently assist the trier of fact, and the Courts of Appeals need to give the trial courts that discretion."

"[Expert testimony] is much abused. Many so-called experts are accepted when they should not be. Rules need amending as soon as possible."

"...the Rules need modification. The principal expert problem is confusion by jury when experts on opposite sides, within the same discipline, testify to opposite conclusions."

"I oppose the suggested amendments to Rule 702 because I think the rule should remain flexible with full discretion for the trial judge to apply in a particular case."

"We are rule-plagued - we do not need national rules to address every minor problem."

"I believe FRE 702 should remain as it is -- this gives the court flexibility in handling such matters. I have had very few problems in the area of experts. One change, however, Rule 26(b) statements should be required automatically for any expert, including a treating doctor."

"The tendency of experts to become advocates is worrisome, as is the lack of a solid scientific base for many of the opinions expressed by experts in court. But the rule changes suggested herein will not eliminate these problems without collateral proceedings."

"I believe the current text of Federal Rule of Evidence 702 is adequate and does not need to be changed."

"Refrain from changing current rules! They work extremely well if the presiding judge has the experience to apply them to fact-specific cases. Theories of yesterday become accepted facts today [Aerodynamics -- TV -- Micro-Imagery]."

"I believe the case law as written makes R. 702 fairly clear. Amendments should be carefully considered."

"The new proposals would simply create new definitional problems and new decision points in litigation, resulting in increased lawyer fees as motions are brought, and delays in the litigation as evidence of these new issues is taken, and the issues resolved and appealed."

"I would hesitate to make changes in the rules. Such changes as suggested are going to be applied with a cleaver and not a scalpel. More attention to the problem by court of appeals will cure any problems currently present."

"I have opposed most of the changes to FRE 702 because they seem to run contrary to the existing jurisprudence and from the judge's standpoint will not ease the burden of presiding at trial."

"I do not think any rules change will assist. Difficult and complicated cases are still going to be that way and will require judicial management."

"No changes in the Rules are necessary. Judges already have discretion to deal with experts."

"Leave the present rule alone."

"No need for new or more rules. Use of present rules and common sense - plus a thorough knowledge of the case allows the judge to assure that this type of evidence is properly used - or excluded. The 3rd. Circuit has recently announced new standards replacing the Frye standards which give additional guidance."

"Present rules and procedures - have been adequate."

"I believe the changes suggested...would be positive and helpful."

Comments on "Substantially Assist" Amendment

"Adding 'substantially assist' language will be helpful but not critical in my view; the present language 'assist' is workable."

"To add 'substantially' as a modifier to the word 'assist' appears problematical and at the very least 'subjective.' Everybody understands the term 'assist.' To add 'substantially' as an additional requirement may dissolve (?) the litigation process."

"Instead of arguing over 'may' we would have to argue over 'substantially.'"

"This criteria is too uncertain (in either form) to enforce universally."

"Not needed."

"...the distinction between 'substantially assist' and 'will assist' seems perilously close to a semantical argument, and one sure to produce raucous disagreement among counsel. So we take evidence to determine that the testimony will assist 'substantially' as opposed to 'will assist'?"

"A playground for appellate courts."

Comments on "Reasonably Reliable" Amendment

"Adding 'reasonably reliable' language is an excellent idea and would permit the court to examine the proposed expert subject matter in advance of trial -- I see no difference between civil and criminal cases."

"How would a jurist gauge whether given expert evidence is 'reasonably reliable' or not?"

"Weight and value of expert testimony should be left to the jurors. I am uncomfortable, on 7th Amendment grounds, about rejecting an expert witness simply because I regard (or find) theories are not 'widely accepted,' or 'reasonably reliable.' That should be for the jury."

"I believe this is in fact the law."

"I thought this was the requirement."

"Let's avoid a mini-trial before the court prior to trial."

"[would favor this amendment] if "c" [requiring 'widely accepted' theories] not adopted."

"Not necessary."

"A playground for appellate courts."

Comment on Amendment Requiring "Widely accepted" Theories

"Adding the 'widely accepted' language is opposed as it would prevent any new theories being presented in court."

"I don't know if there is a discernible difference between 'widely accepted' and 'generally accepted' but thought that the latter is already required for such expert testimony."

"Weight and value of expert testimony should be left to the jurors. I am uncomfortable, on 7th Amendment grounds, about rejecting an expert witness simply because I regard (or find) theories are not 'widely accepted,' or 'reasonably reliable.' That should be for the jury."

"Need more info."

"More certification garbage -- polls of other 'experts.'"

"Inclined to oppose."

"Too hard to get a handle on how widely accepted a theory is without a wasteful mini-trial on that issue!!!"

"Could limit new scientific breakthroughs."

"Not necessary - Court can control."

"Would require collateral trials."

"This proposal is a return to the Frye rule. While that rule is much to be preferred to the present standardless chaos, it is perhaps too restrictive to accommodate advances in science and other fields. The challenge is to impose standards flexible enough to advance reasonably with exploding new technologies."

Comments on Amendment Requiring Early Exchange of Expert Reports

"Already covered in Rule 26(b)(4).

"I already do this."

"This is now required under our delay and expense reduction plan."

"The present availability of expert depositions and interrogatories (?) appears to be adequate."

"I do so -- don't think we should amend the rules."

"Much of this proposal, but not all, is already covered by Rule 26(b)(4) statements. This proposal is more explicit."

"I already do this by local rule."

"I now require this in all cases. In fact, [our] district court local rules require this."

"I do this by court order."

"I've used this in all civil trials for 8 years -- with some success."

"Usually required in our district."

"Proposed amendment requiring exchange of experts' theories in advance would help substantially."

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Rule 6(e), DOJ Proposed Amendment

DATE: March 1, 1992

The Department of Justice has proposed amendments to Rule 6(e) in order to limit the effect of the Supreme Court's decision in *Sells* as to intra-Department use of grand jury materials. As noted in the attached memo, the amendment would:

> "[R]eauthorize the pre-*Sells* practice of treating the Department of Justice as a single entity so that prosecutors may share valuable grand jury information, legitimately developed in the course of a criminal investigation, with other Departmental attorneys who need the information for civil enforcement purposes."

The Department has also proposed in the attached memo that Rule 6(e)(3)(C) be amended by adding a new subdivision (v) which would permit disclosure of grand jury materials to other United States departments or agencies under certain conditions.

Attached are the memo from the Department of Justice spelling out the reasons for the proposals and a draft copy of Rule 6(e) with the proposed changes included.

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

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CRIMINAL RULES
EDWARD LEAVY
BANKRUPTCY RULES

January 8, 1992

Mr. Robert S. Mueller, III
Assistant Attorney General
Criminal Division
U. S. Department of Justice
Washington, DC 20530

Dear Mr. Mueller:

Thank you very much for your letter of January 6, 1992 recommending certain amendments to Rule 6(e), Federal Rules of Criminal Procedure.

As you request, your proposals will be placed on the agenda for consideration by the Advisory Committee at its next meeting in April. You will, of course, be informed of any action taken by the Committee.

I would like to thank you in particular and the Department of Justice in general for your support of the Rules Enabling Act process.

Sincerely,

Wm. Terrell Hodges

c: Mr. Roger Pauley
Professor Dave Schlueter

Dave: Please place on next agenda

U.S. Department of Justice

Criminal Division

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

January 6, 1992

Honorable William Terrell Hodges
United States District Judge
United States Courthouse, Suite 108
Tampa, Florida 33602

Dear Judge Hodges:

I am writing to request that the Advisory Committee place on its agenda for its next meeting proposals to amend Rule 6(e) of the Federal Rules of Criminal Procedure to permit greater use by the government of grand jury information for civil and regulatory enforcement purposes. We believe the proposals represent an important reform that will strengthen enforcement activity in the areas of fraud and abuse involving government contracts and programs, while preserving the equally vital interest -- which we as the nation's sole prosecutive agency also strongly support -- of grand jury secrecy.

The proposals build upon, and would expand, the provisions of 18 U.S.C. 3322, which Congress enacted as part of the Financial Institutions Reform, Recovery and Enforcement Act of 1989. Our experience under that provision has demonstrated that the increased opportunity for sharing of grand jury information has significantly assisted the government's ability to act promptly and effectively with respect to civil and regulatory enforcement against financial institution fraud and abuse.

More specifically, the proposals would address the decisions of the Supreme Court in United States v. Sells Engineering, Inc., 463 U.S. 418 (1983) and United States v. Baggot, 463 U.S. 476 (1983). Sells greatly restricted the ability of civil attorneys in the Justice Department to gain access to grand-jury-generated evidence of contract fraud presented to a grand jury. Baggot held that other government agencies, even with court approval, could not use grand jury information in enforcement of their own important statutory activities where no judicial proceeding was pending or anticipated. Especially in complex, white collar fraud cases, and in light of the existence of statutes of limitation for bringing civil actions, prompt access to grand jury material is frequently crucial to a successful civil or administrative prosecution.

Let me now in more detail describe our proposals, and in that regard divide the discussion, first dealing with the proposal to enhance disclosure within the Department of Justice to attorneys responsible for civil enforcement, and second addressing the proposal to authorize disclosure to other agencies for purposes of enforcement activities not related to a judicial proceeding.

1. As to intra-Department of Justice disclosure and use of grand jury material, we propose to amend Rule 6(e) to make clear that disclosure of grand jury information among Department of Justice attorneys is permissible, without a court order, for purposes of civil or criminal law enforcement. In our view Sells, a 5-4 decision in which the dissenting opinion was authored by then Chief Justice Burger,[1] a former head of the Civil Division, was wrongly decided under the existing language of Rule 6(e). In construing Rule 6(e)(3)(A)(i) to mean that the phrase "for use in the performance of such attorney's duty" referred only to the conduct of criminal cases, the majority in Sells overturned years of Departmental practice and understanding under the Rule. But whatever the correctness of the Sells holding as a matter of law, we submit that the result it reached was unfortunate from a policy standpoint and should be rectified.

The Attorney General is the nation's foremost litigator, responsible for bringing, in the name of the United States, all civilian criminal cases and nearly all civil actions as well. Often, as in the instance of a civil forfeiture proceeding or a civil damages action under the False Claims Act, the conduct cited as the basis for civil liability is closely linked to the commission or possible commission of a crime, so that a prior grand jury investigation may have occurred. Under United States v. John Doe, Inc. I., 481 U.S. 102 (1987), the Supreme Court has held that Rule 6(e) is not violated if the same prosecutor who conducted the grand jury investigation uses information derived therefrom to pursue a companion civil case. Sells, therefore, which requires the government to obtain a court order under a stringent standard of particularized need before allowing a prosecutor to disclose grand jury information to another (civil) attorney in the Justice Department for purposes of civil enforcement, in effect ironically punishes the Attorney General for creating, for reasons of efficiency, separate Divisions, or even discrete units within the same Division or United States Attorney's Office, to handle civil proceedings.

The adverse impact of Sells on the Justice Department and for the country has been profound. Because the courts have generally held that "particularized need" cannot be established

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[1]Justices joining the dissenting opinion included the current Chief Justice and Justices O'Connor and Powell.

by reference to the time and expense needed to duplicate a grand jury's investigation, federal prosecutors are frequently unable to acquaint civil attorney litigators within the Department of activities they should investigate. Then, even if the civil attorneys do learn of the allegations, they must duplicate virtually the entire criminal investigation -- an effort that may not be feasible within the constraints of statutes of limitation or, at best, will cause substantial delays and require needless expenditure of effort and money.

Accordingly, the Department recommends that Rule 6(e) be changed to reauthorize the pre-Sells practice of treating the Department of Justice as a single entity so that prosecutors may share valuable grand jury information, legitimately developed in the course of a criminal investigation, with other Departmental attorneys who need the information for civil enforcement purposes. In our view, such opportunity for sharing will not jeopardize grand jury secrecy. This is true essentially for two reasons. First, Justice Department prosecutors are also guardians of grand jury secrecy; prosecutors clearly do not wish to risk losing criminal cases or to discourage future witnesses from testifying before the grand jury, by making wholesale and unnecessary disclosures. Thus, we anticipate that, as under pre-Sells practice, the criminal attorney must consent before disclosure of any grand jury information to another attorney for civil enforcement may occur. Second, Justice Department attorneys are all officers of the court, bound by Rule 6(e) and by ethical constraints to utilize grand jury material only for the lawful enforcement purposes for which it was obtained. Just as, we believe, few if any examples can be cited of grand jury misuse by Department civil attorneys who regularly received grand jury information prior to 1983 (and subsequently have done so under court order), so we do not anticipate any increased problem with Rule 6(e) violations resulting from the proposed enhanced ability of criminal prosecutors to share grand jury information with their civil enhancement counterparts.

In sum, Sells has placed severe impediments on the Department's civil enforcement efforts without, in our view, any corresponding benefits to grand jury secrecy. While no precise "damage" assessment is possible, we believe that Sells has cost the United States taxpayers many millions of dollars in lost civil recoveries and additional attorney time expended. For that reason, we urge that Rule 6(e) be amended -- as Congress has already effectively done for purposes of civil actions relating to financial institutions in 18 U.S.C. 3322 -- as follows:

(a) Amend Rule 6(e)(3)(A)(i) to read:

"(i) any attorney for the government[2] for use in the performance of an attorney for the government's duty to enforce federal criminal or civil law; and"; and

(b) Amend the first sentence of Rule 6(e)(3)(B) by inserting "civil or" before "criminal law".

The purpose of this latter amendment is to allow a federal agent, such as an IRS accountant, to whom disclosure of grand jury information had already been made under subdivision (e)(3)(A)(ii), for criminal enforcement purposes, also to discuss the information with the civil attorney. The amendment does not allow disclosure, without a court order, to any government personnel to whom an authorized disclosure had not previously occurred and thus does not jeopardize grand jury secrecy. The amendment to subdivision (B) of Rule 6(e)(3) serves to assure that disclosure to a civil attorney is meaningful, particularly in fraud and other complicated cases where agents and auditors have analyzed or audited voluminous records. These persons are more familiar than the prosecutor with the intricate details and were they not permitted to explain their work product to the civil attorney, much of the purpose of granting access to the attorney would be defeated.

2. With respect to disclosures to personnel of other, non-Department of Justice agencies, the Department proposes to add a new subdivision (v) to Rule 6(e)(3)(C), as follows:

"(v) at the request of an attorney for the government, and when so permitted by a court upon a showing of substantial need, to personnel of any department or agency of the United States (I) when such personnel are necessary to provide assistance to an attorney for the government in the performance of such attorney's duty to enforce federal civil law, or (II) for use in

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[2]"Attorney for the government" is, of course, a defined term in the Federal Rules of Criminal Procedure, which refers only to Department of Justice attorneys (except in the case of proceedings arising under the laws of Guam or the Northern Mariana Islands).

relation to any matter within the jurisdiction of such department or agency."[3]

This proposal, unlike the previous one applicable only to Department of Justice attorneys, would require both the approval of the prosecutor and a court order predicated upon a showing of "substantial need" before a disclosure could occur. In this respect, the proposal tracks the provisions of 18 U.S.C. 3322, which currently authorize, upon the same standard, a court order for disclosure of grand jury information to personnel of a financial institution regulatory agency such as the Office of Thrift Supervision.

The proposal is founded upon the belief that, in confining grand jury disclosures for civil law purposes only to judicial proceedings or proceedings that are "preliminary to" such proceedings, Rule 6(e) embodies a policy that is too crabbed. Under the Rule as presently written and interpreted, disclosure of sensitive grand jury information could be made to a litigant for use in a relatively minor and purely private civil action. However, the Rule embodies the view that there is no federal agency proceeding of sufficient importance to warrant the same disclosure. Such a policy is indefensible. For example, suppose that a grand jury investigation into alleged price-fixing in the concrete industry reveals insufficient evidence of price-fixing to warrant an indictment, but that the investigation uncovered some previously unknown evidence suggesting that the concrete used to build a particular nuclear facility was of inferior quality and posed a possible safety risk. Under the present Rule, disclosure by the prosecutor of that information to the appropriate agency such as the Nuclear Regulatory Commission would not only not be authorized, even with court approval, it would constitute a contempt of court! Even assuming that no prosecution would be brought under such circumstances, were the agency's subsequent use of the information to result in a future referral back to the Justice Department for a fraud prosecution, a motion to suppress evidence of the fraud as the "fruit of the poisonous tree" (i.e. the initial criminal disclosure) might lie.

Clearly, as Congress has recognized with regard to financial institution regulatory agencies, a mechanism should be provided to permit, with the approval of the prosecutor and the court, disclosure of grand jury information to government agencies for use in matters or proceedings within their jurisdiction. Federal agencies, after all, are created and charged by Congress with

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[3] A conforming amendment, adding a reference to the new subdivision (v), would also have to be made in Rule 6(e)(3)(D), specifying that a petition for disclosure pursuant to the new provision should be filed in the district where the grand jury convened.

carrying out statutory missions in pursuance of various goals and the public interest. It denigrates their role in our system of government to say that a private litigant in a comparatively minor dispute brought in federal court may have access to grand jury information, but that a federal agency may not be granted such access pursuant to a matter within its statutory cognizance.

As to the standard of "substantial need" used in the proposal, this is identical to the standard recently enacted in 18 U.S.C. 3322. As we understand it, the concept of a "substantial need" is intended to lessen somewhat the "particularized need" standard articulated by the Supreme Court. The term is designed to make clear that to whatever extent the "particularized need" standard precludes or minimizes a court's consideration of the government's saving time or increasing efficiency in its disclosure determinations, that standard no longer applies. Rather, in applying the "substantial need" test, a court would be required to balance the reasons justifying continued grand jury secrecy against the countervailing need for disclosure, including, but not limited to, the public interest -- particularly the protection of the public health or safety -- served by disclosure to a governmental body; the burden or cost of duplicating the grand jury investigation; the potential unavailability of witnesses; and the expiration of an applicable statute of limitations.

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

Sincerely,

Robert S. Mueller, III
Assistant Attorney General
Criminal Division

RULES OF CRIMINAL PROCEDURE

Rule 6. The Grand Jury

* * * * *

(e) RECORDING AND DISCLOSURE OF PROCEEDINGS.

* * * * *

(3) *Exceptions.*

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to --

(i) ~~an~~ any attorney for the government for use in the performance of such attorney's duty~~;~~ to enforce federal criminal or civil law; and

(ii) such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed

RULES OF CRIMINAL PROCEDURE

under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal civil or criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made, and shall certify that the attorney has advised such persons of their obligation of secrecy under this rule.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made --

* * * * *

(v) at the request of an attorney for the government, and when so permitted by a court upon a showing of substantial need, to personnel of any department or agency of the United States (I) when such personnel are necessary to provide assistance to an attorney for the government in the performance of such attorney's duty to

RULES OF CRIMINAL PROCEDURE

enforce federal civil law, or (II) for use in relation to any matter within the jurisdiction of such department or agency.

* * * * *

(D) A petition for disclosure pursuant to subdivision (e)(3)(C)(i) or (v) shall be filed in the district where the grand jury convened. Unless the hearing is ex parte, which it may be when the petitioner is the government, the petitioner shall serve written notice of the petition upon (i) the attorney for the government, (ii) the parties to the judicial proceeding if disclosure is sought in connection with such a proceeding, and (iii) such other persons as the court may direct. The court shall afford those persons a reasonable opportunity to appear and be heard.

* * * * *

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: **Amendments to Rule 11 to Provide for Magistrate Judges Hearing Guilty Pleas and to Inform Accused of Possible Deportation**

DATE: March 2, 1992

1. Magistrate Judges Hearing Guilty Pleas.

At the November meeting, Judge Hodges raised the issue of whether the Supreme Court's decision in Peretz v. United States, 111 S.Ct. 2661 (1991) might support an amendment to Rule 11 to permit magistrate judges to hear guilty pleas, as a delegable "additional duty." (See attached memo dated 9/12/91). He also informed the Committee that the Administration of the Magistrates Judges Committee was going to consider the possibility of using Magistrate Judges to hear guilty pleas in felony cases at its Fall 1991 meeting. Subsequently, that Committee met and the chair, Judge Wayne Alley, sent Judge Hodges the attached letter indicating that his committee was opposed to authorizing magistrate judges to accept guilty pleas in felony cases. That committee was also opposed to authorizing magistrate judges to conduct sentencing proceedings or to preside over an entire felony trial. The question presented is whether the Advisory Committee wishes to pursue the possiblity of amending Rule 11 to permit magistrate judges to conduct any, or all, of the guilty plea inquiry.

2. Amendment to Rule 11(c) Regarding Advice of Possible Deportation.

Also attached is a letter from Mr, James Craven proposing that Rule 11(c) be amended to add a requirement that before any guilty or nolo contendre plea is accepted, the judge must advise an accused who is not a United States citizen of the possiblity of deportation, etc. Attached to his letter is a copy of a similar provision in the North Carolina statutes.

A draft of the proposed amendment as it might appear in Rule 11(c) is attached.

JUDICIAL CONFERENCE OF THE UNITED STATES
COMMITTEE ON THE ADMINISTRATION OF THE MAGISTRATE JUDGES SYSTEM

3102 U.S. Courthouse
200 NW 4th Street
Oklahoma City, Oklahoma 73102

JUDGE WAYNE E. ALLEY
CHAIRMAN

February 12, 1992

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Honorable Wm. Terrell Hodges
United States District Court
United States Courthouse, Suite 108
611 North Florida Avenue
Tampa, Florida 33602-4511

Dear Judge Hodges:

As Chairman of the Committee on the Administration of the Magistrate Judges Committee, I am writing to inform you, in your capacity as Chairman of the Advisory Committee on Criminal Rules, about actions taken by the Magistrate Judges Committee at its December meeting. In accordance with a recommendation of the Federal Courts Study Committee, the Magistrate Judges Committee conducted a constitutional analysis of the authority of magistrate judges as part of an overall study of magistrate judge jurisdiction. As an element of its constitutional analysis, at its December 1991 meeting the Committee considered several possible modifications of magistrate judge authority.

In particular, the Committee examined several proposals regarding the authority of magistrate judges in criminal cases. The Committee considered the adoption of an "opt out" or waiver system for obtaining the consent of the defendant to trial before a magistrate judge in a misdemeanor case. The Committee observed that the proposal was consistent with the policy of the Judicial Conference endorsing the elimination of written consent in misdemeanor cases. It voted to endorse in principle the modification of the consent provision in misdemeanor cases to a waiver or "opt out" system, but declined to seek specific legislation to enact the proposal due to its reluctance to initiate piecemeal changes to the Federal Magistrates Act.

The Committee also considered three proposals to grant magistrate judges expanded authority in felony cases: (1) the authority to accept guilty pleas in felony cases with the consent of the defendant; (2) the authority to conduct sentencing proceedings in felony cases with the consent of the parties; and (3) the authority to preside over an entire felony trial with the consent to the parties.

The Committee expressed a strong view that judicial duties in critical stages of a felony trial, particularly the acceptance of guilty pleas and the conduct of sentencing proceedings, as well as the conduct of the felony trial itself, are fundamental duties of district judges under Article III of the Constitution. The Committee's opposition to authorizing magistrate judges to accept guilty pleas in felony cases is consistent with the policy of the Judicial Conference. The Committee concluded that these duties should not be delegated to magistrate judges, regardless of whether the parties consent to such delegation.

If you have any questions regarding these issues do not hesitate to give me a call.

Sincerely,

Wayne Alley

WAYNE E. ALLEY
United States District Judge

WEA/lp

cc: Prof. David Schlueter
David Adair

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Amendment to Rule 11 to Provide for Magistrate Judges Hearing Guilty Pleas

DATE: September 12, 1991

The Supreme Court recently held in Peretz v. United States, 111 S.Ct. 2661 (1991) that under the Magistrates Act supervision by a magistrate judge of voir dire in a felony case was a delegable "additional duty" if the parties consented. A copy of the decision is attached.

Judge Hodges has suggested that it might be appropriate to consider the possibility of amending Rule 11 to permit United States Magistrate Judges to hear guilty pleas. Such a change would also necessitate a change to the statutory provision(s) addressing the authority of magistrate judges and coordination with the Magistrates' Committee.

I recently spoke with Judge Wayne Alley, chair of the Magistrates' Committee. He indicated that a subcommittee is actively working on this issue and that he expects a report from that group sometime this Fall. The matter will be on the agenda for their December, 1991 meeting.

No specific language is being proposed at this time.

This evident meaning—that the term "Departments" means all independent executive establishments—is also the only construction that makes sense of Art. II, § 2's sharp distinction between principal officers and inferior officers. The latter, as we have seen, can by statute be made appointable by "the President alone, ... the Courts of Law, or ... the Heads of Departments." Officers that are not "inferior Officers," however, *must* be appointed (unless the Constitution itself specifies otherwise, as it does, for example, with respect to officers of Congress) *by the President, "by and with the Advice and Consent of the Senate."* The obvious purpose of this scheme is to make sure that all the business of the Executive will be conducted under the supervision of officers appointed by the President with Senate approval; only officers "inferior," *i.e.*, subordinate, to those can be appointed in some other fashion. If the Appointments Clause is read as I read it, all inferior officers can be made appointable by their ultimate (sub-Presidential) superiors; as petitioners would read it, only those inferior officers whose ultimate superiors happen to be Cabinet members can be. All the other inferior officers, if they are to be appointed by an Executive official at all, must be appointed by the President himself or (assuming cross-Department appointments are permissible) by a Cabinet officer who has no authority over the appointees. This seems to me a most implausible disposition, particularly since the make-up of the Cabinet is not specified in the Constitution, or indeed the concept even mentioned. It makes no sense to create a system in which the inferior officers of the Environmental Protection Agency, for example—which may include, *inter alia*, bureau chiefs, the general counsel and administrative law judges—must be appointed by the President, the Courts of Law, or the Secretary of Something Else.

In short, there is no reason, in text, judicial decision, history or policy, to limit the phrase "the Heads of Departments" in the Appointments Clause to those officials who are members of the President's Cabinet. I would give the term its ordinary meaning, something which Congress has apparently been doing for decades without complaint. As an American dictionary roughly contemporaneous with adoption of the Appointments Clause provided, and as remains the case, a department is "[a] separate allotment or part of business; a distinct province, in which a class of duties are allotted to a particular person...." 1 N. Webster, American Dictionary 58 (1828). I readily acknowledge that applying this word to an entity such as the Tax Court would have seemed strange to the Founders, as it continues to seem strange to modern ears. But that is only because the Founders did not envision that an independent establishment of such small size and specialized function would be created. They chose the word "Department," however, not to connote size or function (much less Cabinet status), but separate organization—a connotation that still endures even in colloquial usage today ("that is not my department"). The Constitution is clear, I think, about the chain of appointment and supervision that it envisions: principal officers could be permitted by law to appoint their subordinates. That should subsist, however much the nature of federal business or of federal organizational structure may alter.

I must confess that in the case of the Tax Court, as with some other independent establishments (notably, the so-called "independent regulatory agencies" such as the Federal Communications Commission and the Federal Trade Commission) permitting appointment of inferior officers by the agency head may not insure the high degree of insulation from congressional control that was the purpose of the appointments scheme elaborated in the Constitution. That is a consequence of our decision in *Humphrey's Executor v. United States*, 295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611 (1935), which approved congressional restriction upon arbitrary dismissal of the heads of such agencies by the President, a scheme avowedly designed to make such agencies less accountable to him, and hence he less responsible for them. Depending upon how broadly one reads the President's power to dismiss "for cause," it may be that he has no control over the appointment of inferior officers in such agencies; and if those agencies are publicly regarded as beyond his control—a "headless Fourth Branch"—he may have less incentive to care about such appointments. It could be argued, then, that much of the *raison d'être* for permitting appointive power to be lodged in "Heads of Departments," see 2640–2642, *supra*, does not exist with respect to the heads of *these* agencies, because they, in fact, will not be shored up by the President and are thus not resistant to congressional pressures. That is a reasonable position—though I tend to the view that adjusting the remainder of the Constitution to compensate for *Humphrey's Executor* is a fruitless endeavor. But in any event it is not a reasonable position that supports the Court's decision today—both because a "Court of Law" artificially defined as the Court defines it is even *less* resistent to those pressures, and because the distinction between those agencies that are subject to full Presidential control and those that are not is entirely unrelated to the distinction between Cabinet agencies and non-Cabinet agencies, and to all the other distinctions that the Court successively embraces. (The Central Intelligence Agency and the Environmental Protection Agency, for example, though not Cabinet agencies or components of Cabinet agencies, are not "independent" agencies in the sense of independence from Presidential control.) In sum, whatever may be the distorting effects of later innovations that this Court has approved, considering the Chief Judge of the Tax Court to be the head of a department seems to me the only reasonable construction of Article II, § 2.

* * *

For the above reasons, I concur in the judgment that the decision below must be affirmed.

Rafael PERETZ, Petitioner

v.

UNITED STATES.

No. 90–615.

Argued April 23, 1991.

Decided June 27, 1991.

Defendant was convicted in the United States District Court for the Eastern District of New York, of importing four kilograms of heroin, and he appealed. The United States Court of Appeals for the Second Circuit, 904 F.2d 34, affirmed, and certiorari was granted. The Supreme Court, Justice Stevens, held that: (1) under Federal Magistrates Act, supervision of voir dire in felony proceeding is additional duty that may be delegated to magistrate if litigants consent, and (2) there is no Article III problem when district court judge permits magistrate to conduct voir dire in accordance with defendant's consent.

Affirmed.

Justice Marshall filed dissenting opinion in which Justices White and Blackmun joined.

Justice Scalia filed dissenting opinion.

1. United States Magistrates ⇐21

Under Federal Magistrates Act, supervision of voir dire in felony proceeding is additional duty that may be delegated to magistrate if litigants consent. 28 U.S.C.A. § 636(b)(3).

2. United States Magistrates ⇐21

There is no Article III problem when district court judge permits magistrate to conduct voir dire in felony proceeding in accordance with defendant's consent. 28 U.S.C.A. § 636(b)(3); U.S.C.A. Const. Art. 3, § 1 et seq.

3. Federal Courts ⇐1

Defendant has no constitutional right to have Article III judge preside at jury selection if defendant has raised no objection to judge's absence. U.S.C.A. Const. Art. 3, § 1 et seq.

4. United States Magistrates ⇐21

Even assuming that litigant could not waive structural protections provided by Article III, no such structural protections were implicated by procedure followed in magistrate's supervision of jury selection in felony trial. U.S.C.A. Const. Art. 3, § 1 et seq.

Syllabus *

Gomez v. United States, 490 U.S. 858, 109 S.Ct. 2237, 104 L.Ed.2d 923, held that the selection of a jury in a felony trial without a defendant's consent is not one of the "additional duties" that magistrates may be assigned under the Federal Magistrates Act. That decision rested on the lack of both an express statutory provision for *de novo* review and an explicit congressional intent to permit magistrates to conduct *voir dire* absent the parties' consent. And it was compelled by concerns that a defendant might have a constitutional right to demand that an Article III judge preside at every critical stage of a felony trial and that the procedure deprived an individual of an important privilege, if not a right. In this case, petitioner Peretz consented to the assignment of a Magistrate to conduct the *voir dire* and supervise the jury selection for his felony trial, never asked the District Court to review the Magistrate's rulings, and raised no objection regarding jury selection at trial. However, on appeal from his conviction, he contended that it was error to assign the jury selection to the Magistrate. The Court of Appeals affirmed the conviction on the ground that *Gomez* requires reversal only in cases in which the magistrate has acted without the defendant's consent.

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Held:

1. The Act's "additional duties" clause permits a magistrate to supervise jury selection in a felony trial provided that the parties consent. The fact that there is only ambiguous evidence of Congress' intent to include jury selection among magistrates' additional duties is far less important here than it was in *Gomez*, for Peretz' consent eliminates the concerns about a constitutional issue and the deprivation of an important right. Absent these concerns, the Act's structure and purpose evince a congressional belief that magistrates are well qualified to handle matters of similar importance to jury selection. This reading of the additional duties clause strikes the balance Congress intended between a criminal defendant's interests and the policies undergirding the Act. It allows courts, with the litigants' consent, to continue innovative experiments in the use of magistrates to improve the efficient administration of the courts' dockets, thus relieving the courts of certain subordinate duties that often distract them from more important matters. At the same time, the consent requirement protects a criminal defendant's interest in requesting the presence of a trial judge at all critical stages of his felony trial. Pp. 2667–2669.

2. There is no constitutional infirmity in the delegation of felony trial jury selection to a magistrate when the litigants consent. A defendant has no constitutional right to have an Article III judge preside at jury selection if he has raised no objection to the judge's absence. Cf. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848, 106 S.Ct. 3245, 3255, 92 L.Ed.2d 675. Cf. also, *e.g.*, *United States v. Gagnon*, 470 U.S. 522, 528, 105 S.Ct. 1482, 1485, 84 L.Ed.2d 486. In addition, none of Article III's structural protections are implicated by this procedure. The entire process takes place under the total control and jurisdiction of the district court, which decides, subject to veto by the parties, whether to invoke a magistrate's assistance and whether to actually empanel the jury selected. See *United States v. Raddatz*, 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424. That the Act does not provide for a *de novo* review of magistrates' decisions during jury selection does not alter this result, for, if a defendant requests review, nothing in the statute precludes a court from providing the review required by the Constitution. See *id.*, at 681, n. 7, 100 S.Ct., at 2415, n. 7. Pp. 2669–2671.

904 F.2d 34 (CA2 1990), affirmed.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and O'CONNOR, KENNEDY, and SOUTER, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which WHITE and BLACKMUN, JJ., joined. SCALIA, J., filed a dissenting opinion.

Joel B. Rudin, New York City, for petitioner.

William C. Bryson, Washington, D.C., for respondent.

Justice STEVENS delivered the opinion of the Court.

The Federal Magistrates Act grants district courts authority to assign magistrates certain described functions as well as "such additional duties as are not inconsistent with the Constitution and laws of the United States." [1] In *Gomez v. United States*, 490 U.S. 858, 109 S.Ct. 2237, 104 L.Ed.2d 923 (1989), we held that those "additional duties" do not encompass the selection of a jury in a felony trial without the defendant's consent. In this case, we consider whether the defendant's consent warrants a different result.

1. Pub.L. 90-578, 82 Stat. 1108, as amended, 28 U.S.C. § 636(b)(3).

2. "THE COURT: Mr. Breitbart, I have the consent of your client to proceed with the jury selection?

"MR. BREITBART: Yes, your Honor.

"THE COURT: And Mr. Lopez, do I have the consent of your client to proceed?

"MR. LOPEZ: Yes, your Honor." App. 5.

I

Petitioner and a codefendant were charged with importing four kilograms of heroin. At a pretrial conference attended by both petitioner and his counsel, the District Judge asked if there was "[a]ny objection to picking the jury before a magistrate?" App. 2. Petitioner's counsel responded: "I would love the opportunity." *Ibid.* Immediately before the jury selection commenced, the Magistrate asked for, and received, assurances from counsel for petitioner and from counsel for his codefendant that she had their clients' consent to proceed with the jury selection.[2] She then proceeded to conduct the *voir dire* and to supervise the selection of the jury. Neither defendant asked the District Court to review any ruling made by the Magistrate.

The District Judge presided at the jury trial which resulted in the conviction of petitioner and the acquittal of his codefendant. In the District Court, petitioner raised no objection to the fact that the Magistrate had conducted the *voir dire*. On appeal, however, he contended that it was error to assign the jury selection to the Magistrate and that our decision in *Gomez* required reversal. The Court of Appeals disagreed. Relying on its earlier decision in *United States v. Musacchia*, 900 F.2d 493 (CA2 1990), it held "that explicit consent by a defendant to magistrate-supervised *voir dire* waives any subsequent challenge on those grounds," and affirmed petitioner's conviction. App. to Pet. for Cert. 2a; 904 F.2d 34 (1990) (affirmance order).

