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ADVISORY COMMITTEE
ON
CRIMINAL RULES

Washington, D.C.
April 18-19, 1994

AGENDA
CRIMINAL RULES COMMITTEE
HEARING AND MEETING

April 18-19, 1994
Washington, D.C.

I HEARING ON PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE (Memo)

A. Introduction and Comments by Chair

B. Testimony by Witnesses on Proposed Amendments

1. Mr. Steven Brill (Rule 53)

3. Mr. Tim Dyk (Rule 53)

2. Ms. Elizabeth Manton (Rule 43)

II COMMITTEE MEETING; PRELIMINARY MATTERS

A. Administrative Announcements and Comments by Chair

B. Approval of Minutes of October 1993, Meeting in San Diego, California

III CRIMINAL RULES UNDER CONSIDERATION

A. Rules Approved by the Supreme Court and Forwarded to Congress: Effective December 1, 1993 (No Memo).

1. Rule 12.1, Discovery of Statements

2. Rule 16(a), Discovery of Experts

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 Section 2255 Hearings

11. Technical Amendments

B. Rules Approved by Judicial Conference and Forwarded to Supreme Court (No Memo)

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

2. Rule 29(b), Delayed Ruling on Judgment of Acquittal

3. Rule 32, Sentence and Judgment

4. Rule 40(d), Conditional Release of Probationer

C. Rules Approved by Standing Committee at June 1993 Meeting: Circulated for Public Comment

1. Rule 5(a), Initial Appearance Before the Magistrate (Memo)

2. Rule 10, Arraignment (Memo)

3. Rule 43, Presence of Defendant (Memo)

4. Rule 53, Regulation of Conduct in the Court Room (Memo)

5. Rule 57, Rules by District Courts (Memo)

6. Rule 59, Effective Date (Memo)

D. Rules Under Consideration by Advisory Committee

1. Rule 6; Amendment to Permit Disclosure of Grand Jury Materials to State Judicial and Attorney Discipline Regulatory Agencies (Memo)

2. Rule 16. Discovery and Inspection

a. Report of Subcommittee on O'Brien Proposals (Memo)

b. Prado Report Re Allocation of Costs of Discovery (Memo)

c. Production of Witness' Names (Memo)

d. Defense Disclosure to Government of Summary of Expert Testimony on Defendant's Mental Condition (Memo)

3. Rule 26; Proposal to Permit Questioning by Jurors (Memo)

4. Rule 32; Amendment Permitting Criminal Forfeiture Before Sentencing (Memo)

5. Rule 46; Typographical Error (Memo)

6. Rule 49(e); Repeal of Provision (Memo)

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

1. Status Report on Local Rules Project; Compilation of Local Rules for Criminal Cases

2. Status Report on Proposal to Implement Guidelines for Filing by Facsimile

3. Status Report on Crime Bill Amendments Affecting Federal Rules of Criminal Procedure

IV. MISCELLANEOUS

V. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

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3/21/94

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MEMO TO: Advisory Committee on Criminal Rules

FROM: David A. Schlueter, Reporter

RE: Hearing on Proposed Amendments to Federal Rules of Criminal Procedure

DATE: March 16, 1994

In June 1993, the Standing Committee approved for publication and comment six Rules of Criminal Procdure: Rules 5(a), 10, 43, 53, 57, and 59 (*See* Item III-C on the agenda). The deadline for the comments to those rules is April 15, 1994. Each of the proposed amendments is addressed separately in the agenda materials.

Originally, a hearing was scheduled for April 4, 1994 in Los Angeles to hear any testimony on the proposed amendments. That hearing has been resheduled to coincide with the Advisory Committee's meeting in Washington, D.C. on April 18, 1994. To date, three individuals have indicated that they wish to present oral testimony to the Committee on the proposals: Mr. Steven Brill and Mr. Tim Dyke will address the proposed amendment to Rule 53 concerning photographing and broadcasting of judicial proceedings. Ms. Elizabeth Manton will address the amendment to Rule 43 concerning arraignments through video technology.

The hearing will be the first item of business for the Committee on April 18th and will be conducted separately from the Committee's agenda. The Committee's discussion and action on the proposed amendments to the six rules will occur at the place indicated in the agenda. (Item III-C).

MINUTES
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

October 11 & 12, 1993
San Diego, California

The Advisory Committee on the Federal Rules of Criminal Procedure met in San Diego, California on October 11 and 12, 1993. These minutes reflect the actions taken at that meeting.

CALL TO ORDER

Judge Jensen, Chair of the Committee, called the meeting to order at 9:00 a.m. on Monday, October 11, 1993 at the Le Meridian Hotel in San Diego, California. The following persons were present for all or a part of the Committee's meeting.

Hon. D. Lowell Jensen, Chair
Hon. B. Waugh Crigler
Hon. Sam A. Crow
Hon. W. Eugene Davis
Hon. Wm. Terrell Hodges
Hon. George M. Marovich
Prof. Stephen A. Saltzburg
Mr. John Doar, Esq.
Mr. Tom Karas, Esq.
Ms. Rikki J. Klieman, Esq.
Mr. Edward Marek, Esq.
Mr. Roger Pauley, Jr., designate of Mr. John C. Keeney, Acting Assistant Attorney General

Professor David A. Schlueter
Reporter

Also present at the meeting were Judge Alicemarie H. Stotler and Mr. Bill Wilson, chair and member respectively of the Standing Committee on Rules of Practice and Procedure; Mr. John Rabiej, Mr. Paul Zingg, and Ms. Anne Rustin of the Administrative Office of the United States Courts and Mr. James Eaglin from the Federal Judicial Center. Judge Rodriguez was not able to attend the meeting.

I. INTRODUCTION AND COMMENTS

Judge Jensen, newly appointed chair of the Committee, welcomed the attendees and recognized Judge Hodges for his outstanding contributions as outgoing chair of the Committee. Following a brief response of gratitude from Judge Hodges, Judge Jensen recognized the contributions of Mr. Marek and Mr. Doar who were also leaving the Committee after many years of service. The Committee also extended its congratulations to Mr. Wilson who had recently received Senate confirmation as a federal district judge.

II. APPROVAL OF MINUTES OF COMMITTEE'S APRIL 1993 MEETING

After noting a typographical error on page 14 of the minutes, concerning the date of the Committee's October 1992 meeting, Judge Marovich moved that the minutes for the April 1993 meeting be approved. Mr. Karas seconded the motion which carried by a unanimous vote.

III. REPORT OF SUBCOMMITTEE ON COMMITTEE PROCEDURES

Judge Crow reported that his subcommittee, comprised of Judge Jensen, Ms. Klieman, Mr. Marek, and Mr. Pauley, had considered two issues raised at the Committee's April 1993 meeting: (1) Whether the Committee should permit interested persons to appear and speak on proposed amendments and (2) Whether any conditions should be imposed on reconsidering a proposed rule change which has been rejected. He provided a brief background of several problems which had arisen in conjunction with proposed amendments. For example, interested parties have from time to time requested permission to address personally the Committee in an attempt to persuade the members to adopt, or reject, a particular proposal. The subcommittee recognized that although some proposals might not be susceptible to "oral testimony" from interested parties, the rule making process should be open to public scrutiny. To address this issue, the subcommittee offered three alternative proposals:

1. *Recommendation:* The Advisory Committee should adopt the subcommittee's recommendation to require all suggestions and proposals submitted by interested persons to be in writing and to limit oral testimony or statements to public hearings only and not business meetings. This

recommendation does not preclude Committee members from asking questions of proponents or opponents who are attending the business meeting.

2. *First Alternative Recommendation:* The Advisory Committee adopt the subcommittee's first alternative recommendation to require all suggestions and proposals submitted by interested persons be in writing and to allow oral testimony at business meetings in support of or in opposition to written proposals upon advance written request and cause shown.

3. *Second Alternative Recommendation:* The Advisory Committee adopt the subcommittee's second alternative recommendation to stay with the status quo but monitor closely the current practice of oral testimony at business meetings and reconsider the above recommendations when circumstances further warrant it.

Judge Crow noted that some members of the subcommittee had expressed the dissenting view that a flat prohibition on any oral presentations would be viewed as contradictory to the public policy of the keeping the Committee's work open to the public. Those members, he noted, favored leaving to the Chair the question of whether oral testimony should be presented at a particular meeting.

Judge Crow thereafter moved that the Committee adopt the subcommittee's recommendation. Judge Davis seconded the motion.

In the discussion which followed, Judge Hodges noted that there was growing pressure on proponents to appear and argue their cause before the Committee. Noting the mixed history of hearing from proponents, he observed that it is often touchy and difficult to decide who should be permitted to address the Committee. He believed that it was important to give some guidance to the Chair and that he favored the first recommendation. He stated that proponents can offer written suggestions and that to permit oral testimony might politicize the meetings.

In response to a question from Judge Crigler, Judge Stotler indicated that no other Committee has articulated

any clear procedure for hearing testimony or oral presentations at business meetings. And she could not recall the issue ever arising in the Standing Committee.

The Reporter informed the Committee that he often receives telephone inquiries from individuals and organizations about the possibility of personally pleading their cause for a particular amendment and that he refers them to the Chair. Ms. Klieman noted that she had been lobbied on at least one proposal and feared that there could be a bombardment of oral testimony. Mr. Wilson spoke in favor of permitting oral arguments on particular proposals and Mr. Marek commented generally on the question of whether the public is even aware of the Committee's agenda. He was informed that that information is available to the public.

Professor Saltzburg favored the first proposal which permitted the option of questions from the Committee. Judge Hodges provided a more detailed description of the need for clear guidance on who should be permitted to appear before the Committee and Judge Stotler added that the Standing Committee would be considering internal rules of procedure for conducting its business. She also suggested that it would be beneficial to prepare an annual report indicating what, if any, action had been taken on various proposals. And it was essential, she added, that the public be aware of the agenda.

The Committee voted unanimously to approve the subcommittee's first recommendation. Mr. Rabiej indicated that he would coordinate the notice of the agendas and at the suggestion of Mr. Pauley, it was decided that the recommendation should be drafted as a bylaw of the Advisory Committee.

Thereafter, Mr. Pauley moved to forward the recommendation and action to the Standing Committee. Judge Crigler seconded the motion which carried by a unanimous vote.

Judge Crow presented the subcommittee's recommendation regarding the possibility of reviving proposed amendments which have been previously rejected by the Committee. He noted that the problem had not been encountered enough to make any judgment as to whether repeated proposals are purposeful or merely coincidental. He also noted that the subcommittee questioned whether it would be advisable to place restrictions on repeated proposals. The subcommittee, he stated, had decided to propose the following recommendation:

The Advisory Committee adopt the subcommittee's

recommendation that the reporter in preparing copies and summaries of all written suggestions or proposals identify those that are similar to ones that have been rejected and, to the extent practicable, provide a summary of the reasons for the rejection appearing in the Committee's minutes.

Judge Crow moved that the recommendation be adopted. Professor Saltzburg seconded the motion.

In the discussion that followed the motion, Crigler expressed concern about reconsideration of rejected amendments and Mr. Marek raised the question of what would constitute "rejection" of a particular proposal. Judge Marovich expressed the view that the Committee should keep it simple, e.g., the Committee would normally not be amenable to continued discussion about a proposal which had been rejected. He also noted that the Committee procedures should not be tuned too finely.

The Committee ultimately voted unanimously in support of the motion. Professor Saltzburg moved that the recommendation be forwarded to the Standing Committee and Mr. Marek seconded the motion. The motion carried by a unanimous vote.

IV. CRIMINAL RULE AMENDMENTS UNDER CONSIDERATION

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

The Reporter indicated that amendments to the following rules had been approved by the Supreme Court and had been forwarded to Congress:

Rule 12.1 (discovery of statements)
Rule 16(a) (discovery of experts)
Rule 26.2 (production of statements)
Rule 26.3 (mistrial)
Rule 32(f) (production of statements)
Rule 32.1 (production of statements)
Rule 40 (commitment to another district)
Rule 41 (search and seizure)
Rule 46 (production of statements)
Rule 8, Rules Governing Section 2255 Proceedings
Technical Amendments (use of term "magistrate judge") throughout the Rules

Barring any action by Congress, these amendments will go into effect on December 1, 1993.

B. Rules Approved by the Judicial Conference and Being Forwarded to the Supreme Court

The Reporter informed the Committee that amendments to Rules 16(a)(1)(A)(statements or organizational defendants), 29(b)(delayed ruling on judgment of acquittal), 32(sentence and judgment), and 40(d)(conditional release of probationer) were approved by the Standing Committee at its June 1993 meeting and that the Judicial Conference had also approved the amendments. They will be transmitted to the Supreme Court in the near future.

C. Rules Approved by the Standing Committee for Public Comment

The Reporter also informed the Committee that the Standing Committee in June 1993 approved for publication and comment amendments to the following rules: Rule 5 (exemption for persons arrested for unlawful flight to avoid prosecution), Rule 10 (in absentia arraignments), Rule 43 (in absentia pretrial sessions; in absentia sentencing); and Rule 53 (cameras in the courtroom). The deadline for public comments is April 15, 1994.

The Reporter indicated that the Litigation Section of the American Bar Association had requested extra time to comment on the proposed amendments, in particular Rule 53. Following a brief discussion during which it was noted that the deadline of April 15 would provide the opportunity to review any public comments at the Committee's Spring meeting. No action was taken on the letter.

D. Other Criminal Procedure Rules Under Consideration by the Committee

1. Rule 6, Secrecy Provisions of Rule re Reporting Requirements.

The Reporter informed the Committee that Mr. David Cook of the Administrative Office had raised the issue of whether Rule 6 would be violated if all indictments, sealed and unsealed, were reported to the Administrative Office. Mr. Rabiej provided some background information on the request. Both Mr. Marek and Mr. Pauley expressed concern over the possible release of any information concerning sealed indictments. Mr. Pauley noted that reporting sealed indictments could be especially problematic where the public was aware that a grand jury was meeting on a big case.

Judge Crow questioned whether the Committee should even be considering the issue. His concern was echoed by Judge Jensen who noted that the Committee should not render advisory opinions on rule interpretations. Judge Marovich moved that the Committee decline to act on the issue and Mr. Doar seconded the motion, which carried by a unanimous vote.

2. Rule 16, Disclosure of Witness Names.

Judge Jensen provided a brief overview of a proposal before the Committee to amend Rule 16 to require the government to disclose the identity and statements of its witnesses before trial. He noted that the proposal, which had been presented by Professor Saltzburg and Mr. Wilson at the April 1993 meeting, had been deferred at the request of Attorney General Janet Reno who had requested time to study the issue. On August 4, 1993, Attorney General Reno wrote to then chair, Judge Hodges, indicating her opposition to any effort to amend Rule 16 to require such disclosure. In support of her position she attached a detailed memo prepared by Mr. Pauley; that memo critiqued a draft amendment prepared by Professor Saltzburg and Mr. Wilson. Judge Jensen noted that the Reporter had prepared an alternate draft.

Mr. Wilson offered brief comments on each of the two drafts and observed that the Department of Justice will apparently not change its views on discovery.

Addressing the draft that he had prepared, Professor Saltzburg noted that the Committee had spent a long time on this issue and that the proposed amendment was an important one. After summarizing the thrust of his draft, Professor Saltzburg noted the long-standing opposition by the Department of Justice and that they were candid enough to reject any suggested changes. He observed, however, that there is no real dispute that discovery encourages efficient trials. The Department recognizes that point, he noted, because it had itself successfully proposed amendments to rules which benefit the prosecution. Professor Saltzburg also observed that the system is more complicated and that this amendment would be a first important step toward making criminal trials more effective. He noted that the draft presented a balance between protecting witnesses and the defendant's right to prepare for trial.

Professor Saltzburg moved that the Committee approve the substance of his draft which would require the government to disclose to the defense seven days before trial the names and statements of its witnesses. Excluded from his motion was any reference to disclosure of co-

conspirator statements. Mr. Karas seconded the motion.

In the lengthy discussion which followed Mr. Pauley provided an in-depth analysis of why the motion should be defeated. He agreed that the Department has agreed to a number of amendments in the past but that it felt very uncomfortable with the proposed amendment. This amendment, he said, was unacceptable to the Department and indicated that it would exert all of its energy at every stage of the rule making process to defeat the amendment. He added that the amendment potentially infringes on the Rules Enabling Act because Congress has already spoken on the issue in the Jencks Act. The Committee, he stated, should therefore defer to Congress and avoid the appearance of an end run. If the proponents have enough political clout, they should seek an amendment through Congressional action. Mr. Pauley also took exception to any suggestion that trials are currently unfair. The Department also wants fair and efficient trials but that the current state of affairs does not present any problems worthy of an amendment. He indicated the fear that the amendment would dampen the willingness of witnesses to come forward and testify. In that regard he observed that the amendment would needlessly invade the privacy interests of the witnesses. Finally, he noted a number of technical problems with the draft, which he had explained in more detail in the memo accompanying Attorney General Reno's letter.

The Reporter briefly introduced an alternative draft noting that the draft contained no reference to production of the government witness statements and no specific procedure for government counsel declining to disclose the evidence. He noted that his draft provided that counsel could use Rule 16(d) to obtain protective orders. That draft did not include any procedure for post-trial review of a decision to not disclose the witnesses.

Mr. Pauley responded by noting that the Department was even more opposed to the Reporter's draft and that it was definitely not a compromise.

Judge Marovich expressed concern about the tone of the Department of Justice's memo and that the Committee would probably lose the battle in Congress. In very strong language, he expressed concern about suggestions that the judiciary would not be able to fairly determine whether a witness' name should be disclosed. He noted that eventually the government would have to disclose its witnesses and that if the Department has good faith reasons for not disclosing the witnesses before trial, they should be able to request an exception to the general rule of disclosure. Judge Marovich added that he is familiar with state discovery

practices and that there is no real danger to government witnesses. He also observed that early disclosure does have a positive impact on trials.

Mr. Marek expressed the view that the Saltzburg/Wilson proposal was a compromise. The key, he said, would be that the Committee Note provide guidance on what constitutes "good faith" on the part of the prosecutor in not disclosing a name. He also noted that the Reporter's draft was less satisfactory because it did not make provision for disclosure of witness statements. He noted that the proper avenue for amending Rule 16 is through the Rules Enabling Act, and not going directly to Congress. Reading from pertinent provisions in the Committee Note accompanying a similar amendment forwarded to Congress in 1974, Mr. Marek noted the importance of pretrial discovery. He also reminded the Committee that the Department of Justice had sought amendments broadening government discovery in Rules 12.1 and 12.3.

Mr. Pauley responded briefly by observing that judges do have concerns about witness safety and can decide whether a sufficient showing has been made by the prosecutor.

Addressing the issue of witness safety, Judge Davis commented that the issue cannot be ignored and that it is not always easy for the prosecution to articulate good cause. But the increase in the case load means that discovery will become more important. He expressed approval of the Reporter's draft amendment and the possibility of a reciprocity provision for the government. Finally, he suggested that the prosecutor's reasons for not disclosing a witness should be unreviewable.

Ms. Klieman noted that she has represented both the government and the defense and that she is not necessarily biased in favor of defendants. She stated that the danger factor is real, not only to the witness but also to the family. But the government has options available for protecting witnesses. Ms. Klieman expressed agreement with Judge Marovich's views on discovery in state practice and added that it would be false to assume that there are more dangers to persons in the federal system. The danger is no different and the Saltzburg/Wilson proposal accounts for that. She noted that the participants should count on good faith of the prosecutor. Drawing on the fact that she has worked on both sides, she could not think of a case where discovery did not promote efficiency. She also indicated that the Reporter's draft fell short of the needed reform. The defendant needs the witness' statements before trial. Finally, she indicated support for inclusion of a reciprocity provision.

Mr. Wilson recounted a case in which a client was innocent and there was clearly no danger to the government witnesses. He noted that the issue of potential danger to witnesses is a very small part of the federal criminal system.

Mr. Doar noted his general reluctance to change the rule and that he did not agree with Judge Marovich's view that judges are better able to decide whether a witness is in danger. He also indicated disagreement with Mr. Wilson's point that the issue of witness safety is not important. Finally, he questioned the need for a provision for post-trial review of the prosecutor's reasons for not disclosing a witness' name.

Professor Saltzburg responded that it would probably not be necessary to include such a provision and that his proposal was intended to include checks and balances on both sides. He added that the proposal should include a provision which recognizes the possible danger to third persons.

Judge Crow disagreed with the view that the attorneys should not be trusted. He agreed that the amendment should require disclosure of names and addresses but was not sure that it should extend to disclosure of statements. He also expressed approval of a reciprocity provision and favored deletion of a post-trial review procedure.

Judge Crigler indicated that he had mixed views on the Saltzburg/Wilson proposal. He did not believe that the Reporter's draft went far enough but was concerned about possible post-trial litigation concerning the prosecutor's decision not to disclose a witness' name. While he agreed with Judge Crow's views about trusting counsel to do the right thing, he was concerned about starting a debate with Congress on criminal discovery.

Judge Marovich stated that there will be no confrontation with Congress unless the Department of Justice wants it. He agreed with those who are opposed to including a post-trial review provision. The real deterrent to abuse of the option of not disclosing a witness is the fact that prosecutors want to maintain credibility.

Professor Saltzburg withdrew his earlier motion and made a substitute motion, with the consent of Mr. Wilson, that the Committee approve in principle an amendment which would require the prosecutor to disclose a witness' name, address, and statement but would not include a provision for post-trial review of the prosecutor's decision not to

disclose. He suggested that the Committee wait on the issue of reciprocity.

Mr. Pauley expressed concern for the timing requirements, noting that in capital cases the prosecution need not disclose a witness' name until three days before trial.

The Committee voted 8 to 2 in favor of Professor Saltzburg's motion.

Following a brief adjournment, Professor Saltzburg presented a draft amendment to the Committee which covered the key points raised in the earlier discussion. Mr. Pauley again urged the Committee to shorten the time for disclosure to three days before trial. Following additional drafting and style suggestions, the Committee voted 9 to 1 to approve the draft amendment and forward it to the Standing Committee for approval and publication.

In later discussion concerning issues to be included in the accompanying Committee Note, it was suggested that the Committee Note make clear that nothing in the amendment is intended to change the protective order provision in Rule 16(d). Mr Pauley also suggested that the Note include a reference to the fact that witnesses often testify at the risk of not only physical injury but also at the risk of economic reprisal.

3. Rule 16, Disclosure to Defense of Information Relevant to Sentencing.

The Reporter informed the Committee that pending amendments to the Commentary for § 6B1.2 (Policy Statement on Standards for the Acceptance of Plea Agreements) recommend that before the defendant enters a guilty plea, the government should first disclose sentencing information which is relevant to the guidelines. He indicated that although the Sentencing Commission did not intend to confer any substantive rights on the defendant through the changed policy statement, the change is apparently intended to encourage plea negotiations that realistically reflect probable outcomes. Mr. Pauley urged the Committee to reject any proposed amendments to the Rules concerning disclosure of sentencing evidence. He noted that the issue had been raised three years earlier and that the Department of Justice had also opposed it then. The Department was concerned that enormous amounts of litigation would be generated through a requirement to disclose sentencing evidence. Noting that the defense receives such information under current practice, he also expressed concern that the

plea bargaining system would break down.

The Committee took no action on the issue.

4. Rule 16, Proposal to Require Government to Identify Materials Relevant to Defendant.

Mr. Marek recommended that the Committee consider Judge Donald E. O'Brien's proposal to amend Rule 16. The gist of the proposal is that Rule 16 be amended to require the government to provide an index, guide or some other device to assist defense counsel in sorting through and identifying documents or information relevant to the case. He noted that Judge O'Brien is a member of the Judicial Conference's budget committee and that he is very concerned about costs associated with pretrial discovery.

Judge Hodges provided background information on a proposal by Judge Donald E. O'Brien first presented to the Committee at its Fall 1992 meeting in Seattle. The proposal was inspired, at least in part, by accounts of young court-appointed lawyers being presented with a room full of documents. From a cost-efficiency standpoint, Judge O'Brien believed that the time and expense of going through massive documents only to find little or no relevant evidence was not justifiable. At the Committee's Fall 1992 meeting, Mr. Doar moved to adopt the proposal. But it failed for lack of a second.

Judge O'Brien, and several others supporting his proposal (Professor Ehrhardt, Judge William Young, and Magistrate Judge John Jarvey) made an oral presentation at the Committee's Spring 1993 meeting in Washington, D.C. urging the Committee to reconsider its position. Although no action was taken on the renewed proposal, Judge Hodges indicated to Judge O'Brien that the matter would be added to the Committee's Fall 1993 meeting agenda. In the meantime, Attorney General Reno had addressed the proposal in her letter on Rule 16 (which the Committee discussed in conjunction with proposed amendments re disclosure of government witnesses).

Judge Crigler indicated that any work product objections that the government might have would be waived when defense counsel was shown the government storage area and that under the civil rules there is no specific authority to require production of any sort of a "roadmap" for locating the pertinent documents.

In an extensive discussion of the issue, Mr. Pauley opposed the proposal. He noted that there was ambiguity in

the proposal and that the Attorney General had provided the Committee with a number of compelling reasons why the proposal was inappropriate and that the defense should not count on an organizational index. Mr. Doar indicated that presenting a chronological list of pertinent documents would be helpful.

Judge Jensen indicated that the matter would be deferred until the Committee's Spring 1994 meeting and appointed a subcommittee (Ms. Klieman, Chair, Judge Davis, Judge Marovich, and Mr. Pauley) to study the proposal more fully.

5. Rule 40, Treating FAX Copies as Certified.

The Committee considered a proposal filed by Magistrate Judge Wade Hampton that the rules be amended to provide that faxed certified documents of indictments, arrest warrants, or other instruments be considered as "certified." Following a brief discussion of the proposal, Judge Crigler noted that the proposal seemed to be adequately covered in the rules and moved that the Committee reject the proposal. Mr. Marek seconded the motion which carried by a unanimous vote.

6. Rule 41, Proposed Deletion of Requirement that Warrant be Issued by Authority Within District.

The Committee considered a proposal filed by Mr. J.C. Whitaker, a federal law enforcement employee, who recommended that Rule 41 be amended to delete the territorial limitations. He noted in his letter that such limitations create hardships for law enforcement officers who must now obtain a search warrant from an authority in district where the property is located, or will be located. The Reporter informed the Committee that the territorial limitation issue had been considered by the Committee when it amended Rule 41 several years ago to cover property moving into, or out of, a district.

