ADVISORY COMMITTEE ON CRIMINAL RULES

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Washington, D.C.
April, 29-30, 1996

CRIMINAL RULES COMMITTEE MEETING

April 29-30, 1996
Washington, D.C.

I. PRELIMINARY MATTERS

A. Administrative Announcements and Comments by Chair

B. Approval of Minutes of October 1995, Meeting in Manchester Village, Vermont

II. CRIMINAL RULES UNDER CONSIDERATION

A. Rules Approved by the Supreme Court and Forwarded to Congress: Effective December 1, 1995 (No memo)

1. Rule 5(a), Initial Appearance Before the Magistrate
2. Rule 43, Presence of Defendant
3. Rule 49(e), Filing of Dangerous Offender Notice (Repeal of Provision).
4. Rule 57, Rules by District Courts

B. Rules Published for Public Comment & Pending Further Review by Advisory Committee:

1. Rule 24(a), Voir Dire (Memo).

C. Proposed Amendments to Rules of Criminal Procedure

1. Proposed Amendments to Rules; Local Rules Project; Report of Subcommittee (Memo).
2. Rule 5.1, Preliminary Examination; Production of Witness Statements (Memo).
3. Rule 6; The Grand Jury; Disclosure of Information to State Officials without Approval by DOJ Criminal Division (Memo).

4. Rule 11, Pleas.

    a. Rule 1 l((e)(1); Settlement Conferences Before Judge; Report of Subcommittee (Memo).

    b. Rule 1 l(e)(4); Rejection of Plea Agreement (Memo).

5. Rule 16(a)(1)(E), (b)(l)(C); Disclosure of Expert Witnesses (Memo).

6. Rule 3 l(d), Poll of Jury; Polling Individually (Memo).

7. Rule 33, New Trial; Time for Filing (Memo).

8. Rule 35(b), Reduction of Sentence for Presentencing and Post-Sentencing Assistance (Memo).

9. Rule 43, Presence of Defendant at Correction of Sentence Proceedings (Memo).

D. Rules Pending Before Other Committees Having Impact on Rules of Criminal Procedure

1. FRAP 4; Time for Filing Appeal in Criminal Case (Memo).

2. FRAP 9; Release of Defendant in Criminal Case (Memo).

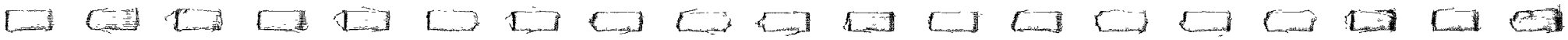
E. Rules and Projects Pending Before Standing Committee and Judicial Conference

1. Oral Status Report on Legislation Affecting Federal Rules of Criminal Procedure (No Memo).

2. Oral Report on Restyling the Rules of Criminal Procedure (No Memo).

3. Other Oral Reports (No Memo).

III. DESIGNATION OF TIME AND PLACE OF NEXT MEETING



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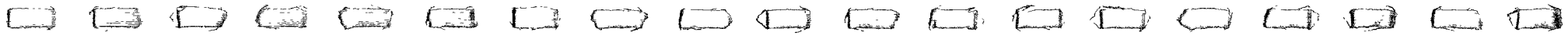

Agenda Item IB

MINUTES
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

October 16-17, 1995
Manchester Village, Vermont

The Advisory Committee on the Federal Rules of Criminal Procedure met at the Equinox Hotel in Manchester Village, Vermont on October 16 and 17, 1995. These minutes reflect the actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Jensen, Chair of the Committee, called the meeting to order at 8:30 a.m. on Monday, October 16, 1995. The following persons were present for all or a part of the Committee's meeting:

Hon. D. Lowell Jensen, Chair
Hon. W. Eugene Davis
Hon. Sam A. Crow
Hon. George M. Marovich
Hon. David D. Dowd, Jr.
Hon. D. Brooks Smith
Hon. B. Waugh Crigler
Hon. Daniel E. Wathen
Mr. Robert C. Josefsberg, Esq.
Mr. Darryl W. Jackson, Esq.
Mr. Henry A. Martin, Esq.
Mr. Roger Pauley, Jr., designate of the Asst. Attorney General for the Criminal Division
Professor David A. Schlueter, Reporter

Also present at the meeting were: Judge Alicemarie H. Stotler; Chair of the Standing Committee on Rules of Practice and Procedure; Judge William R. Wilson, Jr., a member of the Standing Committee on Rules of Practice and Procedure and a liaison to the Committee; Professor Daniel R. Coquillette, Reporter to the Standing Committee; Mr. John Rabiej and Mr. Paul Zing from the Administrative Office of the United States Courts; and Mr. James Eaglin from the Federal Judicial Center.