In *Musacchia*, the Second Circuit had affirmed a conviction in a case in which the defendant had not objected to jury selection by the Magistrate. The Court of Appeals concluded that our holding in *Gomez* applied only to cases in which the magis-

trate had acted without the defendant's consent. The court explained:

"Appellants additionally claim that *Gomez* states that a magistrate is without jurisdiction under the Federal Magistrates Act to conduct *voir dire*. We disagree. Since *Gomez* was decided we and other circuits have focused on the 'without defendant's consent' language and generally ruled that where there is either consent or a failure to object a magistrate may conduct the jury *voir dire* in a felony case. *See* [*United States v. Vanwort*, 887 F.2d 375, 382–383 (CA2 1989), cert. denied, *sub nom. Chapoteau v. United States*, 495 U.S. ——, 110 S.Ct. 1927, 109 L.Ed.2d 290 (1990); *United States v. Mang Sun Wong*, 884 F.2d 1537, 1544 (CA2 1989), cert. denied, 493 U.S. 1082, 110 S.Ct. 1140, 107 L.Ed.2d 1045 (1990); *United States v. Lopez–Pena*, 912 F.2d 1542, 1545–1548 (CA1 1989)] (not plain error to permit magistrate to preside since objection to magistrate must be raised or it is waived); *Government of the Virgin Islands v. Williams*, 892 F.2d 305, 310 (3d Cir.1989) (absent demand no constitutional difficulty under § 636(b)(3) with delegating jury selection to magistrate); *United States v. Ford*, 824 F.2d 1430, 1438–39 (5th Cir.1987) *(en banc)* (harmless error for magistrate to conduct *voir dire* where defendant failed to object), *cert. denied*, 484 U.S. 1034, 108 S.Ct. 741, 98 L.Ed.2d 776 (1988); *United States v. Wey*, 895 F.2d 429 (7th Cir. 1990) (jury selection by magistrate is not plain error where no prejudice is shown). Concededly, [*United States v. France*, 886 F.2d 223 (CA9 1989),] concluded otherwise. The court there ruled that defendant's failure to contemporaneously object to the magistrate conducting jury selection did not waive her right to appellate review. 886 F.2d at 226. But that holding may be explained, as noted earlier, by what the court perceived as the futility of defendant raising an objection below." 900 F.2d, at 502.

The conflict among the Circuits described by the Court of Appeals prompted us to grant the Government's petition for certiorari in the *France* case, see 495 U.S. ——, 110 S.Ct. 1921, 109 L.Ed.2d 285 (1990). Earlier this term, we affirmed that judgment by an equally-divided Court, 498 U.S. ——, 111 S.Ct. 805, 112 L.Ed.2d 836 (1991). Thereafter, we granted certiorari in this case and directed the parties to address the following three questions:

"1. Does 28 U.S.C. § 636 permit a magistrate to conduct the *voir dire* in a felony trial if the defendant consents?

"2. If 28 U.S.C. § 636 permits a magistrate to conduct a felony trial *voir dire* provided that the defendant consents, is the statute consistent with Article III?

"3. If the magistrate's supervision of the *voir dire* in petitioner's trial was error, did the conduct of petitioner and his attorney constitute a waiver of the right to raise this error on appeal?" See 493 U.S. ——, 111 S.Ct. 781, 112 L.Ed.2d 844 (1991).

Resolution of these questions must begin with a review of our decision in *Gomez*.

II

Our holding in *Gomez* was narrow. We framed the question presented as "whether presiding at the selection of a jury in a felony trial *without the defendant's consent* is among those 'additional duties' that district courts may assign to magistrates. 490 U.S., at 860, 109 S.Ct., at 2250 (emphasis added). We held that a magistrate "exceeds his jurisdiction" by selecting a jury "despite the defendant's objection." *Id.*, at 876, 109 S.Ct., at 2248. Thus, our holding was carefully limited to the situation in which the parties had not acquiesced at trial to the Magistrate's role.[2] This part

Magistrates Act permits a magistrate to preside over the selection of a jury when a defendant consents. In *Gomez*, the Court framed the [illegible]

3. As the Third Circuit has recognized:

"The Court did not, however, reach the question presented in this case: whether the Federal

ticular question had divided the Courts of Appeals. See *id.*, at 861–862, and n. 7, 109 S.Ct., at 2239–2240, and n. 7. On the other hand, those courts had uniformly rejected challenges to a magistrate's authority to conduct the *voir dire* when no objection to his performance of the duty had been raised in the trial court.[4]

Although we concluded that the role assumed by the Magistrate in *Gomez* was beyond his authority under the Act, we recognized that Congress intended magistrates to play an integral and important role in the federal judicial system. See *id.*, at 864–869, 109 S.Ct., at 2241–2244 (citing H.R.Rep. No. 96–287, p. 5 (1979)). Our recent decisions have continued to acknowledge the importance Congress placed on the magistrate's role. See, *e.g.*, *McCarthy v. Bronson*, 500 U.S. ——, ——, 111 S.Ct. 1737, ——, 114 L.Ed.2d 194 (1991). "Given the bloated dockets that district courts have now come to expect as ordinary, the role of the magistrate in today's federal judicial system is nothing less than indispensable." *Government of the Virgin Islands*, 892 F.2d, at 308.[5]

Cognizant of the importance of magistrates to an efficient federal court system, we were nonetheless propelled towards our holding in *Gomez* by several considerations. Chief among our concerns was this Court's "settled policy to avoid an interpretation of a federal statute that engenders constitutional issues." *Gomez*, 490 U.S., at 864, 109 S.Ct., at 2241. This policy was implicated in *Gomez* because of the substantial question whether a defendant has a constitutional right to demand that an Article III judge preside at every critical stage of a felony trial.[6] The principle of

as 'whether presiding at the selection of a jury in a felony trial *without the defendant's consent*' is an additional duty within the meaning of the Federal Magistrates Act. *Id.* [109 S.Ct.,] at 2239 (emphasis added); *see also id.* [109 S.Ct.,] at 2248 (rejecting the government's harmless error analysis on the grounds that it 'does not apply in a felony case in which, *despite the defendant's objection* and without any meaningful review by a district judge, an officer exceeds his jurisdiction by selecting a jury'). *Gomez* thus left open the question whether a defendant's consent makes a difference as to whether a district court may assign voir dire to a magistrate." *Government of the Virgin Islands v. Williams*, 892 F.2d 305, 308–309 (1989).

4. See, *e.g.*, *United States v. Ford*, 824 F.2d 1430 (CA5 1987) (en banc), cert. denied, 484 U.S. 1034, 108 S.Ct. 741, 98 L.Ed.2d 776 (1988); *United States v. DeFiore*, 720 F.2d 757 (CA2 1983), cert. denied *sub nom. Coppola v. United States*, 466 U.S. 906, 104 S.Ct. 1684, 80 L.Ed.2d 158 (1984); *United States v. Rivera–Sola*, 713 F.2d 866 (CA1 1983); *Heith v. United States*, 342 F.2d 158 (CA3 1965).

5. "It can hardly be denied that the system created by the Federal Magistrates Act has exceeded the highest expectations of the legislators who conceived it. In modern federal practice, federal magistrates account for a staggering volume of judicial work. In 1987, for example, magistrates presided over nearly half a million judicial proceedings. *See* S.Rep. No. 100–293, 100th Cong., 2d Sess. 7, *reprinted in* 1988 U.S. Code Cong. & Admin.News 5564. As a recent State Report noted, '[i]n particular, magistrates [in 1987] conducted over 134,000 preliminary proceedings in felony cases; handled more than 197,000 references of civil and criminal pretrial matters; reviewed more than 6,500 social security appeals and more than 27,000 prisoner filings; and tried more than 95,000 misdemeanors and 4,900 civil cases on consent of the parties. *Id.* at 5565." *Government of the Virgin Islands v. Williams*, 892 F.2d, at 308.

6. In *Gomez*, we cited our opinion in *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 106 S.Ct. 3245, 92 L.Ed.2d 675 (1986), which emphasized the importance of the personal right to an Article III adjudicator:

"Article III, § 1, serves both to protect 'the role of the independent judiciary within the constitutional scheme of tripartite government.' *Thomas [v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 583, 105 S.Ct. 3325, 3334, 87 L.Ed.2d 409 (1985)], and to safeguard litigants' 'right to have claims decided before judges who are free from potential domination by other branches of government.' *United States v. Will*, 449 U.S. 200, 218 [101 S.Ct. 471, 482, 66 L.Ed.2d 392] (1980). See also *Thomas*, *supra*, [473 U.S.,] at 582–583 [105 S.Ct., at 3333–3334]; *Northern Pipeline [Construction Co. v. Marathon Pipe Line Co.]*, 458 U.S. [50], at 58 [102 S.Ct. 2858, at 2864, 73 L.Ed.2d 598 (1982)]. Although our cases have provided us with little occasion to discuss the nature or significance of this latter safeguard, our prior discussions of Article III, § 1's guarantee of an independent and impartial adjudication by the federal judiciary of matters within the judicial power of the United States

constitutional avoidance led us to demand clear evidence that Congress actually intended to permit magistrates to take on a role that raised a substantial constitutional question. Cf. *Rust v. Sullivan*, 500 U.S. ——, ——, 111 S.Ct. 1759, ——, 114 L.Ed.2d 233 (O'CONNOR, J., dissenting). The requirement that Congress express its intent clearly was also appropriate because the Government was asking us in *Gomez* to construe a general grant of authority to authorize a procedure that deprived an individual of an important privilege, if not a right. See 2A C. Sands, Sutherland on Statutory Construction § 58.04, p. 715 (rev. 4th ed.1984). The lack of an express provision for *de novo* review, coupled with the absence of any mention in the statute's text or legislative history of a magistrate's conducting *voir dire* without the parties' consent, convinced us that Congress had not clearly authorized the delegation involved in *Gomez*. In view of the constitutional issues involved, and the fact that broad language was being construed to deprive a defendant of a significant right or privilege, we considered the lack of a clear authorization dispositive. See *Gomez*, 490 U.S., at 872, and n. 25, 875–876, 109 S.Ct., at 2245, and n. 25, 2247–2248.

Reinforcing this conclusion was the principle that "[a]ny additional duties performed pursuant to a general authorization in the statute reasonably should bear some relation to the specified duties" that the statute assigned to magistrates.[7] Carefully reviewing the duties that magistrates were expressly authorized to perform, see *id.*, at 865–871, 109 S.Ct., at 2242–2245, we focused on the fact that those specified duties that were comparable to jury selection in a felony trial could be performed only with the consent of the litigants.[8] We noted that, in 1968 when magistrates were empowered to try "minor offenses," the exercise of that jurisdiction in any specific case was conditioned upon the defendant's express written consent. See *id.*, at 866, 109 S.Ct., at 2242. Similarly, the 1976 Amendment provided that a magistrate could be designated as a special master in any civil case but only with the consent of the parties. *Id.*, at 867–868, 109 S.Ct., at 2243–2244. And in 1979, when Congress enlarged the magistrate's criminal jurisdiction to encompass all misdemeanors, the exercise of that authority was subject to the defendant's consent. As we explained:

"A critical limitation on this expanded jurisdiction is consent. As amended in 1979, the Act states that 'neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate.' 93 Stat. 643, 28 U.S.C. § 636(c)(2). In criminal cases, the Government may petition for trial before a district judge. 'Defendants charged with misdemeanors can refuse to consent to a magistrate and thus effect the same removal,' S.Rep. No. 96–74, p. 7 (1979), for the magistrate's criminal trial jurisdiction depends on the defendant's specific, written consent." *Id.*, at 870–871, 109 S.Ct., at 2244–2245 (footnote omitted).

Because the specified duties that Congress authorized magistrates to perform without the consent of the parties were not comparable in importance to supervision of felony trial *voir dire* but were instead "subsidiary matters," *id.*, at 872, 109 S.Ct., at 2245, we did not waver from our conclusion that a magistrate cannot conduct *voir dire* over the defendant's objection.

III

[1] This case differs critically from *Gomez* because petitioner's counsel, rather than objecting to the Magistrate's role, affirmatively welcomed it. See *supra*, at 2668. The considerations that led to our holding in *Gomez* do not lead to the conclusion that a magistrate's "additional duties" may not include supervision of jury selection when the defendant has consented.

Most notably, the defendant's consent significantly changes the constitutional analysis. As we explain in Part IV, *infra*, we have no trouble concluding that there is no Article III problem when a district court judge permits a magistrate to conduct *voir dire* in accordance with the defendant's consent. The absence of any constitutional difficulty removes one concern that motivated us in *Gomez* to require unambiguous evidence of Congress' intent to include jury selection among a magistrate's additional duties. Petitioner's consent also eliminates our concern that a general authorization should not lightly be read to deprive a defendant of any important privilege.

We therefore attach far less importance in this case to the fact that Congress did not focus on jury selection as a possible additional duty for magistrates. The generality of the category of "additional duties" indicates that Congress intended to give federal judges significant leeway to experiment with possible improvements in the efficiency of the judicial process that had not already been tried or even foreseen. If Congress had intended strictly to limit these additional duties to functions considered in the committee hearings or debates, presumably it would have included in the statute a bill of particulars rather than a broad residuary clause. Construing this residuary clause absent concerns about raising a constitutional issue or depriving a defendant of an important right, we should not foreclose constructive experiments that are acceptable to all participants in the trial process and are consistent with the basic purposes of the statute.

Of course, we would still be reluctant, as we were in *Gomez*, to construe the additional duties clause to include responsibilities of far greater importance than the specified duties assigned to magistrates. But the litigants' consent makes the crucial difference on this score as well. As we explained in Part II, the duties that a magistrate may perform over the parties' objections are generally subsidiary matters not comparable to supervision of jury selection. However, with the parties' consent, a district judge may delegate to a magistrate supervision of entire civil and misdemeanor trials. These duties are comparable in responsibility and importance to presiding over *voir dire* at a felony trial.

We therefore conclude that the Act's "additional duties" clause permits a magistrate to supervise jury selection in a felony trial provided the parties consent. In reaching this result, we are assisted by the reasoning of the Courts of Appeals for the Second, Third, and Seventh Circuits, all of which, following our decision in *Gomez*,

intimated that this guarantee serves to protect primarily personal, rather than structural, interests. See, e.g., *id.*, at 90 [102 S.Ct., at 2881] (REHNQUIST, J., concurring in judgment) (noting lack of consent to non-Article III jurisdiction); *id.*, at 95 [102 S.Ct., at 2884] (WHITE, J., dissenting) (same). See also Currie, Bankruptcy Judges and the Independent Judiciary, 16 Creighton L.Rev. 441, 460, n. 108 (1983) (Article III, § 1, 'was designed as a protection for the parties from the risk of legislative or executive pressure on judicial decision'). Cf. *Crowell v. Benson*, [285 U.S. 22, 87, 52 S.Ct. 285, 306, 76 L.Ed. 598 (1932)] (Brandeis, J., dissenting)." *Id.*, 478 U.S., at 848, 106 S.Ct., at 3255.

7. "The Federal Magistrates Act provides that a 'magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.' 28 U.S.C. § 636(b)(3). Read literally and without reference to the context in which they appear, these words might encompass any assignment that is not explicitly prohibited by statute or by the Constitution.... "When a statute creates an office to which it assigns specific duties, those duties outline the attributes of the office. Any additional duties performed pursuant to a general authorization in the statute reasonably should bear some relation to the specified duties. Thus in *United States v. Raddatz*, 447 U.S. 667, 674–676, 100 S.Ct. 2406, 2411–2412, 65 L.Ed.2d 424 (1980); *Mathews v. Weber*, 423 U.S. 261, 96 S.Ct. 549, 46 L.Ed.2d 483 (1976); and *Wingo v. Wedding*, 418 U.S. 461, 94 S.Ct. 2842, 41 L.Ed.2d 879 (1974); we interpreted the Federal Magistrates Act in light of its structure and purpose." *Gomez v. United States*, 490 U.S., at 863–864, 109 S.Ct., at 2240–2241 (1989).

8. The legislative history of the statute also emphasizes the crucial nature of the presence or absence of the litigants' consent. See H.R.Rep. No. 96–287, p. 20 (1979) ("Because of the consent requirement, magistrates will be used only as the bench, bar, and litigants desire, only in cases where they are felt by all participants to be competent").

have concluded that the rationale of that opinion does not apply when the defendant has not objected to the magistrate's conduct of the *voir dire*. See *United States v. Musacchia*, 900 F.2d 493 (CA2 1990); *United States v. Wey*, 895 F.2d 429 (CA7 1990); *Government of the Virgin Islands v. Williams*, 892 F.2d 306 (CA3 1989).

We share the confidence expressed by the Third Circuit in *Williams* that this reading of the additional duties clause strikes the balance Congress intended between the interests of the criminal defendant and the policies that undergird the Federal Magistrates Act. 892 F.2d, at 311. The Act is designed to relieve the district courts of certain subordinate duties that often distract the courts from more important matters.[9] Our reading of the "additional duties" clause will permit the courts, with the litigants' consent, to "continue innovative experimentations" in the use of magistrates to improve the efficient administration of the courts' dockets. See H.R. Rep. No. 94–1609, p. 12 (1976); U.S.Code Cong. & Admin.News 1976, p. 6162.[10]

At the same time, the requirement that a criminal defendant consent to the additional duty of jury selection protects a defendant's interest in requesting the presence of a judge at all critical stages of his felony trial. "If a criminal defendant, together with his attorney, believes that the presence of a judge best serves his interests during the selection of the jury, then *Gomez* preserves his right to object to the use of a magistrate. Where, on the other hand, the defendant is indifferent as to whether a magistrate or a judge should preside, then it makes little sense to deny the district court the opportunity to delegate that function to a magistrate, particularly if such a delegation sensibly advances the court's interest in the efficient regulation of its docket." *Government of the Virgin Islands v. Williams*, 892 F.2d, at 311.

In sum, the structure and purpose of the Federal Magistrates Act convince us that supervision of *voir dire* in a felony proceeding is an additional duty that may be delegated to a magistrate under 28 U.S.C. § 636(b)(3) if the litigants consent.[11] The Act evinces a congressional belief that magistrates are well qualified to handle matters of similar importance to jury selection but conditions their authority to accept such responsibilities on the consent of the parties. If a defendant perceives any threat of injury from the absence of an Article III judge in the jury selection process, he need only decline to consent to the magistrate's supervision to ensure that a judge conduct the *voir dire*.[12] However, when a defendant does consent to the magistrate's role, the magistrate has jurisdiction to perform this additional duty.

9. See, *e.g.*, H.R.Rep. No. 94–1609, p. 7 (1976) U.S.Code Cong. & Admin.News 1976, p. 6167 (magistrate is to "assist the district judge in a variety of pretrial and preliminary matters thereby facilitating the ultimate and final exercise of the adjudicatory function at the trial of the case"); S.Rep. No. 92–1065, p. 3 (1972) U.S. Code Cong. & Admin.News 1972, pp. 3350, 3351 (magistrates "render valuable assistance to the judges of the district courts, thereby freeing the time of those judges for the actual trial of cases"); H.R.Rep. No. 1629, 90th Cong., 2d Sess., p. 12 (1968); U.S.Code Cong. & Admin. News 1968, pp. 4252, 4255 (purpose of Act is "to cull from the ever-growing workload of the U.S. district courts matters that are more desirably performed by a lower tier of judicial officers").

10. See, *e.g.*, *United States v. Peacock*, 761 F.2d 1313, 1319 (CA9) (Kennedy, J.) ("There may be sound reasons ... to allow the magistrate to assist [in *voir dire*], as was done in this case. [E]ach of the ... circuits in the federal system ... has been instructed to improve its efficiency in juror utilization.... The practice of delegating voir dire to a magistrate may assist the district courts in accomplishing this objective"), cert. denied, 474 U.S. 847, 106 S.Ct. 139, 88 L.Ed.2d 114 (1985).

11. We noted in *Gomez* that the legislative history of the Act nowhere listed supervision, without a defendant's consent, of a felony trial *voir dire* as a potential magistrate responsibility. We did call attention, however, to a Committee Report that referred to a "letter suggest[ing] that a magistrate selected juries only *with* consent of the parties." *Gomez v. United States*, 490 U.S. 858, 875–876, n. 30, 109 S.Ct. 2237, 2247–2248, n. 30, 104 L.Ed.2d 923 (1989) (emphasis added) (citing H.R.Rep. No. 94–1609, p. 9 (1976)).

IV

[2, 3] There is no constitutional infirmity in the delegation of felony trial jury selection to a magistrate when the litigants consent. As we have already noted, it is arguable that a defendant in a criminal trial has a constitutional right to demand the presence of an Article III judge at *voir dire*. We need not resolve that question now, however, to determine that a defendant has no constitutional right to have an Article III judge preside at jury selection if the defendant has raised no objection to the judge's absence.

We have previously held that litigants may waive their personal right to have an Article III judge preside over a civil trial. See *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848, 106 S.Ct. 3245, 3255, 92 L.Ed.2d 675 (1986). The most basic rights of criminal defendants are similarly subject to waiver. See, *e.g.*, *United States v. Gagnon*, 470 U.S. 522, 528, 105 S.Ct. 1482, 1485, 84 L.Ed.2d 486 (1985) (absence of objection constitutes waiver of right to be present at all stages of criminal trial); *Levine v. United States*, 362 U.S. 610, 619, 80 S.Ct. 1038, 1044, 4 L.Ed.2d 989 (1960) (failure to object to closing of courtroom is waiver of right to public trial); *Segurola v. United States*, 275 U.S. 106, 111, 48 S.Ct. 77, 79, 72 L.Ed. 186 (1927) (failure to object constitutes waiver of Fourth Amendment right against unlawful search and seizure); *United States v. Figueroa*, 818 F.2d 1020, 1025 (CA1 1987) (failure to object results in forfeiture of claim of unlawful postarrest delay); *United States v. Bascaro*, 742 F.2d 1335, 1365 (CA11 1984) (absence of objection is waiver of double jeopardy defense), cert. denied *sub nom. Hobson v. United States*, 472 U.S. 1017, 105 S.Ct. 3476, 87 L.Ed.2d 613 (1985); *United States v. Coleman*, 707 F.2d 374, 376 (CA9) (failure to object constitutes waiver of Fifth Amendment claim), cert. denied, 464 U.S. 854, 104 S.Ct. 171, 78 L.Ed.2d 154 (1983). See generally *Yakus v. United States*, 321 U.S. 414, 444, 64 S.Ct. 660, 677, 88 L.Ed. 834 (1944) ("No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right"). Just as the Constitution affords no protection to a defendant who waives these fundamental rights, so it gives no assistance to a defendant who fails to demand the presence of an Article III judge at the selection of his jury.

[4] Even assuming that a litigant may not waive structural protections provided by Article III, see *Schor*, 478 U.S., at 850–851, 106 S.Ct., at 3256–3257, we are convinced that no such structural protections are implicated by the procedure followed in this case. Magistrates are appointed and subject to removal by Article III judges. See 28 U.S.C. § 631. The "ultimate decision" whether to invoke the magistrate's assistance is made by the district court subject to veto by the parties. See *United States v. Raddatz*, 447 U.S. 667, 683, 100 S.Ct. 2406, 2416, 65 L.Ed.2d 424 (1980). The decision whether to empanel the jury the selection of which a magistrate has supervised also remains entirely with the district court. Because "the entire process

12. We do not qualify the portion of our opinion in *Gomez* that explained why jury selection is an important function, the performance of which may be difficult for a judge to review with infallible accuracy. See 490 U.S., at 873–876, 109 S.Ct., at 2246–2248. We are confident, however, that defense counsel can sensibly balance these considerations against other concerns in deciding whether to object to a magistrate's supervision of *voir dire*. We stress, in this regard, that defendants may waive the right to judicial performance of other important functions, including the conduct of the trial itself in misdemeanor and civil proceedings. Like jury selection, these duties require the magistrate to "observe witnesses, make credibility determinations, and weigh contradictory evidence," *id.* at 874, n. 27, 109 S.Ct., at 2246, n. 27, and therefore present equivalent problems for judicial oversight.

takes place under the district court's total control and jurisdiction," *id.*, at 681, 100 S.Ct., at 2415, there is no danger that use of the magistrate involves a "congressional attemp[t] 'to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating' constitutional courts, *National Insurance Co. v. Tidewater Co.*, 337 U.S. 582, 644 [69 S.Ct. 1173, 1209, 93 L.Ed. 1556] (1949) (Vinson, C.J., dissenting)...." *Schor*, 478 U.S., at 850, 106 S.Ct., at 3256.

In *Raddatz*, we held that the Constitution was not violated by the reference to a Magistrate of a motion to suppress evidence in a felony trial. The principal constitutional argument advanced and rejected in *Raddatz* was that the omission of a requirement that the trial judge must hear the testimony of the witnesses whenever a question of credibility arises violated the Due Process Clause of the Fifth Amendment. Petitioner has not advanced a similar argument in this case, no doubt because it would plainly be foreclosed by our holding in *Raddatz*. That case also disposes of the Article III argument that petitioner does raise. The reasoning in Justice BLACKMUN's concurring opinion is controlling here:

"As the Court observes, the handling of suppression motions invariably remains completely in the control of the federal district court. The judge may initially decline to refer any matter to a magistrate. When a matter is referred, the judge may freely reject the magistrate's recommendation. He may rehear the evidence in whole or in part. He may call for additional findings or otherwise 'recommit the matter to the magistrate with instructions.' See 28 U.S.C. § 636(b)(1). Moreover, the magistrate himself is subject to the Art. III judge's control. Magistrates are appointed by district judges, § 631(a), and subject to removal by them, § 631(h). In addition, district judges retain plenary authority over when, what, and how many pretrial matters are assigned to magistrates, and '[e]ach district court shall establish rules pursuant to which the magistrates shall discharge their duties.' § 636(b)(4)....

"It is also significant that the Magistrates Act imposes significant requirements to ensure competency and impartiality, §§ 631(b), (c), and (i), 632, 637 (1976 ed. and Supp. II), including a rule generally barring reduction of salaries of full-time magistrates, § 634(b). Even assuming that, despite these protections, a controversial matter might be delegated to a magistrate who is susceptible to outside pressures, the district judge—insulated by life tenure and irreducible salary—is waiting in the wings, fully able to correct errors. Under these circumstances, I simply do not perceive the threat to the judicial power or the independence of judicial decisionmaking that underlies Art. III. We do not face a procedure under which 'Congress [has] delegate[d] to a non-Art. III judge the authority to make final determinations on issues of fact.' *Post*, at 703 [100 S.Ct., at 2426] (dissenting opinion). Rather, we confront a procedure under which Congress has vested in Art. III judges the discretionary power to delegate certain functions to competent and impartial assistants, while ensuring that the judges retain complete supervisory control over the assistants' activities." 447 U.S., at 685–686, 100 S.Ct., at 2417–2418.

Unlike the provision of the Federal Magistrates Act that we upheld in *Raddatz*, § 636(b)(3) contains no express provision for *de novo* review of a magistrate's rulings during the selection of a jury. This omission, however, does not alter the result of the constitutional analysis. The statutory provision we upheld in *Raddatz* provided for *de novo* review only when a party objected to the magistrate's findings or recommendations. See 28 U.S.C. § 636(b)(1). Thus, *Raddatz* established that, to the extent "de novo review is required to satisfy Article III concerns, it need not be exercised unless requested by the parties." *United States v. Peacock*, 761 F.2d 1313, 1318 (CA9) (Kennedy, J.), cert. denied, 474 U.S. 847, 106 S.Ct. 139, 88 L.Ed.2d 114 (1985). In this case, petitioner did not ask the District Court to review any ruling by the Magistrate. If a defendant in a future case does request review, nothing in the statute precludes a district court from providing the review that the Constitution requires. Although there may be other cases in which *de novo* review by the district court would provide an inadequate substitute for the Article III judge's actual supervision of the *voir dire*, the same is true of a magistrate's determination in a suppression hearing, which often turns on the credibility of witnesses. See *Raddatz*, 447 U.S., at 692, 100 S.Ct., at 2420 (Stewart, J., dissenting). We presume, as we did in *Raddatz* when we upheld the provision allowing reference to a magistrate of suppression motions, that district judges will handle such cases properly if and when they arise. See *id.*, at 681, n. 7, 100 S.Ct., at 2415, n. 7. Our decision that the procedure followed in *Raddatz* comported with Article III therefore requires the same conclusion respecting the procedure followed in this case.

V

Our disposition of the statutory and constitutional questions makes it unnecessary to discuss the third question that we asked the parties to brief and to argue. We note, however, that the Solicitor General conceded that it was error to make the reference to the Magistrate in this case and relied entirely on the argument that the error was waived. Although that concession deprived us of the benefit of an adversary presentation, it of course does not prevent us from adopting the legal analysis of those Courts of Appeals that share our interpretation of the statute as construed in *Gomez*. We agree with the view of the majority of Circuit Judges who have considered this issue, both before and after our decision in *Gomez*, that permitting a magistrate to conduct the *voir dire* in a felony trial when the defendant raises no objection is entirely faithful to the congressional purpose in enacting and amending the Federal Magistrates Act.[13]

The judgment of the Court of Appeals is affirmed.

It is so ordered.

Justice MARSHALL, with whom Justice WHITE and Justice BLACKMUN join, dissenting.

In *Gomez v. United States*, 490 U.S. 858, 109 S.Ct. 2237, 104 L.Ed.2d 923 (1989), this Court held that the Federal Magistrates Act does not authorize magistrates to conduct jury selection at a felony trial. In an amazing display of interpretive gymnastics, the majority twists, bends, and contorts the logic of *Gomez*, attempting to demonstrate that the consideration critical to our holding in that case was the defendant's refusal to consent to magistrate jury selection. I find *Gomez* to be considerably less flexible. Our reasoning in *Gomez* makes clear that the absence or presence of consent is entirely irrelevant to the Federal Magistrates Act's prohibition upon magistrate jury selection in a felony trial.

The majority's reconstruction of *Gomez* is not only unsound, but also unwise. By discarding *Gomez's* categorical prohibition of magistrate felony jury selection, the majority unnecessarily raises the troubling

13. See, *e.g.*, *United States v. Alvarado*, 923 F.2d 253 (CA2 1991); *Government of the Virgin Islands v. Williams*, 892 F.2d 305 (CA3 1989); *United States v. Rivera-Sola*, 713 F.2d 866 (CA1 1983); *United States v. Ford*, 824 F.2d 1430, 1439–1440 (CA5 1987) (Jolly, J., concurring), cert. denied, 484 U.S. 1034, 108 S.Ct. 741, 98 L.Ed.2d 776 (1988). Cf. *United States v. Wey*, 895 F.2d 429, 431 (CA7 1990) ("It may be that the defendant's consent could authorize the judge to designate a magistrate, under 28 U.S.C. § 636(b), to preside over jury selection"); *Ford*, 824 F.2d, at 1438–1439 (failure to object constitutes waiver of error); *United States v. DeFiore*, 720 F.2d 757 (CA2 1983), cert. denied *sub nom. Coppola v. United States*, 466 U.S. 906, 104 S.Ct. 1684, 80 L.Ed.2d 158 (1984). But see *United States v. Martinez-Torres*, 912 F.2d 1552 (CA1 1990) (en banc); *United States v. Prance*, 886 F.2d 223 (CA9 1989).

question whether this practice is consistent with Article III of the Constitution. To compound its error, the majority resolves the constitutional question in a manner entirely inconsistent with our controlling precedents. I dissent.

I

A

The majority purports to locate the source of a magistrate's authority to conduct consented-to felony jury selection in the Act's "additional duties" clause, which states that "[a] magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." 28 U.S.C. § 636(b)(3). Whether the additional duties clause authorizes a magistrate to conduct jury selection in a felony trial is a conventional issue of statutory interpretation. In *Gomez*, we held that "[t]he absence of a specific reference to jury selection in the statute, or indeed, in the legislative history, persuades us that Congress did not intend the additional duties clause to embrace this function." 490 U.S., at 875–876, 109 S.Ct., at 2247 (footnote omitted). In my view, the existence of a defendant's consent has absolutely no effect on that conclusion.

In *Gomez*, we rejected a literal reading of the additional duties clause that would have authorized magistrates to exercise *any* power not expressly prohibited by federal statute or the Constitution. See *id.*, at 864–865, 109 S.Ct., at 2241–2242. Relying on precedent and legislative history, we emphasized that the additional duties clause is to be read according to Congress' intention that magistrates "handle subsidiary matters[,] [thereby] enabl[ing] district judges to concentrate on trying cases." *Id.*, at 872, 109 S.Ct., at 2245.

> "If district judges are willing to experiment with the assignment to magistrates of other functions in aid of the business of the courts, *there will be increased time available to judges for the careful and unhurried performance of their vital and traditional adjudicatory duties*, and a consequent benefit to both efficiency and the quality of justice in the Federal courts." H.R.Rep. No. 94–1609, p. 12 (1976) (emphasis added) (1976 amendments to Federal Magistrates Act); accord, S.Rep. No. 371, 90th Cong., 1st Sess., 26 (1967) (Federal Magistrates Act of 1968).[1]

We identified two reasons in *Gomez* for inferring that Congress intended jury selection in felony trials to be one of the "vital and traditional adjudicatory duties" retained by district judges rather than delegated to magistrates. First, we noted that Congress felt it necessary to define expressly a magistrate's limited authority to conduct misdemeanor and civil trials. See 28 U.S.C. §§ 636(a)(3), 636(c). We concluded that "th[is] carefully defined grant of authority to conduct trials of civil matters and of minor criminal cases" constituted "an implicit withholding of the authority to preside at a felony trial." *Gomez*, 490 U.S., at 872, 109 S.Ct., at 2245. And in light of the traditional judicial and legislative understanding that jury selection is an essential component of a felony trial,[2] we determined that Congress' intention to deny magistrates the authority to preside at felony trials also extends to jury selection. See *id.*, at 871–872, 109 S.Ct., at 2245.

In my view, this structural inference is not at all affected by a defendant's consent. Under the Act, consent of the parties is a necessary condition of a magistrate's statutory authority to preside at a civil or misdemeanor trial. See 18 U.S.C. § 3401(b); 28 U.S.C. § 636(c)(1). To hold, as the majority does, that a magistrate may likewise conduct jury selection in a felony trial so long as the defendant consents is to treat the magistrate's authority in this part of the felony trial as perfectly coextensive with his authority in civil and misdemeanor trials—the reading of the Act that *Gomez* categorically rejected.

The second basis for our conclusion in *Gomez* that Congress intended felony jury selection to be nondelegable was Congress' failure expressly to provide for judicial review of magistrate jury selection in felony cases. The Federal Magistrates Act provides two separate standards of judicial review: "clearly erroneous or contrary to law" for magistrate resolution of nondispositive matters, see 28 U.S.C. § 636(b)(1)(A), and "*de novo*" for magistrate resolution of dispositive matters, see § 636(b)(1)(B)–(C). We deemed Congress' failure to identify *any* standard of judicial review for jury selection in felony trials to be persuasive evidence of Congress' intent that magistrates not perform this function. *Gomez*, *supra*, 490 U.S., at 873–874, 109 S.Ct., at 2246.

Again, I fail to see how a defendant's consent to a magistrate's exercise of such authority can alter this inference. Congress said no more about the standard of review for consented-to magistrate jury selection than it did about the standard for unconsented-to magistrate jury selection. Nor does the majority identify anything in the statute to indicate the appropriate standard for consented-to magistrate jury selection.

The majority opines that "nothing in the statute precludes" judicial review, *ante*, at 2670. However, it fails to explain how such review may be achieved. The majority's silence is regrettable. In *Gomez*, we recognized that jury selection is most similar to the functions identified as "dispositive matters," for which the Act prescribes a *de novo* review standard. 490 U.S., at 873, 109 S.Ct., at 2246. We expressed "serious doubts," however, as to whether any review could be meaningfully conducted. *Id.*, at 874, 109 S.Ct., at 2247.[3] We likewise concluded that reexamination of individual jurors by the district judge would not be feasible because "as a practical matter a second interrogation might place jurors on the defensive, engendering prejudices irrelevant to the facts adduced at trial." *Id.*, at 875, n. 29; 109 S.Ct., at 2247, n. 29. These difficulties in providing effective review of magistrate jury selection were central to

1. This theme pervades the Act's legislative history. See, *e.g.*, S.Rep. No. 96–74, p. 3 (1979), U.S.Code Cong. & Admin.News 1979, pp. 1469, 1471 (1979 amendments to Federal Magistrates Act) ("In enacting the Federal Magistrates Act in 1968, the Congress clearly intended that the magistrate should be a judicial officer whose purpose was to assist the district judge to the end that the judge could have more time to preside at the trial of cases"); H.R.Rep. No. 94–1609, p. 6 (1976) (same); S.Rep. 94–625, p. 6 (1976) (1976 amendments to Federal Magistrates Act) ("Without the assistance furnished by magistrates ... the judges of the district courts would have to devote a substantial portion of their available time to various procedural steps rather than to the trial itself"); see also S.Rep. No. 371, 90th Cong., 1st Sess., 9 (1967) (Federal Magistrates Act is intended "to cull from the ever-growing workload of the U.S. district courts matters that are more desirably performed by a lower tier of judicial officers").