The proposal failed for lack of a motion.

7. Rules Governing Section 2254 Cases; Proposed Legislation Affecting Rules.

Mr. Rabiej informed the Committee that Congress was considering amendments to Sections 2242 and 2254 and that depending on the final draft, there could be direct impact on the Rules Governing Section 2254 cases. He added that he

would keep the Committee apprised of any further developments.

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

1. Rule 57, Materials Regarding Local Rules.

The Reporter apprised the Committee that the Reporter for the Standing Committee, Dean Coquillette, was coordinating the drafting and publication of an amendment to Rule 57 which addresses the uniform numbering of local rules and guidance on imposing sanctions for failure to follow a local internal operating procedure or standing order. He indicated that the drafting was complete and that the rule would be published for public comment in the near future. The deadline for those comments will be April 15, 1994

2. Rule 59, Proposed Amendments Concerning Technical Amendments by Judicial Conference.

The Reporter also informed the Committee that the Standing Committee had approved amendments to Rule 59, and its counterparts in the other rules, and that they would be published for public comment in the near future. The amendment would permit the Judicial Conference to make technical changes to the rules without the need for Congressional action. The deadline for comments on this amendment is April 15, 1994.

3. Report on Proposal to Implement Facsimile Guidelines.

Judge Jensen informed the Committee that the Judicial Conference was in the process of compiling guidelines on facsimile filings. He indicated that Judge Stotler, incoming chair of the Standing Committee, had requested each of the Advisory Committees to apprise her of whether it would be feasible for the each Committee to approve for publication for public comment (1) the filing guidelines, as revised by the Appellate Rules Advisory Committee, and (2) any necessary amendments to the procedure rules. Judge Stotler provided additional background information on the guidelines. The Reporter indicated that amending the criminal rules themselves was not as critical because Criminal Rule of Procedure 49(d) simply incorporates by reference any such guidelines in the Civil Rules of Procedure. Following additional discussion, the Committee authorized Judge Jensen to apprise the Standing Committee of

the sense of the Committee's observations, i.e., the recommendation that the guidelines include authorization to restrict the hours during which facsimile transmissions might be received by the court.

Judge Crigler indicated that he would be opposed to any facsimile guidelines which did not include some reference to filing during business hours. Following further brief discussion, the Committee was in general agreement that no further action on the guidelines was warranted at this time.

V. REPORT ON EVIDENCE ADVISORY COMMITTEE

Professor Saltzburg, who serves on the Evidence Advisory Committee as a liaison with the Committee, reported that the Evidence Committee had met for three days and discussed a wide range of possible topics for amendments. He noted that the Committee had agreed that no amendments would be suggested unless there was a real problem with the current evidence rule and the amendment would clearly improve the rule. He indicated that the Committee would be considering Rule 404(b) vis a vis Rule 104, i.e., whether the judge should decide finally if there was sufficient evidence showing an extrinsic act.

He noted that the Committee would also consider Rule 410 regarding the practice of a defendant waiving the right, as part of plea bargaining, to object to use of those statements for impeachment purposes. A recent Ninth Circuit decision in *United States v. Mezzanatto* indicated that the defendant may not waive Rule 410. The Evidence Committee had requested the views of the Committee on whether any amendments would be appropriate to Rule 410 and or Rule of Criminal Procedure 11, which contains similar language.

Professor Saltzburg also reported that the Evidence Committee would be considering possible amendments to Rule 614 which would permit questioning by jurors and a possible amendment to Rule 1101(d) concerning possible application of the evidence rules at sentencing.

Following brief discussion about the Committee's role in addressing potential evidence issues impacting on the criminal rules. Professor Saltzburg moved that Rule 410 and Rule 11 be tabled until the next meeting. Judge Davis seconded the motion which carried by a unanimous vote.

Professor Saltzburg and Judge Jensen expressed the view that they believed it inappropriate to amend any criminal procedure rule to provide for juror questioning. Professor Saltzburg thereafter moved that the issue be tabled until

the Spring 1994 meeting. Judge Crigler seconded the motion which carried by a unanimous vote.

Mr Wilson indicated that he believed that some provision should be made for entertaining objections to juror questions out of the presence of the jury. For example, an amendment might be made to Rule 26 which addresses the taking of testimony.

VI. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

Judge Jensen announced that the next meeting of the Committee would be held in Washington, D.C. on April 18 & 19, 1994 at the Thurgood Marshall Federal Judiciary Building.

The meeting adjourned on Tuesday, October 12, 1993.

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

November 24, 1993

MEMORANDUM TO ALL CHIEF JUDGES, UNITED STATES COURTS

SUBJECT: Amendments to the Federal Rules of Practice and Procedure

The Congress has taken no action to defer the effective date of the amendments to the Federal Rules of Appellate, Civil, and Criminal Procedure and the Rules of Evidence, which were adopted by the Supreme Court on April 22, 1993, under 28 U.S.C. § 2072. For your information, the House of Representatives passed H.R. 2814, the "Civil Rules Amendments Act of 1993," that would have deleted amendments to Civil Rule 26(a)(1) and Civil Rule 30(b)(3). The Senate, however, failed to approve the bill under unanimous consent procedures before adjournment.

The amendments are set out in House Documents 103-72, 103-74, 103-75, and 103-76, which were sent to you in May 1993. In accordance with 28 U.S.C. § 2074(a) and the Supreme Court Order of April 22, 1993, the pertinent amendments will govern all proceedings commenced on or after December 1, 1993, and "insofar as just and practicable," all proceedings then pending.

In a separate mailing, I am also sending to you and all other judges and court officers, an excellent paper prepared by Judge Patrick E. Higginbotham, chair, and Dean Edward H. Cooper, reporter to the Advisory Committee on Civil Rules, that summarizes the amendments to the Federal Rules of Civil Procedure.

L. Ralph Mecham

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 22, 1993

Dear Mr. Speaker:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress amendments to the Federal Rules of Criminal Procedure and an amendment to Rule 8 of the Rules Governing Section 2255 Proceedings that have been adopted by the Supreme Court pursuant to Section 2072 of Title 28, United States Code. While the Court is satisfied that the required procedures have been observed, this transmittal does not necessarily indicate that the Court itself would have proposed these amendments in the form submitted.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Advisory Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

William H. Rehnquist

Honorable Thomas S. Foley
Speaker of the House of Representatives
Washington, D.C. 20515

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Criminal Procedure for the United States District Courts be, and they hereby are, amended by including therein amendments to Criminal Rules 1, 3, 4, 5, 5.1, 6, 9, 12, 16, 17, 26.2, 32, 32.1, 40, 41, 44, 46, 49, 50, 54, 55, 57, and 58, and new Rule 26.3, and an amendment to Rule 8 of the Rules Governing Section 2255 Proceedings.

[See infra., pp. _____ _____ _____.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 1993, and shall govern all proceedings in criminal cases thereafter commenced and, insofar as just and practicable, all proceedings in criminal cases then pending.

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

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

November 9, 1993

MEMORANDUM TO THE CHIEF JUSTICE OF THE UNITED STATES
AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I have the honor to transmit herewith for the consideration of the Court proposed amendments to Rules 16, 29, 32, and 40 of the Federal Rules of Criminal Procedure. The Judicial Conference recommends that these amendments be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering these proposed amendments, I am also transmitting an excerpt from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference and the Report of the Advisory Committee on the Federal Rules of Criminal Procedure.

L. Ralph Mecham

Enclosures

EXCERPT FROM THE
REPORT OF THE JUDICIAL CONFERENCE
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
SEPTEMBER 1993

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

III. Amendments to the Federal Rules of Criminal Procedure.

The Advisory Committee on Criminal Rules submitted to your Committee proposed amendments to Criminal Rules 16, 29, 32, and 40 together with Committee Notes explaining their purpose and intent. The proposed amendments were circulated for public comment in late December 1992 on an expedited four-month timetable to coincide with the timetable for amendments to Evidence Rule 412. A public hearing on the proposed amendments was held in Washington, D.C. on April 22, 1993.

The Advisory Committee received a substantial number of comments on the proposed amendments to Criminal Rule 32, particularly from probation officers who were concerned about the time deadlines imposed on the completion of presentence reports. In light of these concerns, the Advisory Committee eliminated the reference to the specific time set for the completion of a presentence report and substituted the existing provision, which requires the report to be completed before the sentence is imposed "without unreasonable delay." Specific time periods regulating other stages of the sentencing process, however, were retained in the proposed amendments. The Advisory Committee also retained the proposed amendment's presumption that a probation officer's sentencing recommendation be disclosed to the parties, despite the recommendation of the Committee on Criminal Law to retain the current rule's presumption against disclosure.

The Advisory Committee made several other changes to the original draft regarding the responsibilities and authority of probation officers during the sentencing process. Among other things, the changes would provide defendant's counsel with a reasonable opportunity, instead of an entitlement, to attend any interview with a probation officer, and they would authorize a probation officer to arrange, rather than to require, meetings with defendant's counsel. In addition, your Committee made stylistic changes to the proposed amendments.

Your Committee agreed with the Advisory Committee's conclusion that a victim allocution provision in Rule 32 was unnecessary because a court now has the discretion to permit a victim to speak at sentencing. Mandating victim allocution might lead to greater victim frustration because of the sentencing guidelines restrictions, which limit the impact of a victim's statement. Your

Committee, however, eliminated as unnecessary several sections of the Committee Note, which would have explained in detail these and other reasons for not including the victim allocution provision in the Rule.

The proposed changes to Rules 16, 29, and 40 are relatively minor. The proposed change to Rule 16 would explicitly extend the discovery and disclosure requirements of the rule to organizational defendants. The changes to Rule 29 would permit 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 the evidence. Changes to Rule 40 would clarify the authority of a magistrate judge to set conditions of release in those cases where a probationer or supervised releasee is arrested in a district other than the district having jurisdiction.

The proposed amendments to the Federal Rules of Criminal Procedure, as recommended by your Committee, appear in Appendix C together with an excerpt from the Advisory Committee report.

Recommendation: That the Judicial Conference approve proposed amendments to Criminal Rules 16, 29, 32, and 40 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress pursuant to law.

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Amendment to Rule 5: Public Comments

DATE: March 12, 1994

At its June 1993 meeting, the Standing Committee approved for publication and comment the Advisory Committee's proposed amendment to Rule 5. The amendment is intended to address the interplay between the requirement for a prompt appearance before a magistrate and the processing of UFAP defendants, where no federal prosecution is intended.

To the best of my knowledge, only one comment has been received on the proposed amendment, which is attached. Mr. Charles Kuenlen of the Department of the Treasury questions whether Rule 40 should also be amended because it too includes a prompt appearance requirement.

While an amendment to Rule 40 specifically cross-referencing the amendment to Rule 5 might be appropriate, there is already a cross-reference in Rule 40(a). As I read it, there is nothing in Rule 40(a) which is inconsistent with the proposed amendment to Rule 5.

DEPARTMENT OF THE TREASURY
FEDERAL LAW ENFORCEMENT TRAINING CENTER
GLYNCO, GEORGIA 31524

LET 10-4 (OGT/LGD)

December 17, 1993

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

Dear Sir:

I am writing to you upon the suggestion of Mr. Paul Zingg, from the Office of Judged Programs, regarding two concerns I have pertaining to the Federal Rules of Criminal Procedure.

1. Rule Number 5 as changed, no longer requires an interstate fugitive arrested upon federal warrant for such unlawful flight to have an initial appearance before the Federal Magistrate-Judge, if the federal charges are dismissed and the prisoner is returned, or remanded to the custody of state authorities. This appears to be in conflict with Rule Number 40, which still requires prisoners arrested in a district other than the district having venue to have the initial appearance without unnecessary delay before the Federal Magistrate-Judge, such proceedings being in accordance with Rule Number 5. Doesn't Rule Number 40 need a change to reflect the Rule Number 5 amendment?

2 Rule Number 49(e) requires timely filing with the district court of a "Dangerous Offender Notice" pursuant to 18 USC§3575(a). My research indicates that 18 USC§3575 was repealed on, or about October 12, 1984 and has not re-appeared for current reference as Rule Number 49 requires.

I am the Instructor and Topical Area Specialist for Federal Court Procedure at the Center. Therefore, my cause for the concerns I have made known to you. We endeavor to keep our students on "the right track". Your advisement as to my concerns will be most appreciated, and I thank you for your time and consideration. Best wishes for the holiday season.

Sincerely,

Charles B. Kuenlen
Legal Instructor

cc Mr. Paul Zingg, Admin Office, U.S. Courts
Michael R. Hanneld, LGD

Rule 5. Initial Appearance Before the Magistrate Judge[1]

(a) IN GENERAL. Except as otherwise provided in this rule, ~~An~~ an officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant ~~shall~~ must take the arrested person without unnecessary delay before the nearest available federal magistrate judge or, ~~in the event that~~ if a federal magistrate judge is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041. If a person arrested without a warrant is brought before a magistrate judge, a

1. New matter is underlined; matter to be omitted is lined through. These rules include amendments adopted by the Supreme Court on April 22, 1993, which will become effective on December 1, 1993, unless Congress acts otherwise.

complaint, satisfying the probable cause requirements of Rule 4(a), must be promptly filed ~~shall be filed forthwith which shall comply with the requirements of Rule 4(a) with respect to the showing of probable cause~~. When a person, arrested with or without a warrant or given a summons, appears initially before the magistrate judge, the magistrate judge ~~shall~~ must proceed in accordance with the applicable subdivisions of this rule. An officer making an arrest under a warrant issued upon a complaint charging solely a violation of 18 U.S.C. § 1073 need not comply with this rule if the person arrested is transferred without unnecessary delay to the custody of appropriate state or local authorities in the district of arrest and an

attorney for the government moves promptly, in the district in which the warrant was issued, to dismiss the complaint.

* * * * *

COMMITTEE NOTE

The amendment to Rule 5 is intended to address the interplay between the requirements for a prompt appearance before a magistrate judge and the processing of persons arrested for the offense of unlawfully fleeing to avoid prosecution under 18 U.S.C. § 1073, when no federal prosecution is intended. Title 18 U.S.C. § 1073 provides in part:

> Whoever moves or travels in interstate or foreign commerce with intent...to avoid prosecution, or custody or confinement after conviction, under the laws of the place from which he flees...shall be fined not more than $5,000 or imprisoned not more than five years, or both.
>
> Violations of this section may be prosecuted...only upon formal approval in writing by the Attorney General, the Deputy Attorney General, the Associate Attorney General, or an Assistant Attorney General of the United States, which

function of approving prosecutions may not be delegated.

In enacting § 1073, Congress apparently intended to provide assistance to state criminal justice authorities in an effort to apprehend and prosecute state offenders. It also appears that by requiring permission of high ranking officials, Congress intended that prosecutions be limited in number. In fact, prosecutions under this section have been rare. The purpose of the statute is fulfilled when the person is apprehended and turned over to state or local authorities. In such cases the requirement of Rule 5 that any person arrested under a federal warrant must be brought before a federal magistrate judge becomes a largely meaningless exercise and a needless demand upon federal judicial resources.

In addressing this problem, several options are available to federal authorities when no federal prosecution is intended to ensue after the arrest. First, once federal authorities locate a fugitive, they may contact local law enforcement officials who make the arrest based upon the underlying out-of-state warrant. In that instance, Rule 5 is not implicated and the United States Attorney in the district issuing the § 1073 complaint and warrant can take action to dismiss both. In a second scenario, the fugitive is arrested by federal authorities who, in compliance with Rule 5, bring the person before a federal magistrate judge. If local law enforcement officers are present, they can take custody, once the United States Attorney informs the magistrate judge that there will be no prosecution under § 1073. Depending on the availability of state or

local officers, there may be some delay in the Rule 5 proceedings; any delays following release to local officials, however, would not be a function of Rule 5. In a third situation, federal authorities arrest the fugitive but local law enforcement authorities are not present at the Rule 5 appearance. Depending on a variety of practices, the magistrate judge may calendar a removal hearing under Rule 40, or order that the person be held in federal custody pending further action by the local authorities.

Under the amendment, officers arresting a fugitive charged only with violating § 1073 need not bring the person before a magistrate judge under Rule 5(a) if there is no intent to actually prosecute the person under that charge. Two requirements, however, must be met. First, the arrested fugitive must be transferred without unnecessary delay to the custody of state officials. Second, steps must be taken in the appropriate district to dismiss the complaint alleging a violation of § 1073. The rule continues to contemplate that persons arrested by federal officials are entitled to prompt handling of federal charges, if prosecution is intended, and prompt transfer to state custody if federal prosecution is not contemplated.

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Proposed Amendment to Rule 10; Public Comments

DATE: March 12, 1994

Attached is the proposed amendment to Rule 10, which was approved for publication and comment by the Standing Committee at its June 1993 meeting. The public comment period ends on April 15, 1994.

To date, we have received no written comments on the proposed amendment.

Rule 10. Arraignment

Arraignment, which must ~~shall~~ be conducted in open court, and ~~shall~~ consists of:

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

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

The defendant must ~~shall~~ be given a copy of the indictment or information before being called upon to enter a plea ~~plead~~. Video teleconferencing may be used to arraign a defendant not physically present in court, if the defendant waives the right to be arraigned in open court.

COMMITTEE NOTE

Read together, Rules 10 and 43 require the defendant to be present in court for the arraignment. *See, e.g., Valenzuela-Gonzales v. United States*, 915 F.2d 1276, 1280 (9th Cir. 1990)(Rules 10 and 43 are broader in protection than the Constitution). The amendment to Rule 10, in addition to several stylistic changes, creates an exception to that rule and provides that the court may permit arraignments through video teleconferencing if the defendant waives the right to be present in court. Similar amendments have also been made to Rule 43 to cover other pretrial sessions.

In amending the rule, and Rule 43, the Committee was very much aware of the argument that permitting video arraignments could be viewed as an erosion of an important element of the judicial process. First, it may be important for a defendant to see and experience first-hand the formal impact of the reading of the charge. Second, it may be necessary for the court to personally see and speak with the defendant at the arraignment, especially where there is a real question whether the defendant really understands the gravity of the proceedings. And third, there may be difficulties in providing the defendant with effective and confidential assistance of counsel if the two are in separate locations, connected only by audio and video linkages.

The Committee nonetheless believed that in appropriate circumstances the court, and the defendant, should have the option of conducting the arraignment where the defendant is in visual and aural contact with the court, but in a different location. Use of video technology might be particularly appropriate, for example, where an arraignment will be pro forma but the time and expense of transporting the defendant to the court are great. In some districts, defendants have to be transported long distances, under armed guard, to an arraignment which may take only minutes to complete.

A critical element to the amendment is that no matter how convenient or cost effective a video arraignment might be, the defendant's right to be present in court stands unless he or she waives that right. As with other rules including an element of waiver, whether a defendant voluntarily waived the right to be present in court during an arraignment will be measured by the same standards. An effective means of meeting that requirement in Rule 10 would be for the court to obtain the defendant's views during the arraignment itself or require the defendant to execute the waiver in writing.

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Proposed Amendments to Rule 43; Public Comments

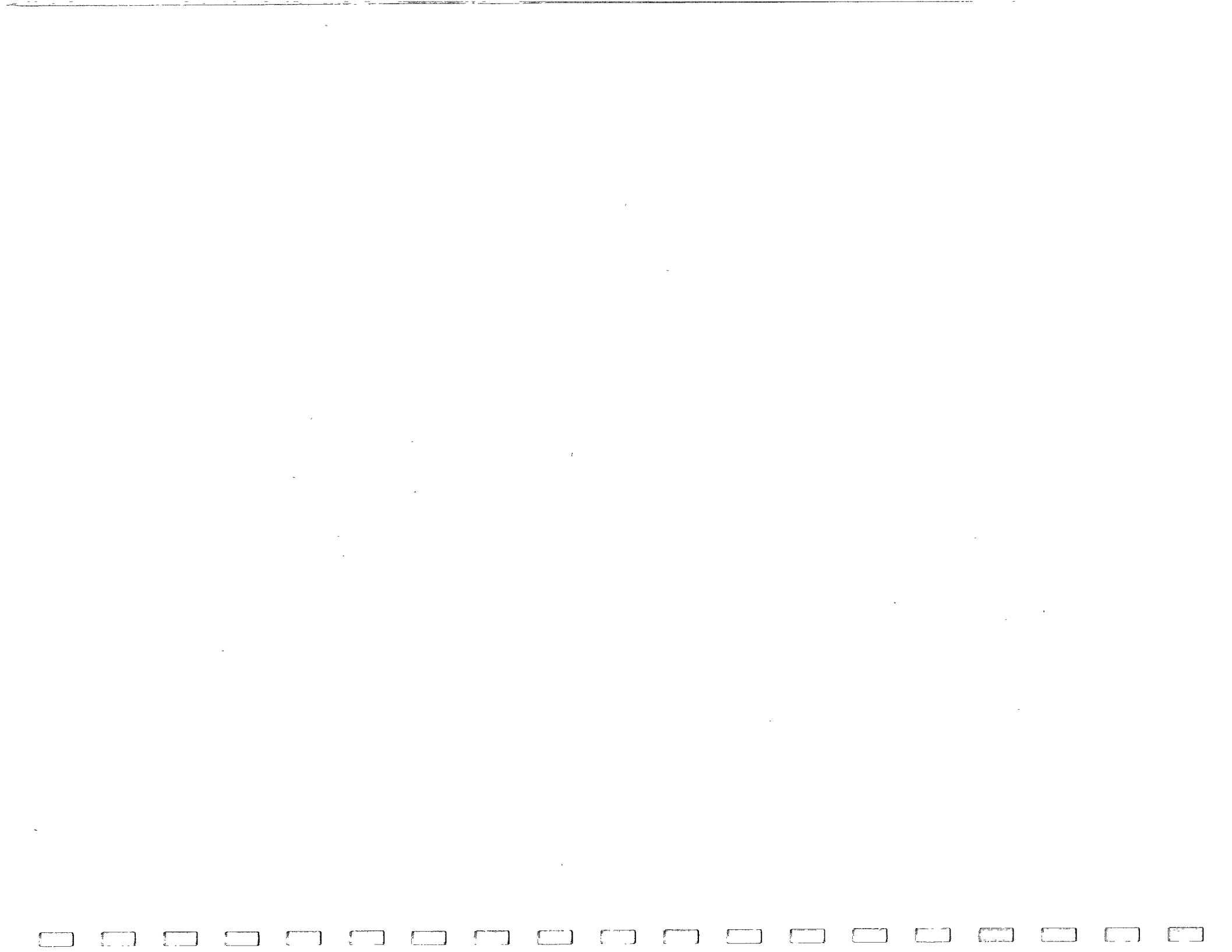
DATE: March 15, 1994

In June 1993, the Standing Committee approved for publication and comment a proposed amendment to Rule 43. The amendment addresses three areas: Under the amendment, a defendant who is initially present at trial, but voluntarily flees, may be sentenced in absentia. Second, courts would be authorized to use video teleconferencing to conduct pretrial sessions with the defendant absent from the courtroom. And finally, the rule is amended to extend to organizational defendants. There are also a number of stylistic changes to the rule.

To date, the Committee has received three written comments, which are attached. First, Judge Martin Feldman from New Orleans questions whether the Committee intended to address the issue of a defendant's presence at pretrial conferences; the Advisory Committee Note defines the term pretrial sessions to include such conferences.

The second commentator, Judge W. Earl Britt from North Carolina, has some personal experience with video teleconferencing and notes support for the amendment. He suggests, however, that the Committee address two points. First, he is concerned that the amendment might be perceived as creating a right in the defendant to be physically present. And second, in mental competency proceedings, there may be a real question as to whether the defendant could ever voluntarily and knowingly consent to being absent from the courtroom. He has included with his letter a copy of an opinion he authored when the defense challenged the legality of the proceeding.

Finally, the Committee has received a letter from Ms. Elizabeth Manton, who apparently will be testifying at the hearing on the proposed amendment on April 18 in Washington, D.C. As noted in her letter, which is attached, the Federal and Community Defenders oppose the amendment which would permit a defendant to waive his or her right to be present at the arraignment.



Rule 43. Presence of the Defendant

(a) PRESENCE REQUIRED. The defendant ~~shall~~ must be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

(b) CONTINUED PRESENCE NOT REQUIRED. The further progress of the trial to and including the return of the verdict, and the imposition of sentence, will ~~shall~~ not be prevented and the defendant will ~~shall~~ be considered to have waived the right to be present whenever a defendant, initially present at trial,

(1) is voluntarily absent after the trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial), ~~or~~

(2) in a noncapital case, is voluntarily absent at the imposition of sentence, or

~~(2)~~(3) after being warned by the court that disruptive conduct will cause the removal of the defendant from the courtroom, persists in conduct which is such

as to justify exclusion from the courtroom.

(c) PRESENCE NOT REQUIRED. A defendant need not be present ~~in the following situations:~~

(1) ~~A corporation may appear by counsel for all purposes.~~ when represented by counsel and the defendant is an organization, as defined in 18 U.S.C. § 18;

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

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

(4) when the proceeding is a pretrial session in which the defendant can participate through video teleconferencing and waives the right to be present in court; or

~~(4)~~(5) ~~At~~ when the proceeding involves a correction ~~reduction~~ of sentence under Rule 35.

COMMITTEE NOTE

The revisions to Rule 43 focus on three areas and reflect in part similar changes in Rule 10, which governs arraignments. First, the amendments make clear that a defendant who, initially present at trial but who voluntarily flees before sentencing, may nonetheless be sentenced in absentia. Second, the court may use video technology to conduct pretrial sessions with the defendant absent from the courtroom, where the defendant waives the right to be present. Third, the rule is amended to extend to

organizational defendants. In addition, some stylistic changes have been made.

Subdivision (a). The changes to subdivision (a) are stylistic in nature and the Committee intends no substantive change in the operation of that provision.

Subdivision (b). The changes in subdivision (b) are intended to remedy the situation where a defendant voluntarily flees before sentence is imposed. Without the amendment, it is doubtful that a court could sentence a defendant who had been present during the entire trial but flees before sentencing. Delay in conducting the sentencing hearing under such circumstances may result in difficulty later in gathering and presenting the evidence necessary to formulate a guideline sentence.