The attendees were welcomed by the chair, Judge Jensen, who noted that Professor Saltzburg's, whose term on the Committee had expired, had made invaluable contributions to the Committee and would be recognized at the Committee's Spring 1996 meeting.

II. APPROVAL OF MINUTES OF OCTOBER 1994 MEETING

Judge Crow moved that the minutes of the Committee's April 1995 meeting in Washington, D.C., be approved. Following a second by Judge Marovich, the motion carried by a unanimous vote.

III. CRIMINAL RULES APPROVED BY THE SUPREME COURT AND FORWARDED TO CONGRESS

The Reporter informed the Committee that the Supreme Court had approved and forwarded to Congress proposed amendments to four rules, which will become effective on December 1, 1995, absent any further action by Congress: Rule 5(a) (Initial Appearance Before the Magistrate Rule 43 (Presence of Defendant); Rule 49(e) (Repeal of Provision re Filing of Dangerous Offender Notice); and Rule 57 (Rules by District Courts). The Reporter noted that in its consideration of the rules, the Supreme Court had changed the word "must" to "shall" in order to maintain consistency within all of the rules.

IV. RULES CONSIDERED BY THE JUDICIAL CONFERENCE AND FORWARDED TO THE SUPREME COURT

Judge Jensen reported on the disposition of Rules 16 and 32 which had been forwarded by the Committee to the Standing Committee for action.. After considerable discussion at its July 1995 meeting, the Standing Committee had approved a modified version of the Committee's proposed amendments to Rule 16, which would have required the government to produce the names and statements of its witnesses prior to trial. In order to avoid any conflict with the Jencks Act, the Standing Committee deleted any requirement to produce a witness' statement. The Standing Committee had approved, without change, the Committee's proposed amendment to Rule 32 regarding forfeiture procedures.

Although the Judicial Conference approved Rule 32 for transmittal to the Supreme Court, it rejected altogether the proposed amendments to Rule 16 regarding production of witness names and statements. Although it was not clear from the Judicial Conference's action whether they specifically intended to reject the amendment to Rule 16 which addressed disclosure of expert witness testimony, the consensus of the Committee was that that amendment had also been implicitly rejected because the changes to Rule 16 had been treated as single unit by the Conference.

V. RULES APPROVED BY STANDING COMMITTEE FOR PUBLICATION AND COMMENT

The Reporter informed the Committee that at its July 1995, meeting, the Standing Committee had approved for publication an amendment to Rule 24(a) which would provide for attorney-conducted voir dire of jurors. The final language was the result of a compromise with a provision presented by the Civil Rules Committee for amending Civil Rule 47.

Judge Jensen indicated that hearings on the proposed amendment have been set for December 15, 1995 in Oakland and February 9, 1996 in New Orleans. He added that any members of the Committee interested in attending those hearings should contact the Rules Committees Support office.

During the discussion on Rule 24, Judge Jensen raised questions about the appropriate role of the Chair and Reporter at the Standing Committee meetings when proposed amendments are offered to the Committee's proposed versions. He noted that for amendments in which the Advisory Committee has invested a great deal of debate and time, it is not always possible to know just what amendments to agree to at the Standing Committee level. That point was made clear during the discussion at that Committee's meeting regarding the proposed amendments to Rules 16 and 32. In both instances, major changes were made to the rules as the result of negotiation and compromise in an attempt to go forward with some amendment, rather than remanding the issue to the Advisory Committee for further action. During the ensuing discussion, the consensus of the Committee was that the Chair and Reporter should have some reasonable discretion to assess the Standing Committee's proposed actions and agree to changes which they believe are in accordance with the Committee's views. Several members expressed concern that if the Standing Committee makes drastic changes to a rule published for comment, there may changed votes at the Advisory Committee level upon further consideration.