2. As we have observed, "'[W]here the indictment is for a felony, the trial commences at least from the time when the work of empanelling the jury begins.'" *Gomez v. United States*, 490 U.S. 858, 873, 109 S.Ct. 2237, 2246, 104 L.Ed.2d 923 (1989), quoting *Lewis v. United States*, 146 U.S. 370, 374, 13 S.Ct. 136, 137, 36 L.Ed. 1011 (1892), quoting *Hopt v. Utah*, 110 U.S. 574, 578, 4 S.Ct. 202, 204, 28 L.Ed. 262 (1884). Moreover, "[J]ury selection is the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice, or predisposition about the defendant's culpability." *Gomez*, *supra*, 490 U.S., at 873, 109 S.Ct., at 2246 (citations omitted). We discerned Congress' recognition of this understanding from its passage of the Speedy Trial Act, 18 U.S.C. § 3161, and from its placement of rules relating to juries and jury selection in a chapter of the Federal Rules of Criminal Procedure entitled "Trial."

3. "To detect prejudices, the examiner—often, in the federal system, the court—must elicit from prospective jurors candid answers about intimate details of their lives. The court further must scrutinize not only spoken words but also gestures and attitudes of all participants to ensure the jury's impartiality. But only words can be preserved for review; no transcript can recapture the atmosphere of the *voir dire*, which may persist throughout the trial." *Gomez*, *supra*, 490 U.S., at 874–875, 109 S.Ct., at 2247 (citations omitted).

See *Gomez*, *supra*, at 873, 109 S.Ct., at 2246, citing Fed.Rules Crim.Proc. 23 and 24.

our construction of the Act in *Gomez*, yet they are essentially ignored today.[4]

In *Gomez*, we found confirmation of the inferences that we drew from the statutory text in "[t]he absence of a specific reference to jury selection in ... the legislative history." *Id.*, at 875, 109 S.Ct., at 2247. See *ante*, at 2665. The legislative history of the Act offers no more support for consented-to magistrate felony jury selection.[5]

In response to the paucity of support for its construction, the majority notes that in *Gomez* we "call[ed] attention" to a House Committee Report that "referred" to a letter from a district judge mentioning jury selection as a duty assigned to magistrates. *Ante*, at 2668, n. 11. While the majority observes that the letter "'suggest[ed] that a magistrate selected juries only *with* consent of the parties,'" *ibid.*, quoting *Gomez*, 490 U.S., at 875, n. 30, 109 S.Ct., at 2247, n. 30 (emphasis added by majority), it neglects to record other salient facts that we noted about this letter. In particular, the letter was the *"lone reference"* in the entire legislative history to such authority. *Ibid.* (emphasis added). Moreover, the letter suggested that magistrate jury selection took place *"perhaps only in civil trials."* *Id.*, at 876, n. 30, 109 S.Ct., at 2247, n. 30 (emphasis added). Finally, as we pointed out in *Gomez*,

> "[the letter] displays little concern about the validity of such assignments: 'How can we do all of this? We just do it. It's not necessary that we find authority in black and white before we give something to the magistrate.... Sure we might get shot down once in a while by an appellate court. So what?'" *Ibid.* (citation omitted).

B

It is clear that the considerations that motivated our holding in *Gomez* compel the conclusion that the Federal Magistrates Act does not permit magistrate felony jury selection even when the defendant consents. I find the majority's arguments to the contrary wholly unpersuasive.

According to the majority, "[t]his case differs critically from *Gomez*" because petitioner's counsel consented to the delegation of jury selection to the Magistrate. *Ante*, 2667. Although it asserts that this factor was essential to our analysis, the majority fails to explain how consent has any bearing on the statutory power of a magistrate to conduct felony jury selection. As I have already indicated, the reasoning behind our conclusion in *Gomez* that Congress did not endow magistrates with jurisdiction to preside over felony jury selection had nothing to do with the defendant's refusal to consent to such jurisdiction.

Unable to support its revisionist construction of the Act with what we said in *Gomez*, the majority seeks to bolster its construction by noting that, provided the parties consent, magistrates may conduct civil and misdemeanor trials and that "[t]hese duties are comparable in responsibility and importance to presiding over *voir dire* at a felony trial." *Ante*, at 2667. The majority's analogy misses the point. The fact that Congress imposed the condition of consent on magistrates' exercise of expressly-provided authority does not prove that Congress also authorized magistrates to conduct trial duties not expressly enumerated in the Federal Magistrates Act—such as supervision of felony jury selection. At most, these specifically enumerated grants of trial authority suggest that *if* Congress had intended to confer on magistrates authority to conduct felony jury selection, it *would have* predicated that authority on the parties' consent. However, as I have already discussed, see *supra*, at 2664–2665, construing the Act as authorizing magistrates to conduct consented-to jury selection in felony cases merely because the Act authorizes consented-to jurisdiction in civil and misdemeanor cases is to draw an inference from Congress' silence precisely opposite to the inference we drew in *Gomez*.[6]

Finally, the majority defends its construction of the additional duties clause by stating that it will permit "'continue[d] innovative experimentations' in the use of magistrates to improve the efficient administration" of the district courts. *Ante*, at 2668. Taken literally, such a rationale admits of no limits, and for this reason it cannot function as a legitimate basis for construing the scope of a magistrate's permissible "additional duties." As in *Gomez*, we must give content to the additional duties clause by looking to Congress' intention that magistrates be delegated administrative and other quasi-judicial tasks in order to free Article III judges to conduct trials, most particularly *felony* trials. See *supra*, at 2663. By creating authority for magistrates to preside over a "critical stage" of the felony trial, see *Gomez*, *supra*, 490 U.S., at 873, 109 S.Ct., at 2246, merely because a defendant fails to request a judge, the majority completely misapprehends both Congress' conception of the appropriate role to be played by magistrates and our analysis in *Gomez*.

II

I have outlined why I believe the only defensible construction of the Federal Magistrates Act is that jury selection in a felony trial can never be one of a magistrate's "additional duties"—regardless of whether a defendant consents. But even if I believed that mine was only one of two "reasonable" interpretations, I would still reject the majority's construction of the Act, because it needlessly raises a serious constitutional question: whether jury selection by a magistrate—even when a defendant consents—is consistent with Article III.

4. The majority concedes that magistrate jury selection "may be difficult for a judge to review with infallible accuracy." *Ante*, at 2669, n. 12. But it dismisses any concerns with respect to the difficulty of effective judicial review, stating that the defendant can eliminate the need for judicial review altogether by simply declining to consent to magistrate jury selection. *Ante*, at 2668–2669, and n. 12. This rationalization misses the point. Insofar as the Federal Magistrates Act insists that magistrate functions be subject to judicial review, the impossibility of effective review is reason *not* to construe the additional duties clause as authorizing magistrates to conduct felony jury selection, regardless of whether the parties consent. See *Gomez*, *supra*, 490 U.S., at 874–875, 109 S.Ct., at 2247.

5. In *Gomez*, we noted that Committee Reports accompanying the 1976 and 1979 amendments to the Magistrates Act contained charts cataloging magistrate functions. In determining Congress' understanding of the permissible scope of magistrate duties, we found it relevant that not one of the charts mentioned jury selection. See *Gomez*, 490 U.S., at 875, n. 30, 109 S.Ct., at 2247, n. 30 (citing H.R.Rep. No. 96–287, pp. 4–5 (1979); S.Rep. No. 96–74, at 3; H.R.Rep. No. 94–1609, at 7; S.Rep. No. 94–625, at 5). Needless to say, the charts also contain no mention of jury selection where the parties have consented to magistrate supervision.

6. Even if I were to accept the majority's conclusion that the scope of a magistrate's authority under the additional duties clause turns on litigant consent, I still could not accept the majority's assumption that there was effective consent in this case. Because the additional duties clause contains no language predicating delegation of an additional duty upon litigant consent, it likewise contains nothing indicating what constitutes "consent" to the delegation of an additional duty. I would think, however, that the standard governing a party's consent to delegation of a portion of a felony trial under the additional duties clause should be at least as strict as that governing delegation of a misdemeanor trial to a magistrate. Under the Act, before a magistrate can conduct a misdemeanor trial, the magistrate must explain to the defendant that he has a right to a trial before a district court judge. If the defendant elects to proceed before the magistrate, the *defendant* must consent *in writing*. See 18 U.S.C. § 3401(b); see also 28 U.S.C. § 636(a)(3) (incorporating requirements of 18 U.S.C. § 3401 into the Federal Magistrates Act). The procedural safeguard of written consent by the defendant "'show[s] a statutory intent to preserve trial before the district judge as the principal—rather than an elective or alternative—mode of proceeding in minor offense cases.'" *Gomez*, *supra*, 490 U.S., at 872, n. 24, 109 S.Ct., at 2245, n. 24, (quoting 114 Cong.Rec. 27342 (1968) (remarks of Rep. Poff)). In this case, the defendant did not consent in writing; in fact, the *defendant* did not proffer consent in any form. Instead, what the majority accepts as sufficient consent were merely verbal remarks made by defense counsel at a pretrial conference and jury selection. See App. 2, 5.

. It is well established that we should "avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." *Gomez*, 490 U.S., at 864, 109 S.Ct., at 2241; accord, *e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 1397, 99 L.Ed.2d 645 (1988); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841, 106 S.Ct. 3245, 3251, 92 L.Ed.2d 675 (1986); *Ashwander v. TVA*, 297 U.S. 288, 348, 56 S.Ct. 466, 483, 80 L.Ed. 688 (1936) (Brandeis, J., concurring). Given the inherent complexity of Article III questions, the canon of constitutional avoidance should apply with particular force when an Article III issue is at stake. Cf. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90, 102 S.Ct. 2858, 2881, 73 L.Ed.2d 598 (1982) (REHNQUIST, J., concurring in judgment) ("Particularly in an area of constitutional law such as that of 'Art. III Courts,' with its frequently arcane distinctions and confusing precedents, rigorous adherence to the principle that this Court should decide no more of a constitutional question than is absolutely necessary accords with both our decided cases and with sound judicial policy").

Although this principle guided our analysis in *Gomez*, see 490 U.S., at 864, 109 S.Ct., at 2241, it is all but forgotten today. The majority simply dismisses altogether the seriousness of the underlying constitutional question: "[W]e have no trouble concluding that there is no Article III problem when a district court judge permits a magistrate to conduct *voir dire* in accordance with the defendant's consent." *Ante*, at 2667. The majority's self-confidence is unfounded. It is only by unacceptably manipulating our Article III teachings that the majority succeeds in avoiding the difficulty that attends its construction of the Act.

As the Court explained in *Schor*, Article III's protections have two distinct dimensions. First, Article III "safeguard[s] litigants' 'right to have claims decided before judges who are free from potential domination by other branches of government.'" *Schor, supra*, 478 U.S., at 848, 106 S.Ct., at 3255, quoting *United States v. Will*, 449 U.S. 200, 218, 101 S.Ct. 471, 482, 66 L.Ed.2d 392 (1980). Second, Article III "serves as 'an inseparable element of the constitutional system of checks and balances'" by preserving "the role of the Judicial Branch in our tripartite system" of government. *Schor, supra*, 478 U.S., at 850, 106 S.Ct., at 3256, quoting *Northern Pipeline, supra*, 458 U.S., at 58, 102 S.Ct., at 2864. Although, parties may waive their personal guarantee of an independent Article III adjudicator, *Schor, supra*, 478 U.S., at 848, 106 S.Ct., at 3255, parties may *not* waive Article III's structural guarantee.

> "Article III, § 1, safeguards the role of the Judicial Branch in our tripartite system by barring congressional attempts to 'transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating' constitutional courts.... To the extent that this structural principle is implicated in a given case, *the parties cannot by consent cure the constitutional difficulty* for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III, § 2. When these Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect." 478 U.S., at 850–851, 106 S.Ct., at 3256–3257 (emphasis added; citations omitted).

In *Gomez*, we recognized and attempted to accommodate "abiding concerns regarding the constitutionality of delegating felony trial duties to magistrates." See 490 U.S., at 863, 109 S.Ct., at 2241. Because jury selection is "a critical stage" of the felony trial, see *id.*, at 873, 109 S.Ct., at 2246, there is a serious question, as several Courts of Appeals have noted, whether allowing a magistrate to conduct felony jury selection "impermissibly intrude[s] on the province of the judiciary," *Schor, supra*, 478 U.S., at 851–852, 106 S.Ct., at 3257. See *United States v. Trice*, 864 F.2d 1421, 1426 (CA8 1988), cert. dism'd, 491 U.S. 914, 109 S.Ct. 3206, 105 L.Ed.2d 714 (1989); *United States v. Ford*, 824 F.2d 1430, 1434–1435 (CA5 1987) (en banc), cert. denied, 484 U.S. 1034, 108 S.Ct. 741, 98 L.Ed.2d 776 (1988).

Indeed, this problem admits of no easy solution. This Court's decision in *United States v. Raddatz*, 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980), suggests that delegation of Article III powers to a magistrate is permissible only if the ultimate determinations on the merits of delegated matters are made by the district judge. See *id.*, at 683, 100 S.Ct., at 2416 ("[A]lthough the [Federal Magistrates Act] permits the district court to give to the magistrate's proposed findings of fact and recommendations 'such weight as [their] merit commands and the sound discretion of the judge warrants,' that delegation does not violate Art. III *so long as the ultimate decision is made by the district court*" (emphasis added; citation omitted)).[7] In *Schor*, we likewise emphasized the availability of *de novo* judicial review in upholding the performance of core Article III powers by an Article I tribunal. See 478 U.S., at 853, 106 S.Ct., at 3258. But this means of satisfying the Constitution is not available here. For, as I have noted, *supra*, at 2664–2665, the Federal Magistrates Act does not expressly provide for judicial review of felony jury selection, and in *Gomez* we expressed "serious doubts" whether such review was even possible. See 490 U.S., at 874, 109 S.Ct., at 2246.

The majority contends that magistrate jury selection raises no Article III structural difficulties, because " 'the entire process takes place under the district court's total control and jurisdiction.' " *Ante*, at 2669, quoting *Raddatz, supra*, 447 U.S., at 681, 100 S.Ct., at 2415. However, as *Raddatz* and *Schor* underscore, the requirement of "the district court's total control and jurisdiction" must include the availability of meaningful judicial review of the magistrate's actual rulings at jury selection. The majority's observation that "nothing in the statute precludes a district court from providing the review that the Constitution requires," *ante*, at 2670, is equally unavailing. The critical question for Article III purposes is whether meaningful judicial review of magistrate felony jury selection can be accomplished. The majority does not answer this question, and *Gomez* strongly suggests that it cannot.

Because it ignores the teachings of *Raddatz* and *Schor*, the majority's analysis of the Article III difficulty posed by its construction of the Federal Magistrates Act raises the question whether these decisions remain good law. This consequence is particularly unfortunate, because, as I have set forth above, the most coherent reading of the Federal Magistrates Act avoids these problems entirely.

I dissent.

Justice SCALIA, dissenting.

When, at a pretrial conference, the United States District Judge assigned to this case asked petitioner's counsel (in petitioner's presence) whether he had "[a]ny objection to picking the jury before a magistrate," counsel responded, "I would love the opportunity." App. 2. Before conducting *voir dire*, the Magistrate herself asked counsel, "I have the consent of your client to proceed with the jury selection?" Coun-

7. The majority seeks to evade this difficulty by pronouncing that Justice BLACKMUN's concurring opinion in *Raddatz* now "control[s]" the constitutional analysis of a delegation of Article III duties to a magistrate. *Ante*, at 2670. Justice BLACKMUN's opinion in *Raddatz*, however, offers little repose for the majority, for Justice BLACKMUN likewise identifies the availability of judicial review as a necessary predicate of the constitutionality of any delegation of Article III duties to a magistrate. See *United States v. Raddatz*, 447 U.S., at 685, 100 S.Ct., at 2417 (BLACKMUN, J., concurring).

sel answered "Yes, your Honor." *Id.*, at 5. After the jury was selected under the Magistrate's supervision, but before it was sworn, the parties met with the District Judge to discuss unresolved pretrial matters. Neither petitioner nor his counsel raised any objection at that time—or at any other point during the trial—to the Magistrate's role in jury selection. Two significant events transpired thereafter. First, the jury convicted petitioner on all counts. Second, after the conviction but prior to sentencing, this Court announced *Gomez v. United States*, 490 U.S. 858, 109 S.Ct. 2237, 104 L.Ed.2d 923 (1989), holding that the Magistrates Act did not authorize magistrates to conduct felony *voir dire* (in that case, where a defendant had objected). On appeal, petitioner sought to raise a *Gomez* claim, but the Court of Appeals held that his consent below precluded him from raising this newly-discovered objection to the Magistrate's role.

As a general matter, of course, a litigant must raise all issues and objections at trial. See *Freytag v. Commissioner*, — U.S. —, ——–—, 111 S.Ct. 2631, 2635–2636, — L.Ed.2d — (SCALIA, J., concurring in judgment). For criminal proceedings in the federal courts, this principle is embodied in Federal Rule of Criminal Procedure 51, which requires "a party, at the time the ruling or order of the [trial] court is made or sought, [to] mak[e] known to the court the action which that party desires the court to take or that party's objection to the action of the court and the grounds therefor."

Rule 51's command is not, however, absolute. One of the hoariest precepts in our federal judicial system is that a claim going to a court's subject-matter jurisdiction may be raised at any point in the litigation by any party. See *Freytag*, — U.S., at —, 111 S.Ct., at 2636 (SCALIA, J., concurring in judgment). Petitioner seeks to invoke that exception here, relying on our statement in *Gomez* that the magistrate lacked "jurisdiction to preside" over the *voir dire* in that case, 490 U.S., at 876, 109 S.Ct., at 2248. But, as Judge Easterbrook has aptly observed, "'jurisdiction' ... is a many-hued term." *United States v. Wey*, 895 F.2d 429, 431 (CA7), cert. denied, 497 U.S. —, 110 S.Ct. 3283, 111 L.Ed.2d 792 (1990). We used it in *Gomez* as a synonym for "authority," not in the technical sense involving subject-matter jurisdiction. The judgment here is the judgment of the District Court; the relevant question is whether *it* had subject-matter jurisdiction; and there is no doubt that it had. The fact that the court may have improperly delegated to the Magistrate a function it should have performed personally goes to the lawfulness of the manner in which it acted, but not to its jurisdiction to act.

This venerable exception to the contemporaneous-objection rule being inapplicable here, petitioner plainly forfeited the *right* to advance his current challenges to the Magistrate's role. In certain narrow contexts, however, appellate courts have *discretion* to overlook a trial forfeiture. The most important of these is described in Federal Rule of Criminal Procedure 52(b): in criminal cases, an appellate court may notice "errors or defects" not brought to the attention of the trial court if they are "plain" and "affect[t] substantial rights." See *United States v. Young*, 470 U.S. 1, 15, and n. 12, 105 S.Ct. 1038, 1046, and n. 12, 84 L.Ed.2d 1 (1985). Petitioner's contention that this case falls into that exception comes up against our admonition that Rule 52(b) applies only to errors that are obvious as well as significantly prejudicial. See, *e.g.*, *United States v. Frady*, 456 U.S. 152, 163, and nn. 13, 14, 102 S.Ct. 1584, 1592, and nn. 13, 14, 71 L.Ed.2d 816 (1982). The error alleged here was anything but obvious. At the time this case was tried, the Second Circuit had held that a magistrate was authorized to conduct felony *voir dire* even if the defendant objected, see *United States v. Garcia*, 848 F.2d 1324 (1988), rev'd *sub nom. Gomez v. United States*, 490 U.S. 858, 109 S.Ct. 2237, 104 L.Ed.2d 923 (1989). No Circuit had held that it was error for a magistrate to conduct *voir dire* where the defendant consented. Perhaps the best indication that there was no "plain" error, of course, is that five Justices of this Court today hold that there was no error at all.*

Even when an error is not "plain," this Court has in extraordinary circumstances exercised discretion to consider claims forfeited below. See, *e.g.*, *Glidden Co. v. Zdanok*, 370 U.S. 530, 535–536, 82 S.Ct. 1459, 1464–1465, 8 L.Ed.2d 671 (1962) (Opinion of Harlan, J.); *Grosso v. United States*, 390 U.S. 62, 71–72, 88 S.Ct. 709, 715, 19 L.Ed.2d 906 (1968); *Hormel v. Helvering*, 312 U.S. 552, 556–560, 61 S.Ct. 719, 721–723, 85 L.Ed. 1037 (1941). In my view, that course is appropriate here. Petitioner's principal claims are that the Magistrates Act does not allow a district court to assign felony *voir dire* to a magistrate even with the defendant's consent, and that in any event the consent here was ineffective because given orally by counsel and not in writing by the defendant. By definition, these claims can be advanced *only* by a litigant who will, if ordinary rules are applied, be deemed to have forfeited them: a defendant who objects will not be assigned to the magistrate at all. Thus, if we invariably dismissed claims of this nature on the ground of forfeiture, district courts would *never* know whether the Act authorizes them, with the defendant's consent, to refer felony *voir dire* to a magistrate, and, if so, what form the consent must take. Cf. 18 U.S.C. § 3401(b) (defendant's consent to magistrate in misdemeanor trial must be in writing).

Given the impediments to the proper assertion of these claims, I believe we are justified in reaching the statutory issue today to guide the district courts in the future performance of their duties. It is not that we *must* address the claims because all legal questions require judicial answers, cf. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 489, 102 S.Ct. 752, 767, 70 L.Ed.2d 700 (1982); *Webster v. Doe*, 486 U.S. 592, 612–613, 108 S.Ct. 2047, 2058–2059, 100 L.Ed.2d 632 (1988) (SCALIA, J., dissenting); but simply that the relevant rules and statutes governing forfeiture, as we have long construed them, recognize a limited discretion which it is eminently sensible to exercise here.

Turning to the merits of the statutory claim, I am in general agreement with Justice MARSHALL. In my view, *Gomez* was driven not primarily by the constitutional problems associated with forcing a litigant to adjudicate his federal claim before a magistrate, but by ordinary principles of statutory interpretation. By specifically authorizing magistrates to perform duties in civil and misdemeanor trials, and specifying the manner in which parties were to express their consent in those situations, the statute suggested *absence* of authority to preside over felony trials through some (unspecified) mode of consent. The canon of *ejusdem generis* keeps the "additional duties" clause from swallowing up the rest of the statute. See *Gomez*, *supra*, 490 U.S., at 872, 109 S.Ct., at 2245.

I would therefore conclude (as respondent in fact conceded) that district courts are not authorized by the Magistrates Act to delegate felony *voir dire* to magistrates. Having reached that conclusion, I need not, and do not, answer the serious and difficult constitutional questions raised by the contrary construction. I note, however, that while there may be persuasive reasons why the use of a magistrate in these circumstances is constitutional, the Court does not provide them today. The Court's analysis turns on the fact that courts *themselves* control the decision whether and to what extent magistrates will be used. *Ante*, at

* Because I conclude that the alleged error was not "plain," I have no occasion to assess its prejudicial impact, assuming that that is possible. Cf. *Gomez v. United States*, 490 U.S., at 876, 109 S.Ct., at 2248; *Arizona v. Fulminante*, 499 U.S. —, —, 111 S.Ct. 1246, —, 113 L.Ed.2d 302 (1991).

2669–2670. But the Constitution guarantees not merely that no Branch will be forced by one of the *other* Branches to let someone else exercise its assigned powers—but that none of the Branches will *itself* alienate its assigned powers. Otherwise, the doctrine of unconstitutional delegation of legislative power (which delegation cannot plausibly be compelled by one of the other Branches) is a dead letter, and our decisions in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570 (1935), and *Panama Refining Co. v. Ryan*, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446 (1935) are inexplicable.

Ronald Allen HARMELIN, Petitioner

v.

MICHIGAN.

No. 89-7272.

Argued Nov. 5, 1990.

Decided June 27, 1991.

Petitioner was convicted in Oakland Circuit Court, Gene Schnelz, J., of possessing more than 650 grams of cocaine and was sentenced to mandatory term of life in prison without possibility of parole. The Michigan Court of Appeals, 176 Mich.App. 524, 440 N.W.2d 75, affirmed and certiorari was granted. The Supreme Court, Justice Scalia held that imposition of mandatory sentence of life in prison without possibility of parole, without any consideration of mitigating factors, such as fact that petitioner had no prior felony convictions, did not constitute cruel and unusual punishment; severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense.

Affirmed.

Scalia, J., announced judgment of Court and delivered opinion of court with respect to Part V, in which Chief Justice Rehnquist and O'Connor, Kennedy and Souter, Justices, joined, and an opinion with respect to Parts I, II, III, and IV, in which the Chief Justice joined.

Justice Kennedy filed an opinion concurring in part and concurring in the judgment, in which O'Connor and Souter, Justices, joined.

Justice White filed a dissenting opinion in which Blackmun and Stevens, Justices, joined.

Justice Marshall filed dissenting opinion.

Justice Stevens filed dissenting opinion in which Blackmun, Justice, joined.

1. Criminal Law ⇐1213.8(1, 2)

The Eighth Amendment contains no proportionality guarantee; what is "cruel and unusual" punishment is to be determined without reference to the particular offense. (Per Justice Scalia, joined by the Chief Justice.) U.S.C.A. Const.Amend. 8.

2. Constitutional Law ⇐14

When two parts of constitutional provision use different language to address same or similar subject matter, difference in meaning is assumed. (Per Justice Scalia, joined by the Chief Justice.)

3. Criminal Law ⇐1213.8(1)

Cruel and unusual punishments clause of the Eighth Amendment was directed at prohibiting certain methods of punishment. (Per Justice Scalia, joined by the Chief Justice.)

4. Constitutional Law ⇐20

Actions of First Congress are persuasive evidence of what Constitution means. (Per Justice Scalia, joined by the Chief Justice.)

5. Criminal Law ⇐1213.8(3, 4, 6)

Imposition of mandatory sentence of life in prison without possibility of parole, on conviction of possessing more than 650 grams of cocaine, without any consideration of mitigating factors such as fact that defendant had no prior felony convictions, did not constitute cruel and unusual punishment; severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense. U.S.C.A. Const. Amend. 8.

6. Criminal Law ⇐1213.8(3, 4)

Doctrine that capital sentence is cruel and unusual under the Eighth Amendment if it is imposed without individualized determination that that punishment is appropriate will not be extended to require individualized determination in imposing mandatory life in prison sentence. U.S.C.A. Const. Amend. 8.

Syllabus *

Petitioner Harmelin was convicted under Michigan law of possessing more than 650 grams of cocaine and sentenced to a mandatory term of life in prison without possibility of parole. The State Court of Appeals affirmed, rejecting his argument that the sentence was "cruel and unusual" within the meaning of the Eighth Amendment. He claims here that the sentence is cruel and unusual because it is "significantly disproportionate" to the crime he committed, and because the sentencing judge was statutorily required to impose it, without taking into account the particularized circumstances of the crime and of the criminal.

Held: The judgment is affirmed.

176 Mich.App. 524, 440 N.W.2d 75, affirmed.

Justice SCALIA delivered the opinion of the Court with respect to Part V, concluding that Harmelin's claim that his sentence is unconstitutional because it is mandatory in nature, allowing the sentencer no opportunity to consider "mitigating factors," has no support in the Eighth Amendment's text and history. Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout the Nation's history. Although Harmelin's claim finds some support in the so-called "individualized capital-sentencing doctrine" of this Court's death penalty jurisprudence, see, *e.g.*, *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944, that doctrine may not be extended outside the capital context because of the qualitative differences between death and all other penalties, see, *e.g.*, *id.*, at 303–305, 96 S.Ct., at 2991–2992. Pp. 2701–2702.

Justice SCALIA, joined by THE CHIEF JUSTICE, concluded in Parts I, II, III, and IV that because the Eighth Amendment contains no proportionality guarantee, Harmelin's sentence cannot be considered unconstitutionally disproportional. Pp. 2684–2701.

(a) For crimes concededly classified and classifiable as felonies—*i.e.*, as punishable by significant terms of imprisonment in a state penitentiary—the length of the sentence actually imposed is purely a matter of legislative prerogative. *Rummel v. Estelle*, 445 U.S. 263, 274, 100 S.Ct. 1133, 1139, 63 L.Ed.2d 382. *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637, which decreed a "general principle of proportionality," *id.*, at 288, 103 S.Ct., at 3009, and used as the criterion for its application a three-factor test that had been explicitly rejected in *Rummel*, *supra*, at 281–282, and n. 27, 100 S.Ct., at 1143, and n. 27, and *Hutto v. Davis*, 454 U.S. 370, 373–374, 102 S.Ct. 703, 705–706, 70 L.Ed.2d 556, was wrong and should be overruled. Pp. 2684–2686.

(b) Although *Solem*, *supra*, 463 U.S., at 285, 103 S.Ct., at 3007, correctly dis-

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

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February 11,1992

Honorable William Terrell Hodges
United States District Judge
United States Courthouse - Suite 108
611 North Florida Avenue
Tampa, FL 33602

Dear Judge Hodges:

I have a suggestion for an amendment to Rule 11 (c), Federal Rules of Criminal Procedure, and I understand you are the Chairman of the Advisory Committee.

Enclosed is a copy of Section 15A-1022 of the General Statutes of North Carolina, our state counterpart to Rule 11(c). That statute was amended effective January 1, 1990 to add the requirement that before any guilty or nolo plea is accepted, any defendant who is not a United States citizen must be advised that there may be immigration consequences to a conviction. Specifically, such defendants must be advised that such a plea "may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law."

As I see it, this would be a good addition to Rule 11(c). Most lawyers know little or nothing of immigration law, and we are seeing more and more foreign national defendants. The immigration consequences can be severe, and such defendants should be advised accordingly.

Very truly yours,

James B. Craven III

James B. Craven III

JBCIII/br
Enclosure
cc: Honorable James G. Exum, Jr.
Honorable Richard C. Erwin
Honorable Robinson O. Everett
Professor David A. Schlueter

§ 15A-1008. Dismissal of charges.

CASE NOTES

Cited in State v. Gravette, 327 N.C. 114, 393 S.E.2d 856 (1990).

ARTICLE 58.

Procedures Relating to Guilty Pleas in Superior Court.

§ 15A-1022. Advising defendant of consequences of guilty plea; informed choice; factual basis for plea; admission of guilt not required.

(a) Except in the case of corporations or in misdemeanor cases in which there is a waiver of appearance under G.S. 15A-1011(a)(3), a superior court judge may not accept a plea of guilty or no contest from the defendant without first addressing him personally and:

(1) Informing him that he has a right to remain silent and that any statement he makes may be used against him;

(2) Determining that he understands the nature of the charge;

(3) Informing him that he has a right to plead not guilty;

(4) Informing him that by his plea he waives his right to trial by jury and his right to be confronted by the witnesses against him;

(5) Determining that the defendant, if represented by counsel, is satisfied with his representation;

(6) Informing him of the maximum possible sentence on the charge, including that possible from consecutive sentences, and of the mandatory minimum sentence, if any, on the charge; and

(7) Informing him that if he is not a citizen of the United States of America, a plea of guilty or no contest may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law.

(b) By inquiring of the prosecutor and defense counsel and the defendant personally, the judge must determine whether there were any prior plea discussions, whether the parties have entered into any arrangement with respect to the plea and the terms thereof, and whether any improper pressure was exerted in violation of G.S. 15A-1021(b). The judge may not accept a plea of guilty or no contest from a defendant without first determining that the plea is a product of informed choice.

(c) The judge may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea. This determination may be based upon information including but not limited to:

(1) A statement of the facts by the prosecutor.

(2) A written statement of the defendant.

(3) An examination of the presentence report.

(4) Sworn testimony, which may include reliable hearsay.

(5) A statement of facts by the defense counsel.

(d) The judge may accept the defendant's plea of no contest even though the defendant does not admit that he is in fact guilty if the judge is nevertheless satisfied that there is a factual basis for the plea. The judge must advise the defendant that if he pleads no contest he will be treated as guilty whether or not he admits guilt. (1973, c. 1286, s. 1; 1975, c. 166, s. 27; 1989, c. 280.)

Effect of Amendments. — The 1989 amendment, effective January 1, 1990, deleted "and" at the end of subdivision (a)(5), added "and" at the end of subdivision (a)(6), and added subdivision (a)(7).

CASE NOTES

Court Must Find Factual Basis for Plea. — When plea of no contest is now entered there must be a finding by the court that there is a factual basis for the plea This finding and entry of judgment thereon constitute an adjudication of guilt State v. Petty, 100 N.C. App 465, 397 S.E.2d 337 (1990)

Subsection (c) of this section provides that before the court may accept a no contest plea it must determine that there is a factual basis for the plea This changes the rule that the court must impose a sentence based on the no contest plea and may not adjudicate the guilt of defendant upon such a plea State v. Petty, 100 N C. App. 465, 397 S E 2d 337 (1990)

A presentence motion to withdraw a plea of guilty should be allowed for any fair and just reason. State v. Handy, 326 N C. 532, 391 S.E.2d 159 (1990).

A motion to withdraw a guilty plea made before sentencing is significantly different from a post-judgment or collateral attack on such a plea, which would be by a motion for appropriate relief State v. Handy, 326 N C 532, 391 S.E.2d 159 (1990).

Basis for Presentence Motion Held Sufficient. — For case holding defendant proffered a fair and just reason for his presentence motion to withdraw his plea of guilty. State v. Handy, 326 N.C. 532, 391 S.E.2d 159 (1990).

A no contest plea may be used to aggravate a crime so as to sustain a death sentence under § 15A-2000(e). State v. Petty, 100 N.C. App. 465, 397 S.E.2d 337 (1990).

No Contest Plea as Conviction for Evidentiary Purposes in Other Proceedings. — Under subsection (c) of this section, when a plea of no contest is now entered there must be a finding by the court that there is a factual basis for the plea. This finding and the entry of a judgment thereon constitute an adjudication of guilt. This adjudication would be a conviction within the meaning of § 8C-1, Rule 609(a), and as a conviction it may then be used in another case to attack the credibility of a witness State v. Outlaw, 326 N.C. 647, 390 S.E.2d 336 (1990)

Subsection (c) of this section has changed the rule that a court may not adjudicate the defendant's guilt on a plea of no contest. Before a court may now accept a plea of no contest it must make a finding that there is a factual basis for the plea This amounts to an adjudication of guilt, and the rationale of former cases that there is no adjudication on a no contest plea so that it may not be used in another case no longer applies. Davis v. Hiatt, 326 N.C. 462, 390 S.E.2d 338 (1990).

Use of No Contest Plea for Impeachment. — A no contest plea can properly be admitted under § 8C-1, Rule 609(a) for purposes of impeachment State v Petty, 100 N C. App 465, 397 S E 2d 337 (1990)

Use of No Contest Plea Entered Prior to July 1, 1975 to Support Habitual Felon Charge Not Proper. — Where defendant was convicted on a plea of no contest to a charge of felony escape, and judgment was entered on April 2, 1973, before the effective date of Chapter 15A (July 1, 1975), and where the rule at that time was that a conviction resulting from a nolo contendere plea could not be used against defendant in any case other than the one in which it was entered because it was neither an admission nor an adjudication of guilt, use of this conviction as one of three prior felony convictions required by § 14-7.1 to support a charge of being a habitual felon was improper State v.

RULES OF CRIMINAL PROCEDURE

Rule 11. Pleas

* * * * *

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

* * * * *

(6) that if the defendant is not a citizen of the United States, a plea of guilty or nolo contendre may result in deportation, exclusion from admission to the United States, or denial of naturalization.

* * * * *

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Proposal to Consider Amendments to Criminal Rules 16

DATE: March 3, 1992

Attached are various materials relating generally to the subject of discovery under the Federal Rules of Criminal Procedure. The first, is a letter from Mr. Bill Wilson recommending that the Committee give attention to the issue of discovery practices, particularly the disclosure of prosecution witnesses.

Second, at the Committee's meeting in Tampa there was some discussion about a pending ABA resolution addressing a number of amendments to Rules 16 and 17. Only one proposal, an amendment requiring disclosure of statements by an organizational defendant, resulted in any Committee action; that matter is addressed in a separate memo. As the cover letter from the chair of the Criminal Justice Section indicates, the resolution passed at the ABA's winter meeting in Dallas -- so it is part of official ABA policy.