The right to be present at court, although important, is not absolute. The caselaw, and practice in many jurisdictions, supports the proposition that the right to be present at trial may be waived through, inter alia, the act of fleeing. *See generally Crosby v. United States*, 113 S.Ct. 748, ____ U.S. ____ (1993). The amendment extends only to noncapital cases and applies only where the defendant is voluntarily absent after the trial has commenced. The Committee envisions that defense counsel will continue to represent the interests of the defendant at sentencing.

The words "at trial" have been added at the end of the first sentence to make clear that the trial of an absent defendant is possible only if the defendant was previously

present at the trial. *See Crosby v. United States, supra.*

Subdivision (c). There are two changes to subdivision (c). The first is technical in nature and replaces the word "corporation" with a reference to "organization," as that term is defined in 18 U.S.C. § 18 to include entities other than corporations.

The second change to subdivision (c) is more significant. New subdivision (c)(4), which parallels a similiar amendment in Rule 10, provides that the court may use video teleconferencing technology to conduct pretrial sessions with the defendant at another location -- if the defendant waives the right to be personally present in court. The Committee balanced the concern that this might dehumanize the judicial process against the fact that some pretrial sesssions can be very brief, pro forma proceedings. As noted above, the right to be present in court is not an absolute right, and may be voluntarily waived by the defendant. It is important to note that the amendment does not require the court to use such technology; the rule simply recognizes that the court may, under appropriate conditions, and in full respect of the defendant's rights, use such technology.

Although the Committee did not attempt to further define the term "pretrial sessions," the rule could logically extend to sessions such as Rule 5 proceedings, arraignments (as specifically provided for in the amendment to Rule 10), preliminary examinations under Rule 5.1, competency hearings, pretrial conferences, and motions hearings not already within the purview of subdivision (c)(3). The Committee does not contemplate that the amendment would extend to guilty plea inquiries under Rule 11(c).

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
556 JEFFERSON STREET
SUITE 300, BOX 19
LAFAYETTE, LOUISIANA 70501

W. EUGENE DAVIS
CIRCUIT JUDGE

November 19, 1993

Honorable Martin L.C. Feldman
United States District Judge
Eastern District of Louisiana
500 Camp Street
New Orleans, LA 70130

In re: Proposed Change to Rule 43(c)(4), Fed. R. Crim. P.

Dear Marty:

Thanks for your note about this rule.

You make a good point. I am sending your letter to Mr. McCabe, the committee secretary, to include in the comments and I will make a note to follow up at the next meeting.

Sincerely,

W. Eugene Davis

WED:df

cc - Mr. Peter G. McCabe

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United States District Court
Eastern District of Louisiana
500 Camp Street
New Orleans, Louisiana 70130

Chambers of
Martin L. C. Feldman
District Judge

November 16, 1993

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

Dear Gene:

I'm writing you as a member of the Advisory Committee On Criminal Rules. The proposed change to Rule 43(c)(4) provides that a criminal defendant need not be present when the proceeding is a pretrial session if the defendant can participate through video teleconferencing and waives the right to be present in court. This suggests that, otherwise, a criminal defendant must be present at the pre-trial conference; the Committee Note defines the term "pretrial sessions" to include pre-trial conferences.

I wonder whether the Committee actually intended to require the presence of criminal defendants at pre-trial conferences unless the conditions of Rule 43(c)(4) are met? I have never required a defendant to be at a pre-trial conference and I don't know of any other judges on our Court who do so.

Perhaps I am not reading the proposed change correctly, but I wanted to share this concern with you as a Committee member.

Sincerely,

MLCF:dcw

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NORTH CAROLINA

POST OFFICE BOX 27504
RALEIGH, NORTH CAROLINA 27611

W. EARL BRITT
JUDGE

TELEPHONE (919) 856-4050

December 10, 1993

Secretary
Committee On Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D. C. 20544

re: Proposed Amendments to Rules

Dear Sir:

I write to comment on the proposed change to Rule 43 of the Federal Rules of Criminal Procedure as set forth in the "Call For Comment" dated October 1993. In particular, my comment is directed toward proposed Rule 43(c)(4) which provides that "A defendant need not be present: . . . when the proceeding is a pretrial session in which the defendant can participate through video teleconferencing and waives the right to be present in court." My concern is prompted by the Committee Note on the bottom of page 13, reading "Although the Committee did not attempt to further define the term 'pretrial sessions,' the rule could logically extend to sessions such as . . . competency hearings . . . ."

The Federal Correctional Institution in Butner, North Carolina, (FCI Butner) is one of only a few institutions in the country where inmates with mental problems are regularly housed. As a result, frequent hearings are held in this district under 18 U.S.C. § 4205, et. seq. to determine the mental condition of the inmates. FCI Butner is located some 40 miles from Raleigh, the closest seat of court in the district. This results in extensive travel for these hearings by both inmates and prison officials, particularly health care professionals.

Under authorization from the Judicial Conference for a pilot project, I recently conducted one of these hearings by use of videoconference technology. The hearing was, in my opinion, successful and will, in the future, result in a tremendous savings in time and resources. More importantly, it will result in a better and more humane method of dealing with mentally ill inmates.

The Federal Public Defender in this district, who represents the inmate involved, challenged the legality of the proceeding. A copy of my opinion addressing those challenges is enclosed. An appeal

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from that opinion has been noted to the United States Court of Appeals for the Fourth Circuit. No further hearings in this fashion are planned until that appeal has been disposed of.

My concern with the proposed amendment is twofold. First, that it might be construed as creating a right in an inmate in these proceedings to be physically present. That was the very issue presented to me and I held that there was no such right. If that decision is upheld on appeal the validity of the decision would be placed in doubt. Second, it requires the defendant to waive his right to be present. Since the very issue involved in these proceedings is the mental state of the defendant and his or her need for care and treatment, it is, of course, doubtful that meaningful "consent" could be obtained.

I would urge the committee to either expressly provide that in competency hearings the consent of the defendant is not required or insert language making it clear that the amendment is not intended to address that issue.

As soon as the Fourth Circuit Court of Appeals has made its decision, I will provide the committee with a copy of the opinion.

If I can provide further information, please advise. In addition, I will be happy to appear before the committee in Los Angeles on 4 April 1994 or at such other time and place that the committee might request.

Sincerely,

W. EARL BRITT

/WEB

cc: Hon. Thomas S. Ellis, III
Hon. B. Waugh Crigler

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

No. 93-447-HC-BR

UNITED STATES OF AMERICA,

Petitioner,

v.

LEROY BAKER,

Respondent.

ORDER

On 22 July 1993 the United States moved the court for a hearing pursuant to 18 U.S.C. § 4245 to determine the present mental condition of respondent Leroy Baker, an inmate at the Federal Correctional Institution in Butner, North Carolina. By Order dated 30 July 1993 the Federal Public Defender for this district was appointed to represent respondent, an additional mental health examiner was authorized to be selected by respondent, and a date for a hearing was set. The date of the hearing subsequently was rescheduled and it ultimately was conducted on 13 August 1993. At the conclusion of the hearing the court determined, by a preponderance of the evidence presented, that respondent was presently suffering from a mental disease or defect for the treatment of which he was in need of custody for care or treatment in a suitable facility. The court ordered that he be committed to the custody of the Attorney General for hospitalization and treatment.

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The above recitation accurately describes not only the proceeding in this case but in dozens[1] of others conducted in this court over the past several years. What is unusual about the proceeding, however, is that it was conducted through the medium of video conference technology, or "teleconferencing."[2] Counsel for respondent objected to the hearing being conducted in that fashion on grounds that it violated respondent's Fifth Amendment rights to due process, his Sixth Amendment right to the effective assistance of counsel, and other rights guaranteed to him by 18 U.S.C. § 4247(d).

I

The Federal Correctional Institution at Butner ("FCI Butner") is a medium-security federal correctional facility that includes a mental health unit capable of meeting the needs of approximately 200 inmates. Although geographically located in Durham County, which is in the Middle District of North Carolina, it is located for jurisdictional purposes in the Eastern District.[3] Raleigh, located some forty miles southeast, is the Eastern District seat of court nearest to FCI Butner. It is there that all

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[1] Court records indicate that some 19 such hearings were conducted during the last year.

[2] At its meeting in March of 1993, the Judicial Conference of the United States authorized the court to conduct a pilot project using video conference technology, also known as "interactive video" or "teleconferencing."

[3] 28 U.S.C. § 113(a) provides in part: "The Eastern District comprises . . . that portion of Durham County encompassing the Federal Correctional Institution, Butner, North Carolina."

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mental competency hearings, including those under 18 U.S.C. §§ 4245 and 4246, are held.

Inmates must be transported by United States Marshals Service deputies from FCI Butner to Raleigh in trips that normally take one hour. On a typical day when mental competency hearings are held,[4] at least two deputies must leave Raleigh at around dawn in order to travel to Butner, secure the inmates, make the return trip to Raleigh and be in court by 9 a.m. or a scheduled time thereafter. The return trip is, of course, equally as long. Inmates usually spend the entire day away from FCI Butner in transit, in a holding cell in the courthouse or in court. This sometimes results in a disruption of inmates' normal medication schedules. While in the holding cells mental health inmates often are, by necessity, placed with other inmates.

II

In preparation for the hearing, the court directed the parties to label and exchange numbered exhibits on the day preceding the hearing and to provide copies to the courtroom deputy.[5] The equipment was set up and tested prior to the date of the hearing and counsel for both parties had an opportunity to see it and to experiment with it.

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[4] The court makes every effort to schedule several hearings on the same day for the convenience of the inmates, witnesses, the Marshals Service and counsel.

[5] Had there been any additional exhibits they could easily have been exchanged between counsel and received by the court by means of facsimile transmission.

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Participants in the hearing in Raleigh were located in Courtroom Two, seventh floor, United States Courthouse, 310 New Bern Avenue, the regular courtroom of the undersigned judge presiding. Present, in addition to the judge, were Linda K. Teal, Assistant United States Attorney, representing the Government; Donna Tomawski, Court Reporter; and Beth Lee, Deputy Clerk of Court, all of whom were participating in the proceeding. Elizabeth Manton, the Federal Public Defender for the Eastern District, was present to observe the proceedings on behalf of respondent. There also were spectators in the courtroom.

Participants in the hearing at Butner were located in a Psychology Department conference room. Present were the respondent and his attorney, Assistant Federal Public Defender G. Alan DuBois, and witnesses for both the government and the respondent. In addition, two security officers and a unit counsellor, Charles Massenburg, were present. Other prison staff members and a representative of the United States Attorney's office also were in the room.

In Raleigh the courtroom was equipped with one 25" monitor and one 18" monitor, the former being located directly in front of and facing the bench and the latter directly in front of government counsel's table, facing the back of the courtroom. At Butner a 25" video monitor was located directly in front of the inmate and his attorney. Two cameras were used in the Raleigh courtroom, one of which was fixed on the judge and the other on the Assistant United States Attorney. Two cameras also were used at

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Butner; one was fixed on respondent and his attorney and the other on the witness stand. Only one camera could be focused at a time and this was accomplished by a switching device located at the other facility. Mr. DuBois, respondent's attorney, made the decision whether to focus the Raleigh cameras on the judge or on the Assistant United States Attorney. The undersigned judge made the decision whether to focus the Butner camera on the respondent, his attorney, or the witness. The camera directed toward respondent and his attorney could be focused on both or concentrated on respondent for a close-up view.

Ms. Tomawski, the court reporter, transcribed the full proceedings with no apparent difficulty.

III

The hearing was conducted in the normal fashion. The government called as its only witness Dr. Rushton Backer, a staff psychologist of the Mental Health Division at Butner. He was examined by Ms. Teal and cross-examined by Mr. DuBois. The court had no difficulty hearing and understanding the questions of Mr. DuBois or the testimony of Dr. Backer. During the questioning the court changed the focus of the camera from counsel to witness and back and also focused on respondent. No exhibits were offered into evidence by the government, although it did rely on a case summary filed with the Motion to Determine Mental Condition. No testimony was presented by respondent, although Mr. Baker was permitted to make an unsworn statement to the court from his seat. The court had no difficulty hearing Mr. Baker. In addition, the written

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report of Dr. Billy W. Royal, a private psychiatrist appointed by the court to assist the defense, was received into evidence. Upon the close of the evidence Mr. DuBois and Ms. Teal made closing arguments. Again, the court had no difficulty hearing and understanding the presentation of the attorneys.

Throughout the hearing the video transmission was clear. The court was able to see the respondent, his attorney and the witnesses at Butner with clarity comparable to that of the parties in the Raleigh courtroom. Facial expressions were evident and demeanor was clearly observable.

IV

At the conclusion of that part of the hearing, the court invited the parties to present additional evidence and argument on respondent's objections to the teleconferencing technology being used. Three witnesses were called by the defense and questioned by Ms. Manton from the Raleigh courtroom. Mr. DuBois testified from Butner; Dr. James Luginbuhl, an expert in social psychology, and Jeffrey Starkweather, a defense attorney, testified from the Raleigh courtroom. The court called as witnesses Dr. Sally Johnson, Deputy Warden and Director of Mental Health Services at Butner, and Alex Holman, Deputy United States Marshal. Dr. Johnson testified from Butner and Mr. Holman from the Raleigh courtroom. Both were cross-examined by Ms. Manton. The court had no difficulty hearing and understanding the witnesses at Butner. The video transmission of this part of the proceeding also was clear. However, the televised image of Dr. Johnson covered only a part of

her face, apparently because the camera at Butner had not been adjusted for her.[6]

The parties were given an opportunity to file briefs in support of their respective contentions. In addition, briefs and other filings by the parties, including the declaration of Leonard S. Rubenstein,[7] the affidavit of Deborah Greenblatt,[8] and a document entitled "Objections To The Proposed Teleconferencing Of Mental Competency Hearings" by Sara Cordelia Wrenn[9] have been presented to and considered by the court.

V

Respondent contends that the use of teleconferencing technology in this proceeding violated his rights to due process under the Fifth Amendment, his Sixth Amendment right to effective assistance of counsel, and other rights to which he is entitled under 18 U.S.C. § 4247(d). Specifically, he contends that his absence from the courtroom deprived the judge of the opportunity to observe his demeanor as a participant in the hearing and as a

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[6] To the extent necessary, sections I through IV constitute the court's findings of fact.

[7] Mr. Rubenstein is Executive Director of the Judge David L. Bazelon Center for Mental Health Law.

[8] Ms. Greenblatt is Director of Carolina Legal Assistance, Inc., a mental disability law project based in Raleigh, North Carolina.

[9] This document is otherwise unidentified.

witness,[10] and brought into play a host of psychological and behavioral factors that are potentially prejudicial to him.

The court notes at the outset that a hearing to determine the present mental condition of an imprisoned person held pursuant to 18 U.S.C. § 4245 is a civil hearing. See e.g., United States v. Copley, 935 F.2d 669, 672 (4th Cir. 1991). As such, it does not implicate the full range of rights guaranteed to individuals subjected to criminal proceedings. A civil commitment does, however, bring about a significant deprivation of an inmate's liberty interests because, for example, it may place the inmate into a regimen of forced treatment or subject him to greater public stigma. See Vitek v. Jones, 445 U.S. 480, 493-94 (1980). Restriction or deprivation of these important interests therfore must be accompanied by procedural safeguards to ensure that the deprivation comports with due process requirements. Id. at 494. As the Supreme Court observed in Addington v. Texas, 441 U.S. 418, 425 (1979), a civil commitment falls in many ways within the spectrum that ranges between criminal and civil cases, and does implicate important individual rights. Accordingly, this court must determine the nature and extent of the process due respondent in connection with the hearing by considering three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's

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[10] As noted earlier, respondent was not sworn and did not testify. He was permitted to make a statement to the court from his seat at counsel table.

> interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). The court will proceed to review the nature of the liberty interest at stake, the government's interest in using the challenged procedures, and the risk of an erroneous deprivation of that interest when the hearing is conducted by means of video conference technology.

A

Without question, the civil commitment of any person to a mental health institution over that person's objection brings about a "massive curtailment of liberty," Humphrey v. Cady, 405 U.S. 504, 509 (1972), even if the person already is imprisoned. Respondent argues that the deprivation is even more pronounced in the context of commitment under section 4245, because the committed inmate is placed behind bars in a prison rather than in a presumably more therapeutic hospital setting and is detained there for an indeterminate amount of time.[11] In light of these factors, respondent argues that

> the commitment hearing is the [respondent's] one and only bite at the apple. It is his one chance to present evidence to win his freedom, his one chan[c]e to have the judge look him in the eye and evaluate him directly as a person and not as the sum of medical reports and progress

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[11] As stated by respondent, once the inmate has been committed, there are no statutorily mandated hearings. A written report must be sent to the court once yearly. Respondent notes that the committed inmate is not entitled to counsel for the duration of commitment and therefore may not know how or when to contest the report. However, in this district the Federal Public Defender is provided copies of annual reports and motions, of any nature, affecting the inmate.

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> notes, his one chance to avoid what could potentially amount to a life sentence of confinement.

(Respondent's Mem. in Opposition to Proposal to Conduct Mental Commitment Cases Held Pursuant to 18 U.S.C. § 4245 and § 4246 by Video Teleconference at 3 [hereinafter Respondent's Mem. in Opposition].)

Respondent argues further that the liberty interest at stake is at least coextensive with and possibly even more extensive than the liberty interest held by criminal defendants awaiting trial or sentencing because those defendants are assured that any sentence will be for a definite amount of time, after which they will be released. In contrast, inmates committed under section 4245 and particularly section 4246 have no specified release date. Further, the committed respondent will suffer not only the stigma of having been incarcerated in a federal prison, but also will bear the additional stigma of having been formally adjudged to suffer from a mental disease or defect. See Addington, 441 U.S. at 425-26 (assessing these detrimental effects). The government does not contest respondent's emphasis on the weight of the liberty interest at stake.

It is apparent to the court that Vitek's three-prong review of whether due process has been satisfied must be conducted. As to the first prong, the court concludes that respondent has a significant liberty interest that cannot be curtailed by government action without due process. The court cannot agree with respondent's efforts to liken civil commitment to a criminal proceeding, because the interests at stake in fact are vastly different. For

one thing, the government's efforts to civilly commit a person are not punitive in nature. Further, the civil commitment must end when the person is no longer suffering from a mental disease or defect such that he or she is a danger to self or others. See Addington, 441 U.S. at 428 (explaining that "a civil commitment proceeding can in no sense be equated to a criminal prosecution"). Due process in the context of a civil commitment hearing consists of an opportunity to be heard "at a meaningful time and in a meaningful manner," Boddie v. Connecticut, 401 U.S. 371, 378 (1971) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)), and a hearing "appropriate to the nature of the case." Id. (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950)). Commitment hearings held pursuant to sections 4245 and 4246 must be conducted according to the requirements set out in 18 U.S.C. § 4247(d), quoted infra.

B

The government contends that it has a significant interest in conducting competency hearings by teleconferencing rather than by standard procedures. Teleconferencing, according to the government, assures a higher level of safety for inmates and for other participants because inmates need not be transported from FCI Butner to Raleigh and back. Travel costs also would be reduced. Elimination of the need to travel to and from Butner and to hold inmates in Raleigh also could minimize or even eliminate disruption to inmates' medication schedules.

Respondent argues that the government's interest, even if legitimate, nevertheless is not strong enough to outweigh the respondent's interest in conducting the hearing in person. He contends that any savings realized by eliminating the need to transport inmates would be countered by new costs incurred as a result of the teleconferencing system, security costs, and other travel costs. Respondent further contends that the government's asserted interest in increased security is not persuasive because the respondents in these hearings do not present increased security risks and are no more likely than other inmates to be unruly or difficult to transport. In light of the nominal benefits to the government, respondent argues, his strong liberty interest should be accorded greater weight.

Having reviewed both parties' arguments, the co concludes that the government does have a legitimate and significant interest in using video conference technology to conduct competency hearings. The alternative to teleconferenced hearings obviously is to hold hearings as before. Initial installation and development of this technology in this district presumably will be expensive, but early evaluations suggest that teleconferencing will save both time and money and, more importantly, will be safer and provide other benefits for the inmates involved. See discussion infra.

C

With respect to the third prong of the Vitek analysis, respondent argues that teleconferencing increases the likelihood of

an erroneous deprivation of liberty because it cannot improve on the traditional hearing format and, instead, works to the detriment of the judge, the inmate, and the inmate's attorney.

1

First, respondent argues that teleconferencing diminishes the quality and quantity of information available to the court and that the equipment used in teleconferencing increases the risk of an erroneous result. Because the judge can see the inmate only if he focuses on the inmate to the exclusion of other participants at Butner, respondent argues, the court is prevented from observing the inmate's demeanor and reaction to witnesses unless the court focuses away from the testifying witness. Peripheral vision also is limited, respondent argues, thereby increasing the likelihood that the judge will "commit the Fundamental Attribution Error."[12] In other words, respondent contends that the judge may erroneously assume that the inmate's actions or behavior are attributable to his personal character when in fact they may be attributable to his reaction to the physical setting or to other stimuli in his environment, which are not visible to the judge. This more narrow focus on the Butner participants also could bring about the "Actor-Observer Effect," according to respondent. He explains that the Actor-Observer Effect is a perceptual bias that arises because

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[12] Respondent describes the "Fundamental Attribution Error" as an error on the part of the fact-finder and as a perceptual bias drawn from the "documented human tendency to overestimate the degree to which behavior is indicative of personal characteristics and to underestimate situational influence on behavior." (Respondent's Mem. in Opposition at 9-10.)

"active participants in a situation see mostly external or situationally motivated reasons for their own behavior, while observers tend to believe the actors' behaviors are internally motivated." (Respondent's Mem. in Opposition at 10.) As a final shortcoming leading to perceptual bias, respondent argues that the physical distancing of an inmate from the judge has the effect of "mak[ing] judges both more anonymous and more remote from the people who must live with their decisions, [thereby increasing the likelihood of a] judicial bias towards the imposition of harsher sanctions or, in this case, more ready commitment." Id. at 11. Respondent contends that research shows that even after the judge has been made aware of these factors, the judge, like most people, still would be willing to make decisions based on the flawed information.

Finally, respondent contends that the quality of the video transmission was poor, which means that "the court will be unable to view the witness or respondent in all his fullness, clarity or subtlety but rather will see a herky-jerky digitally compressed approximation of a person; a ghostly algorithm which can never capture the full essence of the individual." Id. at 12. In sum, the essence of respondent's complaint is this:

> A judge isolated in [a] courtroom dozens of miles away, deprived of the ability to continuously take in an entire courtroom scene through the use of hearing and peripheral vision and limited to viewing one image of dubious quality at a time will to one degree or another lose the information conveyed by the actions [taken by respondent in connection with his actual appearance in a courtroom and while interacting with others]. While the information lost by teleconferencing will not make a difference in every case, it will certainly have an effect on the

> many close cases where the judge inevitably and rightly falls back on his subjective feelings and intuition in deciding whether or not the [respondent's] release would pose a danger to others.

Id. at 13.

After full review of respondent's contentions, the court emphasizes again (having first done so in its findings of fact, set out in sections I through IV, supra) that the video transmission was clear and the respondent's demeanor clearly evident. The court experienced no difficulty changing the cameras' focus and did not find the need to operate the cameras distracting. At this juncture, the court also emphasizes that its consideration of inmates' mental status is informed not only by the inmates' physical appearance and behavior, but also by the medical evaluations and reports prepared by inmates' doctors and by an expert specially appointed by the court for the inmate respondent. These written materials, which are provided to the court in every case, and the oral testimony of witnesses, which is available in most, are generally more relevant and probative than an inmate's demeanor on any given day. While informative, the court believes that an inmate's demeanor -- whether it works to his advantage or disadvantage -- is a much less reliable indicator of dangerousness or mental disease or defect than the written medical evaluations and oral testimony. Demeanor is important, but the court's "subjective feelings and intuition," to the extent that they are informed by an inmate's deportment during a short hearing while the inmate is in unfamiliar surroundings, do not and should not decide "close cases." When an inmate speaks to the court, in a traditional or

teleconferenced competency hearing, the court watches and listens closely. The inmate's demeanor during the entire course of the hearing, however, and particularly those aspects of an inmate's behavior that respondent argues should be perceived via peripheral vision, are relevant but much less so.

2

Respondent goes on to argue that related to the problems with the judge's ability to obtain information are problems with inmates' perceptions. An inmate also is deprived of full participation, according to respondent, and may not be able to perceive the subtle nuances of other participants' behavior that could affect his or her courtroom behavior and demeanor. Respondent reports that some inmates may be subject to disorders that involve delusions or obsessions about television screens, remote control devices, or other forms of technology, and argues that these disorders could complicate the process for an individual so afflicted. In addition, respondent argues that some inmates with mental retardation or other developmental disorders are "concrete thinkers" who have difficulty dealing with abstract concepts, and therefore may need to have actual physical proximity to the judge and other participants in order to understand that they are having a "court-related" experience. Because these inmates may not fully understand or appreciate the gravity of a teleconferenced competency hearing, respondent contends, they cannot receive meaningful notice of televised commitment proceedings.

The court agrees that the use of video conference technology may not be in the best interests of those inmates who suffer illnesses that feature obsessions with or misconceptions about televisions, recording equipment, or other forms of electronic communication. In those special cases, a more traditional hearing can be held. With respect to respondent's argument that actual courtroom presence may be necessary in order to impress upon inmates the gravity of the situation, the court believes that inmates often are better served by being permitted to remain in familiar surroundings in the company of familiar people rather than being summoned to Raleigh and brought (sometimes shackled) into a strange courtroom. Inmates participating in traditional competency hearings sometimes appear frightened or agitated by the strangeness of their situation. In the instant case, respondent was able to remain on-site at Butner in the company of doctors known to him, as well as a counsellor, Charles Massenburg, with whom respondent is particularly comfortable.[13] Respondent appeared relaxed and had no apparent difficulty appreciating the nature and importance of the proceedings. In the court's view, permitting inmates to remain at Butner would be more compatible with their needs than bringing them into an imposing courtroom that, while it probably does impress upon them that the hearing is important, also causes them to feel ill at ease or even frightened.

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[13] As Dr. Sally Johnson testified from Butner, the presence of a counsellor is a benefit to the inmate that can be facilitated at Butner but would not be possible under a purely traditional hearing format because the costs of sending counsellors to Raleigh with inmates would be too high.