Judge Jensen also raised the related question of the appropriate role of the Committee vis a vis lobbying Congress for or against a particular amendment. Mr. Rabiej indicated that the legislative liaison office coordinates any such efforts with the chairs of the respective committees.

The discussion also raised the issue of the relationship between the Advisory Committees and the Standing Committee. Mr. Pauley noted that rarely does the Standing Committee expand on a Committee's proposed amendment; if any changes are made, they usually result in narrowing the Advisory Committee's proposal. Several members also observed that there is a difference in making changes to a rule which has been forwarded for possible publication and comment. In those instances, the Advisory Committee will have another opportunity to review the rule and may decide not to pursue any amendments to the rule. Judge Stotler noted that survey forms had been provided to the

wrong with it and that there should be no problem with some judge, other than the sentencing judge, helping the parties reach an agreement. Mr. Martin expressed mixed feelings about the process used in the Ninth Circuit. He noted that the presence of a judge in the bargaining process can be intimidating and is not excited about opening the door to greater judicial participation at that stage.

Mr. Josefsburg indicated that he did not see any need for a change at this point and Mr. Jackson observed that it was important to first address the underlying policy issue in the rule and determine if there might not be another way to address the problem of moving cases along.

Judge Crow stated that he was disturbed by view that counsel might not be trusted to successfully negotiate plea agreement and noted that there might be a problem if it is the senior judge who is helping the negotiate a settlement. Judge Wilson opined that he could not envision a judge forcing a defendant into a plea agreement. Judge Marovich stated that where the parties do not reach a plea agreement because of a disagreement over the sentencing guidelines, the parties would like to know what the judge is likely to do regarding those guidelines. Justice Wathen noted that there may be cases where there is a legitimate need for judicial intervention. But he was also troubled about judges becoming involved with decisions affecting strategic delay. Mr. Josefsburg stated that there should not be any problem with one judge telling another judge what he or she thinks about the case and that the rule is designed to protect the parties where there is not an agreement.

Judge Dowd moved that the Chair appoint a subcommittee to determine the need for an amendment to Rule 11(e). Judge Davis seconded the motion which carried by a 6 to 5 vote. Judge Jensen subsequently appointed the following members to the subcommittee: Judge Marovich (Chair); Mr. Martin, and Mr. Pauley. Any proposed amendments will be discussed at the Spring 1996 meeting.

B. Rule 12. Proposal to Abolish Rule

The Reporter informed the Committee that a Mr. Paul Sauers had proposed abolishing Rule 12 as being unconstitutional. Following a very brief discussion, the Committee unanimously agreed not to take any action on the proposal.

C. Rule 26.2 Production of Witness Statements

1. Rule 26.2(g). (Scope of Rule)

The Reporter indicated that the Committee had received a suggestion from Mr. Michael R. Levine, an Assistant Public Defender, to make Rule 26.2(g) applicable to preliminary hearings. The Reporter also informed the Committee that he had searched the materials accompanying the most recent amendments to Rule 26.2, which had extended the production of statements requirement to other proceedings, and that he could find no reference to extending that requirement to preliminary hearings. Magistrate Judge Crigler noted that in his experience preliminary examinations are rarely encountered, an observation shared by Judge Jensen. Mr. Pauley noted that if the preliminary hearing includes testimony from a live witness, it would be logical to extend the production requirement to that proceeding. Mr. Martin added that there seems to be an increase in preliminary proceedings in some districts.

Following additional brief discussion, Magistrate Judge Crigler moved to extend Rule 26.2(g) to preliminary hearings under Rule 5.1. Mr. Martin seconded the motion which carried by a unanimous vote. The Reporter informed the Committee that he will draft the appropriate language for consideration at the Committee's next meeting.

2. Rule 26.2(f). (Definition of "Statement")

The Reporter also indicated that at its prior meeting the Committee had indicated an interest in addressing the question of what constitutes a "statement" for purposes of Rule 26.2. During the brief discussion which followed, Judge Stotler observed that the question of whether Rule 26.2 does not seem to raise any real questions; in most cases, the court is simply required to apply the facts to the definition which already exists in the rule. Mr. Pauley observed that the question sometimes arises as to whether an agent's recitation of what a witness has said, in a "302" falls within the definition. He added that the definition of statement in Rule 26.2 follows the definition in the Jencks Act. Judge Jensen observed that there is sometimes an issue as to whether an agent's notes about what a witness said amounts to a statement and Judge Davis noted that in his experience most 302's are excluded from the definition because they are not sufficiently verbatim. Finally, Judge Wilson noted that he believed that the FBI no longer asked witnesses to sign the 302's. No further action was taken on amending Rule 26.2.