Finally, I have attached a short article addressing various issues in criminal discovery which might appropriately be addressed should the Committee be inclined to give attention to the general issue of discovery.

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

ROBERT E. KEETON
CHAIRMAN

JOSEPH F. SPANIOL, JR.
SECRETARY

CHAIRMEN OF ADVISORY COMMITTEES
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APPELLATE RULES
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CIVIL RULES
WILLIAM TERRELL HODGES
CRIMINAL RULES
EDWARD LEAVY
BANKRUPTCY RULES

February 7, 1992

Mr. Wm. R. Wilson, Jr.
P. O. Box 71
Little Rock, Arkansas 72203

Dear Bill:

Thank you very much for your letter of February 4 concerning meaningful discovery under the Federal Rules of Criminal Procedure. This is a subject which has been addressed by the Advisory Committee at least once a year during each year I have served on the Committee. Nevertheless, as you request, I will ask Dave Schlueter, by copy of this letter to him, to include the matter on the agenda for discussion at our next meeting.

I enjoyed your tale about Roger Layne White, noting with particular interest your statement that he was a young lad "who had robbed a bank." You did not say that he was charged with robbing a bank or indicted for robbing a bank; rather, you said he robbed the bank, but you then proceed to complain about a lack of discovery??

Warm personal regards.

Cordially,

Wm. Terrell Hodges

c: Honorable Robert E. Keeton
Mr. Dave Schlueter

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+ ALSO ADMITTED TO PRACTICE IN ALASKA

FAX (501) 375-5914

February 4, 1992

RE: Meaningful Discovery under the Federal Rules of Criminal Procedure

The Honorable Terrell Hodges
U.S. Courthouse, Suite 108
611 N. Florida Avenue
Tampa, Florida 33602-4511

Dear Judge Hodges:

The other day I was just sitting back letting my mind run over desultory thoughts about "life its ownself."

All of the sudden it came upon me that we are less than a decade away from the 21st century, yet the discovery rules in criminal cases in federal district court have not moved into the 20th century!

I am vaguely aware of some efforts to modernize the discovery rules back in the 70's, but it seems to me that such efforts were thwarted either in the Standing Committee or in Congress, or in both. In any event, it seems to me that the time is always ripe to try to improve the system (I realize of course, that "improvement" is in the eye of the beholder).

I am aware that the federal prosecutors* contend that key witnesses will be slain, willy-nilly, if they are identified prior to trial.

Before getting to the danger to witnesses question, I would like to point out that it is manifestly unfair for a person to have to go to trial without having the benefit of meaningful discovery. In any venue in the United States in any type of a civil case, including a garden-variety fender bender, the party can discover the names and addresses of the opposing witnesses (in addition to a lot of other information). Yet, a defendant in a criminal case in federal district court cannot discover the names of these witnesses even if he is facing decades in the federal lock-up. No matter how you cut it, cube it, or slice it, this does not square with traditional notions of fair play and justice.

---

* a/k/a "U.S. Attorneys", "representatives of the Justice Department", etc.

Arkansas came into the fold (of due process) many years ago. I am enclosing, for your ready reference, a copy of the applicable Arkansas discovery rules (reciprocal I point out).

Let me speak briefly to the issue of danger. I know that there are cases in which the defendant is extremely dangerous, and the disclosure of the witnesses against her or him would expose them to undue danger. It would be simple enough to have a provision that the court could enter an order against disclosure (at least until right before trial) in those cases where there is a bona fide danger. In the vast majority of cases, however, the witnesses would not be in any such danger.

This point puts me in mind of* one of my favorite clients, Roger Layne White. I was appointed to represent Roger Layne on bank robbery charges. He was a young, penniless lad from north Georgia who had robbed a bank across the river in North Little Rock. I filed a motion for discovery, citing the due process clause as my authority. I also attached affidavits from several civil practitioners who opined that a party could not properly prepare for trial without meaningful discovery. These affiants further expressed the opinion that the Federal Rules of Criminal Procedure did not provide for meaningful discovery. (I am amazed that outstanding civil lawyers are still shocked when they find out that there is no real discovery procedure in a criminal case in federal district court).

In its opposing pleadings, the federal prosecutors raised the specter of imminent danger to potential witnesses. They did this in the face of the fact that Roger Layne was a penniless, friendless young man who hailed from the red hills of north Georgia. In fact, he had so few intentional contacts with Arkansas that I often wondered if I could have prevailed upon a motion to dismiss for lack of in personam jurisdiction. Roger Layne had gotten drunk in a pub just over the Georgia line into Tennessee (just south of Chattanooga), and woke** up in North Little Rock - - where he decided to rob a bank to get money to go back home (or to get drunk again).

Furthermore, Roger Layne was under a bond so large that all of his living relatives could not have raised the funds to pay 10% to a bail bondsman - - even if the relatives had been so inclined, which they weren't. In other words, Roger Layne was of no danger whatsoever to prospective witnesses because he was

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* "reminds me of" in Florida and Massachusetts.

** "Waked" in Massachusetts, but not in Florida.

locked down for the duration, and he didn't have kith and kin who were interested in even trying to raise a bond for him, much less kill or maim a potential witness.

As you have already guessed, the district judge denied my motion (as well as my motion for permission to conduct voir dire examination). Whereupon, I "got myself out a writ" (as my pro se correspondents in the joint call appellate pleadings), and went to the Eighth Circuit. As you would again guess, I lost again (to borrow Casey Stengal's words again, "You can look it up" - - because it is a reported case).

My point is, again, there is no reasonable ground for denying meaningful discovery in the routine case.

I would appreciate it if you would consider putting this on the agenda for the next meeting of the Advisory Committee - - just for discussion. If a liaison to your Committee does not have authority to make such a request, then I do it amicus curiae.

I realize that this suggestion, coming from a lawyer who represents accused citizens, may lack weight, but, at least, I should have no less credibility than the prosecutors, who are also advocates. In truth and in fact*, both defense lawyers and prosecutors should support rules that will improve the system, come what may.

I have read many of the letters from lawyers who have written expressing opinions on the proposed changes to the Federal Rules of Civil Procedure. Most of them start off with a litany of their credentials. In keeping with this traditional, I would like to point out that I was, once upon time, a chief deputy prosecutor here in Arkansas, and, not so long ago, I was a special prosecutor in a case involving allegations of public corruption. Furthermore, I am a past Chair of the Arkansas State Police Commission. I say this to emphasize that I am not "for" criminals. To the contrary, I think that guilty persons should be convicted, by due process.

Cordially,

Wm. R. Wilson, Jr.

WRWJr:skm
Enclosure

* A redundancy perhaps, but a good one in my view.

cc: The Honorable Robert Keeton w/enclosure

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* ALSO ADMITTED TO PRACTICE IN ALASKA

FAX (501) 375-9014

February 10, 1992

Re: Real Discovery in Criminal Cases
in Federal District Court

The Honorable William Terrell Hodges
United States District Court
United States Courthouse, Suite 108
611 North Florida Avenue
Tampa, Florida 33602-4511

Dear Judge Hodges:

Many thanks for your letter of February 7, 1992.

I realize that I'm betting a long shot. At the same time, Lao-tzu said that, "A journey of a thousand miles begins with the first step." At least I think it was Lao-tzu who said this -- if he didn't, he should have.

Back to Roger Layne White. Before he was convicted, I did speak in terms of "bank robbery allegations." Unfortunately, the federal district court and the court of appeals confirmed beyond peradventure that he did, in fact, rob a bank. As a matter of fact, we pled ("pleaded" if you prefer) guilty, reserving the right to appeal.

Once upon a time a fellow told Mark Twain that there was a lot about the Bible that he did not understand, and that this worried him. Twain replied that he, too, did not understand a lot about the Bible, but it was the parts that he did understand which worried him. Likewise, there was a lot of evidence in Roger Layne's case that we did not know about (due to a lack of discovery), but it was the parts that we did know about which worried us; ergo, the guilty plea.

In any event, I sincerely appreciate your putting discovery on the agenda. I promise that my plea for it will be brief. If it conforms to usual practice, it will be somewhat inarticulate, but it will be heartfelt and fervent.

Cordially,

Wm. R. Wilson, Jr.

WRW:jkh

cc: The Honorable Robert E. Keeton
Professor David A. Schlueter

AMERICAN BAR ASSOCIATION **Section of Criminal Justice**
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COPY

February 14, 1992

Joseph F. Spaniol, Jr.
Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Administrative Office of the United States Courts
Washington, D.C. 20544

Dear Mr. Spaniol:

Enclosed is a copy of Report No. 101E, approved by the American Bar Association House of Delegates at its February 3-4, 1992 meeting.

It is relevant to proposed Federal Rules of Evidence amendments being considered by the Committee on Rules of Practice and Procedure. The Committee circulated these amendments to the Bench and the Bar in August 1991 for comment.

The Association's Secretary will transmit Report 101E to your office and provide official verification of its approval by the ABA House of Delegates. However, I am sending it to you at this time in order to meet the February 15 deadline set by the Committee for receipt of comments on the proposed rule changes.

Sincerely yours,

Andrew L. Sonner

Andrew L. Sonner, Chairperson
Criminal Justice Section

/AS

Enclosure

bcc: Prof. David A. Schlueter

AMERICAN BAR ASSOCIATION
CRIMINAL JUSTICE SECTION

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

BE IT RESOLVED, That the American Bar Association urges the Judicial Conference of the United States to recommend rule changes to implement the concepts embodied in the following proposed rule changes in the interest of improving the fairness and efficacy of pretrial discovery proceedings:[1/]

I. Proposed Rule 16(a)(1)(E)

> Upon request by a defendant or as it otherwise becomes known to the government, the government shall promptly furnish to the defendant all evidence within the possession, custody or control of the government which tends to exculpate the defendant of the crimes charged in the indictment or tends to mitigate the defendant's sentence. The government shall have a continuing obligation to furnish the defendant such material as it becomes known or available to the government.

1/ Material to be deleted is bracketed; material to be added is underscored.

II. Proposed Amendment to Rule 1 (a)(1)(A)

Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. Where the defendant is a corporation, partnership, association or labor union, [the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who] it can inspect and copy or photograph any such relevant written or oral statements or testimony where the statements or testimony were made by a person who (1) was, at the time of the statement or [that] testimony, so situated as a[n] director, officer, [or] employee or agent as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as a[n] director, officer, [or] employee or agent as to have been able legally to bind the defendant respect to that alleged conduct in which e witness was involved.

III. Proposed Amendment to R 17(c)

A subpoena may also command th person to whom it is directed to produce the boo papers, documents or other objects designa i therein. The court on motion made promptly y quash or modify

the subpoena if compliance would be unreasonable or oppressive. [The court may direct that] Upon the consent of the government, the defendant, and the person subpoenaed, or upon order of the court, a subpoena may require the production of books, papers, documents or objects [designated in the subpoena be produced before the court] at a time prior to the trial or prior to the time when they are to be offered in evidence, and in such case the subpoena may be complied with by production of the subpoenaed books, papers, documents or objects directly to the parties or their attorneys, unless the court orders otherwise. [and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.]

IV. PROPOSED AMENDMENTS TO RULE 16(a)(1)(D) and (b)(1)(B)

To amend Rule 16(a)(1)(D) by adding:

Upon request of the defendant, the government shall disclose its intention to call an expert witness at trial. The government shall also provide the area of expertise for which the witness will be offered. If no such notification is made at least ten days prior to the first day of trial, the court shall not allow the testimony of the expert witness in the absence of a showing of good cause for the lack of notification.

To amend Rule 16(b)(1)(B) by adding:

Upon request of the government, the defendant shall disclose his intention to call an expert witness at trial. The defendant shall also provide the area of expertise for which the witness will be offered. If no such notification is made at least ten days prior to the first day of trial, the court shall not allow the testimony of the expert witness in the absence of a showing of good cause for the lack of notification.

EXECUTIVE SUMMARY

1. Summary of the Recommendation

That the ABA House of Delegates urge the Judicial Conference to adopt proposed new rules and amendments to the Federal Rules of Criminal Procedure that would (1) require prompt pretrial disclosure of Brady material; (2) provide organizational defendants with discovery of "statements" under Rule 16 (a)(1)(A) on the same terms as individual defendants; (3) streamline the procedure for issuance and return of pretrial subpoenas duces tecum; and (4) mandate pretrial notification by both sides of an intent to call an expert witness.

2. Summary of the supporting report

Each rule proposal is intended to improve the fairness and efficacy of federal pretrial criminal discovery procedure: (1) To the extent that Brady material is not made available until after the start of trial, or even as late as the close of the government's case (as is allowed under current law), a defendant's ability to prepare and present his defense is prejudiced; (2) organizational defendants should be entitled to discovery of non-grand jury Rule 16 "statements" without having to stipulate to the binding nature of a witness's statements or conduct; (3) issuance and return of non-controversial Rule 17(c) subpoenas would be facilitated greatly if court approval is not required and if production may be made directly to the parties instead of to the court; and (4) notification by either side, at least ten days before trial, of an intention to call an expert witness will reduce the chance of surprise as to expert testimony at trial and will enable lawyers to prepare better for cross-examination.

PRESUMED INNOCENT? RESTRICTIONS ON CRIMINAL DISCOVERY IN FEDERAL COURT BELIE THIS PRESUMPTION

*Hon. H. Lee Sarokin***
*William E. Zuckerman***

I. INTRODUCTION

It is an astonishing anomaly that in federal courts virtually unrestricted discovery is granted in civil cases, whereas discovery is severely limited in criminal matters. In other words, where money is involved, all parties receive all relevant information from their adversaries upon request; but where individual liberty is at stake, such information can be either withheld by the prosecutor or parcelled out at a time when it produces the least benefit to the accused.[1]

The rationale for restricting or delaying the turnover of information to criminal defendants and their counsel is primarily the fear of witness intimidation or tampering, and the possibility that the testimony of defense witnesses or the defendant might be altered to accommodate information received from the government.[2]

Obviously, the assumption of such improper conduct undermines the presumption of innocence accorded to the accused. In essence, the limitations on discovery anticipate that those who are presumed innocent will suborn or commit perjury, or will engage in witness intimidation or tampering.

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* United States District Judge, District of New Jersey.
** J.D. 1991, Rutgers University School of Law-Newark.

1. *See generally* Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U.L.Q. 279; Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 (1960); Nakell, *Criminal Discovery for the Defense and the Prosecution—The Developing Constitutional Considerations*, 50 N.C.L. REV. 437 (1972).

2. Goldstein, *supra* note 1, at 1193; Brennan, *supra* note 1, at 290 n.37 (quoting J. [illegible], POINTS IN THE LAW OF DISCOVERY § 347 (1842)).

> Said Sir John, "[e]xperience . . . has shewn—or (at least) courts of justice in this country act upon the principle—that the possible mischiefs of surprise at the trial are more than counterbalanced by the danger of perjury, which must inevitably be incurred, when either party is permitted, *before* a trial, to know the precise evidence against which he has to contend. . . ."

The failure to provide full disclosure of the government's case early in the proceedings limits a defendant's ability to investigate the background and character of government witnesses and the veracity of their testimony. For example, strict compliance with the Jencks Act[3] necessitates frequent delays and adjournments. Counsel often need time to digest and investigate the information received. As a practical matter, any thorough investigation at that juncture of the proceedings may be impossible, and counsel must do the best that they can in the brief time usually allotted. The court and the jury are inconvenienced by even brief delays; the rights of the defendants are jeopardized because such delays, if granted, often are not sufficient. The restrictions, therefore, not only impinge upon the right of defendants to a fair trial, but also severely hamper the orderly progress of criminal trials. They are wrong in principle and cause delay in practice.

The potential encroachment upon the rights of the accused and the delays engendered thereby can be avoided by reversing the presumptions that underlie these restrictions on discovery. The burden should be placed upon the government to demonstrate that the risks of tampering, intimidation, or perjury exist. Absent such a showing, early and complete disclosure should be required. If, on the other hand, the government can make such a showing, a narrowly-drawn restriction on discovery may be imposed.[4]

Beyond the practical and unsubstantiated concern of preventing defendants' misconduct before and during trial, the argument in favor of continued restrictions on criminal discovery is usually premised on the theory that to allow criminal defendants greater access to the government's evidence is to undermine the adversary system of trial.[5] Furthermore, proponents of restricted discovery contend that the government's difficult standard of proof in criminal proceedings—beyond reasonable doubt—is simply too difficult if prosecutors are required to disclose all information to defendants.[6] The analogy to civil matters, they argue, is imprecise. In civil suits discovery is a two-way street, with each side free to request virtually anything from the other; but a criminal defendant's fifth amendment right against self-incrimination would limit disclosure by the defense even if the government's case were subject to open discovery, and the information would flow only one way.[7] Moreover, the current rules, though admittedly restrictive, do contain reciprocal discovery provisions.[8] It is thus reasoned that the current constraints on defendants' discovery balance the amount of information to which each side may gain access.[9]

Such arguments have validity, however, only if we are willing to cast aside certain fundamental tenets of our criminal justice system. If criminal defendants are truly presumed innocent until proven guilty, then blanket policies that delay defendants' access to the government's witness lists and deny access to witness statements until after those witnesses have testified cannot be justified. These policies are premised upon the fear that defendants will commit further crimes in order to clear themselves of the charges for which they are being tried. In sum, the presumption is one of guilt, not innocence. The contention that restrictions on discovery are necessary to offset the government's difficult standard of proof is equally unsound. The imposition of restrictions

3. 18 U.S.C. § 3500 (1988). The Jencks Act states in pertinent part.

> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.
>
> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

4. Brennan, *supra* note 1, at 294.

5. United States v. Evans, 454 F.2d 813, 820 (8th Cir.), *cert denied*, 406 U.S. 969 (1972). *But see* Goldstein, *supra* note 1, at 1180. Professor Goldstein describes the liberal discovery rule adopted for civil procedure as having "as its object the harnessing of the full creative potential of the adversary process." *Id.*

6. *See* Goldstein, *supra* note 1, at 1173.

7. State v. Tune, 13 N.J. 203, 211-12, 98 A.2d 881, 885 (1953).

> [T]he state is completely at the mercy of the defendant who can produce surprise evidence at the trial, can take the stand or not as he wishes, and generally can introduce any sort of unforeseeable evidence he desires in his own defense. To allow him to discover the prosecutor's whole case against him would be to make the prosecutor's task almost insurmountable.

Id.

8. FED. R. CRIM. P. 16(a) ("Disclosure of Evidence by the Government"); FED. R. CRIM. P. 16(b) ("Disclosure of Evidence by the Defendant").

9. United States v. Robinson, 585 F.2d 274, 280-81 (7th Cir. 1978), *cert. denied*, 441 U.S. 947 (1979).

on defendants to counter the government's standard substantially diminishes that standard, and thus does not constitute a valid justification for their existence. If the function of a criminal trial is really a quest for the truth, to maintain that the adversary system depends on the limitation of defendants' access to information runs contrary to that quest. Civil litigation is no less adversarial because of its unrestricted discovery, and the truth is more likely to be uncovered when information is revealed in time for its meaningful use at trial, than when it is belatedly produced or entirely withheld.

II. Current Restrictions and Their Adverse Effects

The existence of any formal provisions for discovery in federal criminal litigation is a relatively recent phenomenon. Prior to the adoption of Rule 16 of the Federal Rules of Criminal Procedure in 1946, no discovery rights existed.[10] Since that time, the rules regarding discovery have been shaped by a number of forces. In addition to Rule 16, which in its initial draft enunciated very limited duties to disclose, discovery rights have gradually reached their present form by way of court rulings and legislation.[11]

The current criminal discovery rules in federal district court are best understood by looking at some actual examples of how the restrictions can affect defendants and their counsel's ability to mount an effective defense. A case tried recently in federal court, in some ways representative of the deluge of drug cases currently swamping the federal dockets,[12] forcefully illustrates the difficulties which often confront such defendants. The following are excerpts from defense counsel's pretrial argument:

> I would like to put it in context for the court very briefly. From what I know about the case, and what I don't know because I think it would help you evaluate our request for a bill of particulars, this is a situation where my client was not arrested in possession of anything, no search [was] conducted of his car which produced any evidence.

10 F Miller, R Dawson, G Dix, & R Parnes, Criminal Justice Administration 750 (3d ed. 1986) [hereinafter F Miller].

11 *Id.*

12 *See, e.g.*, Labaton, *New Tactics in the War on Drugs Tilt Scales of Justice Off Balance*, N.Y. Times, Dec 29, 1989, at A1, col. 1, *see also*, Greenhouse, *Chief Justice Makes Plea for More Federal Judgeships to Help in Fight Against Drugs*, N.Y. Times, Jan 1, 1990, at 10, col. 1.

> As far as I know, there is no electronic surveillance or other surveillance. I have been given nothing specific at all. I have a charge that says in or about October of '88, which doesn't limit it to the month of October, he allegedly possessed some methamphetamine with intent to distribute. Not told where or with whom or under what circumstances.[13]

These circumstances, whereby prosecutorial reliance on disclosure restrictions can actually prevent a defendant from even learning the specifics of the charges against him, transform rules that purport to "balance" the flow of information between parties into guidelines so detrimental to the defendant that a scene in a federal courtroom can bear an eerie resemblance to the persecution of Joseph K. in Kafka's *The Trial*.[14]

A. *Bill of Particulars*

The general unavailability of a bill of particulars to criminal defendants in federal court often keeps defendants from ascertaining the specific facts of the charges against them.[15] Even when the charges are clear, by denying counsel information that is essential to the preparation of an effective defense, the defendant is, from the outset, at a disadvantage.

As stated previously, one of the justifications for disallowing criminal defendants this useful discovery tool, one which is routinely available in civil litigation, is the defendant's fifth amendment protection against self-incrimination. Even if a comprehensive bill of particulars was discoverable by the defense, the Constitution would prohibit the government from exacting reciprocal information from the accused, and the defendant would be afforded an unfair advantage. This reasoning is less persuasive, however, when one considers the enormous imbalance of investi-

13. United States v. _____, (D.N.J. April 24, 1989) (Transcript of Proceedings) [hereinafter Transcript]. This case's name and docket number are confidential pending defendant's appeal. Accordingly, this excerpt serves solely illustrative, not authoritative, purposes.

14. F. Kafka, The Trial (W.E. Muir trans. 1937). " 'You can't go out, you are arrested.' 'So it seems,' said K. 'But what for?,' he added. 'We are not authorized to tell you that. Go to your room and wait there. Proceedings have been instituted against you, and you will be informed of everything in due course.' " *Id.* at 5-6.

15. Goldstein, *supra* note 1, at 1180. "The elimination of precise pleading, the general unavailability of particulars, and the increasing elasticity given to indictments all leave a good deal of room for 'surprise' at trial. And not all such 'surprise' is readily curable by granting a continuance." *Id.*

gative resources favoring the prosecution.[16]

Moreover, in cases such as the one from which the excerpt was taken[17] it may be nearly impossible for the defendant to establish an alibi defense, given the imprecision with which the government may charge the accused. There, defense counsel so noted: "If we ask for a bill of particulars and want to know if we can put together a legitimate alibi defense, we need some idea what he is accused of doing, and when he was accused of doing it."[18] Implicit in this policy of nondisclosure is the presumption that the defendant need not be given all relevant information to mount his defense because, after all, if guilty, he knows very well when and where he committed the crimes for which he is charged. The rules ignore the possibility of innocence.

But what if the defendant has been wrongly accused? Given our presumption of innocence, this possibility should at least be considered. Even though a defendant is not required to prove his innocence, he should have the opportunity to do so. An innocent defendant in this scenario would have virtually no way of establishing his innocence until he has heard the specifics of the charges against him. Under the current federal rules, such information could be suppressed until the government presents its case at trial.[19] By that time, many variables could lead to a wrongful conviction. But such possible miscarriages of justice

16. *See, e.g.*, Brennan, *supra* note 1, at 292-93.

> [W]hat of the investigatory paraphernalia important to the preparation of criminal evidence which is, as of course it should be, available to law officers? Laboratories, skilled investigators, experts in all areas are an essential part of the equipment of every agency which would boast of being abreast of the modern techniques for the detection and prevention of crime. All of us are gratified that our agencies are so equipped, and would not want to strip their resources. But I suggest that it overstates the fact to say that we don't need to extend criminal discovery procedures to the accused because the scales are already distorted in his favor by the privilege against self-incrimination and the fact that the state has the burden of proving his guilt beyond a reasonable doubt.

Id.

17. *See supra* note 13 and accompanying text.

18. Transcript, *supra* note 13, at 6.

19. FED R CRIM P. 16 provides in pertinent part:

> (2) *Information Not Subject to Disclosure.* Except as provided in paragraphs (A), (B), and (D) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective witnesses except as provided in 18 U S C. § 3500.

would likely be avoided if procedures allowed defendants to demand a bill of particulars and receive crucial information from the prosecution relating to the specifics of the charges against them.[20] The defendant's counsel in our sample case argued this point well, but, because of the unyielding nature of discovery restrictions, to no avail.

> My client is presumed innocent. The Government shouldn't be saying that the defendant since he must be guilty must know what he is accused of doing. I have no idea what he is accused of doing, and he doesn't know what kind of proofs the Government intends to offer. I think under the circumstances we should be given more.[21]

B. *Witness Lists*

The suppression of government witness lists until just before trial is another restriction that significantly impairs defense preparation. Defendant and counsel may be left guessing until the trial nears commencement. By the time they are given the names of the prosecution's witnesses, the defense may be unable to use the information effectively.

> [T]his is a case where the defendant has no information, and I don't think it's enough for the United States Attorney to tell me they think they have good witnesses. They believe the witnesses will be credible, and I should accept it in evaluating what kind of case I am preparing for. I can't do it.[22]

Without the opportunity to investigate the background and character of government witnesses, the defense, as in this case, may be denied the chance to refute the government's assessment of the credibility of its witnesses. This is an example of how a discovery restriction can curtail the adversarial system rather than preserve it.[23]

20. Goldstein, *supra* note 1, at 1180-81. "Though a motion for discovery of documents before trial is technically available, attempts to invoke it are rarely successful. When they are, they usually enable the defendant to get only materials which are not central to his task of preparing a defense." *Id.* at 1181.

21. Transcript, *supra* note 13, at 7.

22. *Id.*

23. *See supra* note 5 and accompanying text (discussing the effect of discovery rights on the adversarial process); *see also* Williams v. Florida, 399 U.S. 78, 82 (1970) (Court discussed adversary system as consideration secondary to the preservation of due process rights).

As stated earlier, the delay in the turnover of government witness lists is premised primarily on the concern that the defendant, if granted immediate access to the identities of those who will testify against him, will intimidate, bribe, or endanger these people in order to avoid conviction. This rationale is unconvincing since the defense will nevertheless receive the witness list before the witnesses testify, and thus defendants will still retain the opportunity to engage in the conduct the restriction seeks to prevent. Defense counsel in our sample case saw the inherent illogic of this practice: "[T]o say a week before trial [that] we are entitled to know [the government witness list] and that removes the dangers to these people, I don't understand. It just denies us the adequate time to properly prepare our case."[24]

One may be hard pressed to discern the practical result of delaying defendants' access to government witness lists. Other than supposedly allowing defendants somewhat less time to tamper with the prosecution's witnesses, which does little to redress the perceived danger, the practice of delaying disclosure may do no more than injure the defendant and slow down the proceedings. Defense counsel in our example noted this reality, stating that "[t]here is no way that I won't find [out] at some point who is involved in the case, and I suspect it would make more sense from a logistical point of view if we were told sooner than later."[25]

Despite the defendant's inability to receive the prosecution's witness list early in the proceedings, the defense is compelled to provide the government with the list of witnesses it will call in order to support an alibi defense. Rule 12.1 provides that when a defendant wishes to introduce a defense of alibi, he or she must give notice to the government and provide the names and addresses of any witnesses the defense plans to call to establish the alibi.[26] In return, the defense receives only the names of witnesses

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The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as "due process" is concerned, for [a rule] which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence.

Id.

24 Transcript, *supra* note 13, at 17.

25 *Id.* at 6

26 FED R CRIM P 12.1. Notice of Alibi

(a) Notice by Defendant. Upon written demand of the attorney for the government stating the time, date, and place at which the alleged offense was committed, the defendant shall serve within ten days, or at such different time as the court may direct, upon the attorney for the government a written notice of the defendant's intention to offer a defense of alibi. Such notice by the defendant shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom the defendant intends to rely to establish such alibi.

Id. See also Wardius v. Oregon, 412 U.S. 470, 472 (1973) (Court held that state's notice-of-alibi rule required reciprocal discovery rights for defendant under the due process clause of the fourteenth amendment). *See also infra* note 28.

27. FED R. CRIM P. 12.1. Notice of Alibi

(b) Disclosure of Information and Witness. Within ten days thereafter, but in no event less than ten days before trial, unless the court otherwise directs, the attorney for the government shall serve upon the defendant or the defendant's attorney a written notice stating the names and addresses of the witnesses upon whom the government intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied on to rebut testimony of any of the defendant's alibi witnesses.

In Williams v. Florida, 399 U.S. 78, 104 (1970), the Court upheld Florida's notice-of-alibi rule, emphasizing that its constitutionality might depend on the state rule's provision that the prosecuting attorney shall in turn provide the defendant with a list of the names and addresses of witnesses that the state proposes to offer in rebuttal to discredit the defendant's alibi.

28. *Williams*, 399 U.S. at 81 ("Given the ease with which an alibi can be fabricated, the State's interest in protecting itself against an eleventh-hour defense is both obvious and legitimate.").

29. *See supra* note 7 and accompanying text.

30. The advantage enjoyed by the government in criminal proceedings, due to its vastly superior investigative resources, is further heightened by Rule 12.1 and its state counterparts. "Reciprocal discovery" in the context of notice-of-alibi is anything but evenhanded; the defendant gives away much more, practically speaking, than he or she receives in return. We are not denouncing all defense disclosure in principle, but such prosecutorial discovery provisions (which are found to be nonviolative of the fifth amendment) must be accompanied by far freer discovery for the defense, if fairness at trial is to be given more than lip service. For an excellent discussion of the emergence of significant prosecutorial discovery rights and the problems resulting therefrom, see Mosteller, *Discovery Against the Defense: Tilting the Adversarial Balance*, 74 CALIF L. REV 1567 (1986).

the government will call to refute the alibi, not the identities of all witnesses who will testify on behalf of the government.[27]

The notice of alibi rule is still another example of the real ideology at work in federal criminal procedure. The requirement that defendants must provide the government with the names of alibi witnesses has its basis in the assumption that alibis are likely to be fabricated and that alibi witnesses will perjure themselves for the defendant's sake.[28] It is also, however, a refutation of the anti-discovery argument that would characterize open criminal discovery as a one-way street.[29] Clearly, here is a provision that compels disclosure by the defense of vital trial strategy and of the identities of perhaps all of its witnesses.[30] For its part, the prosecution

need only disclose a small part of its case; all witnesses who will testify for reasons other than to refute the defendant's alibi remain unannounced to the defendant.

Another related problem confronting the defendant is the apparent inability of the defense to reserve the right to adopt a particular trial strategy. For example, defense counsel may not know at the pretrial stage whether a certain alibi defense will be appropriate or helpful. This is especially so in cases such as our example, where the charges include conspiracy[31] and are vague with respect to the dates and locations of the alleged commission of crimes. The defense must nonetheless furnish the government with all information covered by the notice of alibi rule if it plans to establish an alibi. But there is no corresponding duty for the government ever to disclose its trial strategy other than the obvious strategy to attempt to refute the defendant's alibi. Apparently, the identities of some of the government's witnesses can remain undisclosed indefinitely—for the prosecution is free to claim that their testimony might not be necessary for its case. Defense counsel in our sample case saw that this tactic was subject to abuse and was unfair to his client:

> I tried to negotiate with the United States Attorney to get information, and I have been told, "[W]e have a witness, and we can't tell you who the witness is. Closer to the trial date we may tell you. Accordingly we can't tell you what our relationship is or what kind of arrangements might have been made because we are hoping not to disclose the witness at all."[32]

C. *Witness Statements*

The Jencks Act[33] governs criminal defendants' right to inspect statements made by witnesses in federal prosecutions. Any pretrial statements made by a government witness are to be made available upon motion to the defense only after that witness has testified.[34] Such statements therefore are not subject to defense discovery.

The purpose of the statute has often been officially characterized as simply a means of regulating unwarranted disclosure of

31 *See* Transcript, *supra* note 13, at 5.
32 Transcript, *supra* note 13, at 5-6.
33 18 U.S.C. § 3500 (1988). *See supra* note 3.
34 18 U.S.C. § 3500(b) (1988). *See supra* note 3.

government files to the defense.[35] As with other discovery restrictions, the rule regarding witness statements may in truth be premised on the fear that defendants, if given such information before trial, might commit or suborn perjury by altering defense testimony so as not to conflict with testimony to be given by government witnesses.

These fears, perhaps not without some justification, are the basis for a policy which limits disclosure for all criminal defendants, not just those likely to engage in such misconduct. The effect of the statute on defendants is profound. It provides federal prosecutors with a powerful tool with which to prevent pretrial disclosure of virtually all evidence to be offered by government witnesses.[36] The defense may be surprised at trial with previously unknown evidence and afforded insufficient time to digest newly acquired materials. In order to conduct an effective cross-examination, counsel must be able to investigate the content of the testimony and the background of the witness. Often, this is not possible. The adjudication of criminal cases, arguably the most important task to be undertaken in federal district court, can then become an arcane ritual in which an overly broad public policy supplants the court's truth-seeking function.[37]

It is evident how the current federal discovery restrictions adversely affect the accused, but it is also important to recognize how the restrictions can be detrimental to the prosecution and to the court. With federal criminal prosecutions on the rise and the congestion of court dockets,[38] now more than ever it is practical to facilitate plea agreements and thereby avoid the time and expense of lengthy trials. Limitations on discovery undermine this goal because defendants often cannot ascertain what evidence the government has against them until the trial has commenced. The

35. Palermo v. United States, 360 U.S. 343, 351 (1959); Saunders v. United States, 316 F.2d 346, 349 (D.C. Cir. 1963).

36. Rule 16 of the Federal Rules of Criminal Procedure allows defense discovery of: (A) any statements made by the defendant within the possession of the government, (B) a copy of the defendant's prior criminal record, (C) certain documents and tangible objects, and (D) reports of physical or mental examinations, and of scientific tests or experiments. FED R CRIM P 16(a)(1). But any statements made by government witnesses, both written and oral, are excluded from pretrial discovery under the Jencks Act. *See* 18 U.S.C. § 3500(e) (1988). Thus, virtually the only "statements" of government witnesses which may be discoverable are expert witness reports under Rule 16(a)(1)(D).

37. *See* Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. Rev. 228, 242 (1964).

38. *See* Greenhouse, *supra* note 12, at 10.

complete and early disclosure of all relevant information to criminal defendants would afford them and their counsel the factual evidence necessary to evaluate the strength of the government's case and aid in a knowledgeable election between trial and guilty plea. Returning to our example, defense counsel saw that, absent such information, the defendant really had no option other than trial: "I said to the United States Attorney, and I say to the Court that the practicality of the situation is my client will be in this case for the duration, unless somebody convinces me that they have a strong case against him, or we ought to reconsider our position."[39]

Indeed, it would make sense even from the government's point of view to reconsider the validity of rules controlling criminal defendants' access to information before trial in federal court. Are the restrictions regarding bills of particulars, government witness lists, and witness statements justified in all cases? Even apart from determining whether the rights of the accused are unduly infringed by these practices, the effect on the orderly administration of justice should be considered.

III. The History of Suppression of Evidence Cases in Federal Court

Excerpts from our example illustrate many of the problems confronting federal criminal defendants. The next step is to consider how discovery restrictions may affect their constitutional rights. Do federal courts recognize discovery to be a right or a privilege in criminal cases? Given the nature of current restrictions, it might be easy to conclude that criminal defendants have virtually no inherent discovery rights, and that the prosecution has only limited disclosure duties.[40] But courts have long recognized the existence of both a criminal defendant's constitutionally-protected right to certain evidence and a significant prosecutorial duty to disclose.[41] The arguments for and against

39. Transcript, *supra* note 13, at 6.

40. *See supra* note 36 for a brief discussion of defense discovery rights under Rule 16 of the Federal Rules of Criminal Procedure; the evolution of the prosecutorial duty to disclose is examined in *infra* text accompanying and notes 41-94.