In addition to detrimentally affecting the perceptions of the judge and the inmate, respondent argues that the use of teleconferencing also would negatively impact other participants, such as inmates' counsel. He contends that an inmate's attorney would be placed at a tactical disadvantage because the Assistant United States Attorney would be in Raleigh and would be able to argue directly to the court, while the inmate's attorney would be "reduced to a voice coming out of a box accompanied by a grainy television image." Id. at 16.

In the court's view, even if respondent's counsel does experience a sense of distance as a result of having to argue from Butner, that complaint has no direct bearing on the issue before the court: Whether competency hearings conducted by teleconferencing are constitutional. It was evident to the court that respondent's attorney was perfectly able to articulate his client's best arguments from Butner, just as he does from Raleigh. The Assistant United States Attorney does not reap unfair advantage as a result of his or her presence in the courtroom. In short, respondent, through the office of the Federal Public Defender, has expressed a decided preference for traditional hearings and is not comfortable with or simply does not like certain aspects of video conference technology. The court believes that these grievances are relevant and should be considered to the extent that they inform future efforts to improve this technology, but concludes that they do not bear on the question of constitutionality.

VI

To summarize, respondent argues that competency hearings conducted via teleconferencing are more likely to result in an erroneous deprivation of liberty because the judge will not have access to the full visual input necessary to properly evaluate the inmate and understand his or her behavior, and also may be more inclined to order commitment due to a sense of distance from the inmate. The inmate may also contribute to an erroneous deprivation of liberty because he or she may not appreciate the nature of the teleconference and could be disadvantaged by an inability to properly respond to the proceedings. This lack of understanding on the inmates' part, respondent argues, further exacerbates the likelihood that the judge will reach an erroneous conclusion.

The court has reviewed the arguments and agrees that a significant liberty interest is at stake in civil commitment proceedings. The respondent is entitled to due process in connection with his commitment hearing. Having participated in and closely observed the first televised competency hearing, the court cannot agree with respondent's argument that due process may be afforded to him only through a traditional commitment hearing in which all parties are convened in one location. Finding that the use of video conference technology does not increase the risk of an erroneous result and that the government has a substantial interest in its use, the court concludes that the competency hearing at issue was conducted in full accord with the requirements of due process, that respondent was entitled to and did confront any

witnesses against him, and that no rights accruing to respondent under the federal Constitution have been impinged upon in any way. In reaching this conclusion the court has fully considered all of respondent's constitution-based arguments, including those not specifically reviewed above.

The court observes that the technology used, while adequate and effective in the hearing at issue, presumably will be improved in the near future. Respondent's concern that the judge cannot fully assess inmates' demeanor and reaction to the proceedings should be obviated by use of split-screen technology, which would allow the court to simultaneously observe the respondent and any witness testifying at Butner. This technology already exists and has successfully been used by other court systems. The court anticipates that split-screen technology eventually will be integrated into the hearing format if costs allow and if teleconferenced competency hearings pass constitutional muster when subjected to appellate review.

VII

Finally, respondent argues that rights accruing to him under 18 U.S.C. § 4247(d) were violated. Section 4247(d) provides that in a Chapter 313 mental commitment hearing,

> the person whose mental condition is the subject of the hearing shall be represented by counsel . . . . The person shall be afforded an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing.

These statutory rights also implicate liberty interests that must be afforded due process protection. Cf. Wolff v. McDonnell, 418

U.S. 539, 556-68 (1974); Morrisey v. Brewer, 408 U.S. 471, 481 (1972). Respondent contends that each of the statutory rights listed above are violated by use of teleconferencing to conduct a civil commitment hearing.

A

Under section 4247(d), respondent contends that he is entitled to be physically present in the courtroom during the competency hearing. Drawing on his earlier argument that his liberty interest is at least as extensive as that of a criminal defendant awaiting trial, he contends that cases and statutes forbidding physical exclusion of those defendants from their trials or other important proceedings apply equally to his physical absence from the Raleigh-based commitment hearing.

Relying heavily on a Ninth Circuit case, Valenzuela-Gonzalez v. U.S. Dist. Court for Dist. of Az., 915 F.2d 1276 (9th Cir. 1990), respondent argues that his exclusion from the courtroom violated the Rule 43 requirement that a defendant be present for the arraignment, at the time of the plea, at every stage of the trial and at sentencing. Fed. R. Crim. P. 43(a). In Valenzuela-Gonzalez, the court held that Rule 43 did not authorize or permit the use of closed-circuit television in a criminal arraignment and that unless Congress expressly stated that a defendant's appearance on closed-circuit television was equivalent to his physical appearance in court, the plain meaning of the rule would be in full effect and the defendant must be physically present. Valenzuela-Gonzalez, 915 F.2d at 1281. Notably, however, the Valenzuela-

Gonzalez court did not decide the issue on constitutional grounds. Instead, the court explained that it "need not resolve [the constitutional] question . . . [because] the presence of the defendant at arraignment is required under two federal rules of criminal procedure," and went on to note that "[t]he protection of these rules is broader than [that which] the [C]onstitution provides." Id. at 1280.

Considering the persuasive value of Valenzuela-Gonzalez with respect to this case, the court observes at the outset that Rule 43 does not apply to civil commitment hearings, nor does any other rule of criminal procedure. Respondent concedes this fact but argues that the similarities between Rule 43 and section 4247(d) should convince this court that the Ninth Circuit's conclusion with respect to the rule should apply equally to construction of the statute. However, section 4247(d) not only makes no mention of physical presence, it makes no reference to "presence" at all. It says only that the respondent must be given an opportunity to testify and to otherwise take part in the hearing. While the plain meaning of "presence" may have convinced the Ninth Circuit to disallow an arraignment via teleconferencing, that reasoning cannot be adapted to a statute in which the language does not appear.

B

Respondent's other arguments parallel, for the most part, his constitution-based arguments. He contends that his statutory right to the assistance of counsel will be wrongly impinged by the fact that his lawyer has to argue from a different place and

through a television screen, while the government can argue directly to the judge. His rights to examine and cross-examine witnesses also would be impaired, he argues, because government witnesses could testify from Raleigh and he therefore would not have the opportunity to confront them in a face-to-face meeting. The court reiterates that these proceedings are civil in nature and that the Sixth Amendment's Confrontation Clause does not apply.

IIX

The court appreciates the concern expressed by the Federal Public Defender's office and agrees that this new technology must be assessed with caution and certainly not adopted simply because it is new and apparently convenient. The court also agrees that the inmates involved in hearings under sections 4245 and 4246 often have "unique vulnerabilities" that demand from the court and, in fact, from the system through which they progress, an awareness of and sensitivity to the obstacles that confront them.

Having assessed the reliability and effectiveness of video teleconferencing during the 11 August hearing, the court's only concern is with its ability to readily perceive the respondent's demeanor. However, any difficulties in doing so would quickly be apparent to the court. If use of teleconferencing proved in any particular case to be unsatisfactory, the court can and would immediately recess the hearing and reschedule it to take place in a more conventional setting, at which time the demeanor of the respondent could be more readily observed. The court also recognizes that a conventional hearing format may be more appropri-

ate for inmates likely to have difficulties participating in a teleconferenced hearing due to delusions or obsessions regarding televisions or video-related equipment. Reactions of this nature obviously will vary from person to person, so the court will determine whether a teleconferenced hearing is appropriate under the circumstances on a case-by-case basis. No difficulties warranting rescheduling were apparent in the hearing at issue, and the court finds that the competency hearing in no way abridged any of respondent's constitutional rights to due process.

The court concludes that the teleconferencing at issue here not only is constitutional, but also is effective and must be explored. That the federal judicial system and the services it provides are expensive is no secret. Teleconferencing could, if properly developed and implemented, not only curtail costs and save time for counsel and other court and prison personnel, but also -- more importantly -- be safer and provide other benefits for inmates who otherwise would face a day of transport, strange surroundings, and disrupted medication. The system is viable, and it does not infringe on rights guaranteed to respondent under the Constitution and laws of the United States.

This 13 October 1993.

W. EARL BRITT
United States District Judge

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

ALICEMARIE H. STOTLER
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PETER G. McCABE
SECRETARY

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CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

March 4, 1994

Elizabeth Manton
Federal Public Defender
Montague Bldg., Suite 300
128 E. Hargett Street
Raleigh, North Carolina 27601

Re: Proposed Amendment to Rule 43 of the Federal Rules of Criminal Procedure

Dear Ms. Manton:

Thank you for your letter of March 1, 1994, commenting on the proposed changes to Rule 43 of the Federal Rules of Criminal Procedure. A copy of your letter and any additional material you wish to submit will be sent to the members of the Judicial Conference Advisory Committee on Criminal Rules for their consideration. The Advisory Committee will hold its next meeting on April 18 and 19, 1994, in Washington, D.C.

The public hearing originally scheduled for April 4th in Los Angeles has been rescheduled for April 18th in Washington. This would allow the full advisory committee to hear testimony on the proposed amendments in conjunction with the scheduled meeting. You will be contacted in the next several days once the final arrangements for the hearing have been made.

I would appreciate receiving a copy of your representative's statement by April 4th so that it can be circulated to the advisory committee before the hearing. Please contact John K. Rabiej at (202) 273-1820 if you have any questions.

Sincerely,

Peter G. McCabe
Secretary

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cc: Honorable Alicemarie H. Stotler
Honorable D. Lowell Jensen
Honorable William R. Wilson
Advisory Committee members
Professor David A. Schlueter

FEDERAL PUBLIC DEFENDER

EASTERN DISTRICT OF NORTH CAROLINA

6

Post Office Box 25967
Raleigh, NC 27611-5967
(919) 856-4236

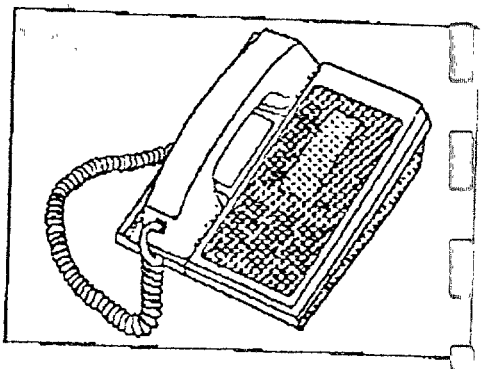
ELIZABETH MANTO
Federal Public Defe
Montague Bldg., Suite
128 E. Hargett Stree
Raleigh, NC 2760

FACSIMILE COVER SHEET

TO: Peter G. McCabe
FAX #: 202-273-1808
VOICE #: 202-273-1803
FROM: ELIZABETH MANTON
DATE: 3-1-94

Pages to follow: 2

COMMENTS:



Please call (919) 856-4236 or FTS 672-4236 if there are any problems with this transmission. The information contained in this message is attorney-privileged and confidential information intended only for the use of the individual or entity named as recipient. If you are not the intended recipient, any dissemination, distribution, or copy of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone. THANK YOU!

3/2
Copy to [illegible]
M.

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FEDERAL PUBLIC DEFENDER

EASTERN DISTRICT OF NORTH CAROLINA

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Federal Public Defender

Post Office Box 25967
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Montague Bldg., Suite 300
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Raleigh, NC 27601

March 1, 1994

Mr. Peter G. McCabe
Secretary of the Rules Committee
1 Columbus Circle NE
Washington, D.C. 20544

Re: Proposed Amendment to Rule 43 of the Federal Rules of Criminal Procedure

Dear Mr. McCabe:

The Federal and Community Defenders oppose the proposed amendment to Rule 43 of the Federal Rules of Criminal Procedure, which would permit the defendant to waive his/her presence before the Court at arraignment. This proposed amendment was apparently drafted to facilitate video tele-conferencing of Court proceedings. As a recent participant in a tele-conferencing project sanctioned by the Judicial Conference, I would like to briefly summarize the concerns of the Defenders in regard to the proposed rule change: to present information regarding the cost-shifting effects that such a proposal, should it be accepted, would have on the cost of defense services, to comment on our concern for the quality of representation afforded a defendant under such circumstances, and to point to the resulting negative impact on communication with both the Court and opposing counsel.

The proposed change in Rule 43 would afford some cost savings to the United States Marshals Office, but would shift that cost, and more, to the appointed counsel system. Because the defendant would not be transported to court for an appearance, counsel, or the appointed counsel system, would then have to incur the cost of travel to the institution to confer there with the client, and to appear with the client at that distant site via the video tele-conferencing system. The cost to the Marshals would be directly shifted, and possibly with extrapolation, to the appointed counsel system.

Should counsel elect not to travel to the institution to confer with the client, or to appear in the video-telecast, the "waiver" may be open to question. In addition, the client and counsel would be deprived of a valuable opportunity to confer early and in person regarding the case.

That same negative impact upon early communication regarding the case is likewise lost when the Court and opposing counsel are

located in a distant courtroom, far from the location of defense counsel and his client. That essential function of many court appearances, to "simply bring the parties together" is lost. All opportunities for early informal personal communication is likewise lost. The opportunity for defense counsel to speak briefly and in person with the Assistant United States Attorney and the case agent is forever gone. This is a critical period for both parties, and a resolution which may have been quickly sketched out is several weeks and several additional meetings away. Again, the cost to the appointed counsel system, and to the criminal justice system as a whole is significantly increased.

Finally, and most critically, the perceptive impact upon the client, and the Court, should not be discounted. The arraignment process will often be the client's first contact with the Judge who will preside over his eventual fate. The inherent dehumanization of the individual who is not brought to Court, who is not moved to a neutral setting for an impartial proceeding, who is not permitted to be seen by "his Judge" in person, but who must remain confined is likely to result in mis-perception by the Court as well as by the defendant and the public.

The Federal and Community Defenders wish to submit additional and more detailed written materials in support of their opposition to this proposed Rule change, and would like to present testimony during the scheduled hearings. A Federal Defender would be available to testify in either Los Angeles or Washington, D.C., wherever the hearings are scheduled. Thank you for the opportunity to comment.

Sincerely,

ELIZABETH MANTON
Federal Public Defender

copy: Dan Scott
Mike Katz
Fred Kay
Maureen Rowley
Benecio Sanchez-Rivera
Paul Denicoff

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Proposed Amendment to Rule 53; Public Comments

DATE: March 15, 1994

Attached is the copy of Rule 53 as it was published for public comment. The amendment, which would permit photographs and broadcasting of judicial proceedings, was proposed by the Advisory Committee at its April 1993 meeting. In June 1993, the Standing Committee approved the publication of the rule for public comment.

To date, only three comments have been received. First, Magistrate Judge Ashmanskas from Oregon has indicated that he "strongly oppose[s] the proposed amendment" and that he has observed a number of horrible experiences involving camera coverage of judicial proceedings. His letter, which is attached, includes a number of quotes from others in Oregon who share his views.

Second, Mr. Douglas Fellman, from Washington, D.C., indicates support for the proposed amendment and states that Mr. Steven Brill, chairman and CEO of American Lawyer Media, L.P., will be appearing before the Committee to testify re support for the amendment.

Finally, Professor Ed Cooper, Reporter for the Civil Rules Committee, offers two suggestions for the Committee's consideration, including the issue of whether the word "standards" should be substituted for "guidelines."

All three letters are attached.

Rule 53. Regulation of Conduct in the Court Room

The taking of photographs in the court room during the progress of judicial proceedings or ~~radio~~ broadcasting of judicial proceedings from the court room ~~shall~~ must not be permitted by the court except as such activities may be authorized under guidelines promulgated by the Judicial Conference of the United States.

COMMITTEE NOTE

The amendment to Rule 53 marks a shift in the federal courts' regulation of cameras in the court room and the broadcasting of judicial proceedings. The change does not require the courts to permit such activities in criminal cases. Instead, the rule authorizes the Judicial Conference to do so under whatever guidelines it deems appropriate.

The debate over cameras in the court room has subsided due to several developments in the last decade. First, the Supreme Court's decision in *Chandler v. Florida*, 448

U.S. 560 (1981) made clear that it is not a denial of due process to permit cameras at criminal trials. Second, a large majority of the state courts now permit photographic and broadcasting coverage of criminal trials, without significant interruption in the proceedings or adverse impact on the participants. Third, developments in video and audio technology have enabled coverage of judicial proceedings to be accomplished with little or no interruption; some courts have adopted rules requiring pooling of coverage, which seems to even further reduce the likelihood of disruption.

In 1990 the Judicial Conference approved a three-year pilot program with audio coverage and photographic coverage of civil proceedings in selected trial and appellate courts. The Conference declined to apply the program to criminal proceedings -- because of the absolute ban of such activities in Rule 53.

In adopting the amendment the Committee was persuaded, in part, by the fact that despite the wide, and almost common, presence of cameras in court rooms there has not been a long list of complaints or a parade of horrible experiences. To the contrary, the Committee believed that judicial decorum might be enhanced if the media is able to observe, and record, the proceedings from a location outside the court room. The Committee also recognized that the criminal justice system might be better understood, and appreciated, if criminal proceedings are made readily available to the public at large. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980)(vital role of print and electronic media as surrogates for the public supports opening of courts to audio and camera coverage).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

563 Gus J. Solomon United States Courthouse
620 Southwest Main Street
Portland, Oregon 97205-3090

DONALD C. ASHMANSKAS
United States Magistrate Judge

December 8, 1993

Peter McCabe
Secretary of the Committee on
Rules of Practice and Procedure
Administrative Office of the
United States Courts
Washington, D.C. 20544

Re: Proposed Amendment to Rule 53

Dear Mr. McCabe:

This is in response to the call for comment on the preliminary draft of proposed amendments to the Federal Rules of Civil Procedure, specifically the proposed amendment to Rule 53 (Regulation of Conduct in the Court Room).

I strongly oppose the proposed amendment.

My opposition is based upon my 18 years of experience as a state and federal trial judge in Oregon. I believe this opposition is consistent with the views of the Oregon individuals and organizations reflected in the attached Exhibit "A".

Contrary to the Committee Note, I have observed a number of "horrible experiences" throughout the years involving camera coverage of various judicial proceedings.

Except for camera coverage of naturalization, ceremonial or investiture proceedings and for instructional purposes in educational institutions, there should be a complete ban on cameras in the courthouse.

Thank you for consideration of comments.

Sincerely,

Donald C. Ashmanskas
U.S. Magistrate Judge

DCA:jmc
Attachment

EXHIBIT "A"

"I find the idea of cameras in the courtroom to be inconsistent with the proper function of our judicial system. I can't think of any instance where the public's right to know has ever been restricted or diminished by the lack of cameras in the courtroom. The news media has not used the cameras to educate the public about the court process, but instead, focus in on the high-profile criminal cases such as the Dayton LeRoy Rogers case. The courtroom should be used for trying cases, not for asking witnesses whether they wish to be televised or not and not for judges having to determine at what angle a camera should be set. Cameras detract from courtroom decorum and the dispassionate dispensing of justice by our court system."

Stuart E. Foster
1990 OSB President
OSB Bar Bulletin
October 1989

"The fair administration of justice will suffer as a result of the Oregon Supreme Court's new rule allowing cameras in the courtroom.

. . .

"No argument has ever been made that televising a trial enhances the fairness of the proceedings. If the proper administration of justice is to maximize fairness in the search for truth, then why allow cameras in the courtroom?"

Garry L. Kahn
1989 OSB President
Multnomah Lawyer
May/June 1989

"The recent promulgation by the Supreme Court of rules to permit television coverage, still photography, and audio recording in trial courtrooms was disturbing and something of a surprise. . . .

Cont'd. EXHIBIT "A"

"It was something of a surprise because it rejected the unequivocal recommendation of the Oregon Association of Defense Counsel and the Oregon Trial Lawyers Association, organizations comprised of most of the trial attorneys of this state. One must wonder a little what greater good is being served by embarking on this course when so many who are sensitive to the idiosyncrasies of the process are so firmly against it."

Cameras in the Courtroom: Another View
Oregon Association of Defense Counsel Newsletter
Spring, 1989

"Lawyers attending the Oregon State Bar's annual meeting cast strong advisory votes Friday against . . . allowing news cameras in courtrooms.

"Voice votes . . . were so decisive that no lawyer present called for a head count . . . ."

Fred Leeson
The Oregonian
September 18, 1988

". . . at the Oregon State Bar's annual meeting, where lawyers greeted a proposal to allow news cameras into courtrooms with the same enthusiasm one would muster for a panhandler with bubonic plague."

Fred Leeson
The Oregonian
September 22, 1988

"The question is again asked whether television should be introduced into the courts of this state.

"There is sound and valid justification for the existing cannons limiting the use of broadcasting, televising, recording and camera equipment in our courtrooms."

OSB Board of Governors
OSB Bar Bulletin
August/September 1980

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

December 29, 1993

Honorable Donald C. Ashmanskas
United States Magistrate Judge
563 United States Courthouse
Portland, Oregon 97205-3090

Re: Proposed Amendment to Rule 53 of the Federal Rules of Criminal Procedure

Dear Judge Ashmanskas:

Thank you for your letter of December 8, 1993, commenting on the proposed changes to Rule 53 of the Federal Rules of Criminal Procedure. A copy of your letter will be sent to the members of the Judicial Conference Advisory Committee on Criminal Rules for their consideration. The Advisory Committee will hold its next meeting on April 18 and 19, 1994, in Washington, D.C.

We welcome your comments and appreciate your interest in the rulemaking process.

Sincerely,

Peter G. McCabe
Secretary

cc: Honorable Alicemarie H. Stotler
Honorable D. Lowell Jensen
Honorable William R. Wilson
Advisory Committee members
Professor David A. Schlueter

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

January 27, 1994

Mr. Douglas A. Fellman, Esquire
Hogan and Hartson
Columbia Square
555 Thirteenth Street NW
Washington, DC 20004-1109

RE: Hearing on Proposed Amendments to the Rules of Criminal Procedure

Dear Mr. Fellman:

Thank you for your letter of January 13, 1994, requesting on behalf of Mr. Steven Brill to appear before the Advisory Committee on the Rules of Criminal Procedure and comment on the proposed amendments to Criminal Rule 53. The public hearing on the proposed amendments is set for April 4, 1994, in Los Angeles, California. I have placed Mr. Brill's name on the list of scheduled speakers at the hearing and will notify you in early March of the precise time and location of the hearing.

The advisory committee requests that a copy of Mr. Brill's statement be sent to this office by Monday, March 21, 1994. It will then be reproduced and circulated to the committee members before the hearing.

We want to thank you for the time you and Mr. Brill have devoted to a review of the proposed amendments to the Criminal Rules. Comments are most welcome and sincerely appreciated by the advisory committee.

Sincerely,

Peter G. McCabe
Secretary

cc: Honorable Alicemarie H. Stotler
Honorable D. Lowell Jensen
Honorable William R. Wilson
Advisory Committee members
Professor David A. Schlueter

HOGAN & HARTSON

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January 13, 1994

BY HAND DELIVERY

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
One Columbus Circle
Washington, D.C. 20544

Re: Audio-Visual Coverage of Judicial Proceedings

Dear Mr. McCabe:

This letter follows my recent telephone conversation with Mark Shapiro in which I conveyed the interest on the part of Steven Brill, chairman and chief executive officer of American Lawyer Media, L.P., in appearing at the April 4, 1994 hearing in Los Angeles on the amendments to the Federal Rules of Criminal Procedure, and particularly Rule 53 (regulating cameras in the courtroom).

Steve Brill and American Lawyer Media's Courtroom Television Network are uniquely situated to inform the Committee's consideration of the important issue of cameras in the courtroom and broadcast coverage during federal criminal proceedings. The Courtroom Television Network was involved at the "cutting edge" of the federal judiciary's decision to implement an experiment with cameras in the courtroom, and CourtTV's experiences in broadcasting hundreds of criminal trials and other proceedings from state courtrooms offer an unparalleled basis for the Committee's examination of the various issues attendant to camera coverage of criminal proceedings.

As the Committee considers the format and structure of the hearing it intends to hold consistent with your October 15, 1993 memorandum to the Bench and Bar, we would be very happy to work with you in order to assure that Mr. Brill's presentation touches upon those areas of greatest interest to the Committee. By way of suggestion, it might be useful if Mr. Brill first discuss generally the Courtroom Television Network's experiences in working with other court systems

on the issue of cameras in the criminal courtroom, then address any areas in which Committee members may have special concern and otherwise be available to answer questions. Of course, Mr. Brill is flexible and open to other topics as well, and we would be happy to work with you and/or the Committee in order that the Courtroom Television Network's presentation be structured to provide maximum information on those topics of greatest interest to the Committee relative to camera coverage of federal criminal proceedings.

Thank you for your courtesy, and we look forward to working with you in the weeks ahead on the very exciting issue of revision to the Criminal Rules so as to permit audio-visual coverage of federal criminal proceedings.

With best regards,

Sincerely,

Douglas A. Fellman

DAF:ajs

cc: Steven Brill
Debby F. Wilson
Allen R. Snyder

THE UNIVERSITY OF MICHIGAN
LAW SCHOOL
HUTCHINS HALL
ANN ARBOR, MICHIGAN 48109

ASSOCIATE DEAN

January 16, 1994

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

Dear David:

Two comments on Criminal Rule 53, as it has been published for comment.

First, there is a typo in the second sentence of the final paragraph of the Committee Note. " * * * if the media is able to observe * * *."

Second, and the point of writing, is the reference to "guidelines." I suspect it will be useful to establish a uniform style for all the rules, but I do not know what the style should be. As you will remember, one point in the discussion of filing by facsimile transmission was that the Judicial Conference directions should be referred to as "standards" because that is the word used in Civil Rule 5(e) and Appellate Rule 25(a). It very well may be that we need two words, and indeed we do if we have in mind two distinct concepts. "Guidelines" may seem to control courts less than "standards" do. It may seem relevant that the standards developed under Rules 5(e) and 25(a) do not apply directly to courts, but instead limit the scope of local rules that do apply directly. There may be some other difference.

Perhaps the Subcommittee on Style can be interested in this question. If you think the reporters should somehow work it through together, I will be glad to take part.

Sincerely yours,

EHC /lm

Edward H. Cooper

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Proposed Amendment to Rule 57, Rules by District Courts; Public Comments

DATE: March 14, 1994

Attached is the proposed amendment to Rule 57, which mirrors similar amendments in the Appellate, Bankruptcy, and Civil Rules. The amendment has been considered off and on by the Advisory and Standing Committess for the last two years; the final published version was coordinated by the Reporter for the Standing Committee, Professor Dan Coquillette.