D. Rule 31(d). Polling of Jurors

The Reporter noted that Judge Brooks Smith had raised the possibility of amending Rule 31(d) to permit the court to poll jurors individually, a procedure not

specifically provided for in the current rule. Judge Smith noted that the issue had arisen in a recent opinion in the Third Circuit, *United States v. Miller*, ____ F.3d ____ (3d Cir. 1995). Mr. Josefsburg moved that Rule 31(d) be so amended. Following a second by Judge Davis the vote to amend the rule was unanimous. The Reporter indicated that he would draft the appropriate language for the Committee's consideration at its next meeting.

E. Rule 33. Motion for New Trial

At the suggestion of Mr. Pauley, the Committee considered an amendment to Rule 33 to address the issue of what event should start the clock for filing a motion for a new trial and how long a defendant should have for doing so. Mr. Pauley indicated that the Department of Justice was recommending that the rule be amended to reflect that the clock starts with some event in the District Court. He noted that if the time runs from an appellate court's affirmance, the time may vary greatly from case to case because of the time consumed by an appeal. He noted that a two-year time limit would send the message that after guilt has been determined, the courts have two years to consider claims of innocence. Mr. Pauley added that to the best of his knowledge, the Department of Justice has no statistics on how many cases are processed under Rule 33. The purpose of the amendment, he said, would be to promote uniformity.

Mr. Martin expressed concern about the shortening the time for filing a motion for new trial, especially in capital cases where a new lawyer may be appointed to handle the appeal.

Following additional brief discussion about what should trigger the timing of a motion, Mr. Pauley moved that Rule 33 be amended to require that motions for new trials must be filed within two years of some event in the District Court, e.g. judgment. Judge Davis seconded the motion which carried by a 10-1 vote. Mr. Pauley indicated that he would draft language for the Committee's consideration at its next meeting.

Rule 35(b). Reduction of Sentence

At the suggestion of Judge T.S. Ellis (a member of the Standing Committee), the Committee considered a proposal to amend Rule 35(b) regarding reduction of a sentence where the defendant has provided pre-sentencing assistance. In his view, a defendant's cooperation may not separate easily into pre-sentencing and post-sentencing cooperation even though Rule 35(b) permits sentence reduction only for post-sentencing assistance. That rigid line, Judge Ellis indicated, raises problems of fairness.

Judge Wilson observed that a defendant who provides pre-sentencing cooperation would normally receive favorable consideration, if any, under the appropriate sentencing

guideline, USSG § 5K1.1. Post-sentencing cooperation is covered under Rule 35(b). Mr. Pauley indicated that the current rule seems to be working well. He noted that Rule 35(b) had been amended by Congress to include the word "subsequent." Following additional discussion on the history of the rule, Judge Crigler noted the problem of accumulating presentence and post-sentence assistance, where neither, standing alone, would be substantial. Mr. Josefsburg indicated that the word "subsequent" should be removed from the rule; it is difficult to accept, and explain to a defendant, the reason for such a rigid rule. In response to a question from Judge Dowd as to why the Rule includes a one-year provision, Mr. Pauley indicated that the language had been intended to encourage early cooperation and that the provision encouraged certainty and finality.

Following additional discussion about the history of Rule 35, Judge Davis moved that the rule be amended to include the language, "In evaluating whether substantial assistance has been rendered, the court may consider the defendant's presentence assistance." Mr., Josefsburg seconded the motion. The motion carried by a 7-3 vote.

Mr. Pauley raised concerns about a defendant being able to benefit twice from the same assistance; under the sentencing guidelines and also under Rule 35(b). The consensus of the Committee that the Reporter should draft alternative language in an attempt to meet the concerns raised by Mr. Pauley, and shared by others.