41. Since the Court first decided, in Mooney v. Holohan, 294 U.S. 103 (1935), that a prosecutor's nondisclosure may violate due process, the constitutional dimensions of a criminal defendant's right to evidence have been gradually set forth in a long line of cases over the last 56 years.

the criminal defendant's right to open discovery may be better considered by analyzing the line of constitutional "access to evidence" cases.

The modern development of the prosecution's duty to disclose began in 1935 with *Mooney v. Holohan*.[42] Mooney, a radical labor organizer, had been convicted of murder as a result of perjured testimony by government witnesses and manufactured physical evidence.[43] Mooney applied for a writ of habeas corpus, maintaining that the prosecution had completely fabricated the case against him.[44] Subsequent investigations found that the district attorney had masterminded the plot to frame Mooney, not only by the use of false evidence but also by intentionally suppressing evidence favorable to the accused.[45] Remarkably, the Supreme Court affirmed the denial of the writ on procedural grounds,[46] but found in dictum that such prosecutorial misconduct constituted a violation of due process.[47] The Court focused on the government's knowing use of perjury, considering this to be the most serious constitutional issue.[48]

In *Pyle v. Kansas*,[49] a case involving similarly egregious prosecutorial misconduct, the Court stressed the issue of the authorities' deliberate suppression of evidence favorable to the accused.[50] Such conduct was held constitutionally impermissible.[51] Later cases gave the Court occasion to consider prosecutors' intentional suppression of evidence independent of a claim of state induced perjury. The Court found there to be a denial of due process where a prosecutor used, but did not suborn, perjured testimony which was relevant only to the punishment of the defendant, not to his guilt.[52] Soon after, the Court further extended prosecutors' duty to disclose, holding that a misrepresentation involving only the credibility of a government witness required the

42. 294 U.S. 103 (1935).

43. *Id.* at 110-11.

44. *Id.* at 109.

45. Chafee, The Mooney-Billings Report 242 (1931).

46. *Mooney*, 294 U.S. at 115. The procedural ground cited by the Court was petitioner's failure to exhaust state remedies.

47. *Id.* at 112-13.

48. *Id.*

49. 317 U.S. 213 (1942).

50. *Id* at 215-16.

51. *Id.* at 216.

52. Alcorta v. Texas, 355 U.S. 28, 31 (1957).

reversal of defendant's conviction and demanded a new trial.[53]

During this period, the Court paid special attention to the culpability of the prosecutor in determining whether a due process violation existed. But in *United States ex rel. Thompson v. Dye*,[54] the Third Circuit's decision was a significant departure from the Supreme Court's analysis.[55] The appellate court found that the defendant's due process rights could only be appraised by examining the effect the suppressed evidence had on the ability of the accused to mount his defense; the prosecutor's state of mind was not controlling.[56] The Second Circuit then followed the *Thompson* reasoning in a case involving the negligent suppression of evidence, where it agreed that the absence of willful misconduct by authorities did not necessarily preclude the existence of a due process violation.[57]

A. *The Brady Doctrine*

With its decision in *Brady v. Maryland*,[58] the Supreme Court broke new ground regarding a criminal defendant's constitutional right of access to information within the government's control. The Court held that the suppression of evidence requested by and favorable to the defendant is a violation of due process if the evidence is material to guilt or punishment.[59] Of particular interest was the Court's conclusion that such a violation exists "irrespective of the good faith or bad faith of the prosecution."[60] Aligning with the Third Circuit's approach in *Thompson*, the *Brady* Court focused on the objective value of the evidence in question, rather than the subjective perception of the prosecutor.

Although the *Brady* decision represented a new direction for the Supreme Court's analysis of this area of the law, the holding left many unanswered questions. Who, for example, determines

53. Napue v. Illinois, 360 U.S. 264, 269 (1959).

54. 221 F.2d 763 (3d Cir. 1955).

55. The Third Circuit's treatment of suppressed evidence in this case was a harbinger of the Supreme Court's eventual approach. *See infra* text accompanying note 61; *see also* Comment, Brady v. Maryland *and the Prosecutor's Duty to Disclose*, 40 U. CHI. L. REV. 112, 114 (1972); Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 YALE L.J. 136, 141 (1964).

56. *Thompson*, 221 F.2d at 765.

57. United States v. Consolidated Laundries Corp., 291 F.2d 563 (2d Cir. 1961).

58. 373 U.S. 83 (1963).

59. *Id.* at 87.

60. *Id.*

what constitutes *Brady* material?[61] If the defense were to make the determination, it would first need to see the government's file, and the point of limiting disclosure to only material exculpatory evidence would be foiled. Alternatively, should the judge be given this task or should the determination be left to the prosecutor?[62] How important is a request by the defense?[63] If defense counsel fails to make a request, does the defendant lose his right to the information? Is the time of disclosure an important consideration?[64] And, most significantly, what will be the standard for "materiality"?[65]

The standard of materiality is so important in this line of cases because, more than anything else, the manner in which the term is defined will measure the extent of the defendant's right of access. A narrow reading of the term would create only a limited right; a broad reading would make the right expansive, perhaps even to mandate a constitutional right of open discovery.[66] The *Brady* Court offered little guidance.

61. *Cf.* Traynor, *supra* note 37, at 237. Justice Traynor noted that "so long as the availability of pretrial discovery to the defendant depends upon the discretion of his adversary, the prosecutor, there is always the risk of unequal treatment, the more to be questioned because it is needless." *Id. See also infra* text accompanying notes 92-94.

62. In practice, the government either makes a unilateral determination that it need not turn over certain information or evidence, or in the alternative frequently suggests that the court engage in an in-camera inspection in order to make that determination. The offer is meant to verify the government's good faith and confidence in its decision not to disclose. In reality it is an empty gesture.

It is virtually impossible for a court to determine whether information is exculpatory or can be utilized for impeachment purposes. For instance, a witness may claim that he saw the defendant at the scene of the crime in a three-piece blue pin-striped suit. In the abstract, the court would conclude that such information was not exculpatory, and would have no way of knowing whether it could be used to impeach the credibility of the witness. On the other hand, the defendant and defense counsel, knowing that the defendant does not and never has owned a three-piece blue pin-striped suit, might be able to use that information to her advantage. Therefore, the tender of an in-camera inspection rarely will suffice except in the most flagrant and obvious circumstances.

63. *See infra* text accompanying notes 77-79.

64. The Third Circuit has found that material which is arguably exculpatory under *Brady*, yet also arguably nondiscoverable under the Jencks Act, must be disclosed in time for effective use at trial. United States v. Starusko, 729 F.2d 256, 263 (3d Cir. 1984); United States v. Higgs, 713 F.2d 39, 44 (3d Cir. 1983). *But see* United States v. Presser, 844 F.2d 1275 (6th Cir. 1988); *infra* note 91 and accompanying text.

65. Some courts have construed the *Brady* doctrine to encompass evidence that is potentially relevant to the defense even if inculpatory. Other courts, however, have taken a much narrower view. *See Presser*, 844 F.2d at 1275; *infra* note 91 and accompanying text.

66. The notion that *Brady* could lead to constitutional discovery rights was put to rest with *Moore v. Illinois*, 408 U.S. 786 (1971). *See infra* notes 72-75 and accompanying text.

B. *Elaborations on Brady*

In *Giglio v. United States*,[67] the Court further defined the right it had created in *Brady*. In *Giglio*, the government failed to disclose an allegedly unauthorized promise of leniency made by an assistant to a key witness in return for his testimony.[68] The Court held that neither the assistant's lack of authority nor his failure to inform his superiors was controlling.[69] The prosecution's duty to present all material evidence to the jury was violated, constituting a denial of due process and requiring a new trial.[70] *Giglio* made it clear that at least some information that could be used for the purpose of impeaching government witnesses was material under *Brady*.[71] Requests by defendants for so-called *Giglio* material—information concerning any deals or arrangements between the government and its witnesses—grew out of this decision.

The same year, with *Moore v. Illinois*,[72] the Court refined *Brady* by declining to expand it. In a five-to-four decision, the Court concluded that the suppression of arguably exculpatory evidence in this complex murder case was not material to the guilt or punishment of the accused, and thus there was no due process violation.[73] The majority stressed the importance of a specific request for *Brady* material, but did not go so far as to rule it indispensable in all cases.[74]

The majority also clearly indicated, in dictum, that it was not prepared to extend the *Brady* rule to include open discovery as of right: "We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police work on a case."[75]

The minor retrenchment of *Moore* was followed by a more liberal rendering in *United States v. Agurs*.[76] The Court there addressed the issue of prosecutorial nondisclosure of evidence in situations in which the defense has not specifically requested

67. 405 U.S. 150 (1972).
68. *Id.* at 152-53.
69. *Id.* at 154.
70. *Id.* at 154-55.
71. *See also, Defendants Have No Right to Pretrial Discovery of "All Impeachment Evidence,"* 4.3 CRIM. L. REP. (BNA) 2127 (May 18, 1988).
72. 408 U.S. 786 (1972).
73. *Id.* at 797.
74. *Id.* at 794-95.
75. *Id.* at 795.
76. 427 U.S. 97 (1976).

disclosure.[77] In a ruling consistent with *Brady*, the Court noted that the prosecution must disclose certain evidence that is obviously favorable to the defense, even absent a specific request.[78] Although again clear to point out that the prosecution need not turn over its entire file to the defense, the Court acknowledged that some evidence requires disclosure to comport with fundamental notions of fairness in the trial process.[79] The emphasis was on the nature of the evidence, not the animus of the prosecutor.

C. *The Break from Brady*

The cases leading up to and including *Agurs* depict a Court seeking clearly but cautiously to expand the right first pronounced in *Brady*. In 1985, with *United States v. Bagley*,[80] the Court moved in the opposite direction, choosing to redefine and confine a defendant's right to evidence. The Court collapsed the three different standards of materiality enunciated in *Agurs* for the three types of constitutionally mandated prosecutorial disclosure—where a prosecutor knowingly uses perjured testimony; where the defense makes a specific request; and where the defense makes no request or only a general request for *Brady* material—into one standard: whether the undisclosed evidence creates a "reasonable probability" that the outcome would have been different.[81] Justice Stevens, dissenting, faulted "the Court's unwarranted decision to rewrite the rule" by transforming the concept of "materiality" from merely an evidentiary concept as used in *Brady* and *Agurs* to a result-oriented standard.[82]

77. *Id.* at 110.
78. *Id.* The suppression of evidence in *Agurs* was held to be nonviolative of the defendant's fifth amendment rights under the due process clause because the suppression was deemed harmless error. *Id.* at 114. The dissent urged that the majority deprived the term "material" evidence "of all meaningful content" by so narrowly defining it. *Id.* (Marshall, J., dissenting). *See supra* text accompanying note 66.
79. *Agurs*, 427 U.S. at 110.
80. 473 U.S. 667 (1985).
81. *Id.* at 682.
82. *Id.* at 709 (Stevens, J., dissenting). *See also id.* at 702-03 (Marshall, J., dissenting). Justice Marshall wrote:

> I would return to the original theory and promise of *Brady* and reassert the duty of the prosecutor to disclose all evidence in his files that might reasonably be considered favorable to the defendant's case. No prosecutor can know prior to trial whether such evidence *will* be of consequence at trial; the mere fact that it might be, however, suffices to mandate disclosure.

From there, in *Arizona v. Youngblood*,[83] the Court returned to the pre-*Brady* reliance on the good or bad faith of the government official as the dispositive factor in determining due process violations in cases dealing with evidence which is lost or destroyed rather than suppressed.[84] Admittedly, one may see a difference in the nature of the evidence withheld in *Agurs* and *Brady* as opposed to *Youngblood*.[85] In the former cases, the exact significance of the undisclosed evidence may be ascertained, whereas in the latter, the value of the lost evidence can never be divined. Nevertheless, the Court's "bad faith" holding represented a major theoretical shift away from the objective analysis of the evidence and how its unavailability affected the defendant's ability to receive a fair trial.

It is clear that the trend in the current Court is to de-emphasize criminal defendants' constitutional right to evidence. In *United States v. Presser*,[86] the Sixth Circuit followed suit in its decision concerning a case where the *Brady* doctrine and Jencks Act provisions came in direct conflict. The government appealed a district court judge's pretrial order requiring disclosure to the defense of all impeachment evidence which tended to negate guilt. The Sixth Circuit held that evidence that was arguably exempt from pretrial disclosure by the Jencks Act, yet also arguably exculpatory under *Brady*, need only be disclosed to defendants in time for use at trial.[87]

The decision in *Presser* is an indication that federal courts are willing to give as much or more weight to the government's interest in nondisclosure, a statutory consideration, as they are to defendants' constitutional interest in pretrial disclosure of material evidence. The court's holding grapples with the conflicting interests by compromise, neither requiring early pretrial disclosure nor countenancing nondisclosure only after government witnesses have testified. If the delay in disclosing *Brady* material results in

Id. (emphasis in original).

83. 488 U.S. 51 (1988).

84. *Id.* at 57-58.

85. *Id.*

86. 844 F 2d 1275 (6th Cir. 1988).

87. *Id.* at 1283. There is no telling how significant the difference could be between affording defendants disclosure in time for "effective" use at trial, *see supra* note 64, and, as here, merely use at trial. It has been argued that such distinctions may separate substantive justice from formalistic justice. *See generally* Kelman, *Interpretative Construction in the Substantive Criminal Law*, 33 STAN. L. REV 591 (1981).

a defendant's lesser capacity to use the evidence effectively at trial, as indeed it might, is not this delay an infringement of the defendant's due process rights? The court thought not, but this conclusion is not inconsistent with the theory that due process rights must be determined by inquiring whether the undisclosed evidence adversely affected the defendant's ability to receive a fair trial.

The call for a constitutional right of discovery is compatible with the holding in *Brady* but has been seriously undercut by recent Supreme Court and federal circuit court decisions. *Brady* and its progeny expressed the idea that all evidence requested by the defense that is material to guilt or punishment is subject to disclosure by the prosecution. By broadly defining what constitutes "material" evidence, and by retaining the analysis that determinations of due process violations should not be made solely on the basis of a finding of bad faith, the possibility that the Court would recognize a right of open discovery was clearly within sight. Beginning with *Bagley*, that outlook began to change, and now the pro-discovery position appears to have little chance of acceptance in the Court's foreseeable future.

This lack of acceptance by the Court, however, does not necessarily invalidate the constitutional arguments in favor of formal criminal discovery rights. It is not difficult to accept discovery as a logical extension of the *Brady* doctrine if one is willing to concede that virtually all likely defense requests for disclosure may be in some sense material to the issues of guilt or punishment. Furthermore, the fact that many prosecutors choose to open their files to opposing counsel raises the additional issue of equal protection.[88] Cognizant that the practice promotes greater efficiency and is in many cases likely to convince the defendant to enter a guilty plea rather than undergo the rigors of trial when the case against him is strong, some prosecutors endorse the use of defense discovery.[89] But should it be left to the vagaries of prosecutorial discretion to determine which defendants are to be afforded this right and which are not? As Justice Brennan noted, fundamental notions of fairness dictate that the opportunity for discovery should be granted to all criminal defendants, not just those who

88. Brennan, *supra* note 1, at 282; Traynor, *supra* note 37, at 237.

89. The very fact that prosecutors so often assent to pretrial discovery should be a persuasive rebuttal of the argument that such disclosure undermines the adversarial nature of criminal proceedings. *See supra* text accompanying note 5.

receive this benefit by chance.[90]

IV. Specific Recommendations

Regardless of whether federal courts will recognize a constitutional right of criminal discovery, it is evident that if discovery is to be afforded any time soon, it is a task for the legislature. Congress should heed the experience of states, such as New Jersey, that permit open discovery for criminal defendants.[91] The concerns that gave rise to the enactment of the Jencks Act on the federal level have not been borne out in the state courts. By studying the positive consequences of such state court discovery provisions, both the federal government and courts can better evaluate the usefulness and validity of the Jencks Act and other restrictions on discovery. We offer the following recommendations:

1. Repeal or modify the Jencks Act

The Jencks Act is a powerful enemy of discovery in federal criminal prosecutions. It reflects an overly broad policy that disadvantages all defendants for the sake of trying to prevent the

90. Brennan, *supra* note 1, at 282; Traynor, *supra* note 37, at 237. "Even the most fair-minded prosecutor is still an advocate and hence is not ideally suited to determine when a legal process should be made available to a defendant and when not Such determinations are freighted with risk, even when they rest on most plausible grounds." *Id.*

91. California was among the first of several states to allow broad criminal discovery rights, both by statute and court decisions. Traynor, *supra* note 37, at 243-46. New Jersey has adopted liberal discovery rules of state criminal procedure. States that have adopted such practices have not deemed it necessary to go back to their old, restrictive ways. As Justice Brennan argued more than a quarter-century ago, we should not "be persuaded that the old hobgoblin perjury, invariably raised with every suggested change in procedure to make easier the discovery of the truth, supports the case against criminal discovery." Brennan, *supra* note 1, at 291. State experience has only added strength to that conclusion.

New Jersey Rules Governing Criminal Practice provide:

> 3:13-3 Discovery and Inspection
>
> (a) Discovery by the Defendant. Upon written request by the defendant, the prosecuting attorney shall permit defendant to inspect and copy or photograph any relevant
>
> (1) books, tangible objects, papers or documents obtained from or belonging to him;
>
> (2) records of statements or confessions, signed or unsigned, by the defendant or copies thereof, and a summary of any admissions or declarations against penal interest made by the defendant that are known to the prosecution but not recorded;
>
> (3) grand jury proceedings recorded pursuant to R. 3:6-6;
>
> (4) results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the matter or copies thereof, which are within the possession, custody or control of the prosecuting attorney;
>
> (5) reports or records of prior convictions of the defendant;
>
> (6) books, papers, documents, or copies thereof, or tangible objects, buildings or places which are within the possession, custody or control of the State;
>
> (7) names and addresses of any persons whom the prosecuting attorney knows to have relevant evidence or information including a designation by the prosecuting attorney as to which of those persons he may call as witnesses;
>
> (8) records of statements, signed or unsigned, by such persons or by codefendants which are within the possession, custody or control of the prosecuting attorney and any relevant record of prior conviction of such persons,
>
> (9) police reports which are within the possession, custody, or control of the prosecuting attorney;
>
> (10) warrants, which have been completely executed, and the papers accompanying them including the affidavits, transcript or summary of any oral testimony, return and inventory;
>
> (11) names and addresses of each person whom the prosecuting attorney expects to call to trial as an expert witness, his qualifications, the subject matter on which the expert is expected to testify, a copy of the report, if any, of such expert witness, or if no report is prepared, a statement of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. If this information is requested and not furnished, the expert witness may, upon application by the defendant, be barred from testifying at trial.

RULES GOVERNING THE COURTS OF THE STATE OF NEW JERSEY (1991).

New Jersey's broad discovery rules cut both ways: if defendants choose to make use of 3:13-3(a), the State is entitled to much pretrial information under 3:13(b). These provisions, unlike the federal rules, are consistent with principles of fairness, and at least provide defendants with the choice of either discovering and being subject to discovery, or being immune from disclosure but not gaining the benefit of learning the prosecution's case. The corresponding discovery rule provides:

> (b) Discovery by the State. A defendant who seeks discovery shall permit the State to inspect and copy or photograph
>
> (1) results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the matter or copies thereof, which are within the possession, custody or control of defense counsel;
>
> (2) any relevant books, papers, documents or tangible objects, buildings or places or copies thereof, which are within the possession, custody or control of defense counsel;
>
> (3) the names and addresses of those persons known to defendant whom he may call as witnesses at trial and their written statements, if any, including memoranda reporting or summarizing their oral statements;
>
> (4) written statements, if any, including any memoranda reporting or summarizing the oral statements, made by any witnesses whom the State may call as a witness at trial;
>
> (5) names and addresses of each person whom the defense expects to call to trial as an expert witness, his qualifications, the subject matter on which the expert is expected to testify, and a copy of the report, if any, of such expert witness, or if no report is prepared, a statement of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. If this information is requested and not furnished the expert may, upon application by the prosecutor, be barred from testifying at trial.

potential misconduct of a few. Denying all defendants access to pretrial statements made by government witnesses out of the fear that some will use such information wrongfully can be likened to outlawing the institution of bail on the theory that some of those arrested might commit further crimes.[92] Such fears may indeed be well-founded in specific circumstances, and in such cases, as in rare instances when bail is not granted, judges should have the authority to impose particular restrictions on discovery. Otherwise, open discovery should be the rule, not the exception.

2. Rule 16 of the Federal Rules of Criminal Procedure should be revised

Drafters of federal criminal discovery rules should adopt the approach taken by the American Bar Association's Standards Relating to Discovery and Procedure Before Trial.[93] A great number of states have implemented all or most of the ABA Standards, which advocate broad discovery provisions, through both legislation and court rulings.[94]

3. The federal government must assume the burden to show cause for limiting disclosure

For discovery rules to work fairly and efficiently, the burden must be placed on the prosecution to make a prima facie showing that disclosure should be restricted in specific instances. Absent such a showing, defendants should be granted early and complete disclosure of all relevant information.[95]

V. Conclusion

Discovery is a useful and basic truth-seeking device in civil litigation; it would play a similar role if it were embraced by the federal courts in criminal proceedings. To provide for full disclosure in civil matters but not in criminal cases elevates property

92. Brennan, *supra* note 1, at 287.

93 ABA Standards for Criminal Justice, Discovery and Procedure Before Trial (Supp. 1986) *See also* F Miller, *supra* note 10, at 751.

94 F Miller, *supra* note 10, at 751.

95. In advocating broadened discovery rights, we are not suggesting that criminal defendants be afforded all traditional civil discovery procedures, such as the ability to submit interrogatories or to take depositions. Rather, our proposal is simply that criminal defendants be granted access to the materials discussed in this Article.

concerns over liberty interests. A defendant is entitled to be apprised of the evidence against him or her, if a fair trial is to be accorded that defendant. The lack or lateness of disclosure defeats that purpose and renders a trial unfair. This imbalance will be corrected only by reversing the underlying presumptions and thus changing discovery rules to allow criminal defendants sufficient access to evidence. Only then will we fulfill the principle that criminal defendants are presumed innocent until proven guilty.

Item II-D-4

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Amendment to Rule 16(a)(1)(A) re Organizational Defendants

DATE: March 9, 1992

At its November 1991 meeting, the Committee considered a proposal from the ABA to amend Rule 16(a)(A) regarding organizational defendants and ultimately voted in favor proceeding with the drafting of an amendment.

A draft of that amendment, along with the original supporting information from the ABA is attached.

Rule 16. Discovery and Inspection

(a) DISCLOSURE OF EVIDENCE BY THE GOVERNMENT.

(1) Information Subject to Disclosure.

(A) STATEMENT OF DEFENDANT. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph disclose to the defendant and make available for inspection, copying or photographing: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; any written record containing the substance of any relevant oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. The government shall also disclose to the defendant the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known by the defendant to be a government agent if the government intends to

RULES OF CRIMINAL PROCEDURE*

use that statement at trial. Upon request of a ~~Where~~ the defendant who is an organization such as a corporation, partnership, association, or labor union, the government shall shall disclose to the defendant any of the foregoing statements made by a person ~~the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury~~ who (1) was, at the time of making the statement ~~that testimony~~, so situated as a ~~an~~ director, officer, ~~or~~ employee, or agent as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of offense, personally involved in the alleged conduct constituting the offense and so situated as a ~~an~~ director, officer, ~~or~~ employee, or agent as to have been able legally to bind the defendant in respect to that alleged conduct in which the ~~witness~~ person was involved.

* * * * *

COMMITTEE NOTE

The amendment is intended to clarify that the discovery and disclosure requirements of the rule apply equally to individual and organizational defendants. See In re United States, 918 F.2d 138 (11th Cir. 1990)(rejecting distinction between individual and organizational defendants). Because an organizational defendant may not know what its officers

or agents have said or done in regard to a charged offense, it is equally important, if not more so, that the organizational defendant have access to statements made by persons whose actions could be binding on the defendant. See also United States v. Hughes, 413 F.2d 1244, 1251-52 (5th Cir. 1969), vacated as moot, 397 U.S. 93 (1970)(prosecution of corporations "often resembles the most complex civil cases, necessitating a vigorous probing of the mass of detailed facts to seek out the truth").

The amendment defines defendant in a broad, nonexclusive, fashion. See also 18 U.S.C. § 18 (the term "organization" includes a person other than an individual). The amendment does not address, however, the issue of what, if any, showing an organizational defendant would have to make to establish that a particular person was in a position to legally bind the organizational defendant. But as with individual defendants, the organizational defendant is entitled to the statements without first seeking court approval. If disclosure is denied and the defendant seeks relief from the court, the Committee envisions that the organizational defendant might have to offer some evidence, short of a binding stipulation or judicial admission, that the person in question was able to bind legally the defendant.

II. Proposed Amendment to Rule 16(a)(1)(A)[4/]

"Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. Where the defendant is a corporation, partnership, association or labor union, [the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who] it can inspect and copy or photograph any such relevant written or oral statements or testimony where the statements or testimony were made by a person who (1) was, at the time of the statement or [that] testimony, so situated as a[n] director, officer, [or] employee or agent as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as a[n] director, officer, [or] employee or agent as to have been able legally to bind the defendant in respect to that alleged conduct in which the witness was involved."

Commentary

Rule 16(a)(1)(A) contains two sentences at present. The first mandates disclosure of a "defendant's" written or recorded statements (including grand jury testimony) and of certain oral statements. The first sentence makes no express

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4/ Material to be deleted is bracketed; material to be added is underscored.

reference to the rights of an organizational defendant. The second sentence specifically refers to organizational defendants. However, it addresses only discovery of certain grand jury testimony. And, rather than mandating such discovery, it authorizes it only pursuant to court order.

Three principal interpretive problems have arisen with respect to the Rule's application to organizational defendants. First, it is not clear under the present rule whether an organizational defendant possesses the same rights to pretrial discovery as does an individual defendant regarding statements other than those made before a grand jury. In other words, under the Rule as currently drafted, an argument can be made that organizational defendants are not covered by the first sentence of Rule 16(a)(1)(A) and are thus not entitled to the discovery of the written and oral statements permitted by that sentence. See In re United States, 918 F.2d 138 (11th Cir. 1990) (rejecting the Government's argument that the first sentence of Rule 16(a)(1)(A) does not apply to organizational defendants).

Second, prosecutors have also argued that an organizational defendant is not, as a rule, permitted discovery of written or oral statements where those statements were made by former officers or employees of the defendant. In making this argument, the Government has asserted that in order to be discoverable under Rule 16 the statement of an individual must qualify as admission of the organizational defendant under Rule 801 of the Federal Rules of Evidence.

Finally, in light of the discretionary character of the second sentence of the Rule, prosecutors have recently begun arguing that an organizational defendant, in order to obtain the grand jury testimony of one of its present or former directors, officers, employees or agents, must stipulate concerning that individual's ability to bind the corporation.

The proposed amendment attempts to resolve these three issues by (1) making it clear that organizational defendants are entitled, on the same terms as are individuals, to discovery of non-grand jury written, recorded and oral statements; (2) eliminating any requirement that, as a condition for permissive discovery of grand jury testimony, organizational defendants must stipulate as to the binding nature of a witness's statements or conduct; and (3) clarifying (a) that organizational defendants are entitled to discovery of the statements or testimony of former directors, officers, employees or agents' so long as the individuals were in a position to bind the defendants either by their conduct or statements and (b) that the standards respecting admissions under Rule 801 of Federal Rules of Evidence do not apply to discovery under Rule 16.

Presently, the first sentence of Rule 16(a)(1)(A) provides that a "defendant" can discover certain of its written statements, certain of its oral statements, and its grand jury testimony. The second sentence states that a defendant who is a "corporation, partnership, association or labor union" (referred to herein as an "organizational defendant") "may" be permitted to

receive its grand jury testimony under certain circumstances. Since the first sentence refers to "defendant[s]" generally while the second refers to organizational defendants specifically, the Government has recently argued that the only discovery to which organizational defendants are entitled is that contained in the second sentence. After examining the Rule's purpose and history, the sole court apparently to address this issue rejected the Government's argument. See In re United States, 918 F.2d 138, 139-40 (11th Cir. 1990). Rule 16(a)(1)(A), it held, permits a organizational defendant the same right to discovery as an individual regarding statements other than those made before a grand jury. Id. The amendment would clarify the Rule to reflect explicitly this holding.

Not only is this clarification supported by the purpose and history of Rule 16(a)(1)(A), but it is grounded in fundamental fairness. A fictional entity like a corporation can only commit a culpable act by and through the acts of individuals such as its directors, officers, employees or agents. While an individual presumably knows what he or she has done, a corporation may have no idea of the merit of the charges against it since it may not know, or be able to discover internally, what its directors, officers, employees or agents said or did. Inasmuch as the purpose of Rule 16 is to "minimize the undesirable effects of surprise at the trial; and . . . otherwise contribute to an accurate determination of the issue of guilt or innocence," Fed. R. Crim. P. 16 Advisory Committee Note

(1974 amendment), an organizational defendant's need for discovery could thus arguably be greater than an individual's.[5/] Consequently, the amendment is intended to make it clear that an organizational defendant is entitled, at a minimum, to the same discovery rights respecting oral and written statements as is possessed by an individual defendant.

Assuming that, as the court held in In re United States, an organization is entitled to discover its written, oral, and recorded statements, the next interpretive issue that has sometimes arisen is whether the statements of former employees constitute discoverable statements of the defendant. Under the present Rule, two quite distinct interpretations are possible as to an organizational defendant's right to discover non-grand jury written and oral statements by current and former employees. On the one hand, a strong argument can be made that an organizational defendant is entitled to discovery of all relevant non-grand jury written and oral statements by any current or former employee without regard to whether that employee was in a position to bind the corporation at the time of

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[5/] Providing greater strength to this contention is the facts that "the criminal prosecution of corporations . . . often resembles the most complex civil cases, necessitating a vigorous probing of the mass of detailed facts to seek out the truth." United States v. Hughes, 413 F.2d 1244, 1251-52 (5th Cir. 1969), vacated as moot, 397 U.S. 93 (1970) (Hughes was cited with approval by the 1974 Advisory Committee in its notes to its amendments to Rule 16).

his statement or conduct.[6/] On the other hand, the Government has recently argued that an organizational defendant is not entitled to discovery of statements made by former employees even where the former employee was in a position to bind the organization at the time of the offense. In support of this argument, the Government has claimed that an organizational defendant is not entitled to the discovery of a statement of an individual unless the statement would qualify as an admission under Rule 801 of the Federal Rules of Evidence if offered at trial.[7/]

Neither of these extreme positions seems reasonable and the Rule should be amended to resolve the ambiguities inherent in its current wording.[8/] Inasmuch as Rule 16 is designed to permit

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[6/] This argument is possible because the second sentence of the present Rule permits an organizational defendant to obtain only the testimony of those individuals who were in a position to bind the organization at the time of their testimony or in respect to the conduct constituting the alleged offense whereas the first sentence of the Rule contains no such limitation. Thus, by implication, no such limitations could be argued to apply to discovery of non-grand jury statements discoverable under the first sentence.

[7/] Rule 801 provides that a statement is not barred from admission as hearsay if it is a statement "offered against a party and is (A) the party's own statement in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."

[8/] Indeed, the Government's position that Rule 16 does not permit discovery of non-grand jury statements by former employees (continued...)

defendants to discover their own statements, it would appear that an organizational defendant's discovery right should encompass all statements by persons who either at the time of the statement or at the time of the conduct were in a position to bind the organization.[9/] Thus, statements made by former employees about conduct engaged in when they were in a position to bind the organization should be discoverable. The proposed amendment achieves this result by recasting the Rule to state clearly that an organizational defendant is entitled to discover the relevant statements or testimony of any person who was or is situated in such a way as to bind it. By clear implication, discovery under the amended Rule 16 would not be dependent upon meeting Rule 801's requirements. Additionally, because the Rule at present only refers to "officer[s] or employee[s]" as those who can bind a organization, the amended Rule would also specifically name

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[8/] (...continued)
who were in a position to bind the organization at the time of the offense leads to the bizarre result that the current Rule provides broader discovery of grand jury testimony by former employees than of non-grand jury statements by such employees.

[9/] This would accord with the decisions which have either explicitly or implicitly addressed this issue. Cf. United States v. Orr, 825 F.2d 1537, 1541 (11th Cir. 1987) (refusing request to read Rule 16 and Fed. R. Evid. 801 in pari materia); United States v. Tarantino, 846 F.2d 1384, 1418 (D.C. Cir.) (similar), cert. denied, 109 S. Ct. 108 (1988); United States v. Bestway Disposal Corp., 681 F. Supp. 1027, 1030 (W.D.N.Y. 1988) (statements of past employees discoverable; no consideration of whether such statements must meet Rule 801's requirements); Fischbach & Moore, Inc., 576 F. Supp. at 1390 (same); United States v. Brighton Bldg. & Maintenance Co., 435 F. Supp. 222, 232-33 (N.D. Ill. 1977) (same), aff'd on other grounds, 598 F.2d 1101 (7th Cir.), cert. denied, 444 U.S. 840 (1979).

directors and agents as those whose acts or statements may legally be imputed to the organizational defendant.

In a number of cases, the Government has contended that unless an organizational defendant stipulates that the individual whose grand jury testimony it seeks under Rule 16(a)(1)(A)'s second sentence was in a position "to have been legally able to bind the defendant" as set forth in the Rule, the organization is not entitled to receive the individual's grand jury testimony. One reported decision (and one later unreported decision following that opinion) has accepted the Government's position.[10/] However, the Rule itself contains no such requirement and courts have often provided organizational defendants with access to grand jury transcripts without requiring such stipulations.[11/] Moreover, neither of these two decisions requiring stipulations (nor the authorities they cite) provides any rationale as to why

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10/ United States v. Twentieth Century-Fox Film Corp., 700 F. Supp. 1242, 1244 (S.D.N.Y. 1988), aff'd on other grounds, 882 F.2d 656 (2d Cir. 1989), cert. denied, 110 S. Ct. 722 (1990) (citing several inapposite decisions and ABA, Handbook on Antitrust Grand Jury Investigations, 74 (2d Ed. 1988) (stating that such a requirement "may" be imposed) and ABA, Criminal Antitrust Litigation Manual, 185 (1983) (similar)); United States v. California Overseas Bank, 1989 U.S. Dist. LEXIS 10402 (S.D.N.Y. Sept. 5, 1989) (following id.).

11/ See, e.g., United States v. Peters, 732 F.2d 1004, 1008 n.8 (1st Cir. 1984) (providing grand jury transcripts of current and former employees without any stipulation requirement); United States v. Bestway Disposal Corp., 681 F. Supp. 1027, 1030 (W.D.N.Y. 1988) (same); United States v. Fischbach & Moore, Inc., 576 F. Supp. 1384, 1390 (W.D. Pa. 1983) (same). Cf. also United States v. Caldwell, 543 F.2d 1333, 1353 (D.C. Cir. 1974), cert. denied, 423 U.S. 1087 (1976) (stressing the need for "acceptance of the language" of Rule 16 "for just what it says").

such a requirement is necessary. To the contrary, it appears intrinsically unfair to require an organization to stipulate blindly that testimony which it has never reviewed is binding on it. Indeed, individual defendants are entitled to their statements under Rule 16 even if they do not acknowledge the statement as being their own.

The proposed amended rule addresses this problem directly by making production of grand jury transcripts mandatory if the testimony is that of persons who were in a position to bind the organizational defendant either by their conduct or statements. This removes the source of the Government's argument in favor of a stipulation requirement -- the discretion accorded to a court to determine whether an organizational defendant "may" be provided with such testimony. See Twentieth Century-Fox Film, 700 F. Supp. at 1244 (adopting this argument).