The deadline for public comment is April 15, 1994; to date, no comments have been received on this particular amendment.

Rule 57. Rules by District Courts

(a) IN GENERAL.

(1) Each district court ~~by action of~~ acting by a majority of the its district the judges thereof may from ~~time to time~~, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice ~~not inconsistent these rules~~. A local rule must be consistent with -- but not duplicative of -- Acts of Congress and rules adopted under 28 U.S.C. § 2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States.

(2) A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a negligent failure to comply with the requirement.

(b) PROCEDURE WHEN THERE IS NO CONTROLLING LAW. A judge may regulate practice in any manner consistent with federal law, these rules, and local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

(c) 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 or abrogated by the judicial council of the

circuit in which the district is located. Copies of the rules and amendments so made by any district court ~~shall~~ must upon their promulgation be furnished to the judicial council and the Administrative Office of the United States Courts and ~~shall~~ must be made available to the public. ~~In all cases not provided for 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

Subdivision (a). This rule is amended to reflect the requirement that local rules be consistent not only with the national rules but also with Acts of Congress. The amendment also states that local rules should not repeat national rules and Acts of Congress.

The amendment also requires that the numbering of local rules conform with any numbering system that may be prescribed by the Judicial Conference. Lack of uniform numbering might create unnecessary traps for counsel and litigants. A uniform number system would make it easier for an increasingly national bar to locate a local rule that applies to a particular procedural issue.

Paragraph (2) is new. Its aim is to protect against loss of rights in the enforcement of local rules relating to matters of form. For example, a defendant should not be deprived of the right to waive a jury trial because counsel has negligently failed to follow local rules of form which are used to effect the waiver. The proscription of paragraph (2) is narrowly drawn -- covering only violations attributable to negligence and only those involving local rules directed to matters of form. It does not limit the court's power to impose substantive penalties upon a party if it or its attorney stubbornly or repeatedly violates a local rule, even one involving merely a matter of form. Nor does it affect the court's power to enforce local rules that involve more than mere matters of form -- for example, a local rule requiring that the defendant waive a jury trial within a specified time.

Subdivision (b). This rule provides flexibility to the court in regulating practice when there is no controlling law. Specifically, it permits the court to regulate practice in any manner consistent with Acts of Congress, with rules adopted under 28 U.S.C. § 2072, and with the district's local rules. This rule recognizes that courts rely on multiple directives to control practice. Some courts regulate practice through the published Federal Rules

and the local rules of the court. Some courts also have used internal operating procedures, standing orders, and other internal directives. Although such directives continue to be authorized, they can lead to problems. Counsel or litigants may be unaware of the various directives. In addition, the sheer volume of directives may impose an unreasonable barrier. For example, it may be difficult to obtain copies of the directives. Finally, counsel or litigants may be unfairly sanctioned for failing to comply with a directive. For these reasons, the amendment disapproves imposing any sanction or other disadvantage on a person for noncompliance with such an internal directive, unless the alleged violator has been furnished in a particular case with actual notice of the requirement.

There should be no adverse consequence to a party or attorney for violating special requirements relating to practice before a particular judge unless the party or attorney has actual notice of those requirements. Furnishing litigants with a copy outlining the judge's practices -- or attaching instructions to a notice setting a case for conference or trial -- would suffice to give actual notice, as would an order in a case specifically adopting by reference a judge's standing order and indicating how copies can be obtained.

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Proposed Amendment to Rule 59; Public Comments

DATE: March 15, 1994

The proposed amendment to Rule 59, which is attached, is identical to similar amendments proposed to the Appellate, Bankruptcy, and Civil Rules. The amendment would permit the Judicial Conference to make technical, nonsubstantive, corrections in the rules without burdening the Supreme Court and Congress.

To date, I have received no written comments on the amendment.

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 may amend these rules to correct errors in spelling, cross-references, or typography, or to make technical changes needed to conform these rules to statutory changes.

COMMITTEE NOTE

The rule is amended to enable the Judicial Conference to make minor technical amendments to these rules without having to burden the Supreme Court and Congress with reviewing such changes. This delegation of authority will relate only to uncontroversial, nonsubstantive matters.

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Proposed Amendment to Rule 6(e); Provision Permitting Disclosure of Grand Jury Materials to State Discipline Agencies

DATE: March 14, 1994

Mr. Barry Miller of Chicago, Illinois has suggested to the Committee that it amend Rule 6(e)(C)(iv) to "permit disclosure of grand jury materials to state judicial and attorney discipline regulatory agencies." His letter is attached and is self-explanatory.

The issue of grand jury secrecy arises with some frequency. My records, which go back to 1988 indicate two such proposed amendments to Rule 6. In 1989, the Committee opposed an attempt by Congress to amend Rule 6 by creating a exception. In 1991, the Committee considered a letter from Judge Pratt concerning leaks in grand jury information. And in 1992, the Committee rejected a DOJ proposal to amend Rule 6(e). The attached materials should provide the Committee with some background information on those proposals:

(a). Minutes from May 1989 meeting indicating Committee opposition to proposed Congressional amendment to overrule *Sells* and *Baggot*.

(b) Memo from David Adair providing background of proposed Congressional amendments to Rule 6.

(c) Minutes from November 1991 meeting; discussion of letter sent by Judge Pratt concerning potential leaks in grand jury secrecy; no amendment considered.

(d) Minutes from April 1992 meeting, Memo, and proposed amendments to Rule 6(e) to extend disclosure to federal attorneys in civil cases; proposed amendment rejected.

MILLER, SHAKMAN, HAMILTON, KURTZON & SCHLIFKE
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STANTON SCHUMAN

WRITER'S DIRECT LINE

December 29, 1993

Hon. William Terrell Hodges, Chair
Advisory Committee on Federal Rules
of Criminal Procedure
c/o Judicial Conference of the United States
Washington, D.C. 20544

Dear Judge Hodges:

I am writing to suggest that Rule 6(e)(3)(C)(iv) be amended to permit disclosure of grand jury materials to state judicial and attorney discipline regulatory agencies. This suggestion arises out of the experience of Illinois agencies during the past decade.

I recently completed a term as president of the Chicago Council of Lawyers, a reform bar association, and I also served as a member of a Special Commission on the Administration of Justice that was appointed by the Illinois Supreme Court. The Special Commission was appointed by the Supreme Court in response to two Federal investigations of the Cook County, Illinois judiciary: Operation Greylord and Operation Gambat. These investigations, which occurred over the past fifteen years, have resulted in the convictions of more than fifteen judges and over 100 attorneys on charges varying from "hustling" cases in courtrooms to fixing murder trials for mob hitmen.

Public court testimony has revealed that the U.S. Attorney's office in Chicago has information about allegations of misconduct by many other judges -- perhaps dozens -- and at least dozens of other lawyers. Representatives of the U.S. Attorney's Office, the Illinois Judicial Inquiry Board, and the Illinois Attorney Registration and Disciplinary Commission ("ARDC") testified before the Special Commission, and have made other

statements on this subject. These agencies have suggested that the U.S. Attorney has not turned over much of its information on judicial and attorney corruption. Much of its hesitancy to turn over information to the responsible Illinois authorities comes from the language in Rule 6(e)(3)(C)(iv) that limits disclosure to state officials "for the purpose of enforcing" "state criminal law." See In re Grand Jury Proceedings, 942 F.2d 1197 (7th Cir. 1991)(reversing District Judge's order turning grand jury materials over to ARDC).

No criminal law violation is as important to our legal system as a judge's fixing cases. Such a legal violation cuts at the very heart of the system -- its honest resolution of disputes. Cf. In re Request for Access to Grand Jury Materials, 833 F.2d 1438 (11th Cir. 1987)(approving disclosure of grand jury materials to House Judiciary Committee for impeachment investigation); In re Petition to Inspect and Copy Grand Jury Materials, 735 F.2d 1261, 1273-75 (11th Cir.)(affirming disclosure of grand jury materials to judicial investigating committee investigating possible misconduct by District Judge), cert. denied, 469 U.S. 884 (1984). Yet under the current rule, grand jury information about drunk driving can be turned over to responsible state officials, but fixing judicial cases cannot.

I therefore suggest that you consider an amendment to the rule permitting disclosure of grand jury materials to state judicial and attorney discipline regulatory agencies, upon court approval. The state agencies should be given the power to request the disclosure of the materials, subject to objection by the Government. Indeed, Recommendation No. 35 of the Special Commission's December 1993 Report on Ethics and Discipline suggests that the Illinois Judicial Inquiry Board should consider suggesting this amendment to you.

I recognize that in some cases, the U.S. Attorney may oppose such disclosure for legitimate reasons, such as an argument that the disclosure would violate a confidentiality agreement with a witness, or would interfere with an important ongoing investigation. Those arguments should not prevent the Rule from being amended, but should be addressed by the District Court on a case-by-case basis.

If you are interested in more detailed information about this matter, including the results of Operation Greylord and Gambat and the workings of the Illinois judicial and attorney discipline systems, I would be happy to be of assistance to you.

Sincerely,

Barry A. Miller

Barry A. Miller

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
Post Office Box 1620
Jacksonville, Florida 32201-1620

Wm. Terrell Hodges
Judge

February 15, 1994

Mr. Barry A. Miller
208 South La Salle Street
Chicago, Illinois 60604

Dear Mr. Miller:

Thank you for your letter of February 10, 1994 enclosing an earlier letter suggesting an amendment to Rule 6 of the Federal Rules of Criminal Procedure.

I have been succeeded as chair of the Criminal Rules Advisory Committee by Judge Lowell Jensen of the Northern District of California. I am therefore transmitting your correspondence to him together with a copy of this letter.

Very truly yours,

WTH.

Wm. Terrell Hodges

c: Honorable D. Lowell Jensen ✓

Lowell — I hope all is well with you

Best regards

Barry

and subsequently approved by the Judicial Conference for submission to the Supreme Court.

1. Amended Rule 11(c)(1), which addresses the requirement that the trial judge apprise an accused during plea inquiries that the court is required to consider applicable sentencing guidelines.

2. Amended Rule 32, which addresses production of the sentencing report and deletion of 32(c)(3)(E).

3. Amended Rule 41(e), which addresses the return of seized property.

Rules Approved by the Standing Committee and Circulated for Public Comment

The Reporter also noted that an amendment in one rule and a new rule had been approved by the Standing Committee at its January 1989 meeting and that the two rules had been circulated for public comment. Public hearings on the rules will be held on July 24, 1989 in the Ceremonial Courtroom of the United States District Court in Chicago, Illinois.

1. Amended Rule 41(a), which addresses the authority to issue warrants for property within and outside the district. The Committee was informed that Rule 41(a)(3) includes an inadvertent reference to overseas searches for persons.

2. New Rule 58, which addresses the procedures for misdemeanors and other petty offenses which are currently located within the Rules of Procedure for the Trial of Misdemeanors before United States Magistrates.

New Criminal Rule Amendments Proposed

Proposed amendments to Rule 6(e)(disclosure of grand jury proceedings). The Committee was informed that Congress is considering amendments to Rule 6(e) which are designed to overrule United States v. Sells Engineering, Inc. 463 U.S. 418 (1983) and United States v. Baggot, 463 U.S. 476 (1983) and provide for expanded disclosure of grand jury materials to other federal agencies (H.R. 1278 and S. 413). Mr. Pauley provided the background on the proposed amendments and explained that although the Department of Justice had sought broad amendments for disclosure, the amendments had been restricted so as to

apply only to violations of banking laws. He explained that the Department of Justice had seen an emergency backlog of several thousand cases involving violations of various banking laws. Although the Department believes that the Committee should be the primary avenue for changing the Rules, there are exceptions where there is an emergency or urgent need for an expedited consideration of changes in the Rules.

Mr. Karas expressed deep concern about the Department's lightning speed in seeking unilateral changes to the Criminal Rules. Judge Weis observed that since Congress had passed the Rules Enabling Act that there had been a change in the climate and that the Standing Committee would be willing to follow emergency procedures for considering needed changes in the Rules. The Committee discussed the background of Rule 6(e) and the fact that as recently as 1985, Congress had considered amendments to Rule 6(e) and had been urged by the Judicial Conference to give careful consideration to a number of sensitive factors, such as the primary purpose for grand jury secrecy. Mr. Tom Smith, a representative from the American Bar Association, indicated that the ABA was opposed to the amendments.

Ultimately, Mr. Karas moved that the Committee request both the House and the Senate to return the bills with the proposed amendents to the Department of Justice with a suggestion to follow the procedures established in the Rules Enabling Act. The motion was seconded by Judge Keenan. After further discussion concerning the utility of sending the matter back to the Department of Justice, Mr. Marek moved to amend the motion to read that Congress should be urged to table the amendments. The amendment was accepted. Mr. Pauley urged rejection of the motion, citing the emergency presented by complicated banking cases which would require civil attorneys to duplicate needlessly the efforts of criminal attorneys who had conducted grand jury proceedings. Judge Huyett moved to further amend the motion to offer expedited consideration of the proposed amendments by the Standing Committee. That amendment was also accepted. Following further discussion, the motion carried.

The matter was discussed extensively again on the second day of the meeting following some additional information on the status of the proposed amendments. The Committee learned that the House version of the rule was now part of proposed amendments to Title 18. The Chairman observed that things had

not really changed since the earlier discussion. Mr. Doar noted that any changes in Rule 6(e) would be dangerous and Mr. Pauley responded that under the amendments disclosure would not be made without the approval of the federal prosecutor and reiterated the extensive background and need for the changes. Judge Keenan expressed concern that prosecutors might use the grand jury process to work toward only a civil case. Judge Everett moved that the Committee express to Congress that confidence in the secrecy of the grand jury is so important that there are serious problems with amending Rule 6(e). The motion failed for want of a second. There was additional discussion about related problems with the proposed changes with the consensus of the Committee being that Rule 6(e) should not be amended.

2. Proposed amendments to Rule 12(b)(pretrial motions). At the suggestion of Judge Manuel Real, the Committee considered whether to amend Rule 12(b) to require litigation of entrapment defenses through a motion to suppress evidence illegally obtained. After brief discussion Judge Huyett moved to table the proposal and Mr. Karas seconded the motion. It carried unanimously.

3. Proposed Amendments to Rule 16 (Discovery). The Committee considered a number of proposed changes to Rule 16 which had been deferred from the November 1988 meeting in New Orleans.

a. Notice of "Other Offense Evidence:" Mr. Marek offered a proposed amendment to Rule 16(a)(1)(E) which would require the government to furnish the defense with particularized information about its intent to use evidence under Federal Rule of Evidence 404(b). The Committee believed that the issue would appropriately fit within that evidence rule and as noted, infra, adopted amendments to Rule of Evidence 404(b).

b. Witness Lists. The Committee considered an amendments to Rule 16 which would: first, require the prosecution to furnish to the defense a written list of names and addresses of all government witnesses; second, provide for reciprocal discovery of names and addresses of defense witnesses; third, prohibit comment upon the failure to call a witness on either list; and fourth, impose a continuing duty to disclose the names and addresses of witnesses. Mr. Marek noted that the proposed changes followed proposals approved by the Supreme Court in 1974. Mr. Pauley indicated that the Department

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GENERAL COUNSEL

May 8, 1989

Dean David Schlueter
Associate Dean, St. Mary's University
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One Camino Santa Maria
San Antonio, Texas 78284

Re: S. 413 - The Financial Institutions Reform, Recovery and Enforcement Act of 1989

Dear David:

I understand that S. 413 is on the agenda for the next meeting of the Advisory Committee on the Federal Rules of Criminal Procedure. The provision of this legislation that specifically interests the Advisory Committee is section 918, which would amend Federal Rule of Criminal Procedure 6(e)(3). The amendments would (1) permit prosecutors to make automatic disclosure of grand jury materials to Department of Justice attorneys for civil purposes without a court order, (2) expand the types of proceedings for which other executive departments and agencies could obtain court-authorized disclosure to include not only "judicial proceedings," but also other matters within their jurisdiction, such as adjudicative and administrative proceedings, and (3) reduce the "particularized need" standard for court-authorized disclosure to a "substantial need" standard in certain circumstances.

The section-by-section analysis of this provision appearing in the Congressional Record indicates that the proposed amendment is designed to "overcome impediments to the government's civil enforcement efforts caused by two decisions of the United States Supreme Court." Cited are United States v. Sells Engineering, Inc., 463 U.S. 418 (1983), and United States v. Baggot, 463 U.S. 476 (1983). The analysis seems to imply that the Supreme Court interpreted Rule 6(e) more stringently than Congress would have intended. A review of the circumstances leading to a 1977 amendment to Rule 6(e), however, indicates that it was Congress which was concerned about unwarranted disclosure under the rule. See United States v. Sells Engineering, Inc., 463 U.S. at 436-442.

In 1977, the Advisory Committee proposed, and the Supreme Court submitted to Congress, an amendment to Rule 6(e)(3)(A) that would have provided that "attorneys for

the government" authorized to receive grand jury information would include those enumerated in Rule 54(c) and "such other government personnel as are necessary to assist the attorneys for the government in the performance of their duties." Although the Advisory Committee notes indicated that the use of grand jury materials was to be limited to criminal matters, the proposal received criticism because of "concern that it would permit too broad an exception to the rule of keeping grand jury proceedings secret." Noting that the language had no explicit limitation to criminal matters, Congress feared that the proposed change "would allow government agency personnel to obtain grand jury information which they could later use in connection with an unrelated civil or criminal case." H.R. Rep. No. 95-195, 95th Cong., 1st Sess. 4 (Apr. 11, 1977).

Accordingly, legislation (H.R. 5864) was introduced to approve other amendments to the criminal rules but to significantly modify the amendments to Rule 6(e) to make clear that grand jury materials were available only to Federal prosecutors in the performance of their official duties, and other government personnel only for duties in connection with the enforcement of Federal criminal law. The intent of the change was set out in the report to H.R. 5864 as follows:

> The rule as redrafted is designed to accommodate the belief on the one hand that federal prosecutors should be able, without the time consuming requirement of prior judicial interposition, to make such disclosures of grand jury information to other government personnel as they deem necessary to facilitate the performance of their duties relating to criminal law enforcement. On the other hand, the rule seeks to allay the concerns of those who fear that such prosecutorial power will lead to misuse of the grand jury to enforce non-criminal federal laws by (1) providing a clear prohibition, subject to the penalty of contempt, and (2) requiring that a court order under paragraph (C) be obtained to authorize such a disclosure. There is, however, no intent to preclude the use of grand jury developed evidence for civil law enforcement purposes. On the contrary, there is no reason why such use is improper, assuming that the grand jury was utilized for the legitimate purpose of criminal investigation. Accordingly, the committee believes and intends that the basis for a court's refusal to issue an order under paragraph (C) to enable the government to disclose grand jury information in a non-criminal proceeding should be no more restrictive than is the case today in the prevailing court decisions. It is contemplated that the judicial hearing in connection with an application for court order by the government under subparagraph (3)(C)(i) should be ex parte so as to preserve, to the maximum extent possible, grand jury secrecy.

S. Rep. 95-354, 95th Cong., 1st Sess. 8 (July 20, 1977). This legislation was enacted as Pub. L. No. 95-78, 91 Stat. 319 (July 30, 1977).

The Supreme Court cases cited above to support the need for the amendment to Rule 6(e) indicate that a "particularized need" must be shown in order to warrant use of grand jury material by Department of Justice attorneys handling civil cases. The pending amendment, therefore, is designed to completely remove the court from the decision to disclose grand jury materials to attorneys handling civil cases and to reduce the standard needed to authorize disclosure to other government personnel.

It should be noted that a 1985 amendment to Rule 6(e)(3)(A)(ii) provides for disclosure to non-Federal personnel as well as Federal personnel.

In 1985, the 99th Congress introduced S. 1562, S. 1676, and H.R. 3340 to amend Rule 6(e)(3). These bills proposed amendments similar to the pending legislation. Both the Committee on the Administration of Criminal Law and the Committee on the Operation of the Jury Sustem considered these bills and submitted separate reports to the Judicial Conference at its March 1986 meeting. The Conference, however, approved a redrafted statement that addressed the concerns of both committees, but indicated that the subject of the amendments was a legislative, rather than a judicial, question. See March 1986 Report of the Proceedings of the Judicial Conference of the United States 31.

I hope this information is of assistance. I have enclosed copies of the proposed amendment to Rule 6(e), the discussion of that change in the Congressional Record, a copy of the relevant portion of the Senate report accompanying H.R. 5864, and a copy of the relevant part of the Judicial Conference's March 1986 report and the approved statement regarding the proposed amendments to Rule 6(e)(3).

Sincerely,

David N. Adair, Jr.
Assistant General Counsel

Enclosures

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.

to Rule 804(a) and a specific child hearsay exception in Rule 804(b). Professor Saltzburg believed that the issue could be addressed by simply adding language to Rule 804(a)(4) to provide for declarants of tender years. That provision would cover not only children but also adults who have the mental age of children. Assuming a declarant was unavailable under that provision, the catch-all provision in Rule 804(b)(5) could be relied upon for the exception itself.

In the following discussion there was general support for the amendment although a number of members expressed concern about going too far with the exception. They believed the exception should only apply to children.

Judge DeAnda moved that Rule 804(a)(4) be amended to include declarants of tender years and that it be forwarded to the Standing Committee for public comment. Mr. Pauley seconded the motion. It carried by a 9 to 1 vote.

d. Proposal from DEA to Amend Rules of Evidence

Professor Saltzburg noted that the DEA has suggested a possible amendment to the Federal Rules of Evidence which would make DEA Form 7 as prima facie evidence. After a brief discussion, Magistrate Crigler moved that the issue be referred to the Justice Department for its views. Mr. Doar seconded that motion which carried by a unanimous vote.

e. Rules 702, 703, and 705. Expert Testimony.

Professor Saltzburg observed that there were still serious problems with the proposed amendments to Rules 702, 703, and 705. The Reporter observed that a recent poll of trial judges indicated that although there was support for limiting expert testimony, a significant number of respondents noted that they were not inclined to see the rule applied to criminal cases. Professor Saltzburg moved that the Standing Committee be apprised that the Committee still opposed the proposed amendments to Rules 702, 703 and 705 and recommended that the Standing Committee table those amendments pending resolution of the jurisdiction question. Judge Keenan seconded the motion which carried unanimously.

E. Other Rules Under Consideration by the Advisory Committee

1. Rule 6(e). Grand Jury Testimony.

Judge Hodges indicated that the Department of Justice had proposed several amendments to Rule 6. In an extensive

discussion of the issue, Mr. Pauley presented the Department's reasons for the amendments. The first was an attempt to overrule the Supreme Court's decision in United States v. Sells Engineering in that it would permit the sharing of grand jury information with government attorneys investigating civil law violations or claims. Sells, he indicated, greatly restricted the ability of the civil attorneys to investigate civil law issues. The second amendment would address issues raised in United States v. Baggot which held that other government agencies could not have access to grand jury information unless litigation was pending. He cited several examples of the inconsistencies of these cases and the problems which had resulted.

Mr. Pauley moved that the requested amendments to Rule 6(3)(3)(A) be approved and forwarded to the Standing Committee. Judge Jensen seconded the motion.

Professor Saltzburg agreed with the concept in the Department's memo but stated that there is an issue of whether it should be announced that material is being shared with the civil attorneys. Judge Hodges observed that if such material would be more widely shared that there might be a move for a bill of rights for grand jury witnesses. Mr. Marek queried whether there was really a problem requiring the amendment. And Mr. Doar expressed concern about the amendments. In his view, criminal and civil cases should be kept separate. The fact that before Sells the government was able to share grand jury information does not mean that it was right to do so.

The motion was defeated by a 3 to 5 vote with 2 absentions. Professor Saltzburg thereafter moved that the the Chair solicit the views of the Civil Rules Committee on this amendment. Judge Keenan seconded the motion which carried by a 9 to 1 vote.

Regarding the second amendment, Mr. Pauley moved that Rule 6(e)(3)(C) be amended and forwarded to the Standing Committee for publication. Judge Keenan seconded the motion.

Mr. Pauley urged the Committee to view this amendment as simply efficient use of governmental resources. In the discussion which followed, several Committee members noted the role of secrecy in grand jury proceedings and the dangers posed by sharing testimony with other agencies. Those dangers, responded Mr. Pauley, could be monitored by the courts. Professor Saltzburg observed that the proposed amendment would make a major change in the way the government used grand jury testimony, which might be a good change. Nontheless, he favored sending the matter to the

Civil Rules Committee first. Mr. Pauley strenuously objected to that suggestion.

The Committee ultimately rejected the motion by 4 to 5 with one absention.

2. Rule 11. Proposal to Require Advice Concerning Consequences of Guilty Plea

Judge Hodges informed the Committee that Mr. James Craven had suggested that Rule 11 be amended. The amendment would require that any defendant who was not a United States citizen be advised that a plea of guilty might result in deportation, exclusion from admission to the United States, or denial of naturalization. The brief discussion which followed focused on the practical problems associated with giving this, and similar advice which really focuses on the potential collateral consequences of a guilty plea. Judge Keenan moved that the proposed amendment be disapproved. Judge DeAnda seconded the motion which carried unanimously.

3. Rule 16. Proposal to Consider Amendments.

Judge Hodges indicated that Mr. Wilson had suggested that Rule 16 be considered in light of growing concerns about federal criminal discovery. But in his absence, the matter would be carried over to the Fall 1992 meeting.

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

The Reporter indicated that in response to the Committee's direction at the November 1991 meeting, he had drafted proposed amendments to Rule 16 concerning disclosure of statements by organizational defendants. In a brief discussion it was noted that the Rule and the Committee Note should differentiate between statements by agents which would be discoverable as party admissions and an agent's statements concerning acts for which the organization would be vicariously liable. Mr. Karas moved that the amendment be forwarded to the Standing Committee for public comment. Judge Crow seconded the motion. It carried unanimously.

5. Rule 29(b). Proposal to Delay Ruling on Motion for Acquittal.

The Committee continued its discussion of an amendment to Rule 29(b) which had been suggested by the Department of Justice and addressed at the November 1991 meeting. Additional drafting of the amendment made clear that the judge could only consider evidence admitted at the time of the motion in considering whether to grant a deferred

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.

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

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: Subcommittee Report on O'Brien Proposals

DATE: March 17, 1994

Attached is the Subcommittee Report on proposed amendments submitted by Judge Donald O'Brien. Discussion of the report is on the agenda for the April meeting in Washington, D.C.