G. Local Rules Project; Proposed Amendments

The Reporter indicated that the Local Rules Project had completed its survey of local rules governing criminal cases and that Professor Mary P. Squiers had provided, first, a list of rules which might be worthy of consideration by the Committee as proposed amendments to the national rules and second, a proposed uniform numbering system for local rules. Professor Coquillette provided background information on the project which had begun in 1986. He observed that similar studies and compilations had already been conducted on the civil and appellate rules and that the criminal rules had not presented nearly the number of problems encountered in those two sets of rules. He noted that a uniform numbering system for all of the rules would be especially critical in the age of computerized access by counsel and the courts to both the national and local rules.

Mr. Rabiej informed the Committee that his office had received inquires from district courts as to the effective date of any uniform numbering system and that it appeared that the issue would be presented to the United States Judicial Conference in March 1996, with an effective date one year later.

Following additional brief comments, Judge Dowd moved that a subcommittee be appointed by the chair to study the local rules and report back to the Committee. Judge Marovich seconded the motion, which carried by a unanimous vote. Judge Jensen later

appointed the following persons to that subcommittee: Judge Davis (Chair), Judge Crow, and Judge Crigler.

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

A. Status Report on Crime Bill Amendments Potentially Affecting Criminal Rules

Mr. Rabiej reported that there were no imminent amendments in the pending Crime Bill affecting the Criminal Rules.

B. Status Report on Federal Rules of Evidence 413-415

Mr. Rabiej indicated that the Judicial Conference's proposed changes to Federal Rules of Evidence 413-415 had gone into effect on July 9, 1995, without any changes by Congress. He stated that representatives of the Evidence Committee and the Administrative Office had met with members of Congress in an attempt to convince Congress to accept the Judicial Conference's proposed changes.

VIII. MISCELLANEOUS

A. Appointment of Advisory Committee Members to Other Committees

Judge Jensen noted that Judge Dowd had been appointed as the Committee's liaison to the Evidence Advisory Committee, to replace Professor Saltzburg.

B. Restyling the Rules of Criminal Procedure

The Reporter informed the Committee that it appeared that Mr. Bryan Garner was prepared to draft restyled criminal rules, as part of the Standing Committee's long range plan to modernize and streamline the language of all of the rules of procedure. Judge Jensen noted the potential problem of inadvertently making substantive changes in the rules. Professor Coquillette noted the value of restyling the rules, including catch-up changes or minor changes which may have been deferred. The Reporter observed that for the last several years, a number of rules had already been restyled. i.e., Rule 32 which had been completely reorganized.

Mr. Pauley shared the concern raised by Judge Jensen that restyling changes might result in substantive changes. He queried whether the Supreme Court had been informed

the pending major changes in the rules. Judge Stotler indicated that she would be meeting with Chief Justice Rehnquist and that the issue would be addressed. She noted that Mr. Garner had assisted the Supreme Court by informally submitting proposed changes to the Court's redraft of its own rules.

Judge Jensen and the Reporter indicated a possible method of addressing the proposed changes: Subcommittees could be appointed to review Mr. Garner's drafts and report to the Committee. Judge Jensen subsequently appointed two subcommittees to review those drafts: Subcommittee A (Rules 1-30): Judge Smith (Chair), Mr. Josefsburg, and Mr. Martin. Subcommittee B (Rules 31-60): Judge Dowd (Chair), Mr. Jackson, and Chief Justice Wathen.

C. Comments on Long Range Planning Subcommittee Report.

Judge Stotler requested that the Committee members complete the survey provided by the Standing Committee which would assist that Committee in analyzing potential long-range issues.

The Reporter indicated that the Committee had been asked to address two key issues: the role of the Advisory Committee Notes and the respective roles of the Standing and Advisory Committees. The second issue had been addressed at the beginning of the meeting. With regard to the Committee Notes, the Reporter stated that it did not appear that there would be two sets of notes, one for the Advisory Committee and one for the Standing Committee, which would reflect a sort of legislative history for any particular amendment. Judge Stotler indicated that the Chair and Reporter of the Advisory Committee should have the option of revising the Committee Notes to reflect any later amendments by the Standing Committee of the underlying Rule of Procedure.

D. Report by Justice Department on Proposed Amendments

Mr. Pauley informed the Committee that in the future the Department of Justice would be asking that several items be placed on the agenda: a possible amendment to Rule 6(e) regarding disclosures of grand jury information to state and federal authorities; and a possible amendment to Rule 41 to provide for searches of computers and for "sneek and peek" warrants.