The basis for the discretion presently accorded courts in this respect apparently arises out of a concern that has nothing to do with stipulation requirements. The drafters of the present Rule made it discretionary because they were concerned that there might be circumstances in which organizational defendants should not be entitled to discovery of testimony, as for instance, in the situation where corporate defendants might apply pressure against former employees who remained in the same industry and who would be vulnerable to intimidation. See In re United States, supra, 918 F.2d at 140. Not only does this specific concern seem remote, but Rule 16 expressly provides that

upon a sufficient showing "discovery or inspection [may] be denied, restricted, or deferred" or otherwise limited as necessary by court order. Fed. R. Crim. P. 16(d)(1). When required, therefore, the Government can obtain a limiting court order should an organizational defendant's discovery lead to other harms. Hence, when weighed against the purposes of Rule 16 -- minimization of the undesirable effects of surprise at trial and contributing to an accurate determination of the issue of guilt or innocence -- the discretionary character of Rule 16(a)(1)(A) appears unwarranted. Additionally, its continued existence is only likely to continue to lead to new interpretive problems.[12/]

12/ Since the production of organizational grand jury testimony is to become mandatory there is no longer a need for the organizational defendant to move the court to grant such discovery and, as with an individual defendant, the proposed amendment should make all organizational defendant discovery accomplishable without resort to court orders. See Fed. R. Crim. P. 16 Advisory Committee Note (1974 amendment) (discussing the lack of need to obtain a court order for discovery when the discovery is changed from discretionary to mandatory).

determining the conveyances were fraudulent.

The judgment of the United States District Court for the Northern District of Oklahoma is AFFIRMED.

In re UNITED STATES of America, Petitioner.

No. 90-3854.

United States Court of Appeals, Eleventh Circuit.

Oct. 30, 1990.

Corporation was indicted for conspiracy to defraud United States. The United States District Court for the Middle District of Florida, No 90-60-CR-T-15A, William J Castagna, J., refused to vacate magistrate's discovery order permitting corporate defendant to discover certain oral statements of corporate employees or agents. Government petitioned for writ of mandamus. The Court of Appeals, Hatchett, Circuit Judge, held that under federal discovery rule, corporate defendant was entitled to same discovery as an individual defendant regarding statements of "defendant" other than those made before grand jury.

Petition for writ of mandamus denied.

Criminal Law ⇐627.7(2)

Corporate defendant is entitled to same discovery as individual defendant regarding statements other than those made before grand jury; word "defendant" in discovery rule permitting defendant to inspect any relevant written or recorded statements made by defendant within possession of government applies to both individual and corporate defendants; second sentence of rule, applying to grand jury testimony discoverable by corporate defendant, does not reveal congressional intent to limit discovery of statements by corporate defendant to only grand jury testimony. Fed.Rules Cr.Proc.Rule 16(a)(1)(A), 18 U.S.C.A.

Andrew Grosso, Lewis Morris, Asst. U.S. Attys., Tampa, Fla., for U.S.

Judge William J. Castagna, U.S. District Judge, D. Frank Winkles, Tampa, Fla., Lee Fugate, James W. Dodson, Clearwater, Fla., for appellee.

On Petition for Writ of Mandamus from the United States District Court for the Middle District of Florida.

Before TJOFLAT, Chief Judge, HATCHETT and ANDERSON, Circuit Judges.

HATCHETT, Circuit Judge:

The government's petition for writ of mandamus requires that we rule on the scope of discovery provided to a corporate defendant in a criminal case pursuant to Federal Rule of Criminal Procedure 16(a)(1)(A). We deny the petition.

FACTS AND PROCEDURAL HISTORY

On February 28, 1990, a federal grand jury in the Middle District of Florida, returned a nine-count indictment charging the Professional Foundation for Health Care, Inc. (the Foundation) with conspiracy to defraud the United States Department of Health and Human Services. On March 23, 1990, the Foundation filed a motion to compel production of oral and grand jury statements of its employees. On July 14, 1990, a United States Magistrate issued an order which required the government to disclose to the Foundation both grand jury statements and oral statements made by the Foundation's employees to government agents where the government intended to introduce these statements at trial, and "where the declarant (1) was at the time the statement was made so situated as an officer or employee as to have been able legally to bind the defendant in respect to

the conduct constituting the offense or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to the conduct in which he was involved."

The government filed a motion for reconsideration with the district court asking it to vacate the magistrate's order. The district court denied the government's motion for reconsideration. The government then petitioned this court for a writ of mandamus directing the district court to vacate the magistrate's discovery order.

CONTENTIONS

The government contends that the only statements discoverable by a corporate defendant under Federal Rule of Criminal Procedure 16(a)(1)(A) are those made by certain employees or officers before the grand jury.

The Foundation contends that the legislative history and plain language of Rule 16(a)(1)(A) provides for discovery of the statements of employees of a corporate defendant to the same extent as an individual defendant.

ISSUE

The issue is: whether under Federal Rule of Criminal Procedure 16(a)(1)(A) a corporate defendant is entitled to the same discovery as an individual defendant regarding statements other than those made before a grand jury.

DISCUSSION

Rule 16(a)(1)(A) of the Federal Rules of Criminal Procedure provides:

> Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. Where the defendant is a corporation, partnership, association or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who (1) was, at the time of that testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which the witness was involved.

18 U.S.C.A. (West Supp.1990).

The first sentence of Rule 16(a)(1)(A) requires that certain disclosures be made to a defendant upon request. The rule does not by its terms define "defendant" as a natural person. The government, however, argues that the second sentence of the rule is the only basis for disclosing statements to a corporate defendant. According to the government, to read the rule in any other fashion would render the second sentence of the rule superfluous.

Contrary of the government's claim, the second sentence of Rule 16(a)(1)(A) is a congressional attempt to treat the corporate defendant in the same manner as an individual defendant, rather than an attempt to make a distinction between corporate and individual defendants for purposes of delineating the scope of discovery rights. Under Rule 16(a)(1)(A), individual defendants are entitled to discovery of their own grand jury testimony which relates to the offense charged, because "[t]he traditional rationale behind grand jury secrecy—protection of witnesses—does not apply when

the accused seeks discovery of his own testimony. *Cf. Dennis v. United States*, 384 U.S. 855 [86 S.Ct. 1840, 16 L.Ed.2d 973] (1966)." Fed.R.Crim.P. 16 advisory committee's note, 18 U.S.C.A. (West 1986). Prior to the 1974 amendment of Rule 16, which added the reference to legal entities as defendants, the Fifth Circuit had held that corporate defendants could discover the grand jury testimony of all present and former officers and employees regarding matters within the scope of their employment. *United States v. Hughes*, 413 F.2d 1244, 1253 (5th Cir.1969), *vacated as moot*, 397 U.S. 93, 90 S.Ct. 817, 25 L.Ed.2d 77 (1970).

The drafters of Rule 16(a)(1)(A) were concerned that corporate defendants should not be entitled to grand jury testimony of former employees in every instance. Senator McClellan of Arkansas, for example, expressed concern that corporate defendants might apply pressure against former employees who remained in the same industry and who would be vulnerable to intimidation. 121 Cong.Rec. S12765 (daily ed. July 17, 1975). The Department of Justice took the position that statements and grand jury testimony of corporate defendants "should be discoverable under Rule 16 only to the extent that such statements and testimony may be equated with those of individual defendants discoverable under the same rule." *Federal Rules of Criminal Procedure Amendments: Hearings on H.R. 6799 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 2d Sess. 128, 171 (statement of John C. Keeney, Acting Assistant Attorney General) (June 20, 1975). In response, the advisory committee's note to Rule 16 cites the *Hughes* decision and then states that Rule 16(a)(1)(A) "makes clear that such statements are discoverable if the officer or employee was 'able legally to bind the defendant in respect to the activities involved in the charges.'" *Cf. State v. CECOS International, Inc.*, 38 Ohio St.3d 120, 526 N.E.2d 807 (1988) (noting that Fed.R.Crim.P. 16(a)(1)(A) effectively overruled *Hughes*).

The legislative history relating to the second sentence of the rule does not reveal congressional intent to limit discovery of statements by a corporate defendant to only grand jury testimony. Rather, the drafters added the second sentence to Rule 16(a)(1)(A) to address the concern that the grant of discovery of grand jury testimony to a defendant found in the first sentence of the rule would be used by corporate defendants to discover grand jury testimony of employees unable to legally bind the corporation.

In light of these factors, we hold that the word "defendant" in the first sentence of Rule 16(a)(1)(A) includes both individual and corporate defendants. The second sentence merely qualifies the first sentence and restricts discovery of statements to a corporate defendant consistent with the general policy of grand jury secrecy. Without this limitation on discovery of grand jury testimony, corporate defendants would be entitled to discovery of the grand jury testimony of all of its officers and employees rather than the two categories specified.

CONCLUSION

For the reasons stated above, we deny the government's petition for writ of mandamus.

In re CAPITAL CITIES/ABC, INC., Petitioner.

No. 90-7749.

United States Court of Appeals, Eleventh Circuit.

Nov. 2, 1990.

Television network filed petition for mandamus relief directed at the United States District Court for the Southern District of Alabama, No. 90-0766-CB-C, chal-

em II-D-5

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Proposed Amendment to Rule 29(b)

DATE: March 6, 1992

In June 1991, the Department of Justice proposed an amendment to Rule 29(b) which would permit the trial court to defer ruling on a motion for judgment of acquittal until after the verdict. The letter proposing this amendment is attached along with materials indicating action on a similar proposal in 1983.

At its Fall 1991 meeting, the Committee considered the proposal and after some discussion a consensus emerged that the amendment, if any, should include some limitation on what evidence the trial could consider in making a deferred ruling on the motion. Attached is a draft amendment of Rule 29(b) which addresses that issue.

RULES OF CRIMINAL PROCEDURE

Rule 29. Motion for Judgment of Acquittal

* * * * *

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

COMMITTEE NOTE

The amendment permits the reservation of a motion for a judgment of acquittal made at the close of the government's case in the same manner as the rule now permits for motions made at the close of all of the evidence. Although the rule as written did not permit the court to reserve such motions made at the end of the government's case, trial courts on occasion have nonetheless reserved ruling. See, e.g., United States v. Bruno, 873 F.2d 555 (2d Cir.), cert. denied, 110 S.Ct. 125 (1989); United States v. Reifsteck, 841 F.2d 701 (6th Cir. 1988). While the amendment will not affect a large number of cases, it should remove the dilemma in those close cases where at the end of the government's case the trial court would feel pressured into making an immediate, and possibly erroneous, decision or violating the rule as presently written by reserving its ruling on the motion.

The amendment also permits the trial court to balance the defendant's interest in an immediate resolution of the motion against the interest of the government in being able to appeal, should a guilty verdict result, a subsequent unfavorable ruling and thus attempt to have the verdict reinstated. Under the double jeopardy clause the government may appeal the granting of a motion for judgment of acquittal only if there would be no necessity for another trial, i.e., only where the jury has returned a verdict of guilty. United States v. Martin Linen Supply Co., 430 U.S. 564 (1977). Thus, the government's right to appeal a rule 29 motion is only preserved where the ruling is reserved until after the verdict.

In addressing the issue of preserving the government's right to appeal and at the same time recognizing double jeopardy concerns, the Supreme Court observed:

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

United States v. Scott, 437 U.S. 82, 100 n. 13 (1978). By analogy, reserving a ruling on a motions for judgment of acquittal strikes the same balance as that reflected by the Supreme Court in Scott.

Reserving a ruling on a motion made at the end for the government's case does pose problems, however, where the defense decides to present its evidence and run the risk that its evidence would support the government's case. To minimize that problem, the amendment provides that the trial

court is to consider only the evidence submitted at the time of the motion in making its ruling, whenever made.

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

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

DATE: September 12, 1991

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

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

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

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

U.S. Departm of Justice

Criminal Division

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

JUN 24 1991

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

Dear Judge Hodges:

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

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

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

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

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

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

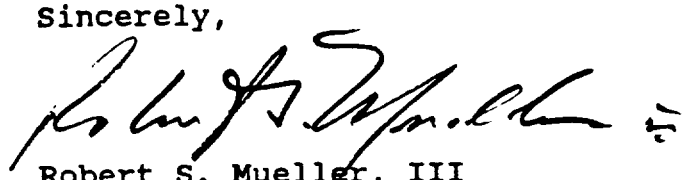
Rather than either coercing a premature decision or encouraging well-intentioned Rule breaking, in cases such as the one posited, where the sufficiency question is close and the judge is genuinely undecided, we believe the court should have the lawful option to reserve decision; and in determining whether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

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

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

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

Sincerely,



Robert S. Mueller, III
Assistant Attorney General

Enclosure

COMMITTEE NOTE

Rule 12.1(f)

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

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

* * *

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

COMMITTEE NOTE

Rule 12.2(e)

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

Rule 29. Motion for Judgment of Acquittal

* * *

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

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

* * *

COMMITTEE NOTE

Rule 29(b)

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

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

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

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

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

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

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

Rule 30. Instructions

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

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

Rule 29

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

Rule 30

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

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

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

Respectfully submitted,

Walter E. Hoffman
Chairman, Advisory Committee on Criminal Rules

July 18, 1984

M E M O R A N D U M

May 23, 1983

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

TO: Advisory Committee on Criminal Rules

FROM: Wayne R. LaFave

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

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

U.S. Department of Justice

Criminal Division

COPY

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

19 JAN 1983

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

Dear Judge Hoffman:

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

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

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

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

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

c.c. Prof. Wayne LaFave, University of Illinois College of Law

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

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

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

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

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

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

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

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

> We should point out that it is entirely possible for a trial court to reconcile the public interest in the Government's right to appeal from an erroneous conclusion of law with the defendant's interest in avoiding a second prosecution. In United States v. Wilson, 420 U.S. 332 (1975), the court permitted the case to go to the jury, which returned a verdict of guilty, but it subsequently dismissed the indictment for preindictment delay on the basis of evidence adduced at trial. Most recently in United States, v. Ceccolini, 435 U.S. 168 (1978), we described similar action with approval: "The District Court had sensibly first made its finding on the factual question of guilt or innocence, and then ruled on the motion to suppress; a

5/ See, e.g., United States v. Conway supra n. 1; United States v. Dreitzler, 577 F.2d 539, 552 (9th Cir. 1978; United States v. Braverman, 522 F.2d 218 (7th Cir.), cert. denied 423 U.S. 985 (1978); United States v. Brown, 456 F.2d 293 (2d Cir.), cert. denied 407 U.S. 910 (1972).

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

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

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

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

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

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

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

Sincerely,

D. Lowell Jensen
Assistant Attorney General
Criminal Division

cc: Professor Wayne LaFave

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

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

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

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

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

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

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

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

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

Comments and Recommendations

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

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

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

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

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

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

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

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

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

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

[footnote continued on page 7]

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

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

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* footnote continued from page 6

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

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

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

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

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

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

CRIMINAL JUSTICE SECTION

American Bar Association

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

ON BEHALF OF THE
AMERICAN BAR ASSOCIATION
CRIMINAL JUSTICE SECTION

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

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

WASHINGTON, D.C.
FEBRUARY 14, 1984

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

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

Introduction

Mr. Chairman and members of the Committee:

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

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

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

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

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

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

The Criminal Justice Section believes that the purpose of

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

Rule 29(b) - Motion for Judgment of Acquittal

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

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

ANALYSIS OF PROPOSED CHANGES

TO THE

FEDERAL RULES OF CRIMINAL PROCEDURE

AND

TO THE

RULES Ggoverning SECTION 2254 AND SECTION 2255 CASES

AMERICAN COLLEGE OF TRIAL LAWYERS

FEDERAL RULES OF CRIMINAL PROCEDURE

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NOVEMBER, 1983

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TO THE COMMITTEE ON
FEDERAL RULES OF CRIMINAL PROCEDURE:

Under guidelines promulgated by the American College of Trial Lawyers, it is the responsibility of the Federal Rules of Criminal Procedure Committee[1/] to submit its comments concerning the changes in federal rules proposed by the United States Judicial Conference Committee on Federal Rules of Practice and Procedure.

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

A summary of the proposed rule changes follows below:

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

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

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

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

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

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

* * *

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

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

RULE 29(b)

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

Rule 29. Motion for Judgment of Acquittal

* * *

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

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15/ Proposed Amendments, p. 7.

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

* * *16/

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

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

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16/ Proposed Amendments, p. 8.

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

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

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

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

THE LEGAL AID SOCIETY

Criminal Appeals Bureau

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COMMENTS

OF THE

FEDERAL DEFENDER SERVICES UNIT

OF

THE LEGAL AID SOCIETY

OF THE CITY OF NEW YORK

ON THE

PRELIMINARY DRAFT OF PROPOSED AMENDMENTS

TO THE

FEDERAL RULES OF CRIMINAL PROCEDURE,

RULES GOVERNING §2254 CASES

IN THE UNITED STATES DISTRICT COURTS, AND

RULES GOVERNING §2255 PROCEEDINGS

IN THE UNITED STATES DISTRICT COURTS

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

— February 14, 1984

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

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

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

PROPOSED RULE 29

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PROPOSED RULE 30

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

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

Item II-D-6

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Proposed Repeal of Rule 32(e)

DATE: March 9, 1992

As noted in the attached letter, the Department of Justice has recommended that Rule 32(e) be repealed. The letter is self-explantory.

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

ROBERT E. KEETON
CHAIRMAN

JOSEPH F. SPANIOL, JR.
SECRETARY

CHAIRMEN OF ADVISORY COMMITTEES
KENNETH F. RIPPLE
APPELLATE RULES
SAM C. POINTER, JR.
CIVIL RULES
WILLIAM TERRELL HODGES
CRIMINAL RULES
EDWARD LEAVY
BANKRUPTCY RULES

December 18, 1991

Mr. Roger Pauley, Director
Office of Legislation
U. S. Department of Justice
Criminal Division, Room 2244
Washington, DC 20530

Dear Roger:

Thank you very much for your letter of December 12, 1991 suggesting a repeal of Rule 32(e) F. R. Cr. P.

I note that you appropriately sent a copy of your letter to Dave Schlueter; and, by copy of this letter to him, I will ask Dave to include this item on the agenda for the Committee's consideration at its next meeting in April.

Warm personal regards.

Cordially,

Wm. Terrell Hodges

c: Professor David A. Schlueter

U.S. Department of Justice

RAP:pam
#920002041

Washington, D.C. 20530

DEC 12 1991

Honorable William Terrell Hodges
Judge, United States District Court
United States Courthouse, Suite 108
611 North Florida Avenue
Tampa, Florida 33602

Dear Judge Hodges:

I am writing to suggest that the Advisory Committee consider, as a technical amendment, repealing Rule 32(e), F.R. Crim.P. That Rule states that a defendant convicted of an offense not punishable by life imprisonment or death may be placed on probation "if permitted by law." While the quoted phrase may save the Rule from outright inconsistency with the later-enacted statute, 18 U.S.C. 3561(a), the Rule is misleading in that the statute precludes probation not only for crimes that carry a maximum sentence of life imprisonment or death (i.e. Class A felonies, see 18 U.S.C. 3559(a)), but also for Class B felonies and other cases in which the defendant has been sentenced at the same time to a term of imprisonment.[1]

Although it would be possible to rewrite Rule 32(e) to either refer to the statute or otherwise be consistent with it, I recommend that the Rule be repealed because (1) it arguably is more in the nature of substance (i.e. setting forth the circumstances in which probation may be imposed) than procedure, and (2) in attempting only to address sentences of probation, it is incomplete. If, in other words, it is appropriate to include in the Federal Rules of Criminal Procedure a description of when a probationary sentence may be imposed, why is it not also appropriate to include similar descriptions -- currently lacking in the Rules -- with respect to sentences to pay a fine, restitution, and other permissible types of sentence? I submit that these matters are better left to Title 18. See chapters 227 and 232.

---

[1] In fact, the Rule appears to be inconsistent with 18 U.S.C. 3561(a) in barring probation for an organization convicted of a Class A felony. The statute is careful to preclude probation only for individuals convicted of certain felonies.

I hope you are well and look forward to seeing you in April.

Sincerely,

Roger A. Pauley

Roger A. Pauley, Director
Office of Legislation
Criminal Division

cc: Professor David A. Schlueter

Item **II-D-7**

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Rule 49: Proposed Amendment Regarding Use of Double-Sided Paper

DATE: March 7, 1992

Attached is a letter from the Environmental Defense Fund urging amendments to the Federal Rules of Appellate, Civil and Criminal Procedure to the effect that only double-sided, unbleached paper should be used for legal pleadings. Citing environmental concerns, the organization estimates that federal litigation is likely to result in the use of over 150 million pieces of paper during the duration of the cases. The group also estimates that requiring double-sided paper would save approximately 75 million pieces of paper a year.

Any amendments concerning the size and composition of paper could be made in Rule 49.

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

ROBERT E KEETON
CHAIRMAN

JOSEPH F SPANIOL JR

CHAIRMEN OF ADVISORY COMMITTEE
KENNETH F RIPPLE
APPELLATE RULES
SAM C POINTER JR
CIVIL RULES
CRIMINAL RULES
EDWARD LEAVY
BANKRUPTCY RULES

December 19, 1991

Karen Florini, Esquire
Howard Fox, Esquire
James Simon, Esquire
Stephanie Pollack
Environmental Defense Fund
1616 P Street, N.W., Suite 150
Washington, D. C. 20036

Dear Attorneys Florini, Fox, Simon and Pollack:

Thank you for your letter of December 12, 1991, regarding the filing of legal pleadings on double-sided, unbleached paper. A copy of your letter, with enclosure, will be sent to the members of the Judicial Conference Committees on Rules of Practice and Procedure for consideration.

We appreciate your interest in the Federal rulemaking process.

Sincerely,

Joseph F. Spaniol, Jr.
Secretary

cc: Honorable Robert E. Keeton
Chairmen, Members and Reporters
to the Advisory Committees on
Rules of Practice and Procedure

December 12, 1991

Joseph F. Spaniol, Jr.
Secretary, Committee on Rules of
Practice and Procedure
Administrative Office of the U.S. Courts
1120 Vermont Avenue, NW, Suite 626
Washington, DC 20544

BY MESSENGER

Dear Mr. Spaniol:

The undersigned environmental organizations hereby request that the Committee on Rules of Practice and Procedure initiate revisions to the Federal Rules of Civil, Criminal, and Appellate Procedures to allow the filing of legal pleadings on double-sided, unbleached paper. Such a revision would constitute a small but significant step in improving the efficiency with which our society uses materials and implementing pollution-prevention strategies.

According to statistics published by the Administrative Office of the United States Courts, over 300,000 new cases were filed in the federal courts last year. Making conservative assumptions about average lengths of dockets, numbers of court copies submitted, and numbers of parties served, these cases alone are likely to entail the filing and serving of well over **150 million pieces of paper** during their active lives. Laid end-to-end, that's more than enough sheets of paper to wrap around the Earth and then some. (Our calculations are shown in the attached table.)

Two-Sided Copies Would Reduce Solid Waste and Pollution.

Using two-sided copies would reduce the amount of paper-associated waste and pollution throughout the whole life-cycle of litigation documents, from the initial manufacture of paper through ultimate document disposal.

If all parties to federal litigation filed and served two-sided documents, we estimate that more than 75 million sheets of paper would be saved annually. As a result, the amount of pollution created by the paper industry would be correspondingly reduced. This is no trivial consideration, for the paper industry ranks among the highest in the nation in volume of toxic pollutants released and transferred, as reported in the U.S. Environmental Protection Agency's Toxics Release Inventory.[1]

In addition, use of double-sided copies would generate less waste -- or need for storage -- at the end of a case. All of the papers generated during litigation either become trash or are placed in long-term storage by the courts (and parties). Either way, shorter files are preferable. By using double-sided paper in litigation, the legal profession can start reducing the amount of paper used and eventually discarded.

Use of Unbleached Paper Avoids Formation of Bleaching Process By-products

At present, the manufacture of writing and printing paper generally involves use of substantial amounts of chlorine compounds in the bleaching process. As by-products, substantial quantities of several hundred chlorinated compounds are formed, some of which are highly toxic (including dioxins). These by-products are found in waste-water effluents and sludges from pulp mills as well as in the paper products themselves. Allowing use of unbleached paper (whether virgin or recycled) offers an opportunity to avoid creating these compounds in the first place -- a stellar opportunity for pollution prevention.

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[1] U.S. Environmental Protection Agency, Toxics In the Community: National and Community Perspectives 113 (1991) (EPA 560/4-91-014).

Derivation of Estimates of Paper Usage in Federal Litigation

These estimates are approximations only, and are provided in order to illustrate the potential scope of reductions in paper use. They are based on the number of cases filed in federal court in 1990. See Report of the Proceedings of the Judicial Conference of the United States, 4, 5 (Washington, DC, 1991). Totals exclude cases filed in the U.S. Court of Appeals for the Federal Circuit.

Few statistics are available on numbers of pages filed and served per case. To provide an estimate, we used conservative assumptions (as indicated in the footnotes to the table). Of course, some cases will generate substantially more pages, and others less, particularly if they are settled quickly. Overall, however, these figures are probably significant underestimates because they:

--exclude all exhibits, appendices, and discovery materials;
--assume that each case has only one plaintiff or appellant and one defendant or appellee;
--assume the filing of only one motion at the district court level and no motions at the appellate level;
--do not account for filing and service of additional copies when the deferred appendix method is used in appellate cases.

ESTIMATED NUMBERS OF PAGES FILED AND SERVED IN FEDERAL CASES

Case Type	Est. Docket Length (a)	Court Copies	Party Copies	Total Copies (b)	Total Pages per Case (c=a x b)	Number of New Cases (d)	Total Pgs/Year (e=c x d)	Potential Savings (=e/2)
Civil	100*	Orig. + 1	2	3	300	211,626	63,487,800	31,743,900
Criminal	50**	Orig. + 1	2	3	150	48,250	7,237,500	3,618,750
Appellate	125***	Orig. + 14	2	16	2,000	40,982	81,964,000	40,982,000
Grand Total							152,689,300	76,344,650

*/ 100 pages = e.g., 15 page complaint, 10 page answer, one 20 page motion, one 15 page response, one 5 page reply, 20 page plaintiff's pretrial brief, 15 page defendant's pretrial brief.

**/ 50 pages = e.g., 10 page indictment, 40 pages of further filings.

***/ 125 pages = e.g., 50 page opening brief, 50 page response, 25 page reply, no motions.

Around the world in paper:

Circumference of earth = 24,902 miles (x 5280 ft/mile x 12 in/ft) = 1,577,790,720 inches
1,577,790,720 inches/11 inches (1 page) = 143,435,520 sheets to go around the earth.

Item II-D-8

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Rule 59: Authorization for Judicial Conference to Make Technical Amendments to Rules

DATE: March 7, 1992

At its January 1992 meeting, the Standing Committee considered a report from its Subcommittee on Style on the problem of making technical, nonsubstantive, amendments to the Rules. The subcommittee recommended that amendments to the various Federal Rules of Procedure could remove the necessity of seeking Supreme Court and Congressional approval of the so-called technical amendments. With regard to the Criminal Rules, it was suggested that an amendment to Rule 59 would be appropriate which would authorize the Judicial Conference to make the necessary changes.

A draft amendment to Rule 59 to that effect is attached.

A similar amendment could be made to Federal Rules of Evidence 1102 and a draft amendment to that Rule is also attached.

RULES OF CRIMINAL PROCEDURE

Rule 59. Effective Date; Technical Amendments

(a) These rules take effect on the day which is 3 months subsequent to the adjournment of the first regular session of the 79th Congress, but if that day is prior to September 1, 1945, then they take effect on September 1, 1945. They govern all criminal proceedings thereafter commenced and so far as just and practicable all proceedings then pending.

(b) The Judicial Conference of the United States shall have the power to correct typographical and clerical or other purely verbal or formal matters in these rules.

COMMITTEE NOTE

The amendment is intended to streamline the process of correcting clerical or other technical matters which appear from time to time in the Rules. Currently such changes are formally reviewed by the Supreme Court and Congress pursuant to the Rules Enabling Act.

FEDERAL RULES OF EVIDENCE

Rule 1102. Amendments

Amendments to the Federal Rules of Evidence may be made as provided in section 2076 of title 28 of the United States Code. The Judicial Conference of the United States shall have the power to correct typographical and clerical or other purely verbal or formal matters in these rules.

COMMITTEE NOTE

The amendment streamlines the process of correcting or changing clerical or technical matters which appear from time to time in the Rules. Currently such changes are formally reviewed by the Supreme Court and Congress pursuant to the Rules Enabling Act.

Item II-D-9

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: ABA Megatrials Proposal; Follow-Up

DATE: March 5, 1992

At its November 1991 meeting in Tampa, the Committee considered a proposal from the American Bar Association to address the issue of "megatrials." The thrust of the proposal was that the Advisory Committee should encourage the trial courts to fashion appropriate remedies or encourage adoption of local rules dealing with the problem.

The Committee believed that such action was outside its jurisdiction and reported the matter to the Standing Committee. Attached is a letter from Judge Keeton to the Secretary of the ABA indicating the Standing Committee's position.

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

January 30, 1992

Anthony R. Palermo, Secretary
American Bar Association
700 Midtown Tower
Rochester, New York 14604

Dear Mr. Palermo:

Following the meeting of the ABA House of Delegates last August, you transmitted to Judge William Terrell Hodges, as Chairman of the Judicial Conference Advisory Committee on the Federal Rules of Criminal Procedure, an ABA approved resolution and report asking Judge Hodges' Committee "to encourage the ... district courts to fashion remedies in appropriate individual cases, or encourage adoption of local rules in selected districts" regarding megatrials.

At the meeting of the Judicial Conference Standing Committee on Rules of Practice and Procedure held on January 16-17, 1992, Judge Hodges reported that

> [A]fter some discussion on this matter the [Advisory Committee on Criminal Rules] concluded that the specific request made by the resolution was probably outside its jurisdiction and that the existing rules already afford district judges a number of techniques for appropriately managing megatrials. Rather than attempting to amend any particular rules of criminal procedure, the Committee believed that it would be more appropriate to refer the matter to the Standing Committee.

After considerable discussion it was the consensus of the Standing Committee that the problem presented was one of practice and case management, not rule making, and that the function of encouraging and monitoring local experimentation should not be undertaken by the Judicial Conference Rules Committees.

As you may know, as an individual judge I welcome the interest of the Bar in fashioning solutions to the special problems of megatrials, and in helping judges address the controversial issues that emerge as special procedures and practices are fashioned. At least for the present, however, it seems best not to attempt by national rules to guide or control local experimentation. As I understand the resolution of the ABA House of Delegates, it is entirely consistent with this view. I hope interested members of the ABA will understand why the Standing Committee on Rules of Practice and Procedure concludes that the Rules Committees of the Judicial Conference should not act in these circumstances.

It appears that the resolution of the House of Delegates originated in the ABA Criminal Justice Section. I would be grateful if you would communicate the views of the Standing Committee to the leaders of that Section and to others who may have an interest in the subject.

Sincerely,

Robert E. Keeton

Robert E. Keeton

cc: Honorable William Terrell Hodges
Professor David A. Schlueter

Item III

COMMITT ' ON RULES OF PRACTICE AND P CEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

April 20, 1992

MEMORANDUM TO THE CHAIRMAN, MEMBERS, LIAISON MEMBER, AND REPORTER OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

SUBJECT: Evidence Rule 702 and related discovery rules

At the request of Judge Keeton I am sending you herewith a copy of a letter received from Professor Michael J. Saks, regarding Evidence Rule 702 and related discovery rules. Extra copies will be available at the Committee meeting this week.

Joseph F. Spaniol, Jr.
Secretary

cc: Honorable Robert E. Keeton
Honorable Sam C. Pointer, Jr.
Standing Committee

United States District Court
Post Office and Courthouse Building
Boston, Massachusetts 02109

CHAMBERS OF
ROBERT E. KEETON
DISTRICT JUDGE

April 17, 1992

Michael J. Saks, Ph.D.
Professor
The University of Iowa College of Law
Boyd Law Building
Iowa City, Iowa 52242

Dear Professor Saks:

Thank you for your letter of April 3rd and the enclosures.

I am arranging for copies of your letter to be available to members of the Standing Committee and the Advisory Committee on Criminal Rules before their respective meetings in the near future.

Sincerely,

Robert E. Keeton

cc: Joe Spaniol, Secretary

THE UNIVERSITY OF IOWA

3 April 1992

Hon. Robert Keeton
U.S. District Court for Massachusetts
Room 306
John W. McCormack Post Office and Courthouse
Boston, MA 02109

RE: Proposed revision to FRE 702 and related discovery rules

Dear Judge Keeton:

I am writing to you in your capacity as chair of the Standing Committee on Rules of Practice and Procedure.

To the extent that the proposed revisions are aimed at enhancing the prospects that finders of fact will be supplied with evidence that will increase the likelihood that they reach correct factual conclusions, I want to point out that the concerns that motivate the proposed changes apply with at least the same force to the criminal context. (The principal exception may be the cost to litigants of hiring experts, and that difference cuts in a variety of odd directions when we compare the civil context to the criminal.)

Because the criminal context typically involves more lopsided resources than the civil context, whole categories of special kinds of evidence have been invented and admitted without the benefit of serious adversary testing. Because many of the forensic sciences have their origins and continued existence almost exclusively in police laboratories, they did not and do not undergo the kind of professional and scientific scrutiny that occurs in fields that have academic roots, industry applications, and are offered in the wider marketplace. Many kinds of forensic science evidence have been admitted without supporting data, without challenge, and with only superficial judicial scrutiny. As a result, the accuracy of much of this evidence is doubtful, and in some areas has been found to be far poorer than asserted by experts and assumed by the public.

Ironically, because most criminal defendants have no funds to hire opposing experts, and because they would have difficulty finding any to hire if they did have the funds (because forensic scientists work almost exclusively in and for police laboratories) the illusion is created that such

College of Law Boyd Law Building Iowa City, Iowa 52242 FAX 319/335-9019

evidence and expertise is sound and uncontroversial. On the civil side, the defense often has the resources to challenge a plaintiff's scientific claims and can find the experts it needs (in universities, industry, hospitals, etc.). Thus, the quality of information on the civil side is healthier because it has been subjected to adversary testing, yet the very vigor of that testing has created an impression that there is a problem there. The problem is greater where there appears to be no problem. Attention has been drawn to where the lion's share of the money is, not to where the lion's share of the problem is.

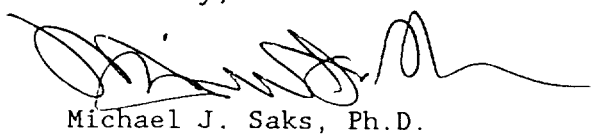
As one example, consider a detailed study of the claim of document examiners to be able to identify handwriting. See Risinger, Denbeaux & Saks, Exorcism of Ignorance as a Proxy for Rational Knowledge: The Case of Handwriting Identification "Expertise," 137 U. Pa. L. Rev. 731 (1989) (showing that no data exist supporting the claims of expertise, minimal if any judicial review of the basis of the claims of expertise, research showing contrary to the claims of the field that many people write indistinguishably alike, and proficiency studies showing a high rate of errors by document examiners). (Enclosed.) (I have been undertaking similar reviews of other common forensic science, and find that some of them present a similar record.)

More generally, basic empirical and theoretical research in many of the forensic sciences borders on non-existent, and what there is often is far from sufficient to establish its premises or logic. Few are the fields that offer as little support for their claims of expertise. For the most part, forensic science operates on faith. As a contrast the this state of affairs, what it would take to build a base of knowledge from which a forensic science could draw supportable inferences is discussed in Saks & Koehler, What DNA "Fingerprinting" Can Teach the Law About the Rest of Forensic Science 13 Cardozo L. Rev. 361 (1991). (Enclosed.)

Beyond the lack of scientific basis to the claims of many forensic sciences, consider the findings of proficiency testing of various forensic scientists. The original research, Peterson, Fabricant & Field, Crime Laboratory Proficiency Testing Research Program: Final Report (USGPO, 1978) found a high rate of error for a wide range of forensic sciences. (Examples: 71.2% obtained unacceptable results in blood testing, 34% erred in matching paint samples, 22% could not accurately distinguish metals, 50% could not tell that what they were sent were dog hairs.) As a result, in the president of the International Association for Identification told his members in 1978 that "crimes laboratories flunk[ed] analysis." The principal response of the forensic science community was to stop publishing such studies. The findings of subsequent research, sponsored by the Forensic Sciences Foundation, have been kept secret. This contrasts with the situation in many other fields, where studies of the accuracy of asserted expertise are publically available in the published literature. Ironically, these "sciences" that exist for virtually no reason other than to supply information to the courts in criminal cases have endeavored to make unavailable to the courts and the public the information necessary to assess the quality of their evidence and expertise.

My suggestion to you is straightforward: Revise the rules so as to make the courts no less able to evaluate the quality of asserted scientific evidence offered in criminal cases than they will be in civil cases.

Sincerely,



Michael J. Saks, Ph.D.
Professor

encl.

XC: Dean Daniel R. Coquillette, Dean Paul D. Carrington,
Hon. Ralph K. Winter, Jr.