PROPOSED REPORT OF SUBCOMMITTEE ON RULE 16(a)(1)(C)

Chairperson:
Rikki J. Klieman, Esquire
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GROSS & PABIAN
21 Custom House Street
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The Honorable George M. Marovich
United States District Judge
United States District Court
219 South Dearborn Street
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The Honorable W. Eugene Davis
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556 Jefferson Street, Suite 300
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Roger Pauley, Esquire
Office of the Attorney General
2244 U.S. Department of Justice
Criminal Division
Washington, D.C. 20530

I. CHARGE:

The purpose of the SubCommittee is to examine the amendments to Rule 16(a)(1)(C) proposed by Judge Donald O'Brien and his group consisting of Judge William G. Young, Magistrate John Jarvey and Professor Charles Ehrhardt. Their proposals are related to the possibility of disclosure by the Government of an index of relevant evidence. The precise language of the proposed amendment is as follows:

RULE 16(a)(1)(C)

Alternative 1

(C) Documents and Tangible Objects. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant. Upon the request of a defendant, the Government shall also identify any materials set forth in this paragraph which directly name the defendant or clearly refer to the defendant.

COMMENT

Alternative 1 adds a final sentence to the presently existing Rule 16(a)(1)(C) requiring the government to specifically identify discoverable materials which "directly name the defendant or clearly refer to the defendant."

Alternative 2

(C) Documents and Tangible Objects. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant. Upon the request of a defendant, the Government shall make available to the defendant any existing electronic or other method of indexing or organization which would facilitate the examination of documents set forth in this paragraph.

COMMENT

Alternative 2 adds a final sentence to Rule 16(a)(1)(C) which encompasses a different approach to the problem. Most prosecutions of multiple defendants have multiple counts in the indictment. The government usually has some method of identifying which documents are relevant to each of the separate counts. Upon the defendant's request, this amendment would require the government to produce such an index or other organizational method, if it already exits.

RULE 16(a)(4)

The Court may prohibit the government from introducing in evidence any of the foregoing material not disclosed, so as to secure and maintain fairness in the just determination of the cause.

COMMENT

In order to deal with the inadvertent failure of the government to identify the materials which directly implicate a defendant, this amendment provides that the trial court has wide discretion in dealing with the matter in order to secure and maintain fairness in the just determination of the cause. This provision is identical to Florida Rule of Criminal Procedure 3.220(a)(1)(xiii).

The provision may be unnecessary in light of Rule 16(d)(2) which seems to provide this same discretion.

II. The response of the Department of Justice was as follows:

"We must object as well to the second proposal, which I understand was briefly considered and rejected by your Committee last October. The proposal is motivated by the laudable desire to save public monies in the form of hourly fees paid to appointed counsel when those counsel have to pore over hundreds or thousands of documents in a complex, multi-defendant case, searching for any materials relevant to their particular client. However, requiring

the government to turn over an index or other organizational system it may have devised for the documents would set an unwise precedent with respect to the work product of federal investigative agencies and prosecutors. It could also in many cases unfairly reveal the government's theory of the case. Moreover, it may be doubted whether any competent counsel would deem it appropriate to rely on a government-provided index to a set of materials or rather would feel compelled to examine all the documents independently to determine their relevance to his client's defense. Likewise, a requirement that the government provide an index or organizational system would almost certainly lead to additional litigation, where counsel alleged that the government's index was inaccurate or misleading. The cost of such litigation would reduce or eliminate any savings contemplated by the amendment."

Attorney General Janet Reno
August 4, 1993

III. Judge O'Brien's Response

Judge O'Brien responded to the position of the Department of Justice in his letter to Judge Jensen of October 8, 1993.

In summary, Judge O'Brien stated that his primary concern "is to remedy the unfairness caused in complex cases by having defense attorneys buried in voluminous unindexed discovery materials." He maintained that the financial concerns were secondary.

He disagreed with the characterization of an index being work-product and believed that an index, no more than the documents themselves, would not unfairly reveal the government's theory of the case. He agreed with the Attorney General that defense attorneys might not routinely rely on an index in preparation for trial, but further stated that with the inherent problems of discovery in a complex criminal case and with the usual reliance on the good faith of prosecutorial disclosure, even a poorly prepared index would be better than nothing. Finally, he believed that the

question of additional litigation should not be the issue, but the focus should be on the fairness of the rule.

IV. The SubCommittee's Position

The SubCommittee has thoroughly reviewed the materials submitted in support of a proposed amendment as well as the views espoused by the Department of Justice. Mr. Pauley opposes the amendment for reasons set forth in Attorney General Reno's letter quoted above. For various other reasons, the SubCommittee recommends against going forward with these proposed amendments.

First, we believe we should resist efforts to clutter the discovery rules with detailed provisions designed to resolve specific discovery problems. The criminal rules should be succinct and general in nature. If we recommend these amendments, we may invite similar amendments designed to resolve other specific discovery problems.

Second and relatedly, the SubCommittee members (with the exception of Mr. Pauley) see no reason why a court does not now have authority, in appropriate cases, to order the government to produce its indices or to specify documents that are relevant to particular defendants. Nothing in the rule proscribes such discovery and the Advisory Committee notes to the 1974 amendments to Rule 16 made it clear that "the rule is intended to prescribe the minimum amount of discovery to which the parties are entitled. It is not intended to limit the judge's discretion to order broader discovery in appropriate cases."

At our request, the Reporter has prepared a memorandum on this point which is attached hereto. Although the Reporter recommends consideration of a minor amendment, the position of the SubCommitee remains the same.

On an analogous problem, our research reveals that when defendants move to order the government to specify which particular documents (from a large number of documents presented to defendant) it will use at trial, most courts have assumed they had discretion to grant such relief. Courts have usually considered factors such as number of documents involved, importance to the defendant of having the documents specified and relative hardship to the parties if the relief is or is not granted. (See cases discussed in 108 A.L.R. Fed. 380, 513-517.) We believe that this is the preferred approach to the discovery problems these proposed amendments seek to address: allow the district court to exercise its sound discretion and decide each motion on its own merits.

Moreover, the SubCommittee was concerned that, as stated in the Attorney General's letter, adoption of the proposed amendment to require the government to turn over its index into materials provided under Rule 16 could generate significant new litigation involving, e.g., claims that the index was incomplete or inaccurate and therefore misled the defense. Any such new litigation would tend to defeat the purpose of the proposal to expedite and facilitate the trial process.

The SubCommittee also considered the financial concerns related to attorneys appointed under the Criminal Justice Act.

Again, the membership reaches the same conclusion. A motion from defense counsel in an appropriate case can be considered by the trial court and a remedy can be created without the necessity of a rule change.

Finally, there is an additional consideration that is voiced by some members of the criminal defense bar. There is a fear that such an amendment may foster poor lawyering skills by lazy lawyers. Attorneys who represent someone's liberty should not use shortcuts at their client's peril.

Another Point of View

There is a viewpoint (expressed by members of the O'Brien group and adopted here) that complex litigation and multiple defendant cases have become the norm, rather than the exception. In addition, small cases at trial often arise out of extensive investigations. When a prosecutor provides defense counsel with a room full of paper or tapes, the defense attorney is lost and overwhelmed. Without some type of index or other method to aid in a search, the hours to be spent "looking for the needle in the haystack" are wasted and costly.

The proposed amendment does not expand the documents subject to discovery under Rule 16; it simply provides more meaningful access to the material. The problem is exacerbated in the cases where defense counsel is appointed under the Criminal Justice Act. The fees generated by a lengthy search are enormous. Since the same government pays for the work of the prosecutor and the defense lawyer, the government will be paying twice for gathering the

materials originally and for searching through them eventually.

The government routinely prepares an index and disclosure of such a document would add nothing of substance to what has already been disclosed. The government is not providing more materials; it only provides an aid to find the materials more quickly.

Any suggestion that the Department of Justice would lose more cases as a result of supplying this additional discovery device is purely speculative. Well prepared prosecution case files and meaningful access to them, are a direct means to foster guilty pleas which serve the interests of justice.

ATTACHMENT

MEMO TO: Ms. Rikki J. Klieman

FROM: Dave Schlueter, Reporter

RE: Report of Subcommittee on Rule 16

DATE: February 11, 1994

At the request of Judge Jensen, I conducted a search for any caselaw or other authority regarding the proposed amendments from Judge O'Brien. Specifically, I focused on the issue of whether a trial court, faced with the scenerio envisioned by Judge O'Brien, could order the government to produce an index, guide, or inventory, to the defense counsel. Unfortunately, I have found no cases or or other authority directly answering that question.

The absence of caselaw does not indicate that courts are not ordering the relief envisioned. And it may be that in some instances the government or some other entity has voluntarily provided an inventory or index to voluminous records. For example in *United States v. Gleason*, 616 F.2d 2 (2d Cir. 1979), *cert. denied*, 444 U.S. 1082 (1980), the defendant, former chairman of the board of a bank, argued that the government violated Rule 16 by not disclosing to him before trial a letter he had written years earlier to the then chairman of the board. The court held that the letter was "hardly relevant" and that the government's failure to produce the letter before trial did not prevent him from preparing for trial. The documents in question had apparently been in the custody of the FDIC. Although those documents were voluminous, said the court, the defendant

> "had long before trial been provided with an inventory of them and in preparing a strategy of ignorance should have known that Board minutes and earnings statements to which he might have been exposed would be important and should, with the aid of the inventory, have been extracted from the mass for examination." Id. at 25.

While the opinion does not indicate the circumstances of production of the inventory, it does point out that the inventory should have aided the defendant in preparing his case.

It is important to note that while some courts might agree with the subcommittee's view that Rule 16 states the minimum requirement for discovery, others might be inclined to view it as both the minimum and the maximum. That is, if the rule doesn't specifically require disclosure, the defendant does not get it. An example of that debate is clear from reading the cases addressing the age-old question

of whether trial courts have the authority to order disclosure of the prosecution's witnesses. *See United States v. Price*, 448 F.Supp. 503 (D.Colo 1978)(circuit by circuit summary of whether prosecution's witnesses should be disclosed to defendant).

I have reveiwed the subcommittee's report and believe that its preliminary decision not to recommend any amendments is supportable. The subcommittee is correct, I believe, in its view that amendments should not be made simply to remedy extraordinary or purely hypothetical situations. Without hard empirical data or reported cases on point, it is difficult to know whether trial courts are taking care of the problem without resorting to Rule 16. On many occasions the Advisory Committee has decided not to adopt a proposed amendment simply because it was not convinced that a problem existed.

On the other hand, the problem raised by Judge O'Brien does not seem wholly implausible or speculative. It is rather easy to envision a trial where voluminous documents or records exist and neither the prosecution nor the trial court are inclined to provide pretrial relief in the nature of an inventory, index, or some other cataloging device to assist counsel. The question is, assuming that such a scenario is likely to arise, should any amendment to Rule 16 be made?

Given the history of this proposed amendment, the continuing focus on megatrials, and the absence of clear caselaw on the point, I am personally inclined to recommend that the Committee consider some minor amendment to Rule 16 which would address, at least in part, the concerns raised by Judge O'Brien. My suggestion would be to add some language to Rule 16 which would authorize the court to order such relief as it deemed necessary in cases involving voluminous records. That would provide the trial court with some discretion and would provide the Committee with an opportunity to address the issue of inventories, for example, in a Committee Note. The publication and comment period would hopefully provide the Committee with some insight into the extent of the problem, if indeed one exists, and whether the proposed amendment meets the issue.

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Implementation of Prado Report Re Allocation of Discovery Costs

DATE: March 17, 1994

Attached are materials received from Peter McCabe regarding implementation of the Prado Report vis a vis allocation of discovery costs. As his letter notes, the issue has been referred to the Criminal Rules Committee for its consideration.

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

December 28, 1993

MEMORANDUM TO PROFESSOR DAVID A. SCHLUETER

SUBJECT: Material to be Placed on Agenda for April 18-19, 1994 Meeting

The attached material regarding the allocation of the cost of reproducing discoverable documents was sent to Rikki Klieman for her information as part of her subcommittee's review of Judge O'Brien's proposal. As noted in the material, the Judicial Conference has referred this matter to the Committee on Rules of Practice and Procedure for consideration in accordance with the Rules Enabling Act. The issue falls within the jurisdiction of the Advisory Committee on Criminal Rules, and I am referring it to you for the Committee's consideration.

Peter G. McCabe
Secretary

Attachment

cc: Honorable Alicemarie H. Stotler
Honorable D. Lowell Jensen
Dean Daniel R. Coquillette

L. RALPH MECHAM
DIRECTOR

CLARENCE A. LEE, JR.
ASSOCIATE DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544

JOHN K. RABIEJ
CHIEF, RULES COMMITTEE
SUPPORT OFFICE

December 28, 1993

MEMORANDUM TO RIKKI J. KLIEMAN

SUBJECT: Additional Material on Criminal Rule 16

In accordance with Judge Jensen's request, I am sending to you a copy of a draft agenda report prepared for the consideration of the Judicial Conference's Committee on Defender Services, which is meeting on January 5-8, 1994. The agenda report is related to the Rule 16 issue presented by Judge O'Brien. I am also sending copies of this material to the other members of your subcommittee.

John K. Rabiej

John K. Rabiej

Attachment

cc: Honorable Alicemarie H. Stotler
Honorable D. Lowell Jensen
Honorable W. Eugene Davis
Honorable George M. Marovich
Roger Pauley, Esquire
Professor David A. Schlueter
Dean Daniel R. Coquillette

AGENDA ITEM 11(c)

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

Memorandum

DATE: November 23, 1993

FROM: Theodore J. Lidz, Chief, Defender Services Division

SUBJECT: Proposal to Require the Prosecution to Provide Copies of Discoverable Materials to Appointed Counsel and to Allocate the Costs of Duplication

TO: Chair and Members, United States Judicial Conference Committee on Defender Services

In March 1993, the Judicial Conference adopted the following recommendation, which was included in the *Report of the Judicial Conference of the United States on the Federal Defender Program* (page 36):

> The proposal to require the prosecution to provide copies of discoverable materials to the defense and allocate the costs of duplication should be referred to the standing Committee on Rules of Practice and Procedure, for consideration in accordance with the Rules Enabling Act.

The Conference was responding to reports from the Committee to Review the Criminal Justice Act and the Committee on Defender Services. The former advocated an amendment to the Criminal Justice Act or Rule 16 of the Federal Rules of Criminal Procedure to require the prosecution to provide copies of relevant discovery materials to appointed counsel,[1] with the expenses of duplication to be reimbursed from the Defender Services appropriation. The Committee on Defender Services recommended legislation authorizing the presiding judicial officer discretion to allocate between the prosecution and the defense the costs of providing discovery materials to the defense.

These proposals were aimed particularly at resolving the dilemma faced by panel attorneys in "megatrials" whereby appointed counsel must either advance the substantial cost of copying voluminous materials, or risk compromising effective representation by foregoing the duplication of relevant discovery

---

[1] Rule 16 requires the government to make material in its possession which is subject to discovery available for inspection, copying or photographing by the defense. The prosecution is not obligated to supply copies to the defense.

materials and, at best, relying upon personal review at the prosecutor's office.

As reported to the Committee on Defender Services at its June 1993 meeting, the Division asked for the assistance of a federal defender in preparing a position paper on this matter for the consideration of the Committee and possible submission to the Committee on Rules of Practice and Procedure. Michael G. Katz, the Federal Public Defender for the Districts of Colorado and Wyoming, worked on this project and submitted a letter describing his findings. I have attached a copy of his letter for your information.

In view of the pros and cons of the various "solutions" discussed in Mr. Katz's letter, the Division recommends a two-track approach combining elements of the second and third "solutions." First, in order to provide immediate relief, the *Guidelines for the Administration of the Criminal Justice Act, Volume VII, Guide to Judiciary Policies and Procedures (CJA Guidelines)* should be amended to ensure that panel attorneys are reimbursed promptly for incurring substantial expenses in duplicating discovery. This would help resolve the panel attorney dilemma in complex cases without jeopardizing cooperative discovery practices reportedly employed by prosecutors in routine cases. Second, since the Judicial Conference referred the matter to the Committee on Rules of Practice and Procedure, the Committee on Defender Services should consider communicating its views to the Rules Committee or its Advisory Committee on Criminal Rules. In particular, the Committee on Defender Services could explain its support for vesting authority in the court to allocate discovery costs reasonably between the prosecution and defense counsel.

1. Presently, the *CJA Guidelines* permit the court to order interim reimbursement for extraordinary and substantial expenses. Paragraph 2.27(C) states:

> Interim Reimbursement for Expenses. Where it is considered necessary and appropriate in a specific case, the presiding judge or magistrate judge may, in consultation with the Administrative Office, arrange for interim reimbursement to counsel of extraordinary and substantial expenses incurred in providing representation in a case.

By designating a minimum outlay of $500 for duplication of discovery as presumptively qualifying for interim reimbursement, panel attorneys would be more likely to receive prompt payment for such expenses under this guideline. Indeed, when it becomes obvious that a case will exceed the $500 threshold, a panel attorney could apply to the court prospectively to approve

interim reimbursement arrangements so that counsel's financial exposure would be significantly lessened.

The Defender Services Division recommends:

The Committee on Defender Services amend paragraph 2.27 of the *CJA Guidelines* by adding the following sentence:

Interim reimbursement should be authorized when counsel's reasonably-incurred, "out-of-pocket" expenses for duplication of discoverable materials made available by the prosecution exceed $500.

There should be no significant budget impact since the provision would only expedite payments already obligated under the Criminal Justice Act.

2. In January 1993, the Committee on Defender Services recommended that "the Judicial Conference request legislation authorizing the presiding judicial officer discretion to allocate between the prosecution and the defense the costs of providing discovery materials to the defense pursuant to Rule 16, statute, case law or rule of court." The Conference referred the matter to the Committee on Rules of Practice and Procedure, "for consideration in accordance with the Rules Enabling Act."

Issues related to possible changes in criminal rules of practice or procedure are generally considered by the Judicial Conference Advisory Committee on Criminal Rules, and recommendations are then forwarded to the Committee on Rules of Practice and Procedure. Ed Marek, Federal Public Defender for the Northern District of Ohio and, until last month, a member of the Advisory Committee on Criminal Rules, has informed the Division that the matter has not been scheduled for formal consideration by the Advisory Committee. He further advises that, although it has not been the subject of discussion, comments from the Committee on Defender Services regarding the matter would be welcome by the Advisory Committee. In considering whether to take such action, it would be useful for the Committee on Defender Services to consider the comments provided in Mr. Katz's letter.

The Defender Services Division recommends:

The Committee on Defender Services consider at its January meeting whether to submit a statement to the Committee on Rules of Practice and Procedure and/or the Advisory Committee on Criminal Rules on the subject of providing courts with discretion to allocate discovery costs between the prosecution and appointed defense counsel.

The budgetary impact of allocating discovery costs is unknown.

Attachment

Office of the
FEDERAL PUBLIC DEFENDER
DISTRICTS OF COLORADO AND WYOMING
999 18th Street, North Tower, Suite 207
Denver, CO 80202

(303) 294-7002
FAX 294-1192

...ichael G. Katz
...ederal Public Defender
...harles Sackely
...hief, Trial Division
...ki Mandell-King
...hief, Appellate Division

September 28, 1993

Ted Lidz
Chief, Defender Services Division
Administrative Offices of the
United States Courts
One Columbus Cir., N.E., #4-200
Washington, D.C. 20544

Re: Discovery Project for Defender Services Committee

Dear Ted:

As you know I have been working on a discovery project for the Defender Services Committee at the request of Dick Wolfe. Specifically I have been seeking Defender input and insight on one of the Prado Committee recommendations dealing with allocation of costs and burdens of production of discovery material between the prosecution and the defense. At issue is the possibility of an amendment to Rule 16 of the Federal Rules of Criminal Procedure, or the CJA Guidelines, to bring about change and address what is perceived by many to be a problem, especially in complex multi-defendant cases.

I began by sending a survey to Federal Public and Community Defenders requesting information on current discovery practices in both routine and complex cases. Specifically, I attempted to determine whether "open file" policies were in effect, and also to determine whether the prosecution or defense was bearing the cost and/or burden of production of discovery material in both routine and complex cases. The results of that survey, reported to the Defenders in a memo dated August 27, 1993, revealed that very few districts have an "open file" discovery practice. Even within districts discovery practices varied widely depending on the nature of the case and the particular Assistant U.S. Attorney handling the case. It appears that in routine cases the Government bears the burden and costs of reproduction of discovery material regardless of the timing of the disclosure and regardless of whether the material is covered by Rule 16 or goes beyond the scope of the rule (e.g. Jencks material, grand jury transcripts, etc). In complex cases it appears that the Federal Defender and/or the CJA panel lawyers are bearing the costs and burden of reproduction. For example, in some districts the Government will provide one complete set of discovery that defense counsel will then have to share and

copy. In other districts the defense is merely given access to the material which it must duplicate at its own cost. In some cases where the Government produces audio or video tapes they will duplicate them if defense counsel supplies the cassettes. Finally, in many districts the Federal Public Defender is coordinating reproduction of discovery and perhaps bearing a major portion of those costs.

In addition I learned that in many cases panel lawyers have to pay for reproduction or duplication out of pocket, obtaining reimbursement at the close of the case. Some panel lawyers have expressed concerns over a district judge finding that some of these expenses were not "reasonable" under the Criminal Justice Act and therefore the potential exists for the panel lawyer to be denied reimbursement in a case with voluminous discovery.

My memorandum of August 27 to Federal Public and Community Defenders also contained a second "survey" consisting of four questions based on four very general solutions to the perceived problems. Defenders were asked to select which of the following general solutions they would prefer:

1) I would favor an amendment to Rule 16 of the Federal Rules of Criminal Procedure requiring the Government to actually produce copies of all Rule 16 material for each appointed defense attorney, hence bearing the burden and costs of production.

2) I would prefer an amendment to the CJA Guidelines that would require that panel attorneys be compensated immediately for the costs of duplication and production of all discovery made available by, and obtained from, the Government.

3) I would favor a Rule or Guideline amendment that would allow the district court judge to have discretion in apportioning the costs of duplication and production of discovery between Government and defense counsel on a case by case basis under a set of broad guidelines to be developed.

4) I favor continuance of the current "Ad Hoc" system.

As might be expected, the response was not overwhelming with only about half of the Defenders responding. Interestingly, the responses were divided evenly among the four "solutions". Furthermore, a number of Defenders offered additional comments on each of the proposed solutions.

about the ability to develop meaningful guidelines that would be flexible enough to adapt to different discovery practices in different districts.

Finally there is the suggestion of simply maintaining the current "Ad Hoc" system. Those who favored this approach did so for two primary reasons. First, that they had encountered few problems with the discovery practices in their districts; and second, that a change in the rules or guidelines might result in less discovery at greater expense to the defense appropriation.

By this letter I am not intending to express any preference on my part, nor can I speak for the Federal Defenders if for no other reason then they themselves are divided on this issue. However, I do think it is wise to give careful consideration to what might be "lost" by changes in discovery rules or guidelines, as well as the potential shifting of costs to the CJA appropriation. It is also important to consider that the panel attorneys are the ones experiencing the greatest problem with the current system where payment is being advanced with some uncertainty about the timing and scope of reimbursement.

Please feel free to contact me if I can provide you with any additional information or comment.

Sincerely,

MICHAEL G. KATZ
Federal Public Defender

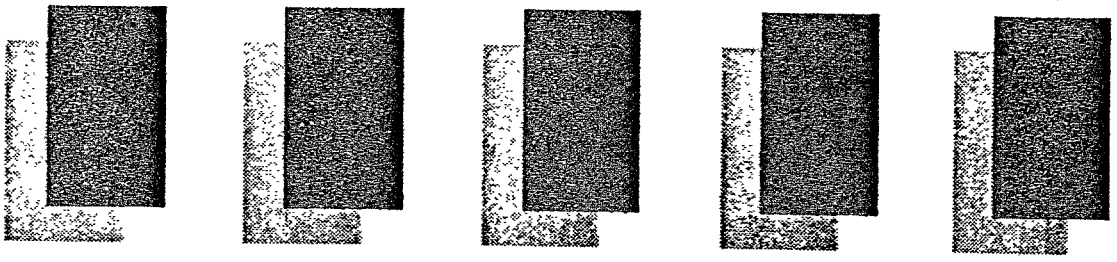
MGK/dmt

The problem with the first proposal, an amendment to Rule 16, requiring the Government to provide all discovery material to each defense counsel at Government expense, is that while it may be philosophically "pure" it is doubtful such an amendment to Rule 16 would be adopted. It would put the entire burden and cost of production on the Government, and it is even questionable whether, in a complex case, each defense counsel needs an individual copy of every tape or document. Such a proposed amendment would certainly run into opposition from the Justice Department and could justifiably be attacked as not being very cost effective. Furthermore, in districts where the Government is producing discovery beyond the literal requirement of Rule 16 there is a concern that such an amendment might cause the Government to restrict what is discoverable simply based on economics. Hence, a "benefit" that is being obtained in some districts would be lost.

The second solution, an amendment to the CJA Guidelines requiring immediate compensation to panel attorneys for costs of duplication of "all discovery made available" would appear to solve the panel attorney problem. It would leave no "discretion" with the district court to refuse payment, and would keep the CJA panel attorney from having to "bankroll" the case. (Several Defenders suggested that under this approach the panel attorneys need not even advance payment, and that CJA counsel could simply present a voucher to the Court for payment of costs of duplication). This proposed solution would apply not only to Rule 16 material, but any other discovery "made available" by the Government. It would probably shift most of the cost of production into the defense appropriation because the Department of Justice would be aware of such a guideline amendment and would point to it in virtually all complex cases. However a number of Defenders agreed that the Government would probably still reproduce the discovery in routine cases.