IX. CONCLUDING REMARKS; DESIGNATION OF TIME AND PLACE OF NEXT MEETING

The Committee was reminded that its next meeting would be held at the Administrative Office of the United States Courts in Washington, D.C. on April 29 and

30, 1996. The Committee also decided to hold its Fall 1996 meeting in Portland, Oregon on October 7-8, 1996.

On behalf of the Committee, Judge Jensen expressed deep appreciation to Mr. Rabiej and his staff for making arrangements for the meeting

Respectfully submitted,

David A. Schlueter
Professor of Law
Reporter

Agenda Item IIB1

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Dave Schlueter, Reporter

RE: Rule 24(a); Attorney-Conducted Voir Dire; Public Comments

DATE: March 25, 1996

In April 1995, this Committee forwarded to the Standing Committee a proposed amendment to Rule 24(a) which would require courts to provide for attorney-conducted voir dire of the prospective jurors. The Committee believed strongly, that if the proposal was to work, some provision would have to be included for the ability of the court to establish limits on the questioning and in appropriate cases to cut off absolutely the right of any party to question the jurors. A similar amendment was presented by the Civil Rules Committee to amend Civil Rule 47.

At the Standing Committee meeting in July 1995, the discussion of the two proposed amendments was intense. In anticipation that an amendment would be forthcoming the Committee received a number of letters from judges opposed to the concept of any proposed change to the rule. The consensus of the Standing Committee, however, was that the proposed amendments should be published for comment. Rather than publishing two separate versions of Rules 24 and 47, the Standing Committee asked the Criminal and Civil Rules Committee chairs/reporters to present a uniform amendment. The amendments to those two rules, as they were published in September 1995, are attached.

Attached is a summary of the comments received, and testimony given at a joint hearing of the Criminal and Civil Rules Committee in Oakland, California, in December 1995, on Rule 24. A transcription of the testimony from the New Orleans hearing in February 1996, is not yet available.

Please note that the summary includes pre-publication comments on the proposed amendment. A draft of the summary and charts were prepared by my research assistant, Ms. Linda Perez, to whom I am deeply indebted.

I am also attaching correspondence from Professor Ed Cooper, Reporter for the Civil Rules Committee, who has proposed some re-drafting of Rules 24 and 47. The draft generally mirrors the version approved by this Committee in April 1995.

The Civil Rules Committee will be considering the future of Civil Rule 47 at its meeting in Washington, D.C. on April 18-19, 1996.

* * * * *

B. Rule 24(a), Trial Jurors: Proposal re Voir Dire by Counsel

The Reporter and Judge Jensen reviewed the topic of possible amendments to Rule 24(a) regarding attorney participation They noted that a similar proposal had been considered by the Civil Rules Committee, that a considerable amount of material, including relevant articles and survey materials, had been sent to the Committee members They added that opposition had been expressed to any attempts to increase the level of participation by attorneys or the parties Judge Crigler noted that there was strong opposition from the judges in the Fourth Circuit

Judge Jensen also noted that Judge Easterbrook had forwarded the results of his poll of Seventh Circuit judges but Judge Jensen raised the questioned whether there should also be some input from the practicing bar Mr Josefsberg agreed that non-judges should be polled Judge Wilson pointed out that there was another important issue which should be addressed, the perception of justice He noted that people generally do not believe that they are being treated fairly when they cannot take part Judge Davis agreed with that position but noted that many judges fear the slippery slope of counsel participation Judge Jensen added that he could not agree with the apparent competition to reduce the time used to select a jury because picking a jury was much too important for that

Judge Crigler stated that in his experience all judges do permit some supplemental questioning, a point to which Mr Josefsberg responded that as with the amendments to Rule 16, there was a need to promote consistency re questioning by counsel Justice Wathen observed that his state does not permit voir dire by counsel, but trial judges permit it anyway

Judge Marovich provided additional comments about the background of attorney-conducted voir dire and Professor Saltzburg stated that while he believes in participation by counsel, he was generally not in favor of any amendment to Rule 24 He subsequently moved that a draft amendment presented by the reporter be considered by the Committee Mr Jackson seconded the motion Following additional discussion on the draft and possible amendments to it, the Committee voted 9-2 to forward the amendment to the Standing Committee with the recommendation that the amendment be published for public comment

* * * * *

Rule 24. Trial Jurors.[*]

(a) VOIR DIRE EXAMINATION. The court shall conduct the voir dire examination of prospective jurors . But the court shall also permit the defendant or the defendant's attorney and the attorney for the government to orally examine the prospective jurors to supplement the court's examination within reasonable limits of time, manner, and subject matter, as the court determines in its discretion. The court may terminate examination by a person who violates those limits or for other good cause. ~~The court may permit the defendant or the defendant's attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or the defendant's attorney and the attorney for the government to supplement the examination by such further inquiry~~

[*] New matter is underlined and matter to be omitted is lined through.