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

ROBERT E. KEETON
CHAIRMAN

JOSEPH F. SPANIOL, JR.
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CRIMINAL RULES

EDWARD LEAVY
BANKRUPTCY RULES

BY FAX

April 16, 1992

MEMORANDUM TO DAVID A. SCHLUETER

SUBJECT: April 23-24, 1992, Criminal Rules Meeting

I am enclosing the proposed amendments to Civil Rules 83 and 84, and to Evidence Rule 702 in the form tentatively approved by the Civil Rules Committee for recommendation to the Standing Committee. The Committee also approved the proposal to amend Evidence Rule 705 without further change.

Joseph F. Spaniol, Jr.
Secretary

cc: Honorable Robert E. Keeton
Advisory Committee on
Criminal Rules

Rule 83. Rules by District Courts; Orders

* * * *

(b) Experimental Rules. With the approval of the Judicial Conference of the United States, a district court may adopt an experimental local rule inconsistent with rules adopted under 28 U.S.C. §§ 2072 and 2075 if it is *otherwise* consistent with the provisions of Title 28 of the United States Code and is limited in its period of effectiveness to five years or less.

* * * *

Rule 84. Forms; Technical Amendments

* * * *

(b) Technical Amendments. The Judicial Conference of the United States may amend these rules or the explanatory notes ~~to conform to statutory changes,~~ to correct errors in grammar, spelling, cross-references, ~~and~~ *or* typography, and to make other similar technical changes of form ~~and~~ *or* style.

Rule 702. Testimony by Experts

Testimony providing scientific, technical, or other specialized information, in the form of an opinion or otherwise, may be received if (1) it is reasonably reliable and ~~may~~ *will, if credited,* substantially assist the trier of fact to understand the evidence or to determine a fact in issue and (2) the witness is qualified as an expert with respect thereto by knowledge, skill, experience, training, or education. Except with leave of court for good cause shown, the witness shall not testify on direct examination in any civil action to any opinion or inference, or reason or basis therefor, that has not been disclosed as required by Rules 26(a)(2) and 26(e)(1) of the Federal Rules of Civil Procedure.

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Survey of Judges on Use of Expert Witnesses

DATE: April 12, 1992

The Judicial Center has just completed a survey of federal judges on the issue of expert testimony in civil trials. That report/survey is enclosed for your information. As you can see, the study focuses to some extent on the proposed amendments to Rules of Evidence 702 and 705, which are being handled by the Civil Rules Committee. You may wish to include this material in your agenda books at the tab marked "II-C-3" (Report of Evidence Subcommittee).

THE FEDERAL JUDICIAL CENTER
DOLLEY MADISON HOUSE
1520 H STREET, N.W.
WASHINGTON, D.C. 20005

RESEARCH DIVISION

Writer's Direct Dial Number
FTS/202 633-6341

April 2, 1992

Hon. William Terrell Hodges
Chairman, Advisory Committee on Criminal Rules
Chief Judge, United States District Court
United States Courthouse
Suite 108
611 North Florida Avenue
Tampa, Florida

Dear Judge Hodges:

The enclosed report presents preliminary findings of the Federal Judicial Center's survey on the characteristics of expert testimony in recent civil trials This report focuses on the judges' perceptions of the problems with expert testimony, and their reactions to proposed changes to Rule 702 of the Federal Rules of Evidence and Rule 26 of the Federal Rules of Civil Procedure.

The survey also addresses the types of experts presenting testimony in recent civil trials, the issues addressed by expert testimony, and procedures for managing expert testimony. Information on responses concerning these topics is available at your request, and will be included in our final report of the results.

Copies of this report have been sent to Judge Keeton and Judge Pointer Please let us know if you would like us to distribute this report to members of your committee.

Sincerely,

Joe S. Cecil

Molly T Johnson

Molly Treadway Johnson

cc: Professor David A. Schlueter, Reporter
Joseph F. Spaniol, Jr., Secretary

PROBLEMS OF EXPERT TESTIMONY IN CIVIL TRIALS: PRELIMINARY FINDINGS

Joe S. Cecil

and

Molly Treadway Johnson

Division of Research

Federal Judicial Center

March 31, 1992

This report describes preliminary results of the Federal Judicial Center's survey on the characteristics of expert testimony in recent civil trials. First, we briefly describe the survey. Second, we report on the judges' perceptions of the problems with expert testimony. Third, we report on judges' reactions to proposed changes to Rule 702 of the Federal Rules of Evidence and Rule 26 of the Federal Rules of Civil Procedure. Finally, we include in an appendix judges' comments on the proposed amendments.

Survey of Federal District Court Judges

On November 25, 1991 a questionnaire was sent to all 518 active federal district court judges (other than rules committee members), seeking their views on expert testimony in civil trials. A postcard reminder was sent two weeks later, and a second letter with a replacement copy of the questionnaire was sent on January 17, 1992. To date, 64% have returned completed questionnaires to us. The analyses presented below are based on the first 318 responses we received.

In addition to the topics discussed below, the survey also addresses the types of experts presenting testimony in recent civil trials, the issues addressed by expert testimony, and procedures for managing expert testimony. Information on responses concerning these topics is available upon request, and will be included in our final report of the results.

Assessment of Problems with Expert Testimony.

Judges were presented with a list of problems that are often attributed to expert testimony and asked to indicate, on a 5-point scale, the frequency with which each occurs in civil cases involving expert testimony. Table 1 presents the list of problems ranked according to the mean frequency ratings assigned to them by respondents.

The most frequent problem is "Experts abandon objectivity and become advocates for the side that hired them." A number of judges chose to elaborate on this concern in responding to the open-ended questions. One judge noted, "The biggest problem is . . . that both sides can hire well-qualified experts who will say whatever is needed and thereby become advocates." Another judge criticized the "willingness of academics to sell their credentials to the highest bidder -- or at least for a high bid -- and testify in support of questionable propositions." A third judge mentioned the use of "'professional witness expert[s]' who will give any opinion the lawyer wants, especially in product liability cases."

The second most frequent problem is the "Excessive expense of party-hired experts." In comments, some judges merely noted that the cost of retaining experts appears to be exorbitant. One judge focused on pretrial problems, mentioning the "refusal of experts to write a report or to give a deposition without being paid a substantial fee." Other judges noted that experts often offer redundant testimony, thereby increasing both the expense and duration of trials.

The third and fourth most frequent problems -- "Conflict among experts that defies reasoned assessment" and "Expert testimony appears to be of questionable validity or reliability" -- relate to difficulty in making an informed assessment of expert testimony. Several judges reported that expert testimony is often in direct opposition, making it difficult to assess the basis of the disagreement. These judges usually noted the obligation of the attorney to make the evidence comprehensible. Other judges focused on testimony that goes beyond the foundation that has been prepared. Several judges objected to experts basing their testimony on facts or assumptions that are inconsistent with the case, and suggested that some attorneys rely on experts to introduce testimony that is otherwise inadmissible.

Table 1: Frequency of Problems with Expert Testimony in Civil Trials.

1. Experts abandon objectivity and become advocates for the side that hired them. (3.98)*
2. Excessive expense of party-hired experts. (3.48)
3. Conflict among experts that defies reasoned assessment. (3.08)
4. Expert testimony appears to be of questionable validity or reliability. (3.01)
5. Disparity in level of competence of opposing experts. (2.74)
6. Attorney(s) unable adequately to cross-examine expert(s). (2.72)
7. Failure of party(ies) to provide discoverable information concerning retained experts. (2.60)
8. Expert testimony comprehensible but does not assist the trier of fact. (2.50)
9. Expert testimony not comprehensible to the trier of fact. (2.42)
10. Delays in trial schedule caused by unavailability of expert(s). (2.29)
11. Indigent party unable to retain expert to testify. (2.13)
12. Expert(s) poorly prepared to testify. (2.05)

* The number in parentheses is the mean rating on a scale of 1 ("Very Infrequent") to 5 ("Very Frequent") of the frequency with which the judges observed this problem in civil cases involving expert testimony.

Opinions on Proposed Amendments

The final section of the survey asked judges to indicate their opinions on proposed amendments to the rules governing expert testimony in civil and criminal cases. Three of the amendments have been proposed by the Advisory Committee on Civil Rules, while the fourth has been proposed by the President's Council on Competitiveness. In particular, the survey asked about opinions on:

- an amendment to Rule 702 of the Federal Rules of Evidence that would require expert testimony to "substantially assist" (rather than merely assist) the trier of fact;

- an amendment to Rule 702 of the Federal Rules of Evidence that would require expert testimony to be "reasonably reliable";

- an amendment to Rule 702 of the Federal Rules of Evidence that would require expert testimony to be based on "widely accepted" theories, as proposed by the President's Council on Competitiveness; and,

- an amendment to Rule 26 of the Federal Rules of Civil Procedure that would require a party presenting expert testimony to provide other parties, in advance of trial, with a report describing the nature of the expected testimony and the qualifications of the proposed testifying expert.

In responding to each of the first three amendments, judges were given an opportunity to indicate whether they favored it for both civil and criminal cases, favored it for one type of case but not the other, opposed it for both types of cases, or were unsure of their preference (for the fourth amendment, they were asked if they favored or opposed it for civil cases, or were unsure). Many judges offered written comments about the proposed amendments, often providing an explanation for their opposition to the amendments. Summaries of the comments are presented here; the full text of the comments is set forth in Appendix A.

Table 2 shows the percentage and number of judges selecting each response option for the four proposed amendments. Both proposed amendments to Rule 702 presently before the Advisory Committee on Civil Rules were favored by a majority of judges, at least for civil cases. The proposal to require that expert testimony must be "reasonably reliable" received the most support; 62% of judges favored this amendment for both civil and criminal cases, while an additional 5% favored it for civil cases but opposed it for criminal cases. The comments were evenly distributed

between those favoring the amendment and those opposing it. Two judges indicated that they thought expert testimony is already required to be "reasonably reliable."

Slightly less support exists for the "substantially assist" amendment; 45% of judges favor of it for both civil and criminal cases, with an additional 11% favoring it for civil cases while opposing it for criminal cases. Over one-third of the judges (36%) opposed this amendment for both civil and criminal cases. Several judges who opposed this amendment expressed concern that this language would lead to arguments over the meaning of the word "substantially."

The proposed amendment to Rule 702 put forth by the President's Council on Competitiveness failed to attract the support of most judges. Those judges expressing a preference were almost evenly divided between those favoring the amendment (39% for civil and criminal cases) and those opposing the amendment (42%). An unusually high proportion of judges (14%) indicated that they were "not sure" of their opinion on this amendment, perhaps because they were less familiar with this proposal. Most of the comments expressed general opposition without raising specific problems. Several judges, however, expressed concern that the amendment would hamper the development and presentation of new scientific theories.

The Advisory Committee's proposed change to Rule 26(a)(2) of the Federal Rules of Civil Procedure, requiring early exchange of reports on anticipated expert testimony, received overwhelming support; 96% favored this amendment, while only 3% opposed it. The vast majority of judges who commented merely indicated that the practice of exchanging reports about testifying experts was already in effect in their courts, either by local rule or court orders.

Table 2. Opinions on Proposed Amendments

Proposed Change

a. Amend F.R.E. 702 to increase the threshold for admitting expert testimony by requiring that it "substantially assist" the trier of fact.

45% (141)	11% (33)	1% (2)	36% (113)	8% (24)
Favor for both civil & criminal cases	Favor for civil cases but oppose for criminal cases	Favor for criminal cases but oppose for civil cases	Oppose for both civil & criminal cases	Not sure

b. Amend F.R.E. 702 to add a requirement that expert evidence must be "reasonably reliable" in order to be admitted.

62% (194)	5% (17)	1% (2)	26% (80)	6% (19)
Favor for both civil & criminal cases	Favor for civil cases but oppose for criminal cases	Favor for criminal cases but oppose for civil cases	Oppose for both civil & criminal cases	Not sure

c. Amend F.R.E. 702 to require that expert testimony be based on "widely accepted" theories. A party would have to prove that its expert's opinion is based on an established theory that is supported by a significant portion of experts in the relevant field.

39% (121)	4% (13)	0.3% (1)	42% (132)	14% (45)
Favor for both civil & criminal cases	Favor for civil cases but oppose for criminal cases	Favor for criminal cases but oppose for civil cases	Oppose for both civil & criminal cases	Not sure

d. Amend Rule 26(a)(2) of the Federal Rules of Civil Procedure to require a party presenting expert testimony to provide other parties, in advance of trial, with a report describing the expert testimony to be presented, including the nature of the expected testimony and the qualifications of the person(s) who will testify.

96% (298)	3% (8)	2% (5)
Favor for civil cases	Oppose for civil cases	Not sure

"I believe the case law as written makes R. 702 fairly clear. Amendments should be carefully considered."

"The new proposals would simply create new definitional problems and new decision points in litigation, resulting in increased lawyer fees as motions are brought, and delays in the litigation as evidence of these new issues is taken, and the issues resolved and appealed."

"I would hesitate to make changes in the rules. Such changes as suggested are going to be applied with a cleaver and not a scalpel. More attention to the problem by court of appeals will cure any problems currently present."

"I have opposed most of the changes to FRE 702 because they seem to run contrary to the existing jurisprudence and from the judge's standpoint will not ease the burden of presiding at trial."

"I do not think any rules change will assist. Difficult and complicated cases are still going to be that way and will require judicial management."

"No changes in the Rules are necessary. Judges already have discretion to deal with experts."

"Leave the present rule alone."

"No need for new or more rules. Use of present rules and common sense - plus a thorough knowledge of the case allows the judge to assure that this type of evidence is properly used - or excluded. The 3rd. Circuit has recently announced new standards replacing the Frye standards which give additional guidance."

"Present rules and procedures - have been adequate."

"I believe the changes suggested...would be positive and helpful."

Comments on "Substantially Assist" Amendment

"Adding 'substantially assist' language will be helpful but not critical in my view; the present language 'assist' is workable."

"To add 'substantially' as a modifier to the word 'assist' appears problematical and at the very least 'subjective.' Everybody understands the term 'assist.' To add 'substantially' as an additional requirement may dissolve (?) the litigation process."

"Instead of arguing over 'may' we would have to argue over 'substantially.'"

"This criteria is too uncertain (in either form) to enforce universally."

"Not needed."

"...the distinction between 'substantially assist' and 'will assist' seems perilously close to a semantical argument, and one sure to produce raucous disagreement among counsel. So we take evidence to determine that the testimony will assist 'substantially' as opposed to 'will assist'?"

"A playground for appellate courts."

Comments on "Reasonably Reliable" Amendment

"Adding 'reasonably reliable' language is an excellent idea and would permit the court to examine the proposed expert subject matter in advance of trial -- I see no difference between civil and criminal cases."

"How would a jurist gauge whether given expert evidence is 'reasonably reliable' or not?"

"Weight and value of expert testimony should be left to the jurors. I am uncomfortable, on 7th Amendment grounds, about rejecting an expert witness simply because I regard (or find) theories are not 'widely accepted,' or 'reasonably reliable.' That should be for the jury."

"I believe this is in fact the law."

"I thought this was the requirement."

"Let's avoid a mini-trial before the court prior to trial."

"[would favor this amendment] if "c" [requiring 'widely accepted' theories] not adopted."

"Not necessary."

"A playground for appellate courts."

Comment on Amendment Requiring "Widely accepted" Theories

"Adding the 'widely accepted' language is opposed as it would prevent any new theories being presented in court."

"I don't know if there is a discernible difference between 'widely accepted' and 'generally accepted' but thought that the latter is already required for such expert testimony."

"Weight and value of expert testimony should be left to the jurors. I am uncomfortable, on 7th Amendment grounds, about rejecting an expert witness simply because I regard (or find) theories are not 'widely accepted,' or 'reasonably reliable.' That should be for the jury."

"Need more info."

"More certification garbage -- polls of other 'experts.'"

"Inclined to oppose."

"Too hard to get a handle on how widely accepted a theory is without a wasteful mini-trial on that issue!!!"

"Could limit new scientific breakthroughs."

"Not necessary - Court can control."

"Would require collateral trials."

"This proposal is a return to the Frye rule. While that rule is much to be preferred to the present standardless chaos, it is perhaps too restrictive to accommodate advances in science and other fields. The challenge is to impose standards flexible enough to advance reasonably with exploding new technologies."

Comments on Amendment Requiring Early Exchange of Expert Reports

"Already covered in Rule 26(b)(4).

"I already do this."

"This is now required under our delay and expense reduction plan."

"The present availability of expert depositions and interrogatories (?) appears to be adequate."

"I do so -- don't think we should amend the rules."

"Much of this proposal, but not all, is already covered by Rule 26(b)(4) statements. This proposal is more explicit."

"I already do this by local rule."

"I now require this in all cases. In fact, [our] district court local rules require this."

"I do this by court order."

"I've used this in all civil trials for 8 years -- with some success."

"Usually required in our district."

"Proposed amendment requiring exchange of experts' theories in advance would help substantially."

Item IV

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Proposed Amendments to Rule 57, Promulgation of Local Rules

DATE: April 13, 1992

At its meeting in New Orleans in January 1992, the Standing Committee instructed the Reporters for the various Committees to consider possible amendments to the various rules which would adddress some of the problems raised by the "Local Rules Project." That project, which has lasted for a number of years resulted in several conclusions: First, some judges are placing procedural rules in some form other than a "local rule." The Standing Committee was concerned that that practice frustrates the need for disclosure and publication of rules which may prove to be an unnecessary trap for counsel from outside the district.

Second, the Standing Committee was concerned that there is apparently no set pattern for numbering local rules. The Standing Committee hopes to recommend some form of uniform numbering system which will be make it easier for counsel to determine if a local rule exists on a particular topic.

Finally, the Standing Committee was concerned that local rules not duplicate or simply paraphrase material already located in a particular procedural rule. The sentiment was that duplication can confuse, rather than clarify, the requirements of the rule.

The Reporters of several of the Committees recently shared drafts of amendments which would address these points. I am attaching suggested language from the Bankruptcy Committee and the Appellate Rules Committee along with suggested changes in Criminal Rule 57. As you can see, there are several possible approaches to this problem, especially in the area of developing a uniform numbering system. I have not yet heard from the Civil Rules Committee. I understand that the Standing Committee intends to consider this issue at its June meeting.

You may wish to include this material in your agenda books at Tab "II-D-9." (The Rules in General, etc).

RULES OF CRIMINAL PROCEDURE

Rule 57. Rules by District Courts

(a) IN GENERAL. Each district court by action of a majority of the judges thereof from time to time, after giving appropriate notice and an opportunity to comment, make and amend rules governing its practice which are ~~not inconsistent~~ consistent with, but not duplicative of, these rules. Any local rules promulgated under this rule shall, where practicable, conform in numbering to these rules of criminal procedure. In all cases not provided by rule, the district judges and magistrate judges may regulate their practice in any manner consistent with these rules or those of the district in which they act, except that any local procedural rules or directives governing the trial of criminal cases should be placed in local rules.

(b) EFFECTIVE DATE AND NOTICE. A local rule so adopted shall take effect upon the date specified by the district court and shall remain in effect unless amended by the district court and shall remain in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district court is located. Copies of the rules and amendments so made by any district court

RULES OF CRIMINAL PROCEDURE

shall upon their promulgation be furnished to the judicial council and the Administrative Office of the United States Courts and shall be made available to the public. ~~In all cases not provided by rule, the district judges and magistrate~~ judges ~~may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act.~~

COMMITTEE NOTE

Rule 57 provides a certain degree of flexibility to district courts to promulgate local rules of practice and procedure. But experience has demonstrated several problems. The amendments are intended to address those problems. First, as originally written, Rule 57 only prohibited rules which were inconsistent with the rules of criminal procedure. No mention was made of local rules which might attempt to paraphrase or merely duplicate what was already a part of a particular rule of criminal procedure. Such duplicative language can become confusing to the practitoner where it is not entirely clear which version of the rule or language should govern the practice in that particular court. Such duplication can also obscure any local variations or special requirements. To remedy this problem the amendment specifically prohibits such. The prohibition would also apply to local rules which merely attempt to paraphrase a rule of criminal procedure.

Second, the absence of any uniform numbering of local rules can become an unnecessary trap for the unwary counsel who may be completely unaware of applicable local provisions. To remedy that problem, the amendments require that local rules conform in numbering, where practicable, with the national rules of criminal procedure. For example, any local rules dealing with the topic of discovery should bear, in some form, the number 16. In this way, the practitoner should be able to locate quickly any local rule which bears on the discovery process.

RULES OF CRIMINAL PROCEDURE

Finally, rather than placing local directives and procedural rules in a local rule, some courts have treated them as internal operating procedures, which need not be formalized under this rule. Unfortunately, placing such practice oriented directives in some place other than a local rule can also prove to be a trap for counsel. To remedy this problem, the amendment recognizes a distinction between local rules and internal operating procedures and requires that directives or guidance to counsel on procedural matters should be promulgated as a local rule. The process for promulgating a local rule under Rule 57 is designed to insure that counsel will have some notice that a local rule exists and that the local rule is not inconsistent with a national rule of criminal procedure. Internal operating procedures should be reserved for those matters which describe the internal operations of the court.

April 2, 1992

TO: Reporters to the Advisory Committees (Civil, Appellate, and Criminal Rules)

FROM: Alan N. Resnick, Reporter to the Advisory Committee on Bankruptcy Rules

RE: Rules on Uniform Numbering of Local Rules and on Technical Amendments

At a meeting held on March 26, 1992, the Advisory Committee on Bankruptcy Rules approved drafts of amendments to Bankruptcy Rules 9029 and 8018 in response to the Standing Committee's resolution on local rules. It also proposed a new rule, Bankruptcy Rule 9027, in response to the Standing Committee's resolution regarding technical amendments.

I enclose copies of the proposed amendments for your information.

[redacted]

Rule 9029. Local Bankruptcy Rules

Each district court by action of a majority of the judges thereof may make and amend rules governing practice and procedure in all cases and proceedings within the district court's bankruptcy jurisdiction which are ~~not inconsistent~~ consistent with, but not duplicative of, these rules and which do not prohibit or limit the use of the Official Forms. Rule 83 F.R.Civ.P. governs the procedure for making local rules. A district court may authorize the bankruptcy judges of the district, subject to any limitation or condition it may prescribe and the requirements of 83 F.R.Civ.P., to make and amend rules of practice and procedure which are ~~not inconsistent~~ consistent with, but not duplicative of, these rules and which do not prohibit or limit the use of the Official Forms. Local rules made by a district court or by bankruptcy judges pursuant to this rule shall be numbered or identified in conformity with any uniform system prescribed by the Judicial Conference of the United States. In all cases not provided for by rule, the court may regulate its practice in any manner ~~not inconsistent~~ consistent with the Official Forms ~~or~~ and with these rules or those of the district in which the court acts.

COMMITTEE NOTE

This rule is amended to prohibit local rules that are merely duplicative of, or a restatement of, the Federal Rules of Bankruptcy Procedure. This restriction is designed to prevent possible conflicting interpretations arising from minor inconsistencies between the wording of national and local rules, and to lessen the risk that any significant local practices may

be overlooked by inclusion in local rules that are unnecessarily long. The prohibitions contained in this rule apply to local rules that are inconsistent with, or duplicative of, the Federal Rules of Civil Procedure that are incorporated by reference or made applicable by these rules.

This rule is amended further to require that local rules be numbered or identified in conformity with any uniform numbering system that may be prescribed by the Judicial Conference. A uniform numbering or identification system would make it easier for the bar that is increasingly national in scope to locate a local rule that is applicable to a particular procedural issue.

The change in the phrase "not inconsistent with" to "consistent with" is stylistic and conforms to similar amendments to Rule 8018 and F.R.Civ.P. 83, and to the language in 28 U.S.C. § 2071.

[redacted]

Rule 8010. Rules by Circuit Councils and District Courts

Circuit councils which have authorized bankruptcy appellate panels pursuant to 28 U.S.C. § 158(b) and the district courts may by action of a majority of the judges of the council or district court make and amend rules governing practice and procedure for appeals from orders or judgments of bankruptcy judges to the respective bankruptcy appellate panel or district court~~, not inconsistent~~ consistent with, but not duplicative of, the rules of this Part VIII. Rule 83 F.R.Civ.P. governs the procedure for making and amending rules to govern appeals. Local rules made pursuant to this rule shall be numbered or identified in conformity with any uniform system prescribed by the Judicial Conference of the United States. In all cases not provided for by rule, the district court or the bankruptcy appellate panel may regulate its practice in any manner ~~not inconsistent~~ consistent with, but not duplicative of, these rules.

COMMITTEE NOTE

This rule is amended to prohibit local rules that are merely duplicative of, or a restatement of, Part VIII of the Federal Rules of Bankruptcy Procedure. This rule is amended further to require that local rules be numbered or identified in conformity with any uniform numbering system that may be prescribed by the Judicial Conference. See the Committee Note to Rule 9029.

The change in the phrase "not inconsistent with" to "consistent with" is stylistic and conforms to similar amendments to Rule 9029 and F.R.Civ.P. 83, and to the language in 28 U.S.C. § 2071.

[redacted]

Rule 9037. Technical Amendments.

The Judicial Conference of the United States may amend these rules to make them consistent in form and style with [redacted] statutory changes [redacted] and to correct errors in grammar, spelling, cross-references, typography, and other similar technical matters of form and style.

COMMITTEE NOTE

This rule is added to enable the Judicial Conference to make minor technical amendments to these rules without having to burden the Supreme Court or Congress with such changes. This delegation of authority will lessen the delay and administrative burdens that can encumber the rule-making process on minor non-controversial, non-substantive matters. For example, this authority would have been useful to make the [redacted] changes in [redacted] that became necessary when the new title of "Magistrate Judge" replaced the title "Magistrate" as a result of a statutory change.

Rule 2005

Appellate Rules

Draft

After giving appropriate public notice and an opportunity for comment, ~~E~~ each court of appeals by action of a majority of the circuit judges in regular active service may ~~from time to time~~ make and amend, from time to time, rules governing its practice not inconsistent with these ~~rules~~ Federal Rules of Appellate Procedure. In all cases not provided for by rule, the courts of appeals may regulate their practice in any manner not inconsistent with these federal rules. When a court of appeals prescribes a rule that relates to any topic covered by the Federal Rules of Appellate Procedure, the court shall give the local rule a number that corresponds to the related federal rule. For example, Rule 27 of these rules governs motions; if a court of appeals prescribes a rule governing motions, the court of appeals shall number the rule in a manner that indicates that the local rule relates to motions, such as Circuit Rule 27 or Local Rule 27.1. A court of appeals' rule that is not related to any other of these federal rules shall be numbered to correspond to this Rule 47. The courts of appeals shall place directions to parties or their lawyers regarding the processing of appeals in local rules and shall not use internal operating procedures for such directions. To the extent possible, rules prescribed by the courts of appeals shall not repeat these federal rules. ~~Copies of all rules made by a court of appeals shall upon their promulgation be furnished to the Administrative Office of~~

~~the United States Courts.~~ A court of appeals shall furnish the Administrative Office of the United States Courts with copies of all rules prescribed by the court at the time of their promulgation.

Committee Notes

The primary purpose of these amendments is to make local rules more accessible. The amendments make three basic changes. First, the rule mandates a uniform numbering system under which local rules are keyed to the national rules. If a local rule on a topic covered by the federal rules uses the same number, notice of the existence of the local rule and accessibility to it are improved. In addition, tying the numbers of local rules to the corresponding national rules should eliminate the perceived need for repeating language from the national rules in the local rules.

Second, the rule also requires courts of appeals to delete from their local rules all language that merely repeats the national rules. Repeating the requirements of the national rules in local rules obscures the local variations. Eliminating the repetition will leave only the local variations and the existence of a local rules on a topic will signal a special local requirement.

Third, the rule requires the courts of appeals to observe the distinction between rules and internal operating procedures. Internal operating procedures should not contain directives to lawyers or parties; they should deal only with how the court conducts its internal business. Placing a practice oriented provision in the internal operating procedures may cause a practitioner, especially one from another circuit, to overlook the provision.

The opening phrase of the rule regarding publication and a period for comment before adoption of a rule simply reflects requirements mandated by the 1988 amendment of 28 U.S.C. § 2071.

PRELIMINARY DRAFT
OF PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 12. Pleadings and Motions Before Trial; Defenses and Objections

* * * * *

(i) PRODUCTION OF STATEMENTS AT SUPPRESSION HEARING. Except as herein provided [in these Rules(?) *or* in this Rule?], rule [Rule] 26.2 shall apply [applies] at a hearing on a motion to suppress evidence under subdivision (b)(3) of this rule. For purposes of this subdivision, a law enforcement officer shall be [is] deemed a [government] witness called by the government ~~, and upon a claim of privilege the court shall excise the portions of the statement containing privileged matter~~.

COMMITTEE NOTE

The amendment in [to] subdivision (i) is one of a series of contemporaneous amendments to Rules 26.2, 32(f), 32.1, 46, and Rule 8 of the Rules Governing § 2255 Hearings, which extended Rule 26.2, [()]Production of [Witness] Statements of Witnesses[())], to other proceedings or hearings conducted under the Rules of Criminal Procedure. Language was added to Rule 26.2(c) which [now] explicitly states that the trial court may excise privileged matter from the requested witness statements[;]. That [that] change to Rule 26.2 rendered similar language in Rule 12(i) redundant.

Rule 16. Discovery and Inspection

(a) [GOVERNMENTAL] DISCLOSURE OF EVIDENCE BY THE GOVERNMENT.

(1) *Information Subject to Disclosure.*

* * * * *

(E) EXPERT WITNESSES. Upon request of a defendant [At a defendant's request], the government shall disclose to the defendant any evidence which [that] the government may present at trial under Rules 702, 703, or 705 of the Federal Rules of Evidence. This disclosure shall [must] be in the form of a written report[,] prepared and signed by the witness[,] that includes a complete statement of all opinions to be expressed and the basis [bases] and reasons therefor, the data or other information relied upon in forming such [the] opinions, any exhibits to be used as a summary of or support for [to summarize or support] such opinions, and the [witness's] qualifications of the witness.

(2) *Information Not Subject to Disclosure.* Except as provided in paragraphs (A), (B), ~~and~~ (D),

and (E) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the [a] [government] attorney for the government or other government agents in connection with the investigation or prosecution of the case, [Nor does this rule authorize the discovery or inspection] or of statements made by government witnesses or prospective government witnesses[,] except as provided in 18 U.S.C. § 3500.

* * * * *

(b) [THE DEFENDANT'S] DISCLOSURE OF EVIDENCE BY THE DEFENDANT.

(1) *Information Subject to Disclosure.*

* * * * *

(C). EXPERT WITNESSES. If the defendant requests disclosure under subdivision (a)(1)(E) of this rule [and the government complies], upon compliance with the request by the government, the defendant, on request of the government [at the government's request], shall provide the government with a written report[,] prepared and signed by the witness[,] that includes

a complete statement of all opinions to be expressed and the basis [bases] and reasons therefor, the data or other information relied upon in forming such opinions, any exhibits to be used as a summary of or support for [to summarize or support] such opinions, and the [witness's] qualifications of the witness.

* * * * *

COMMITTEE NOTE

The addition of [New] subdivisions (a)(1)(E) and (b)(1)(C) expand federal criminal discovery by requiring notice and disclosure, respectively [upon request], of the identities of expert witnesses, what they are expected to testify to, and the bases of [for] their testimony. The amendment tracks closely with [closely tracks] similar language in Federal Rule of Civil Procedure 26 and is intended to reduce [minimize] the element of surprise which [that] often results from unexpected expert testimony, reduce the need for continuances, and to provide the opponent with a fair opportunity to test the merit of the expert's testimony through focused cross-examination. See Eads, Adjudication by Ambush: Federal Prosecutors' Use of Nonscientific Experts in a System of Limited Criminal Discovery, 67 N. Carolina L. [N.C.L.] Rev. 577, 622 (1989).

Like other provisions in Rule 16, subdivision (a)(1)(E) requires the government to disclose certain information regarding [about] its expert witnesses if the defendant first requests the information [at the defendant's request]. Once the requested information is provided [After disclosing the information], the

government is entitled, under (b)(1)(C)[,] to reciprocal discovery of the same information from the defendant.

With increased use of both scientific and nonscientific expert testimony, one of the [counsel's] most basic discovery needs of counsel is to learn that an expert is expected to testify. See Gianelli, Criminal Discovery, Scientific Evidence, and DNA, 44 Vand. L. Rev. 793 (1991); Symposium on Science and the Rules of Legal Procedure, 101 F.R.D. 599 (1983). This is particularly important where [if] the expert is expected to testify on matters which touch on [about] new or controversial techniques or opinions. The amendment is intended to meet this need by first, requiring notice of the expert's identity and qualifications[,] which in turn will permit the requesting party to interview the prospective witness in preparation for trial and [to] determine whether in fact the witness is [in fact] an expert within the definition of Federal Rule of Evidence 702. Like Rule 702, which generally provides a broad definition of [broadly defines] who qualifies as an "expert," the amendment is broad in that it [the new disclosure requirements of Rule 16] includes [include] both scientific and nonscientific experts and does not distinguish between [are not limited to] those cases where [in which] the expert will be presenting testimony on [testify about] novel scientific evidence. The rule does [new provisions do] not extend, however, to witnesses who may offer only lay opinion testimony under Federal Rule of Evidence 701.

Secondly [Second], the requesting party is entitled to disclosure of [discover] the substance of the expected testimony. This provision [aspect of subparagraphs (a)(1)(E) and (b)(1)(c)] is intended to permit more complete pretrial preparation by the requesting party. For example, this should inform the requesting party [can learn] whether the expert will be providing only background information on a particular issue or whether the witness will actually offer an opinion.

Thirdly [Third], and perhaps most importantly [important], the requesting party is to be informed of the grounds of the bases of [for] the expert's opinion, including identification [the identities] of other

experts upon whom the testifying expert may be relying. [Although] Rule 16(a)(1)(D) covers disclosure [of] and access to any results or reports of mental or physical examinations and scientific testing.[,] But the fact that no [the absence of] formal written reports have been made does not necessarily mean that an expert will not testify at trial. At least one federal court has concluded that this provision did not otherwise require the government to disclose the identity of its expert witnesses where [they had prepared] no reports[.] had been prepared. See, e.g., United States v. Johnson, 713 F.2d 654 (11th Cir. 1983[)], cert. denied, 484 U.S. 956 [465 U.S. 1030] (1984) (there is no right to witness list[,] and Rule 16 was not implicated because no reports were made in the case). [¶]The amendment should remedy that problem. Without regard to whether a party would be entitled to the underlying bases for expert testimony under other provisions of Rule 16, the amendment requires disclosure the bases relied upon. That would necessarily [The new disclosure requirements] cover not only written and oral reports, tests, reports, and investigations, but any information which [that] might be recognized as [a] legitimate basis for an opinion under Federal Rule of Evidence 703, including [other experts'] opinions of other experts.

As with other discovery requests under Rule 16, subdivision (d) is available to either side to seek ex parte a protective or modifying order concerning requests for information under (a)(1)(E) or (b)(1)(C).

Rule 26.2. Production of [Witness] Statements of Witnesses

* * * * *

(c) PRODUCTION OF EXCISED STATEMENT. If the other party claims that the statement contains privileged information or matter that does not relate to the subject matter concerning which the

witness has testified, the court shall order that it be delivered to the court in camera. Upon inspection, the court shall excise ~~the~~ [any] portions of the statement that are privileged or that do not relate to the subject matter concerning which the witness has testified, and shall order that the statement with such material excised, be delivered to the moving party. Any portion of the statement that is withheld from the defendant over the defendant's objection ~~shall~~ [must] be preserved by the attorney for the government, and, in the ~~event of a conviction and an appeal by the defendant~~ [if the defendant appeals a conviction], ~~shall~~ [must] be made available to the appellate court for the purpose of determining the correctness of the decision to excise the portion of the statement.

(d) RECESS FOR EXAMINATION OF STATEMENT. Upon delivery of the statement to the moving party, the court, upon application of that party, may recess the proceedings ~~in the trial~~ for ~~the examination of such statement and for preparation for its use~~ [so

that counsel may examine the statement and prepare to use it] in the ~~trial~~ proceedings.