That leads to the third solution, which is a Rule or Guideline amendment that would give the district court discretion in apportioning costs of duplication and production of discovery between the Government and defense on a case by case basis. Under this proposal a case could be declared complex for discovery purposes; and there could be a page limitation beyond which the defense would bear the cost. Several Defenders have pointed out that this may be close to the current system without the "guidelines". The fact is that district court judges do routinely become involved in discovery "squabbles" reaching a workable solution in these complex cases. However, there is some skepticism

REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE FEDERAL DEFENDER PROGRAM



March 1993

Submitted to the Judiciary Committees of the Congress pursuant to section 318
of the Judicial Improvements Act of 1990
(Pub. L. No. 101-650)

3. Discretion for judges to order payment of travel expenses for certain defendants to attend court proceedings.

By statute the United States marshal is required to furnish subsistence and transportation to an arrested person who is released from custody back to his or her residence. In addition, the court may direct the marshal to provide a financially eligible defendant who is released from custody with transportation and subsistence expenses to travel to the court for further judicial proceedings. There is, however, no authority for payment of subsistence during the course of the proceedings, for travel expenses for the return trip to the defendant's residence, or for successive trips to appear at subsequent court proceedings or related matters. When a defendant is unable to afford the cost of temporary quarters, the pretrial services office of the court may be able to assist in providing shelter in low-cost subsidized facilities, but not other expenses.

The present lack of clear statutory authority to pay for travel and subsistence expenses in these situations has resulted in substantial hardships to certain defendants, particularly those who have no funds and are required to attend lengthy court proceedings. Accordingly, there should be explicit statutory authority for the courts to provide assistance with transportation, housing, and food for financially eligible defendants in appropriate circumstances.

Recommendation

18 U.S.C. § 4285 should be amended to give the presiding judge in a case discretion in appropriate circumstances to order that funds be provided to CJA eligible persons for travel to and from court proceedings and related consultations and for subsistence during court and related proceedings.

4. Requiring the prosecution to provide copies of discovery materials to defendants, with costs paid from the CJA.

The Review Committee recommended that the CJA or the Federal Rules of Criminal Procedure be amended to require that the prosecution provide copies of relevant discovery material to a defendant represented by appointed counsel and that expenses associated with duplication of discovery materials be reimbursed from the CJA appropriation.

Rule 16(a) of the Federal Rules of Criminal Procedure obligates the prosecution to make discoverable material available for inspection, copying, or photographing by the defense. The prosecution is not obligated to supply copies to the defense.

The Defender Services Committee has suggested that the presiding judicial officer be given discretion to make reasonable allocation between the prosecution and defense of the duplication expenses associated with discovery under Rule 16.

Recommendation

The proposal to require the prosecution to provide copies of discoverable materials to the defense and allocate the costs of duplication should be referred to the standing Committee on Rules of Practice and Procedure, for consideration in accordance with the Rules Enabling Act.

5. Safeguards to prevent inappropriate discovery by the prosecution through payment of costs of fact witnesses.

The Review Committee recommended either that the CJA be amended or that standing orders be entered in every district protecting information about defense witnesses contained in expense reimbursement documents from discovery by the prosecution.

The Department of Justice, through the United States Marshals Service, is responsible for reimbursing defense fact witnesses. In 1986 the CJA was amended to authorize a federal defender or clerk of court, rather than the United States attorney, to certify the fees and expenses of fact witnesses for eligible defendants. The review committee believes that the possibility still exists for the prosecution to use the payment of these vouchers as a means of obtaining discovery.

The Review Committee further recommended that eventually the authority for reimbursing defense fact witnesses should be transferred from the Department of Justice to federal defenders and local administrators.

Recommendation

The Defender Services Committee should study the advisability of legislation to transfer payment of the reimbursement of defense fact witnesses from the Department of Justice to the CJA appropriation.

MEMO TO: Advisory Committee on Criminal Rules

FROM: David A. Schlueter, Reporter

RE: Proposed Amendment to Rule 16 to Require Government and Defense Pretrial Disclosure of Witnesses

DATE: March 17, 1994

At its Fall 1993, meeting in San Diego, the Advisory Committee approved and forwarded to the Standing Committee a proposed amendment to Rule 16. The amendment would require the government, upon request by the defense, to produce the names, etc. of its witnesses not later than seven days before trial. The discussion on that amendment is included in the Minutes of the San Diego Meeting at pages 7 to 11.

The proposed amendment was carefully considered by the Standing Committee at its January 1994 in Tuscon, Arizona. Although there was a general consensus favoring publication of the amendment for public comment, the Standing Committee deferred acting on the proposal until its Summer 1994 meeting. It asked the Advisory Committee to consider its comments and suggested technical and stylistic refinements to both the rule and the committee note. In deferring action, the Standing Committee seemed persuaded by the fact that no appreciable time would be lost by waiting; it understood that given the timetable for publication and comment, there would still be time to do so this year if the rule were presented to the Standing Committee at is June 1994 meeting.

In particular, the Standing Committee suggested that the Advisory Committee Note contain additional material on the issue of whether the amendment would conflict with the Jencks Act and whether the Supercession Clause in 28 U.S.C. § 2072(b) would be implicated. It also indicated that the deferral would provide the Department of Justice with the opportunity to seek an accomomodation on the amendment. During the discussion, Mr. Irv Nathan from the Department of Justice assured the Committee that the Department would work with the Committee to arrive at an amendment for the Standing Committee's consideration.

Attached are (1) the amendment as it was presented to the Standing Committee, (2) copies of suggested changes to the amendment presented at the Standing Committee meeting and (3) a slightly revised version of the amendment and committee note taking into account the suggestions made at the Standing Committee meeting. I have marked the new or revised material in the Committee Note with lines in the margins.

Rule 16. Discovery and Inspection[1]

(a) GOVERNMENTAL DISCLOSURE OF EVIDENCE.

(1) Information Subject to Disclosure.

* * * * *

(F) NAMES, ADDRESSES AND STATEMENTS OF WITNESSES. At the defendant's request in a non-capital case, the government, no later than seven days before trial, must disclose to the defendant, the names and addresses of the witnesses the government intends to call during its case in chief, together with any statements of such witnesses as defined in Rule 26.2(f). Such disclosure need not be made if (i)

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1. New matter is underlined and matter to be omitted is lined through.

the attorney for the government has a good faith belief that pretrial disclosure of some or all of this information will threaten the safety of a person or lead to an obstruction of justice, and (ii) submits to the court, ex parte and under seal, an unreviewable statement setting forth the names of the witnesses and the reasons why the government believes that the information cannot safely be disclosed.

* * * * *

(2) *Information Not Subject to Disclosure.* Except as provided in paragraphs (A), (B), (D), ~~and~~ (E)~~,~~ and (F) of subdivision (a)(1), this rule does not authorize the discovery of 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.

* * * * *

(b) THE DEFENDANT'S DISCLOSURE OF EVIDENCE.

(1) *Information Subject to Disclosure.*

* * * * *

(D) NAMES, ADDRESSES, AND STATEMENTS OF WITNESSES. If the defendant requests disclosure under subdivision (a)(1)(F) of this rule, and the government complies, the defendant, at the request of the government, must disclose to the government prior to trial the names,

addresses, and statements of witnesses -- as defined in Rule 26.2(f) -- the defense intends to call during its case in chief. The government may not make such a request if it has filed an ex parte statement under subdivision (a)(1)(F).

* * * * *

COMMITTEE NOTE

No subject has engendered more controversy in the Rules Enabling Act process over many years than discovery. In 1974, the Supreme Court approved an amendment to Rule 16 that would have provided pretrial disclosure to a defendant of the names of government witnesses, subject to the government's right to seek a protective order. Congress, however, refused to approve the rule in the face of vigorous opposition by the Department of Justice. In recent years, a number of proposals have been made to the Advisory Committee to reconsider the rule approved by the Supreme Court. The opposition of the Department of Justice has remained constant, however, as it has argued that the threats of harm to witnesses and obstruction of justice have increased over the years along with the increase in narcotics offenses, continuing criminal

enterprises, and other crimes committed by criminal organizations.

The Committee has recognized that government witnesses often come forward to testify at risk to their personal safety, privacy, and economic well being. The Committee recognized, at the same time, that the great majority of cases do not involve any such risks to witnesses.

The Committee shares the concern for safety of witnesses and third persons and the danger of obstruction of justice. But it is also concerned with the practical hardships defendants face in attempting to prepare for trial without adequate discovery, as well as the burden placed on court resources and on jurors by unnecessary trial delay. The Federal Rules of Criminal Procedure recognize the importance of discovery in situations in which the government might be unfairly surprised or disadvantaged without it. In several amendments -- approved by Congress since its rejection of the proposed 1974 amendment to Rule 16 regarding disclosure of witnesses -- the rules now provide for defense disclosure of certain information. See, e.g., Rule 12.1, Notice of Alibi; Rule 12.2, Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition; and Rule 12.3, Notice of Defense Based Upon Public Authority. The Committee notes also that both Congress and the Executive Branch have recognized for years the value of liberal pretrial discovery for defendants in military criminal prosecutions. *See* D. Schlueter, *Military Criminal Justice: Practice and Procedure*,§ 10(4)(A) (3d ed. 1992)(discussing automatic prosecution disclosure of government witnesses and

statements). Similarly, pretrial disclosure of witnesses is provided for in most State criminal justice systems where the caseload and the number of witnesses is much greater than that in the federal system.

The arguments against similar discovery for defendants in federal criminal trials seem unpersuasive and ignore the fact that the defendant is presumed innocent and therefore is presumptively as much in need of information to avoid surprise as is the government. The fact that the government bears the burden of proving all elements of the charged offense beyond a reasonable doubt is not a compelling reason for denying a defendant adequate means for responding to government evidence. In providing for enhanced discovery for the defense, the Committee believes that the danger of unfair surprise to the defense and the burden on courts and jurors will be reduced in many cases and that trials in those cases will be fairer and more efficient.

The Advisory Committee regards the amendment to Rule 16 as a reasonable step forward and as a rule which must be carefully monitored. In this regard it is noteworthy that the amendment rests on three assumptions which are as follows: First, the government will act in good faith, and there will be cases in which the evidence available to the government will support a good faith belief as to danger although it does not constitute "hard" evidence to prove the actual existence of danger. Second, in most cases judges will not be in a better position than the government to gauge potential danger to witnesses. And third, post-trial litigation as to the sufficiency of government reasons

in every case of an ex parte submission under seal would result in an unacceptable drain on judicial resources.

Subdivision (a)(1)(F). The Committee considered several approaches to discovery of witness names and statements. In the end, it adopted a middle ground between complete disclosure and the existing Rule 16. The amendment requires the government to provide pretrial disclosure of names and addresses of witnesses and their statements unless the attorney for the government submits, ex parte and under seal, to the trial court written reasons, based upon the facts relating to the individual case, why some or all of this information cannot safely be disclosed. The amendment adopts an approach of presumptive disclosure that is already used in a significant number of United States Attorneys offices. While the amendment recognizes the importance of discovery in all cases, it protects witnesses and information when the government has a good faith basis for believing that disclosure will pose a threat to the safety of a person or lead to an obstruction of justice.

The provision that the government provide the names, addresses, and statements no later than seven days before trial should eliminate some concern about the safety of witnesses and some fears about possible obstruction of justice. The seven-day provision extends only to noncapital cases; currently, the government is required in such cases to disclose the names of its witnesses at least three days before trial. The Committee believes that the difference in the timing requirements is justified in light of the fact that any danger to witnesses would

be greater in capital cases.

The amendment provides that the government's ex parte submission of reasons for not disclosing the requested information will not be reviewed, either by the trial or the appellate court. The Committee considered, but rejected, a mechanism for post-trial review of the government's statement. It was concerned that such *ex parte* statements could become a subject of collateral litigation in every case in which they are made. While it is true that under the rule the government could refuse to disclose a witness' name, address, and statements even though it lacks sufficient evidence for doing so in an individual case, the Committee found no reason to assume that bad faith on the part of the prosecutor would occur. The Committee was certain, however, that it would require an investment of vast judicial resources to permit post-trial review of all submissions. Thus, the amendment provides for no review of government submissions. No defendant will be worse off under the amended rule than under the current version of Rule 16, because the current version of Rule 16 allows the government to keep secret the information covered by the amended rule whether or not it has a good faith reason for doing so.

Perhaps the most critical aspect of the amendment is the requirement that the government is required to disclose the statements of its witnesses before trial, unless it files a statement indicating why it cannot do so. On its face, the amendment appears to create a potential conflict with the Jencks Act, 18 U.S.C. § 3500 which only requires the government to disclose its

witnesses' statements at trial, *after* they have testified. But in fact the amendment is entirely consistent with the Jencks Act which recognizes the value of discovery. It is also consistent with other amendments to other Federal Rules of Criminal Procedure, approved by Congress, which extend the spirit of the Jencks Act to defense discovery of statements at some pretrial proceedings. *See, e.g.*, 26.2(g) and pretrial discovery of expert witness testimony. In proposing the amendment to Rule 16 the Committee was fully cognizant of the respective roles of the Judicial, Legislative, and Executive branches in amending the rules of procedure and believed it appropriate to offer this important change in conformity with the Rules Enabling Act. 28 U.S.C. §§ 2072 and 2075.

It should also be noted that the amendment does not preclude either the defendant or the government from seeking protective or modifying orders from the court under subdivision (d) of this rule.

Subdivision (b)(1)(D). The amendment, which provides for reciprocal discovery of defense witness names, addresses, and statements, is triggered by full compliance with a defense request made under subdivision (a)(1)(F). If the government withholds any information requested under that provision, it may not take advantage of the reciprocal discovery provision. The amendment provides no specific deadline for defense disclosure, as long as it takes place before trial starts.

Judge Jensen's Comments

Rule 16. Discovery and Inspection[1]

(a) GOVERNMENTAL DISCLOSURE OF EVIDENCE.

(1) Information Subject to Disclosure.

* * * * *

(F) NAMES, ADDRESSES AND STATEMENTS OF WITNESSES. At the defendant's request in a non-capital case, the government, no later than seven days before trial, must disclose to the defendant the names and addresses of the witnesses the government intends to call during its case in chief, together with any ~~their~~ statements ~~of such witnesses~~ as defined in Rule 26.2(f). ~~Such~~ The disclosure need not be made if (i)

of their

What's defined Witnesses? Statements?

1. New matter is underlined and matter to be omitted is lined through.

the attorney ~~for the government~~ has a good faith ~~belief~~ that pretrial disclosure of some or all of this information will threaten the safety of a person or lead to an obstruction of justice, and (ii) submits to the court, ex parte and under seal, an unreviewable statement setting forth the ~~names of the witnesses~~ and the reasons why the government believes that the information cannot safely be disclosed.

* * * * *

(2) *Information Not Subject to Disclosure.* Except as provided in paragraphs (A), (B), (D), and (E) and (F) 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~~ involved in the investigation or prosecution ~~of~~ the case.

* * * * *

(b) THE DEFENDANT'S DISCLOSURE OF EVIDENCE.

(1) *Information Subject to Disclosure.*

* * * * *

(D) NAMES, ADDRESSES, AND STATEMENTS OF WITNESSES. If the defendant requests disclosure under subdivision (a)(1)(F) of this rule, and the government complies, the defendant, at the request of the government, must disclose to the government ~~prior to~~ before trial the names,

NOTE

January 12, 1994

David:

A thought about Criminal Rule 16, lines 17 et seq. I read the draft to intend the meaning set out in the Note at p. 7: the government is to disclose all information except the information that will threaten personal safety or an obstruction of justice. But the language could be read to mean that if some of the information would threaten personal safety or an obstruction of justice, none need be disclosed. "Such disclosure need not be made if (1) * * * disclosure of some or all of this information will threaten * * *." It might be improved, along with a change to the active voice, as follows:

> ~~Such disclosure need not be made~~ [I]f ~~(i)~~ the attorney for the government has a good faith belief that pretrial disclosure of some or all of this information will threaten the safety of a person or lead to an obstruction of justice, ~~and (ii) submits to the court,~~ the government need not disclose information specified in an unreviewable statement submitted to the court, ex parte and under seal, ~~an unreviewable statement~~ setting forth the ~~names of the witnesses and the~~ reasons why the government believes that the information cannot safely be disclosed.

— Ed Cooper

Joe Spaniol's Comments

Rule 16. Discovery and Inspection[1]

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the attorney for the government ~~has~~ believes in good faith ~~belief~~ that pretrial disclosure of some or all of this information will threaten the safety of any person or will lead to an obstruction of justice, and ~~(ii)~~ submits to the court, ex parte and under seal, ~~an~~ unreviewable a written statement ~~setting forth~~ containing the names of the witnesses and stating the reasons why the government believes ~~that~~ the information cannot safely be disclosed.

* * * * *

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

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* * * * *

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Recommended for publication

Ha 20 years
Alan Sundberg

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* * * * *

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* * * * *

COMMITTEE NOTE

No subject has engendered more controversy in the Rules Enabling Act process over many years than discovery. In 1974, the Supreme Court approved an amendment to Rule 16 that would have provided pretrial disclosure to a defendant of the names of

government witnesses, subject to the government's right to seek a protective order. Congress, however, refused to approve the rule in the face of vigorous opposition by the Department of Justice. In recent years, a number of proposals have been made to the Advisory Committee to reconsider the rule approved by the Supreme Court. The opposition of the Department of Justice has remained constant, however, as it has argued that the threats of harm to witnesses and obstruction of justice have increased over the years along with the increase in narcotics offenses, continuing criminal enterprises, and other crimes committed by criminal organizations.

Notwithstanding the absence of an amendment to Rule 16, the federal courts have continued to struggle with the issue of whether the Rule, read in conjunction with the Jencks Act, permits a court to order the government to disclose its witnesses before they have testified at trial. *See United States v. Price*, 448 F.Supp. 503 (D. Colo 1978)(circuit by circuit summary of whether government is required to disclose names of its witnesses to the defendant).

The Committee has recognized that government witnesses often come forward to testify at risk to their personal safety, privacy, and economic well being. The Committee recognized, at the same time, that the great majority of cases do not involve any such risks to witnesses.

The Committee shares the concern for safety of witnesses and third persons and the danger of obstruction of justice. But it is also concerned with the practical hardships defendants face in attempting to prepare for

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The Committee has recognized that government witnesses often come forward to testify at risk to their personal safety, privacy, and economic well being. The Committee recognized, at the same time, that the great majority of cases do not involve any such risks to witnesses.

The Committee shares the concern for safety of witnesses and third persons and the danger of obstruction of justice. But it is also concerned with the practical hardships defendants face in attempting to prepare for

trial without adequate discovery, as well as the burden placed on court resources and on jurors by unnecessary trial delay. The Federal Rules of Criminal Procedure recognize the importance of discovery in situations in which the government might be unfairly surprised or disadvantaged without it. In several amendments -- approved by Congress since its rejection of the proposed 1974 amendment to Rule 16 regarding disclosure of witnesses -- the rules now provide for defense disclosure of certain information. See, e.g., Rule 12.1, Notice of Alibi; Rule 12.2, Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition; and Rule 12.3, Notice of Defense Based Upon Public Authority. The Committee notes also that both Congress and the Executive Branch have recognized for years the value of liberal pretrial discovery for defendants in military criminal prosecutions. *See* D. Schlueter, *Military Criminal Justice: Practice and Procedure*,§ 10(4)(A) (3d ed. 1992)(discussing automatic prosecution disclosure of government witnesses and statements). Similarly, pretrial disclosure of witnesses is provided for in many State criminal justice systems where the caseload and the number of witnesses is much greater than that in the federal system. *See generally* Clennon, *Pre-Trial Discovery of Witness Lists: A Modest Proposal to Improve the Administration of Criminal Justice in the Superior Court of the District of Columbia*, 38 Cath. U. L. Rev. 641, 657-674 (1989)(citing state practices).

The arguments against similar discovery for defendants in federal criminal trials seem unpersuasive and ignore the fact that the defendant is presumed innocent and therefore is presumptively as much in need of

information to avoid surprise as is the government. The fact that the government bears the burden of proving all elements of the charged offense beyond a reasonable doubt is not a compelling reason for denying a defendant adequate means for responding to government evidence. In providing for enhanced discovery for the defense, the Committee believes that the danger of unfair surprise to the defense and the burden on courts and jurors will be reduced in many cases and that trials in those cases will be fairer and more efficient.

The Advisory Committee regards the amendment to Rule 16 as a reasonable step forward and as a rule which must be carefully monitored. In this regard it is noteworthy that the amendment rests on three assumptions which are as follows: First, the government will act in good faith, and there will be cases in which the evidence available to the government will support a good faith belief as to danger although it does not constitute "hard" evidence to prove the actual existence of danger. Second, in most cases judges will not be in a better position than the government to gauge potential danger to witnesses. And third, post-trial litigation as to the sufficiency of government reasons in every case of an ex parte submission under seal would result in an unacceptable drain on judicial resources.

Subdivision (a)(1)(F). The Committee considered several approaches to discovery of witness names and statements. In the end, it adopted a middle ground between complete disclosure and the existing Rule 16. The amendment requires the government to provide pretrial disclosure of names and addresses of witnesses and their statements unless the

attorney for the government submits, ex parte and under seal, to the trial court written reasons, based upon the facts relating to the individual case, why some or all of this information cannot safely be disclosed. The amendment adopts an approach of presumptive disclosure that is already used in a significant number of United States Attorneys offices. While the amendment recognizes the importance of discovery in all cases, it protects witnesses and information when the government has a good faith basis for believing that disclosure will pose a threat to the safety of a person or will lead to an obstruction of justice.

The provision that the government provide the names, addresses, and statements no later than seven days before trial should eliminate some concern about the safety of witnesses and some fears about possible obstruction of justice. The seven-day provision extends only to noncapital cases; currently, the government is required in such cases to disclose the names of its witnesses at least three days before trial. The Committee believes that the difference in the timing requirements is justified in light of the fact that any danger to witnesses would be greater in capital cases.

The amendment provides that the government's ex parte submission of reasons for not disclosing the requested information will not be reviewed, either by the trial or the appellate court. The Committee considered, but rejected, a mechanism for post-trial review of the government's statement. It was concerned that such *ex parte* statements could become a subject of collateral litigation in every case in which they are made. While it is true that under

the rule the government could refuse to disclose a witness' name, address, and statements even though it lacks sufficient evidence for doing so in an individual case, the Committee found no reason to assume that bad faith on the part of the prosecutor would occur. The Committee was certain, however, that it would require an investment of vast judicial resources to permit post-trial review of all submissions. Thus, the amendment provides for no review of government submissions. No defendant will be worse off under the amended rule than under the current version of Rule 16, because the current version of Rule 16 allows the government to keep secret the information covered by the amended rule whether or not it has a good faith reason for doing so.

Perhaps the most critical aspect of the amendment is the requirement that the government is required to disclose the statements of its witnesses before trial, unless it files a statement indicating why it cannot do so. On its face, the amendment appears to create a potential conflict with the Jencks Act, 18 U.S.C. § 3500 which only requires the government to disclose its witnesses' statements at trial, *after* they have testified. But in fact the amendment is entirely consistent with the Jencks Act which recognizes the value of discovery. It is also consistent with other amendments to other Federal Rules of Criminal Procedure, approved by Congress, which extend the spirit of the Jencks Act to defense discovery of statements at some pretrial proceedings. *See, e.g.*, 26.2(g) and pretrial discovery of expert witness testimony.

In proposing the amendment to Rule 16 the Committee was fully cognizant of the respective roles of the Judicial, Legislative, and Executive branches in amending the rules of procedure and believed it appropriate to offer this important change in conformity with the Rules Enabling Act. 28 U.S.C. §§ 2072 and 2075. The Committee views the amendment as a purely procedural change. Under the Rules Enabling Act, the proposed change to Rule 16 will provide Congress with an opportunity to review the extent and application of the Jencks Act and if it agrees with the amendment, permit the it to supercede any conflicting statutory provision, under 28 U.S.C. § 2072(b). *See* Carrington, *"Substance" and "Procedure" In the Rules Enabling Act*, 1989 Duke L.J. 281, 323 (1989)("In authorizing supercession and assuming responsibility for a view of promulgated rules, Congress demands that it be asked whether a proposed rule conflicts with a procedural arrangement previously made by Congress and, if so, whether the arrangement is one on which the Congress will insist.").

It should also be noted that the amendment does not preclude either the defendant or the government from seeking protective or modifying orders from the court under subdivision (d) of this rule.

Subdivision (b)(1)(D). The amendment, which provides for reciprocal discovery of defense witness names, addresses, and statements, is triggered by full compliance with a defense request made under subdivision (a)(1)(F). If the government withholds any information requested under that provision, it may not take advantage of the reciprocal discovery provision. The amendment provides

no specific deadline for defense disclosure, as long as it takes place before trial starts.

MEMO TO: Advisory Committee on Criminal Rules

FROM: David A. Schlueter, Reporter

RE: DOJ Proposal to Amend Rule 16(a)(1)(E) to Require Defendant to Disclose Expert Testimony on Issue of Mental Condition.

DATE: March 14, 1994

Rule 16(a)(1)(E) was added, effective December 1, 1993, to provide for defense discovery of a government witness' expected testimony and qualifications. The Department of Justice has now recommended that Rule 16 be amended to require the defense to disclose, without a triggering request from the prosecution, similar information concerning defense expert testimony anticipated under Rule 12.2, Notice of Insanity Defense Testimony of Defendant's Mental Condition. The DOJ proposal would also include a reciprocal discovery provision.

The attached letter from the Ms. Jo Ann Harris, Assistant Attorney General, sets out the reasons for the amendment and is self-explanatory. It also includes suggested language.

It should be noted that Rule 12.2 already includes a notice provision for expert testimony and it might be more appropriate to make any amendments to that rule, rather than Rule 16. In any event, if the Committee is inclined to suggest an amendment, both Rule 12.2 and Rule 16 should include some cross-referencing to the other rule.

United States Department of Justice
ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION
WASHINGTON, D.C. 20530

February 23, 1994

Honorable D. Lowell Jensen
United States District Judge
P.O. Box 36060
450 Golden Gate Avenue
San Francisco, California 94102

Dear Judge Jensen:

Recently, as you know, new Rules 16(a)(1)(E) and (b)(1)(C), F.R.Crim.P., which were developed by the Advisory Committee, took effect. The amendments provide for reciprocal discovery of expert witness testimony intended to be offered at trial and require the parties, upon request, to disclose a written summary of the expert testimony, together with the bases and reasons therefor, and the witness' qualifications. The purpose of the amendments, as explained in the Note, is to "minimize surprise that often results from unexpected expert testimony, reduce the need for continuances, and ... provide the opponent with a fair opportunity to test the merit of the expert's testimony through focused cross-examination."