~~as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.~~

* * * * *

COMMITTEE NOTE

The amendment is intended to insure that the parties are given an opportunity to participate in the critical stage of jury selection. While a recent survey from the Federal Judicial Center indicates that a majority of district courts permit participation by counsel, Shapard & Johnson, *Survey Concerning Voir Dire* (Federal Judicial Center 1994), the Committee recognizes that in many cases the right to participation is completely precluded under the present rule. Those opposing greater participation by counsel assert that providing an opportunity for such participation will extend the time for selecting a jury and that counsel may use the examination for improper means, e.g., attempting to influence or educate the jury regarding their client's view of the case.

Those supporting greater counsel participation assert that it is important for the parties to participate personally in the process because jurors may be intimidated by the trial court and that their answers to the judge may be less than candid. *See generally* D. Suggs & B. Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis*, 56 Indiana L. Jour. 245, 256-257 (1981)(authors note that unintentional, nonverbal, communication from judge during voir dire may affect jurors' response); S. Jones, *Judge- Versus Attorney-Conducted Voir Dire*, 11 Law and Human Behavior 131, 143 (1987))(study showed the jurors attempted to report not what they truly felt but "what they believed the judge wanted to hear"). Second, in order to insure a fair opportunity to obtain information relevant to the exercise of peremptory challenges and challenges for

cause, it is important that at a minimum counsel be given the opportunity to conduct supplemental examination.

Although the concerns expressed by the opponents are not without merit, the Committee believed that on balance, the need for counsel participation outweighed the risk of potential abuse. The amendment recognizes that, particularly in criminal cases, there are good reasons for permitting supplemental inquiries by counsel, without regard to whether counsel or the courts can do a better job of picking an impartial jury. The amendment avoids that debate and at the same time recognizes that the defendant or defendant's counsel should have the right, even if limited, to question the potential jurors.

While the amendment recognizes the long-standing tradition in federal courts that the primary responsibility for conducting voir dire rests with the trial judge, it creates a presumptive right of counsel to participate in supplemental examinations. The right to supplemental questioning, however, is not absolute and may be conditioned on one of several factors.

First, the court may place reasonable limits on the time, manner, and subject matter of the examination. This condition probably reflects current practice in some courts. That is, at the present time, judges already permit counsel to pose supplemental questions, subject to such reasonable limitations in cases where attorney-conducted voir dire is permitted.

The second condition reflects the Committee's view that the court should retain the authority in particular cases to cut off absolutely any supplemental questioning. The amendment assumes that the supplemental examination has begun and that at some point, the defendant or trial counsel has engaged in conduct which violates the court's limits or demonstrates a purpose to use the voir dire process for some reason other than determining the ability of a potential juror to serve impartially. The amendment also

assumes that the court should have an articulable reason for absolutely barring supplemental questioning by the parties.

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

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITT

JAMES K. LOGAN
APPELLATE RULES

PAUL MANNES
BANKRUPTCY RULES

PATRICK E. HIGGINBOTHAM
CIVIL RULES

D. LOWELL JENSEN
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

To: Hon. Alicemarie H. Stotler, Chair, and Members of the Standing Committee on Rules of Practice and Procedure

From: Hon. Ralph K. Winter, Chair
Advisory Committee on Evidence Rules

Date: June 7, 1995

I. Proposed Amendments to the Rules of Evidence

The Advisory Committee has proposed amendments to Federal Rules of Evidence 801(d)(2), 803(24), 804(b) and Rule 806. It has also proposed a new Rule 807. The Advisory Committee requests the Standing Committee's approval of these amendments for publication and comment.