* * * * *

(g) SCOPE OF RULE. Subdivisions (a)-(d) and (f) of this rule shall apply at a suppression hearing held pursuant to [conducted under] Rule 12, at trial pursuant [under] this rule, at sentencing pursuant to [under] Rule 32(f), at hearings [a hearing] to revoke or modify probation or supervised release held pursuant to [conducted under] Rule 32.1(c), at detention hearings [a detention hearing] held pursuant to [conducted under] Rule 46(i), and at an evidentiary hearing held pursuant to [conducted under] Section 2255 of Title 28, United States Code.

COMMITTEE NOTE

The addition of subsection [New subdivision] (g), which describes the scope of the Rule, recognizes other contemporaneous [parallel] amendments in [to] the Rules of Criminal Procedure which extend [extending] the application of Rule 26.2 to other proceedings. Those [The] changes [referred to in this subdivision] are thus consistent with the extension of Rule 26.2 in 1983 to [a] suppression hearings [hearing] conducted pursuant to [under] Rule 12. See Rule 12(i).

In extending Rule 26.2 to suppression hearings in 1983 [For that earlier extension of Rule 26.2], the

Committee offered several reasons. First, production of witness statements enhances the [court's] ability of the court to assess the [witnesses'] credibility of the witnesses and thus assist[s] the court in making accurate factual determinations [accurately finding the facts] at suppression hearings. Second, because [a] witnesses testifying at a suppression hearing may not necessarily testify at the trial itself, waiting until after a witness testifies at trial before requiring production of that witness's statement would be futile. Third, the Committee believed that it would not work [is not feasible] to leave the suppression issue open until trial, where Rule 26.2 would then be applicable [apply]. Finally, one of the central reasons for requiring production of statements at suppression hearings was the recognition [the Committee recognized] that[,] by its nature, the results of a suppression hearing have a profound and ultimate impact on the issues presented at trial.

The reasons given in 1983 for extending Rule 26.2 to a suppression hearing are equally compelling with regard to [apply equally to] other adversary type hearings which ultimately depend on [that require] accurate and reliable information. That is, there [There] is a continuing [similar] need for information affecting the credibility of witnesses who present testimony [testify] or [make] written statements which are considered by [that] the court [considers.] in making its decision. And that [This] need exists without regard to whether the witness is presenting testimony or an affidavit at a pretrial hearing, at a trial, or at a post-trial [posttrial] proceeding.

As noted in the 1983 Advisory Committee Note to Rule 12(i), the courts have generally declined to extend the Jencks Act, 18 U.S.C. § 3500, beyond the confines of actual trial testimony. That [unduly restrictive] result will be obviated by the addition of Rule 26.2(g) and amendments to the Rules noted in that new subdivision.

Although amendments to Rules 32, 32.1, 46, and Rule 8 of the Rules Governing Proceedings under 28 U.S.C. § 2255 specifically address the requirement of producing a witness's statement, Rule 26.2 has become known as the

central "rule" requiring production of statements. Thus, the references in the Rule itself will assist the bench and bar in locating other Rules which include [containing] similar provisions.

The amendment[s] to Rule 26.2 and the other designated Rules is [are] not intended to require production of a witness'[s] statement before the witness actually testifies or before the witness'[s] affidavit is presented to the court.

Minor conforming amendments have been made to subsection (d) to reflect that Rule 26.2 will be applicable [applies] to proceedings other than the trial itself. And language has been added to subsection (c) to recognize explicitly [make clear] that privileged matter may be excised from the witness's prior statement.

Rule 26.3 Mistrial

Before ordering a mistrial, the court shall provide an opportunity for the government and for each defendant to comment on the propriety of the order, including whether each party consents or objects to a mistrial, and to suggest any alternatives.

COMMITTEE NOTE

Rule 26.3 is a new rule designed to reduce the possibility of an erroneously ordered mistrial[,] which could produce adverse and irretrievable consequences. The rule [Rule] is not designed [intended] to change in any way the substantive law governing mistrials but instead is directed at providing both sides with an opportunity to place on the record their views about the

proposed [mistrial] order declaring a mistrial. In particular, [While] the court must give each side an opportunity to state whether it objects or consents to the order[,]. But the Rule does not require each side to state its position.

Recently several [Several recent] cases have held that [a defendant's] retrial of a defendant was barred by the Double Jeopardy Clause of the Constitution because the trial court had abused its discretion in declaring a mistrial. See United States v. Dixon, 913 F.2d 1305 (8th Cir. 1990); United States v. Bates, 917 F.2d 388 (9th Cir. 1990). In both cases the appellate courts concluded that the trial court[s] had acted precipitously [precipitately] and had failed to solicit the [parties'] views of the parties as to [about] the necessity of a mistrial and the feasibility of any alternative action [alternatives]. The new Rule is designed to remedy that situation.

The Committee regards the Rule as a balanced and modest procedural device which [that] could benefit both the prosecution and the defense. While the Dixon and Bates decisions adversely affected the government's interest in prosecuting the defendants on [for] serious crimes, the new Rule could also benefit defendants. The Rule also ensures that the [a] defendant has the opportunity to dissuade a judge from declaring a mistrial in a case where [even when] granting one would not be an abuse of discretion, but [if] the defendant believes that the prospects for a favorable outcome before that particular court or jury are stronger [greater] than they would [might] be at a [upon] retrial.

Rule 32. Sentence and Judgment

* * * * *

(f) Production of Statements at Sentencing Hearing.

(1) In General. Rule 26.2 (a)-(d), (f) shall apply [applies] at a sentencing hearing under this rule.

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

COMMITTEE NOTE

The addition of subsection [subdivision] (f) to Rule 32 is one of a number of contemporaneous amendments extending Rule 26.2 to hearings and proceedings other than the trial itself. The amendment to Rule 32 specifically [This addition] codifies the result in cases such as United States v. Rosa, 891 F.2d 1074 (3d. Cir. 1989). In that case the defendant pleaded guilty to a drug offense. During sentencing the defendant unsuccessfully attempted to obtain Jencks Act materials relating to a co-accused who testified as a government witness at sentencing. In concluding that the trial court erred in not ordering the government to produce its witness'[s] statement, the court stated:

> We believe the sentence imposed on a defendant is the most critical stage of criminal proceedings, and is, in effect, the "bottom-line" for the defendant, particularly where the defendant has pled guilty. This being so, we can perceive no purpose

> in denying the defendant the ability to effectively cross-examine a government witness where such testimony may, if accepted, add substantially to the defendant's sentence. In such a setting, we believe that the rationale of Jencks v. United States...and the purpose of the Jencks Act would be disserved if the government at such a grave stage of a criminal proceeding could deprive the accused of material valuable not only to the defense but to his very liberty. Id. at 1079.

The court added that the defendant had not been sentenced under the new Sentencing Guidelines and that its decision could take on greater importance under those rules. Under Guideline sentencing, said the court, the trial judge has less discretion to moderate a sentence and is required to impose a sentence based upon specific factual findings which [that] need not be established beyond a reasonable doubt. Id[.] at n. 3.

Although the Rosa decision only decided [decided only] the issue of access by the defendant to Jencks material, the amendment parallels Rules 26.2 (applying Jencks Act to trial) and 12(i) (applying Jencks Act to suppression hearing) in that both the defense and the prosecution are entitled to Jencks material.

Production of a statement is triggered by the witness' oral testimony or the presentation of the witness' affidavit. If neither is presented, no production is required. [A witness's statement must be produced only if the witness testifies or if the witness's affidavit is presented.] The sanction provision rests on the assumption that the proponent of the witness'[s] affidavit or testimony has deliberately elected to withhold relevant material.

Rule 32.1. Revocation or Modification of Probation or Supervised Release

* * * * *

(c) PRODUCTION OF STATEMENTS

(1) In General. Rule 26.2(a)-(d) and (f) shall apply [applies] at any hearing under this rule.

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

COMMITTEE NOTE

The addition of subdivision (c) is one of several amendments which [that] extend Rule 26.2 to Rules 32(f), 32.1, 46, and Rule 8 of the Rules Governing Proceedings under 28 U.S.C. § 2255. As noted in the Committee Note to Rule 26.2, the central purpose of [primary reason for] extending that Rule to other hearings and proceedings rests heavily upon the compelling need for accurate information affecting the credibility of witnesses who have presented evidence [witnesses' credibility]. While that need is certainly clear in a trial on the merits, it is equally compelling and perhaps [, if not] more so, in other pretrial and post-trial [posttrial] proceedings in which both the prosecution and defense have high [great] interests at stake. In the case of revocation or

modification of probation or supervised release proceedings, not only is the defendant's liberty interest at stake, but the government also has a stake in protecting the interests of the community.

Providing for [Requiring] production of witness statements at hearings conducted pursuant to [under] Rule 32.1 will enhance the procedural due process which [that] the rule [Rule] now provides and which [that] the Supreme Court required in Morrissey v. Brewer, 408 U.S. 471 (1972) and Gagnon v. Scarpelli, 411 U.S. 778 (1973). Access to [a witness's] prior statements of a witness will enhance the ability of both the defense and prosecution to test the credibility of the other side's witnesses under Rule 32.1(a)(1), (a)(2), and (b)[,] respectively, and thus will assist the court in assessing credibility.

Production of a witness's statement is triggered by the witness'[s] testimony or presentation of the written affidavit. If neither is presented, production is not required. [A witness's statement must be produced only if the witness testifies or if the witness's affidavit is presented.]

Rule 40. Commitment to Another District

(a). APPEARANCE BEFORE FEDERAL MAGISTRATE. If a person is arrested in a district other than that in which the offense is alleged to have been committed, that person shall [must] be taken without unnecessary delay before the nearest available federal magistrate. Preliminary proceedings concerning the defendant shall [must] be conducted in accordance with Rules 5 and 5.1, except that if no preliminary examination is held because an indictment has been returned or an information filed or because the defendant elects

to have the preliminary examination conducted in the district in which the prosecution is pending, the person ~~shall~~ [must] be held to answer upon a finding that such person is the person named in the indictment, information or warrant. If held to answer, the defendant ~~shall~~ [must] be held to answer in the district court in which the prosecution is pending, [—] provided that a warrant is issued in that district if the arrest was ~~made without a warrant~~ [warrantless] [—], upon production of the warrant or a certified copy ~~thereof~~. [Have I correctly read the proviso in the preceding sentence? Upon production of the warrant by whom? — B.A.G.] The warrant or certified copy may be produced by facsimile transmission.

* * * * *

COMMITTEE NOTE

The amendment to subdivision (a) is intended to expedite ~~the process of~~ determining where a defendant will be held to answer by permitting facsimile transmission of a warrant or a certified copy of the warrant. The amendment recognizes that ~~there has been an increased reliance by~~ the public in general, and[— particularly] the legal profession in particular,[—] [has increasingly relied] on accurate and efficient transmission of important legal documents by facsimile machines.

Rule 41. Search and Seizure

* * * * *

(c) ISSUANCE AND CONTENTS.

* * * * *

(2) *Warrant Upon Oral Testimony.*

(A) GENERAL RULE. If the circumstances make it reasonable to dispense with a written affidavit, a Federal magistrate judge may issue a warrant based, in whole or in part, upon sworn ~~oral~~ testimony communicated by telephone or other appropriate means ~~.~~ , including facsimile transmission.

* * * * *

COMMITTEE NOTE

The amendment to Rule 41(c)(2)(A) is intended to expand the authority of magistrates and judges in considering oral requests for search warrants. It also recognizes the value [of,] and [the public's] increased dependance of the public generally on[,] facsimile machines to efficiently and accurately transmit written information [efficiently and accurately]. It [The Rule as amended] should thus have the effect of encouraging [encourage] law enforcement officers to seek a warrant, especially in those cases where [when] it is necessary or desirable to supplement oral telephonic communications by written materials[,] which may now be transmitted electronically as well.

The Committee considered amendments to Rule 41(c)(2)(B), Application, Rule 41(c)(2)C), Issuance, and Rule 41(g), Return of Papers to Clerk, but determined that permitting use of [allowing] facsimile machines [transmissions] in those instances would not save time and would present [cause] problems and questions concerning the need to preserve facsimile copies.

Rule 46. Release from Custody

* * * * *

(i) PRODUCTION OF STATEMENTS.

(1) In General. Rule 26.2(a)-(d) and (f) shall apply [applies] at a detention hearing held pursuant to [under] 18 U.S.C. § 3144.

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

COMMITTEE NOTE

The addition of subdivision (i) to this Rule is one of a series of similar amendments to Rules 26.2, 32, 32.1, and Rule 8 of the Rules Governing Proceedings Under 28 U.S.C. § 2255[,] which now extend Rule 26.2 to other proceedings and hearings. As pointed out in the Committee Note to the amendment to Rule 26.2, without regard to whether a witness'[s] testimony or affidavit is being considered at a pretrial proceeding, at the trial itself, or at a post-trial [posttrial] proceeding, there is [a] continuing and compelling need to assess the credibility and reliability of information relied upon by the court [, whether a witness's testimony or affidavit is being considered at a pretrial proceeding, at trial, or at a posttrial proceeding]. Production of a witness's

prior statements directly furthers that goal, [allows the court and the parties to test a witness's credibility more thoroughly.]

The need for reliable information is no less crucial in a proceeding to determine whether a defendant should be released from custody. The issues decided at pretrial[-]detention hearings are important [both] to both a defendant and [to] the community. For example, a defendant charged with criminal acts may be incarcerated [without bail] prior to [before] an adjudication of guilt without bail on grounds of future dangerousness which is not subject to [— a basis not requiring] proof beyond a reasonable doubt. [Conversely,] Although [although] the defendant clearly has an interest in remaining free prior to [until *or* before] trial, the community has an equally compelling interest in being protected from potential criminal activity committed by persons awaiting trial [crimes that persons awaiting trial may commit].

In upholding the constitutionality of pretrial detention based upon dangerousness, the Supreme Court [has] in United States v. Salerno, 481 U.S. 739 (1986), stressed the existence of procedural safeguards in the Bail Reform Act. [*See United States v. Salerno*, 481 U.S. 739 (1986).] The Act provides for the right to counsel and the right to cross-examine adverse witnesses. See, e.g., 18 U.S.C. § 3142(f)([giving defendants the] right of defendant to cross-examine adverse witness[es]). Those safeguards, said the Court, are "specifically designed to further the accuracy of that determination." 481 U.S. at 751. The Committee believes that requiring the production of a witness'[s] statement will further enhance the fact-finding process.

Given the fact that in the case of pretrial detention hearings held very early in the prosecution of a case, a particular witness'[s] statement may not yet be on file, it may be difficult to locate and produce that statement. Or the parties may not even be aware that a statement exists. [The Committee recognizes that pretrial detention hearings are often held very early in a prosecution, and that a particular witness's statement may not yet be on file, or even known about.] The amendment nonetheless envisions that [both sides should

make] reasonable efforts should be made to locate such statements, assuming that they in fact exist. If a witness'[s] statement is not discovered until after the pretrial detention hearing, the court may reopen the proceeding if the statement would have [had] a material bearing on the court's decision regarding detention. See 18 U.S.C. § 3142(f).

RULES GOVERNING PROCEEDINGS IN THE UNITED STATES DISTRICT COURT UNDER § 2255 OF TITLE 28, UNITED STATES CODE

Rule 8. Evidentiary Hearing

* * * * *

(d) Production of Statements at Evidentiary Hearing.

(1) In General. Federal Rule of Criminal Procedure 26.2(a)-(d), and (f) shall apply [applies] at an evidentiary hearing under these rules.

(2) Sanctions for Failure to Produce Statement. If a party elects not to comply with an order pursuant to [under] Federal Rule of Criminal Procedure 26.2(a) to deliver a statement to the moving party, [at the evidentiary hearing] the court shall [may] not consider the affidavit or testimony of the witness at the evidentiary hearing [whose statement is withheld].

COMMITTEE NOTE

The amendment to Rule 8 is one of a series of parallel amendments to Federal Rules of Criminal

Procedure, 32, 32.1, and 46[,] which extend the scope of Rule 26.2 (Production of witness statements [Note: The current title is "Production of Statements of Witnesses" — but I've suggested making it "Production of Witness Statements"]) to proceedings other than the trial itself. The amendments are grounded on [reflect] the compelling need for accurate and credible information in making decisions concerning the defendant's liberty. See the Advisory Committee Note to Rule 26.2(g). A few courts have recognized the authority of a judicial officer to order production of prior statements by a witness at a § 2255 hearing,[.] see [See], e.g., United States v. White, 342 F.2d 379, 382, n.4 (4th Cir. 1959)[, *cert. denied,* 382 U.S. 871 (1965)]. The amendment to Rule 8, however, now grants explicit authority to do so.

The amendment is not intended to require production of a witness's statement before the witness actually presents oral testimony [testifies] or [before] the witness'[s] affidavit is presented to the court for its consideration.

PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 12. Pleadings and Motions Before Trial; Defenses and Objections

* * * * *

(i) PRODUCTION OF STATEMENTS AT SUPPRESSION HEARING. Except as provided in these Rules [?] [*or* in this Rule?], Rule 26.2 applies at a hearing on a motion to suppress evidence under subdivision (b)(3) of this rule. For purposes of this subdivision, a law enforcement officer is deemed a government witness.

COMMITTEE NOTE

The amendment to subdivision (i) is one of a series of contemporaneous amendments to Rules 26.2, 32(f), 32.1, 46, and Rule 8 of the Rules Governing § 2255 Hearings, which extend Rule 26.2 (Production of Witness Statements) to other proceedings conducted under the Rules of Criminal Procedure. Rule 26.2(c) now explicitly states that the trial court may excise privileged matter from the requested witness statements; that change rendered similar language in Rule 12(i) redundant.

Rule 16. Discovery and Inspection

(a) GOVERNMENTAL DISCLOSURE OF EVIDENCE.

(1) *Information Subject to Disclosure.*

* * * * *

(E) EXPERT WITNESSES. At a defendant's request, the government shall disclose to the defendant any evidence that the government may present at trial under Rules 702, 703, or 705 of the Federal Rules of Evidence. This disclosure must be in the form of a written report, prepared and signed by the witness, that includes a complete statement of all opinions to be expressed and the bases and reasons therefor, the data or other information relied upon in forming the opinions, any exhibits to be used to summarize or support such opinions, and the witness's qualifications.

(2) *Information Not Subject to Disclosure.* Except as provided in paragraphs (A), (B), (D), and (E) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by a government attorney or other government agents in connection with the investigation or prosecution of the case Nor does this rule authorize the discovery or

inspection of statements by government witnesses or prospective government witnesses, except as provided in 18 U.S.C. § 3500.

* * * * *

(b) THE DEFENDANT'S DISCLOSURE OF EVIDENCE.

(1) *Information Subject to Disclosure.*

* * * * *

(C). EXPERT WITNESSES. If the defendant requests disclosure under subdivision (a)(1)(E) of this rule and the government complies, the defendant, at the government's request, shall provide the government with a written report, prepared and signed by the witness, that includes a complete statement of all opinions to be expressed and the bases and reasons therefor, the data or other information relied upon in forming such opinions, any exhibits to be used to summarize or support such opinions, and the witness's qualifications.

* * * * *

COMMITTEE NOTE

New subdivisions (a)(1)(E) and (b)(1)(C) expand federal criminal discovery by requiring disclosure, upon request, of the identities of expert witnesses, what they are expected to testify to, and the bases for their testimony. The amendment closely tracks similar language in Federal Rule of Civil Procedure 26 and is intended to minimize the surprise that often results from unexpected expert testimony, reduce the need for continuances, and to provide the opponent with a fair opportunity to test the merit of the expert's testimony through focused cross-examination. *See* Eads, *Adjudication by Ambush: Federal Prosecutors' Use of Nonscientific Experts in a System of Limited Criminal Discovery*, 67 N.C.L. Rev. 577, 622 (1989).

Like other provisions in Rule 16, subdivision (a)(1)(E) requires the government to disclose information about its expert witnesses at the defendant's request. After disclosing the information, the government is entitled, under (b)(1)(C), to reciprocal discovery of the same information from the defendant.

With increased use of both expert testimony, one of counsel's most basic discovery needs is to learn that an expert is expected to testify. *See* Gianelli, *Criminal Discovery, Scientific Evidence, and DNA*, 44 Vand. L. Rev. 793 (1991); Symposium on Science and the Rules of Legal Procedure, 101 F.R.D. 599 (1983). This is particularly important if the expert is expected to testify about new or controversial techniques or opinions. The amendment is intended to meet this need by requiring notice of the expert's identity and qualifications, which in turn will permit the requesting party to interview the prospective witness in preparation for trial and to determine whether the witness is in fact an expert within the definition of Federal Rule of Evidence 702. Like Rule 702, which broadly defines who qualifies as an "expert," the new disclosure requirements of Rule 16 include both scientific and nonscientific experts and are not limited to those cases in which the expert will testify about novel scientific evidence. The new provisions do not extend, however, to witnesses who may offer only lay opinion testimony under Federal Rule of Evidence 701.

Second, the requesting party is entitled to discover the substance of the expected testimony. This aspect of subparagraphs (a)(1)(E) and (b)(1)(c) is intended to permit more complete pretrial preparation by the requesting party. For example, the requesting party can learn whether the expert will be providing only background information on a particular issue or whether the witness will actually offer an opinion.

Third, and perhaps most important, the requesting party is to be informed of the bases for the expert's opinion, including the identities of other experts upon whom the testifying expert may be relying. Although Rule 16(a)(1)(D) covers disclosure of and access to any results or reports of mental or physical examinations and scientific testing, the absence of formal written reports does not necessarily mean that an expert will not testify at trial. At least one federal court has concluded that this provision did not otherwise require the government to disclose the identity of its expert witnesses where they had prepared no reports. *See, e.g., United States v. Johnson,* 713 F.2d 654 (11th Cir. 1983), *cert. denied*, 465 U.S. 1030 (1984)(there is no right to witness list, and Rule 16 was not implicated because no reports were made in the case). ¶The amendment should remedy that problem. The new disclosure requirements cover not only written and oral reports, tests, reports, and investigations, but any information that might be recognized as a legitimate basis for an opinion under Federal Rule of Evidence 703, including other experts' opinions.

As with other discovery requests under Rule 16, subdivision (d) is available to either side to seek ex parte a protective or modifying order concerning requests for information under (a)(1)(E) or (b)(1)(C).

Rule 26.2. Production of Witness Statements.

* * * * *

(c) PRODUCTION OF EXCISED STATEMENT. If the other party claims that the statement contains privileged information or matter

that does not relate to the subject matter concerning which the witness has testified, the court shall order that it be delivered to the court in camera. Upon inspection, the court shall excise any portions of the statement that are privileged or that do not relate to the subject matter concerning which the witness has testified, and shall order that the statement with such material excised be delivered to the moving party. Any portion of the statement that is withheld from the defendant over the defendant's objection must be preserved by the attorney for the government, and, if the defendant appeals a conviction, must be made available to the appellate court for the purpose of determining the correctness of the decision to excise the portion of the statement.

(d) RECESS FOR EXAMINATION OF STATEMENT. Upon delivery of the statement to the moving party, the court, upon application of that party, may recess the proceedings so that counsel may examine the statement and prepare to use it in the proceedings.

* * * * *

(g) SCOPE OF RULE. Subdivisions (a)-(d) and (f) of this rule apply at a suppression hearing conducted under Rule 12, at trial under this rule, at sentencing under Rule 32(f), at a hearing to revoke or

modify probation or supervised release conducted under Rule 32.1(c), at detention a detention hearing conducted under Rule 46(i), and at an evidentiary hearing conducted under Section 2255 of Title 28, United States Code.

COMMITTEE NOTE

New subdivision (g) recognizes parallel amendments to the Rules of Criminal Procedure extending the application of Rule 26.2 to other proceedings. The changes referred to in this subdivision are thus consistent with the extension of Rule 26.2 in 1983 to a suppression hearing conducted under Rule 12. *See* Rule 12(i).

For that earlier extension of Rule 26.2, the Committee offered several reasons. First, production of witness statements enhances the court's ability to assess witnesses' credibility and thus assists the court in accurately finding the facts at suppression hearings. Second, because a witness testifying at a suppression hearing may not necessarily testify at trial itself, waiting until after a witness testifies at trial before requiring production of that witness's statement would be futile. Third, the Committee believed that it is not feasible to leave the suppression issue open until trial, where Rule 26.2 would then apply. Finally, the Committee recognized that, by its nature, the results of a suppression hearing have a profound impact on the issues presented at trial.

The reasons given in 1983 for extending Rule 26.2 to a suppression hearing apply equally to other adversary hearings that require accurate and reliable information. There is a similar need for information affecting the credibility of witnesses who testify or make written statements that the court considers. This need exists whether the witness is presenting testimony or an affidavit at a pretrial hearing, at trial, or at a posttrial proceeding.

As noted in the 1983 Advisory Committee Note to Rule 12(i), the courts have generally declined to extend the Jencks Act, 18 U.S.C. § 3500, beyond the confines of actual trial testimony. That unduly restrictive result

will be obviated by the addition of Rule 26.2(g) and amendments to the Rules noted in that new subdivision.

Although amendments to Rules 32, 32.1, 46, and Rule 8 of the Rules Governing Proceedings under 28 U.S.C. § 2255 specifically address the requirement of producing a witness's statement, Rule 26.2 has become known as the central "rule" requiring production of statements. Thus, the references in the Rule itself will assist the bench and bar in locating other Rules containing similar provisions.

The amendments to Rule 26.2 and the other designated Rules are not intended to require production of a witness's statement before the witness actually testifies or before the witness's affidavit is presented to the court.

Minor conforming amendments have been made to subsection (d) to reflect that Rule 26.2 applies to proceedings other than the trial itself. And language has been added to subsection (c) to make clear that privileged matter may be excised from the witness's prior statement.

Rule 26.3 Mistrial

Before ordering a mistrial, the court shall provide an opportunity for the government and for each defendant to comment on the propriety of the order, including whether each party consents or objects to a mistrial, and to suggest any alternatives.

COMMITTEE NOTE

Rule 26.3 is a new rule designed to reduce the possibility of an erroneously ordered mistrial, which could produce adverse and irretrievable consequences. The Rule is not intended to change the substantive law

governing mistrials but instead is directed at providing both sides an opportunity to place on the record their views about the proposed mistrial order. While the court must give each side an opportunity to state whether it objects or consents to the order, the Rule does not require each side to state its position.

Several recent cases have held that a defendant's retrial was barred by the Double Jeopardy Clause of the Constitution because the trial court had abused its discretion in declaring a mistrial. *See United States v. Dixon*, 913 F.2d 1305 (8th Cir. 1990); *United States v. Bates*, 917 F.2d 388 (9th Cir. 1990). In both cases the appellate courts concluded that the trial courts had acted precipitately and had failed to solicit the parties' views about the necessity of a mistrial and the feasibility of any alternatives. The new Rule is designed to remedy that situation.

The Committee regards the Rule as a balanced and modest procedural device that could benefit both the prosecution and the defense. While the *Dixon* and *Bates* decisions adversely affected the government's interest in prosecuting for serious crimes, the new Rule could also benefit defendants. The Rule ensures that a defendant has the opportunity to dissuade a judge from declaring a mistrial even when granting one would not be an abuse of discretion, if the defendant believes that the prospects for a favorable outcome before that particular court or jury are greater than they might be upon retrial.

Rule 32. Sentence and Judgment

* * * * *

(f) Production of Statements at Sentencing Hearing.

(1) In General. Rule 26.2 (a)-(d), (f) applies at a sentencing hearing under this rule.

(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, at sentencing the court may not consider the affidavit or testimony of witness whose statement is withheld.

COMMITTEE NOTE

The addition of subdivision (f) to Rule 32 is one of a number of contemporaneous amendments extending Rule 26.2 to proceedings other than the trial itself. This addition codifies the result in cases such as *United States v. Rosa*, 891 F.2d 1074 (3d Cir. 1989). In that case the defendant pleaded guilty to a drug offense. During sentencing the defendant unsuccessfully attempted to obtain Jencks Act materials relating to a co-accused who testified as a government witness at sentencing. In concluding that the trial court erred in not ordering the government to produce its witness's statement, the court stated:

> We believe the sentence imposed on a defendant is the most critical stage of criminal proceedings, and is, in effect, the "bottom-line" for the defendant, particularly where the defendant has pled guilty. This being so, we can perceive no purpose in denying the defendant the ability to effectively cross-examine a government witness where such testimony may, if accepted, add substantially to the defendant's sentence. In such a setting, we believe that the rationale of *Jencks v. United States* . . . and the purpose of the Jencks Act would be disserved if the government at such a grave stage of a criminal proceeding could deprive the accused of material valuable not only to the defense but to his very liberty. *Id.* at 1079.

The court added that the defendant had not been sentenced under the new Sentencing Guidelines and that its decision could take on greater importance under those rules. Under Guideline sentencing, said the court, the trial judge has less discretion to moderate a sentence and is required to impose a sentence based upon specific factual findings that need not be established beyond a reasonable doubt. *Id.* at n. 3.

Although the *Rosa* decision decided only the issue of access by the defendant to Jencks material, the amendment parallels Rules 26.2 (applying Jencks Act to trial) and 12(i) (applying Jencks Act to suppression hearing) in that both the defense and the prosecution are entitled to Jencks material.

A witness's statement must be produced only if the witness testifies or if the witness's affidavit is presented. The sanction provision rests on the assumption that the proponent of the witness's affidavit or testimony has deliberately elected to withhold relevant material.

Rule 32.1. Revocation or Modification of Probation or Supervised Release

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(c) PRODUCTION OF STATEMENTS

(1) In General. Rule 26.2(a)-(d) and (f) applies at any hearing under this rule.

(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 affidavit or testimony of a witness whose statement is withheld.

COMMITTEE NOTE

The addition of subdivision (c) is one of several amendments that extend Rule 26.2 to Rules 32(f), 32.1, 46, and Rule 8 of the Rules Governing Proceedings under 28 U.S.C. § 2255. As noted in the Committee Note to Rule 26.2, the primary reason for extending that Rule to other hearings and proceedings rests heavily upon the compelling need for accurate information affecting the witnesses' credibility. While that need is clear in a trial on the merits, it is equally compelling, if not more so, in pretrial and posttrial proceedings in which both the prosecution and defense have great interests at stake. In the case of revocation or modification of probation or supervised release proceedings, not only is the defendant's liberty interest at stake, but the government also has a stake in protecting the interests of the community.

Requiring production of witness statements at hearings conducted under Rule 32.1 will enhance the procedural due process that the Rule now provides and that the Supreme Court required in *Morrissey v. Brewer*, 408 U.S. 471 (1972) and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). Access to a witness's prior statements will enhance the ability of both the defense and prosecution to test the credibility of the other side's witnesses under Rule 32.1(a)(1), (a)(2), and (b), and thus will assist the court in assessing credibility.

A witness's statement must be produced only if the witness testifies or if the witness's affidavit is presented.

Rule 40. Commitment to Another District

(a). APPEARANCE BEFORE FEDERAL MAGISTRATE. If a person is arrested in a district other than that in which the offense is alleged to have been committed, that person must be taken without unnecessary delay before the nearest available federal magistrate. Preliminary proceedings concerning the defendant must be conducted in accordance with Rules 5 and 5.1, except that if no preliminary examination is held because an indictment has been returned or an information filed or because the defendant elects to have the preliminary examination conducted in the district in which the prosecution is pending, the person must be held to answer upon a finding that such person is the person named in the indictment, information or warrant. If held to answer, the defendant must be held

to answer in the district court in which the prosecution is pending — provided that a warrant is issued in that district if the arrest was warrantless — upon production of the warrant or a certified copy. [Have I correctly read the proviso in the preceding sentence? Upon production of the warrant by whom? — B.A.G.] The warrant or certified copy may be produced by facsimile transmission.

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COMMITTEE NOTE

The amendment to subdivision (a) is intended to expedite determining where a defendant will be held to answer by permitting facsimile transmission of a warrant or a certified copy of the warrant. The amendment recognizes that the public in general — particularly the legal profession — has increasingly relied on accurate and efficient transmission of documents by facsimile machines.

Rule 41. Search and Seizure

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(c) ISSUANCE AND CONTENTS.

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(2) *Warrant Upon Oral Testimony.*

(A) GENERAL RULE. If the circumstances make it reasonable to dispense with a written affidavit, a Federal magistrate judge may issue a warrant based, in whole or in part, upon sworn testimony communicated by telephone or other appropriate means, including facsimile transmission.

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COMMITTEE NOTE

The amendment to Rule 41(c)(2)(A) is intended to expand the authority of magistrates and judges in considering oral requests for search warrants. It also recognizes the value of, and the public's increased dependance on, facsimile machines to transmit written information efficiently and accurately. The Rule as amended should thus encourage law enforcement officers to seek a warrant, especially when it is desirable to supplement telephonic communications by written materials, which may now be transmitted electronically.

The Committee considered amendments to Rule 41(c)(2)(B), Application, Rule 41(c)(2)C), Issuance, and Rule 41(g), Return of Papers to

Clerk, but determined that allowing facsimile transmissions in those instances would not save time and would cause problems concerning the need to preserve facsimile copies.

Rule 46. Release from Custody

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(i) PRODUCTION OF STATEMENTS.

(1) In General. Rule 26.2(a)-(d) and (f) applies at a detention hearing held under 18 U.S.C. § 3144.

(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, at the detention hearing the court may not consider the affidavit or testimony of witness whose statement is withheld.

COMMITTEE NOTE

The addition of subdivision (i) is one of a series of similar amendments to Rules 26.2, 32, 32.1, and Rule 8 of the Rules Governing Proceedings Under 28 U.S.C. § 2255, which now extend Rule 26.2 to other proceedings. As pointed out in the Committee Note to the amendment to Rule 26.2, there is a compelling need to assess the credibility and reliability of information relied upon by the court , whether a witness's testimony or affidavit is being considered at a pretrial proceeding, at trial, or at a posttrial proceeding.

Production of a witness's prior statements allows the court and the parties to test a witness's credibility more thoroughly.

The need for reliable information is no less crucial in a proceeding to determine whether a defendant should be released from custody. The issues decided at pretrial-detention hearings are important both to a defendant and to the community. For example, a defendant charged with criminal acts may be incarcerated without bail before an adjudication of guilt on grounds of future dangerousness — a basis not requiring proof beyond a reasonable doubt. Conversely, although the defendant has an interest in remaining free until *or* before trial, the community has an equally compelling interest in being protected from crimes that persons awaiting trial may commit.

In upholding the constitutionality of pretrial detention based upon dangerousness, the Supreme Court has stressed the procedural safeguards in the Bail Reform Act. *See United States v. Salerno*, 481 U.S. 739 (1986). The Act provides for the right to counsel and the right to cross-examine adverse witnesses. *See, e.g.*, 18 U.S.C. § 3142(f)(giving defendants the right to cross-examine adverse witnesses). Those safeguards, said the Court, are "specifically designed to further the accuracy of that determination." 481 U.S. at 751. The Committee believes that requiring the production of a witness's statement will enhance the fact-finding process.

The Committee recognizes that pretrial detention hearings are often held very early in a prosecution, and that a particular witness's statement may not yet be on file, or even known about. The amendment nonetheless envisions that both sides should make reasonable efforts to locate such statements, assuming that they exist. If a witness's statement is not discovered until after the pretrial detention hearing, the court may reopen the proceeding if the statement would have had a material bearing on the court's decision. *See* 18 U.S.C. § 3142(f).

RULES GOVERNING PROCEEDINGS IN THE UNITED STATES DISTRICT COURT UNDER § 2255 OF TITLE 28, UNITED STATES CODE

Rule 8. Evidentiary Hearing

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(d) Production of Statements at Evidentiary Hearing.

(1) In General. Federal Rule of Criminal Procedure 26.2(a)-(d), and (f) applies at an evidentiary hearing under these rules.

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

COMMITTEE NOTE

The amendment to Rule 8 is one of a series of parallel amendments to Federal Rules of Criminal Procedure, 32, 32.1, and 46, which extend the scope of Rule 26.2 (Production of Witness Statements) to proceedings other than the trial itself. The amendments reflect the compelling need for accurate and credible information in making decisions concerning the defendant's liberty. *See* the Advisory Committee Note to Rule 26.2(g). A few courts have recognized the authority of a judicial officer to order production of prior

statements by a witness at a § 2255 hearing. *See, e.g., United States v. White*, 342 F.2d 379, 382 n.4 (4th Cir.), *cert. denied*, 382 U.S. 871 (1965). The amendment to Rule 8 now grants explicit authority to do so.

The amendment is not intended to require production of a witness's statement before the witness actually testifies or before the witness's affidavit is presented to the court for its consideration.