New rules 16(a)(1)(E) and (b)(1)(C), however, are defendant-triggered. The defendant initiates the discovery by first requesting that the government disclose a summary of its anticipated expert testimony. Only after the government complies with this request may the government make a similar demand upon the defendant.

While we do not object to the concept of defendant-triggered discovery generally,[1] we do urge the Committee to make an exception in order to permit the government to invoke the Rule when the defendant gives notice under Rule 12.2(a) and (b) of an

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[1]In the early 1970s, when Rule 16 was significantly expanded, the Advisory Committee proposed that discovery be independent, i.e., that each side have the right to request certain information from the other. The Supreme Court transmitted the proposal to Congress in this form. However, Congress amended the Rule in a variety of respects, including making the Rule generally defendant-triggered.

intention to rely on a defense of mental condition and to introduce expert testimony in support thereof. Although the notice requirements of Rule 12.2 insure that the government is not surprised by the nature of the defense or by the fact that the defendant intends to call an expert witness to testify, the other benefits of newly fashioned Rule 16(b)(1)(C) -- that is, being provided with a summary of the witness' anticipated testimony and the witness' qualifications -- are unavailable. In our experience, this may lead to the same undesirable consequences that adoption of Rules 16(a)(1)(E) and (b)(1)(C) was meant to prevent, including the possibility of delay and a diminished ability fairly to test the merits of the defense-called expert's testimony. Accordingly, we recommend that Rule 16 be amended to afford the government the limited right, when the defendant gives notice of an intent to rely on an expert-witness supported defense of mental condition under Rule 12.2, to initiate expert witness discovery under Rule 16(b)(1)(C). The defendant, of course, would be given a corresponding right to request discovery of any expert testimony the government intends to introduce in response on the issue of the defendant's mental condition.

Specifically, we urge that Rule 16(b)(1)(C) be amended by inserting after the first sentence the following:

> If the defendant gives notice under rule 12.2(b) of an intent to introduce expert testimony, the defendant, at the government's request, must disclose to the government a written summary of such testimony the defendant intends to use under Rules 702, 703 and 705 of the Federal Rules of Evidence as evidence at trial.

Rule 16(a)(1)(E) would be amended to provide a parallel right of discovery to the defendant, by inserting after the first sentence the following:

> If the government requests discovery under the second sentence of subdivision (b)(1)(C) of this rule and the defendant complies, the government, at the defendant's request, shall disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703, and 705 as evidence at trial on the issue of the defendant's mental condition.

Adoption of these changes would in our view facilitate trials in which a defense is raised involving the defendant's mental condition and on which expert witness evidence is offered.

Your and the other Committee members' consideration of this proposal is appreciated. [2]

Sincerely,

Jo Ann Harris
Assistant Attorney General

[2]In addition, and on an unrelated matter, we point out that Rule 49(e), which creates procedures for filing a dangerous special offender notice, is obsolete and should be repealed. The two dangerous special offender statutes to which it refers were themselves repealed for offenses occurring after November 1, 1987.

MEMO TO: Advisory Committee on Criminal Rules

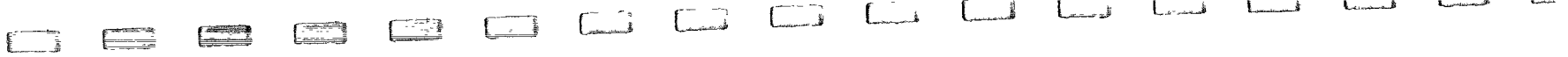
FROM: Dave Schlueter, Reporter

RE: Rule 26; Questions by Jurors

DATE: March 16, 1994

At the Committee's San Diego meeting in October 1993, Professor Saltzburg's report on the actions of the Evidence Committee noted that that Committee was considering an amendment to Federal Rule of Evidence 610 which would permit questioning of witnesses by jurors (*See* Minutes, San Diego Meeting, p. 15-16). After brief comments from Judge Jensen and Professor Saltzburg, the issue was tabled until the April 1994 meeting.

At this point, no Committee member has offered any specific amendments or suggestions concerning a possible amendment to the Rules of Criminal Procedure which would address the issue. If the Committee is inclined to consider such an provision, I would be happy to research the issue and draft an amendment for the Fall 1994 meeting. I would envision including it in Rule 26.



MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Rule 32; DOJ Proposal to Amend New Rule 32(d)(2) Re Forfeiture Proceedings

DATE: March 15, 1994

In October 1993, Mr. Pauley suggested that Rule 32 be amended to improve the procedures relating to criminal forfeitures. A completely revised Rule 32 is currently pending before the Supreme Court. Assuming the Court has no objection to the new rule, it will be forwarded to Congress for its consideration. Mr. Pauley's proposal would amend what, if approved by Congress, will be new Rule 32(d)(2):

(d) JUDGMENT

* * * * *

(2) *Criminal Forfeiture.* When a verdict contains a finding of criminal forfeiture, the judgment must authorize the Attorney General to seize the interest or property subject to forfeiture on terms that the court considers proper.

The attached letter from Mr. Pauley explains the need for the amendment and includes suggested language (the separate double-spaced draft) which could be substituted for the amendment now pending before the Supreme Court.

The case he cites in his letter, *United States v. Alexander*, 772 F.Supp. 440 (D.C. Minn. 1990), is attached for the Committee's reference. That case indicates that current Rule 32, in conjunction with forfeiture provisions in the RICO statutes, precluded seizure of the defendant's assets before sentencing.

U. S. Department of Justice
Criminal Division

Washington, D.C. 20530

February 22, 1994

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

Dear Dave:

You may remember that, back in October 1993 when I sent you the attached letter containing a proposal to amend Rule 32, relating to the time of issuance of criminal forfeiture orders, I followed up with a telephone call indicating that the version of the amendment in the letter was not quite correct and was from an earlier draft that we had subsequently perfected in minor respects. You said I should remind you closer to the time for putting together the agenda for the mid-April 1994 meeting and should provide a copy of the amendment as we wished it to appear for the Committee's consideration.

Enclosed pursuant to that conversation is a copy of the perfected amendment.

I look forward to seeing you in a few weeks.

Sincerely,

Roger A. Pauley, Director
Office of Legislation
Criminal Division

Enclosure

Rule 32(d)(2) of the Federal Rules of Criminal Procedure is amended to read as follows:

"(2) Criminal Forfeiture. When a verdict contains a finding that property is subject to a criminal forfeiture, the court, after notice to the defendant and a reasonable opportunity to be heard as to the timing and form of the order, may enter an order of forfeiture at any time commencing eight days after the return of the verdict (or, if a motion for a new trial under Rule 33 has been filed, at any time after the disposition of the motion), and need not withhold the entry of such order until the time of sentencing. The entry of an order of forfeiture shall authorize the Attorney General to seize the property subject to forfeiture, to conduct such discovery as the court may deem proper to facilitate the identification, location or disposition of the property, and to commence proceedings consistent with any statutory requirements pertaining to ancillary hearings and the rights of third parties. At the time of sentencing, the order of forfeiture shall be made a part of the sentence and shall be included in the judgment."

U. S. Department of Justice

Criminal Division

Washington, D.C. 20530

October 27, 1993

Honorable D. Lowell Jensen
United States District Judge
P.O. Box 36060
450 Golden Gate Avenue
San Francisco, California 94102

Dear Judge Jensen:

As I indicated near the end of the last meeting of the Advisory Committee on Criminal Rules in San Diego, the Department of Justice is interested in pursuing an amendment of Rule 32, F.R.Crim. P., that would improve the procedure relating to criminal forfeiture. This letter is to request that such a proposal (as further described herein) be placed on the agenda for the Committee's consideration at its next meeting.

Rule 32(b)(2), F.R.Crim. P., was enacted in 1972 to provide a procedure for including a verdict of forfeiture in a criminal case in the final judgment of the court. The Rule has been construed to mean that a forfeiture order is a part of the judgment of conviction and hence cannot be entered until the defendant is sentenced. E.g., United States v. Alexander, 772 F. Supp. 440 (D. Minn. 1990).

Experience has revealed several problems with the delay of the entry of the forfeiture order that have become increasingly serious since the implementation of the Sentencing Reform Act in 1987 and the resulting increase in time between verdict and judgment in most complex criminal cases. First, the government's statutory right to take discovery to determine the location of forfeitable property is triggered by the entry of the order of forfeiture. See 18 U.S.C. § 1963(k); 21 U.S.C. § 853(m). Because the order cannot be entered until sentencing, months of valuable time may be lost in the process of locating assets for forfeiture, and assets are frequently rendered unavailable.

Second, the rights of third parties to petition the court in an ancillary hearing for the return of forfeited property are also triggered by the entry of the order of forfeiture. See 18 U.S.C. § 1963(1); 21 U.S.C. § 853(n). It is unfair to require such third parties to await the sentencing of the defendant

before having an opportunity to establish that they are the true owners of the forfeiture property, if that process can be commenced soon after the verdict.

Finally, the government cannot actually seize the forfeited property under some forfeiture statutes until the order of forfeiture is entered, making it necessary for the court to impose restraining orders on the property until that time.

The amendment seeks to ameliorate or resolve these problems by permitting the court to enter an order of forfeiture shortly after a verdict containing a finding that property is subject to forfeiture is returned. Under our proposal such an order could be entered -- after notice to affected parties and an opportunity to be heard -- at any time beginning eight days after the return of the verdict or at any time after the disposition of a Rule 33 motion for a new trial and while proceedings leading up to the sentencing of the defendant and the entry of a final judgment were underway. The determination whether to enter an order of forfeiture in advance of sentencing is made discretionary, however, to permit the court to take into account instances where the entry of a forfeiture order before judgment and the beginning of the time at which the defendant can take an appeal would result in irreparable harm to the defendant.

Specifically, the amendment we propose is as follows:

Rule 32(d)(2) [1] of the Federal Rules of Criminal Procedure is amended to read as follows:

> **"(2) Criminal Forfeiture.** When a verdict contains a finding that property is subject to a criminal forfeiture, the court, after notice to the parties affected and a reasonable opportunity to be heard, may enter an order of forfeiture at any time, commencing eight days after the return of the verdict (or, if a motion for a new trial under Rule 33 has been filed, at any time after the disposition of the motion), and need not withhold the entry of such order until the time of sentencing. The entry of an order of forfeiture shall authorize the Attorney General to seize the property subject to forfeiture, to conduct such discovery as the court may deem proper to facilitate the identifcation, location or dispsition of the property, and to commence

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[1] The amendment refers to Rule 32(d)(2) rather than (b)(2) because the forfeiture provisions of the Rule will shortly appear in subsection (d) rather than (b), assuming the Supreme Court promulgates the pending revisions to Rule 32 next year.

proceedings consistent with any statutory requirements pertaining to ancillary hearings and the rights of third parties. At the time of sentencing, the order of forfeiture shall be made a part of the sentence and shall be included in the judgment."

Your and the other Committee members' consideration of this matter is deeply appreciated.

Sincerely,

Roger A. Pauley

Roger A. Pauley, Director
Office of Legislation
Criminal Division

cc: Professor Schlueter

of the City of Little Rock, Chief Louie Caudell, Sgt. Duane Chapman, and Lt. John Martin. Plaintiff's motion for summary judgment is denied.

UNITED STATES of America

v.

Ferris J. ALEXANDER.

Crim. No. 4-89-85.

United States District Court,
D. Minnesota,
Fourth Division.

June 1, 1990.

Following defendant's conviction of three counts of RICO offenses, the Government filed a presentence request for an order and judgment of forfeiture of assets determined to be part of the RICO enterprise. The District Court, Rosenbaum, J., held that forfeiture of RICO properties could not be granted prior to sentencing.

Motion denied.

1. Forfeitures ⇐5

Forfeiture of RICO properties could not be granted prior to sentencing. 18 U.S.C.A. § 1963(a, e).

2. Forfeitures ⇐1

Forfeiture provisions of RICO are mandatory, leaving the court no discretion as to their ultimate implementation. 18 U.S.C.A. § 1963(a, e).

3. Forfeitures ⇐1

RICO forfeiture sanctions are in personam, rather than in rem, thereby punishing the individual rather than the property. 18 U.S.C.A. § 1963.

Jerome Arnold, Paul W. Murphy and Mary E. Carlson, Minneapolis, Minn., for U.S.

Robert F. Smith, Universal City, Cal., and Deborah Ellis, St. Paul, Minn., for defendant Ferris J. Alexander.

ORDER

ROSENBAUM, District Judge.

On May 23, 1990, a federal jury returned a verdict finding Ferris J. Alexander guilty on 25 counts of a 41 count indictment. Included among the counts upon which guilty verdicts were entered were three counts of RICO offenses, 18 U.S.C. § 1962(a), (c), and (d). On May 25, 1990, the same jury found that certain properties which were used by Ferris J. Alexander to establish, operate, control, conduct, and participate in the conduct of the RICO enterprise afforded him a source of influence over the enterprise in violation of 18 U.S.C. § 1963(a)(2).

This matter is now before the Court upon the government's presentence request for an order and judgment of forfeiture pursuant to 18 U.S.C. § 1963. The government seeks forfeiture of all assets determined to be part of the RICO enterprise by the jury's second verdict.

On May 25, 1990, the Court ordered that the assets be preserved for forfeiture by permitting the Attorney General to seize the assets immediately. The Court, at the same time, recognized that there existed a possibility that such a seizure may effect a prior restraint on the dissemination of materials which are protected by the first amendment to the United States Constitution. By order, dated May 26, 1990, the Court directed defendant to submit a plan to continue operating the business assets without jeopardizing the government's interest. The government has made clear its intention to disassociate itself from any such plan. The government continues to seek immediate forfeiture.

[1] The Court has considered the plans proposed by the defendant, the briefs and submissions of the parties, and the arguments of counsel. The Court concludes forfeiture may not take place until a judgment of conviction is entered and sentence imposed.

The Court's decision is well founded in law and practice. The language of Title 18, Section 1963(e), provides, in relevant part,

> Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper.

18 U.S.C. § 1963(e). Section 1963(a)—the section upon which the government specifically relied to seek this forfeiture—suggests the judgment of forfeiture should be entered at the time of sentencing. That section provides,

> The court, *in imposing sentence on such person shall order*, in addition to any other sentence *imposed pursuant to this section*, that the person forfeit to the United States all property described in this subsection.

18 U.S.C. § 1963(a) (emphasis added). The Court reads these sections to indicate that a separate order of forfeiture must be entered following conviction, presumably at the time of sentencing.

[2, 3] The Court is mindful of RICO's unique structure and purpose. The statute is different from all other forfeiture and federal statutes in scope and procedural requirements. *See United States v. Conner*, 752 F.2d 566, 576 (11th Cir.), *cert. denied*, 474 U.S. 821, 106 S.Ct. 72, 88 L.Ed.2d 59 (1985); *United States v. Veon*, 538 F.Supp. 237, 242 (E.D.Cal.1982). The forfeiture provisions of RICO are mandatory, leaving the Court no discretion as to their ultimate implementation. *See United States v. Murillo*, 709 F.2d 1298, 1300 (9th Cir.1983); *United States v. Godoy*, 678 F.2d 84, 88 (9th Cir.1982), *cert. denied*, 464 U.S. 959, 104 S.Ct. 390, 78 L.Ed.2d 334 (1983). The forfeiture sanctions, furthermore, are *in personam*, rather than *in rem*, thereby punishing the individual rather than the property. *United States v. Ginsburg*, 773 F.2d 798, 801 (7th Cir.1985), *cert. denied*, 475 U.S. 1011, 106 S.Ct. 1186, 89 L.Ed.2d 302 (1986); *Conner*, 752 F.2d at 576; *United States v. Cauble*, 706 F.2d 1322, 1349 (5th Cir.1983), *cert. denied*, 465 U.S. 1005, 104 S.Ct. 996, 79 L.Ed.2d 229 (1984).

The government's concern regarding its proprietary interest is well taken. There is no question the government's interest is guaranteed even before the entry of a guilty verdict. Section 1963(c) specifically provides "[a]ll right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section." 18 U.S.C. § 1963(c). *See Ginsburg*, 773 F.2d at 801.

Yet, the forfeiture of the property is subject to a specific procedure outlined by the Congress. Specifically, Rule 32(b), Federal Rules of Criminal Procedure (Fed. R.Crim.P.), must be read in conjunction with the provisions of Section 1963. *See Conner*, 752 F.2d at 577. Rule 32(b) was promulgated in order "to provide procedural implementation of the recently enacted criminal forfeiture provisions of the Organized Crime Control Act of 1970, Title IX, § 1963." Rule 32(b), Fed.R.Crim.P., Advisory Committee Notes on 1972 Amendments. The first subsection of Rule 32(b) provides,

> A judgment of conviction shall set forth ... the verdict ... and the adjudication and sentence.... The judgment shall be signed by the judge and entered by the clerk.

Rule 32(b)(1), Fed.R.Crim.P. Rule 32 provides further direction if the sentence includes forfeiture. The second subsection of Rule 32(b) provides,

> 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.

Rule 32(b)(2), Fed.R.Crim.P. (emphasis added). There can be little doubt Rule 32, therefore, contemplates forfeiture as part of the judgment of sentence in addition to any other sentence which may be imposed. Rule 32 is void of language mandating an order of forfeiture immediately upon a jury's verdict. Rather, Rule 32 echoes the directions of Section 1963(a), which contemplate an order of forfeiture at the time of sentencing.

A review of RICO convictions reveals the general practice is, in fact, imposition of forfeiture at the time of sentencing. *See United States v. Friedman*, 849 F.2d 1488, 1489 (D.C.Cir.1988); *United States v. Horak*, 833 F.2d 1235, 1238 (7th Cir.1987); *United States v. Robilotto*, 828 F.2d 940, 942 (2d Cir.1987), *cert. denied*, 484 U.S. 1011, 108 S.Ct. 711, 98 L.Ed.2d 662 (1988); *Ginsburg*, 773 F.2d at 799; *United States v. Sheeran*, 699 F.2d 112, 116 (3d Cir.), *cert. denied*, 461 U.S. 931, 103 S.Ct. 2095, 77 L.Ed.2d 304 (1983); *Godoy*, 678 F.2d at 85. Implementation of forfeiture in a sentencing order is also consistent with the general sentencing procedure pursuant to other criminal statutes contemplating forfeiture. *See e.g. United States v. Seifuddin*, 820 F.2d 1074, 1079 (9th Cir.1987) (18 U.S.C. § 3611); *United States v. Sandini*, 816 F.2d 869, 873 (3d Cir.1987) (21 U.S.C. §§ 848 and 853); *Ivers v. United States*, 581 F.2d 1362, 1367 (9th Cir.1978) (19 U.S.C. §§ 1602–04).

The Court reiterates the prior restraint concerns regarding the imposition of an immediate forfeiture. The Supreme Court has held specifically that if "the object ... is not punishment, in the ordinary sense, but suppression of the offending [material] in the future," then speech has been subject to a prior restraint. *Near v. Minnesota*, 283 U.S. 697, 711, 51 S.Ct. 625, 629, 75 L.Ed. 1357 (1931). Punishment in this matter will be imposed at the time of sentencing, thereby dissolving defendant's prior restraint concern. Until that moment, however, punishment has not been imposed and the possibility of a prior restraint is real.

The Court is confident the government's interest in the forfeitable property may be preserved by the Post–Indictment Restraining Order entered on May 30, 1989. Until recently, the government appeared to find the restraining order—an order it drafted—fully sufficient. The order clearly provides the government with extensive monitoring powers. The defendant has been fully apprised of the consequences of noncompliance. If violations of the restraining order have, in fact, taken place, those violations have not been brought to the attention of the Court. The government has suggested the absence of complaint regarding defendant's compliance (or lack thereof) is a reflection of its conservative enforcement of the restraining order in the face of first amendment concerns. Those concerns are appropriate, and they apply equally to the present state of affairs. Be that as it may, the government may seek to enforce the restraining order—which the Court found consistent with the first amendment by order dated January 19, 1990—to its full extent between now and the date of sentencing.[1]

Upon these bases, the Court determines, first, that forfeiture of the RICO properties may not be granted prior to sentencing; and, second, that its orders of May 25 and 26, 1990, are vacated. As a result of the vacation of the May 25 and 26, 1990, orders, this Court's previous Post–Indictment Restraining Order, dated May 30, 1989, is re-instated subject to the following amendments:

1. The Post–Indictment Restraining Order of May 30, 1989, is in effect as to the property earlier specified and to each of the businesses and entities identified in Exhibit A, attached hereto.

2. The bookstores, warehouses, and video rental facilities, identified in Exhibit A may be operated up to ten hours per day, which hours shall be provided, in writing, to the United States Attorney for the District of Minnesota.

3. The defendant or one on his behalf shall file a bond, or deposit cash, with the Clerk of the United States District Court in the amount of $50,000 prior to the re-opening of any of the businesses. This bond or cash shall secure the United States of America against the waste or dissipation of the assets described in Exhibit A.

4. This order is in effect as of the date hereof, but the same is stayed by order of

1. The Court reiterates that forfeiture is mandatory pursuant to 18 U.S.C. § 1963. Yet, the Court retains discretion to determine the "time and place that the property declared forfeited is to be seized by the Attorney General." *United States v. L'Hoste*, 609 F.2d 796, 811 (5th Cir.), *cert. denied*, 449 U.S. 833, 101 S.Ct. 104, 66 L.Ed.2d 39 (1980).

this Court to and until Monday, June 4, 1990, at 12:00 noon.

EXHIBIT A

Adult Entertainment Center
416–420 Hennepin Avenue
Minneapolis, MN

American Empress Theater and Bookstore
614–616 Hennepin Avenue
Minneapolis, MN

AB Distributors Company
311–315 East Lake Street
Minneapolis, MN

Chicago–Lake Bookstore
739–743 East Lake Street
Minneapolis, MN

Nicola Bookstore
2936–2938 Lyndale Avenue South
Minneapolis, MN

Joey's Adult Bookstore
315 South Broadway
Rochester, MN

Broadway Book II
319–323 South Broadway
Rochester, MN

Broadway Book I
324–328½ South Broadway
Rochester, MN

Video Hits
216 East Third Street
Winona, MN

Ultimate Bookstore
227 East Third Street
Winona, MN

Wabasha Adult Bookstore
13–15 East Superior Street
Duluth, MN

The Flick
621–623 University Avenue West
St. Paul, MN

Street Bookstore
341–347 East Lake Street Lake
Minneapolis, MN

East Hennepin Bookstore
(The Odd Follows)
401–401½ Hennepin Avenue East
Minneapolis, MN

Northern Hotel
10–12 West First Street
Duluth, MN

The Newspaper Club

Kenneth LaLonde Enterprises

LeRoy Wendling

The Superior Street Company

J. Thomas Company

John Thomas Company

Express Entertainment

The American Book Wholesalers

United States Video

U.S. Video

United States Video Distributors

Baker Investments

American Book Wholesalers

A.B. Video

A & B Distributors

Bell Investments

American Theater Supply Company

Video Hits

AB Distributing

Magazine and Book Agency

WEST KEY NUMBER SYSTEM

SYLVESTER BROTHERS DEVELOPMENT COMPANY, Plaintiff,

v.

BURLINGTON NORTHERN RAILROAD, Metal-Matic, Inc., et al., Defendants and Third-Party Plaintiffs,

v.

ABBOTT NORTHWESTERN HOSPITAL, Moorhead Machinery & Boiler Company, et al., Third-Party Defendants.

Civ. No. 4–88–692.

United States District Court,
D. Minnesota,
Fourth Division.

Sept. 11, 1990.

Landfill operator who had entered into consent order with Minnesota Pollution

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Typographical Error in Rule 46(i)

DATE: March 16, 1994

It has come to our attention that there is a typographical error in Rule 46(i). That provision, which became effective on December 1, 1993, refers to production of witness statements at detention hearings held "under 18 U.S.C. § 3144." The provision should read "18 U.S.C. § 3142." Section 3144 addresses release or detention of a material witness and Section 3142 addresses release or detention of a defendant pending trial. Although it was clearly the intent of the Committee to refer to pretrial detention hearings under § 3142, as demonstrated in the Advisory Committee Note and in Rule 26.2(g)(3), several magistrate judges have apparently declined to read Rule 46 to apply to anything other than a § 3144 hearing.

On January 20, 1994, Judge Jensen wrote to the Mr. Robert Feidler in the Administrative Office requesting that the necessary steps be taken to correct the typographical error in Rule 46(i). A copy of that letter is attached for your information. At this point, it does not appear that any action will have to be taken by the Committee on this issue.

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

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RALPH K. WINTER, JR.
EVIDENCE RULES

January 20, 1994

Mr. Robert E. Feidler
Legislative and Public Affairs Officer
Administrative Office of the
United States Courts
Washington, D.C. 20544

Dear Mr. Feidler:

I am writing to request that you take the necessary steps to include a provision in appropriate legislation that would correct a typographical error in the amendment to Rule 46(i)(1) of the Federal Rules of Criminal Procedure. The amendment became effective on December 1, 1993. The statutory citation contained in amended Rule 46(i)(1) should be 18 U.S.C. § 3142, instead of 18 U.S.C. § 3144.

I appreciate your assistance in this matter.

D. Lowell Jensen

cc: Honorable Alicemarie H. Stotler
Dean Daniel R. Coquillette

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Rule 49(e); Repeal of Provision

DATE: March 16, 1994

Rule 49(e) currently addresses the filing of a "dangerous offender notice" and cross-references 18 U.S.C. § 3575(a) and 21 U.S.C. § 849(a). Because both of those statutes have been repealed, the Committee should take action to recommend that Rule 49(e) also be repealed.

Rule 49. Service and Filing of Papers

* * * * *

(e) FILING OF DANGEROUS OFFENDER NOTICE. A filing with the court pursuant to 18 U.S.C. § 3575(a) or 21 U.S.C. § 849(a) shall be made by filing the notice with the clerk of the court. The clerk shall transmit the notice to the chief judge or, if the chief judge is the presiding judge in the case, to another judge or United States magistrate judge in the district, except that in a district having a single judge and no United States magistrate judge, the clerk shall transmit the notice to the court only after the time for disclosure specified in the aforementioned statutes and shall seal the notice as permitted by local rule.

COMMITTEE NOTE

The amendment to the rule, which repeals subdivision (e), reflects Congressional abrogation of the two statutory provisions which gave rise to the rule, 18 U.S.C. § 3575(a) and 21 U.S.C. § 849(a).

ORAL PRESENTATIONS