II. Tentative Decisions Not to Amend

The Advisory Committee has tentatively decided not to propose amendments to the following Rules of Evidence and asks the Standing Committee to submit these tentative decisions for publication and comment:

Rule 103(a), (b), (c), (d) (Rulings on Evidence)
Rule 104 (Preliminary Questions)
Rule 408 (Compromise or Offers to Compromise)

framework of consolidated proceedings. There is not yet sufficient experience to support adoption of formal rules establishing — and regulating the terms of access to — litigation support libraries, document depositories, depositions taken once for many actions, or similar devices. To the extent that consolidation devices may not prove equal to the task, however, these questions will deserve attention in the future.

Rule 26(c)(3) applies only to the dissolution or modification of protective orders entered by the court under subdivision (c)(1). It does not govern orders that control access to material submitted to the court by motion, at a hearing, at trial, or otherwise. It does not address private agreements entered into by litigants that are not submitted to the court for its approval. Nor does Rule 26(c)(3) apply to motions seeking to vacate or modify final judgments that occasionally contain restrictions on the disclosure of specified information. Rules 59 and 60 govern such motions.

Rule 47. Selecting ~~Selection of~~ Jurors

(a) ~~Examination of~~ Examining Jurors. The court ~~may~~ shall ~~permit the parties or their attorneys to~~ conduct the voir dire examination of prospective jurors ~~or may itself conduct the examination~~. But the court shall also permit

the parties to orally examine the prospective jurors to supplement the court's examination within reasonable limits of time, manner, and subject matter, as the court determines in its discretion. The court may terminate examination by a person who violates those limits, or for other good cause. ~~In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.~~

* * * * *

COMMITTEE NOTE

Rule 47(a) in its original and present form permits the court to exclude the parties from direct examination of prospective jurors. Although a recent survey shows that a

majority of district judges permit party participation, the power to exclude is often exercised. See *Shapard & Johnson, Survey Concerning Voir Dire* (Federal Judicial Center 1994). Courts that exclude the parties from direct examination express two concerns. One is that direct participation by the parties extends the time required to select a jury. The second is that counsel frequently seek to use voir dire not as a means of securing an impartial jury but as the first stage of adversary strategy, attempting to establish rapport with prospective jurors and influence their views of the case.

The concerns that led many courts to undertake all direct examination of prospective jurors have earned deference by long tradition and widespread adherence. At the same time, the number of federal judges that permit party participation has grown considerably in recent years. The Federal Judicial Center survey shows that the total time devoted to jury selection is virtually the same regardless of the choice made in allocating responsibility between court and counsel. It also shows that judges who permit party participation have found little difficulty in controlling potential misuses of voir dire. This experience demonstrates that the problems that have been perceived in some state-court systems of party participation can be avoided by making clear the discretionary power of the district court to control the behavior of the party or counsel. The ability to enable party participation at low cost is of itself strong reason to permit party participation. The parties are thoroughly familiar with the case by the start of trial. They are in the best position to know the juror information that bears on challenges for cause and peremptory challenges, and to elicit it by jury questioning.

In addition, the opportunity to participate provides an appearance and reassurance of fairness that has value in itself.

The strong direct case for permitting party participation is further supported by the emergence of constitutional limits that circumscribe the use of peremptory challenges in both civil and criminal cases. The controlling decisions begin with *Batson v. Kentucky*, 476 U.S. 79 (1986) and continue through *J.E.B. v. Alabama ex rel. T.B.*, 114 S.Ct. 1419 (1994). *See also Purkett v. Elem*, 115 S.Ct. 1769 (1995). Prospective jurors "have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination." *J.E.B.*, 114 S.Ct. at 1428. These limits enhance the importance of searching voir dire examination to preserve the value of peremptory challenges and buttress the role of challenges for cause. When a peremptory challenge against a member of a protected group is attacked, it can be difficult to distinguish between group stereotypes and intuitive reactions to individual members of the group as individuals. A stereotype-free explanation can be advanced with more force as the level of direct information provided by voir dire increases. As peremptory challenges become less peremptory, moreover, it is increasingly important to ensure that voir dire examination be as effective as possible in supporting challenges for cause.

Fair opportunities to exercise peremptory and for-cause challenges in this new setting require the assurance that the parties can supplement the court's examination of prospective jurors by direct questioning. The importance of

party participation in voir dire has been stressed by trial lawyers for many years. They believe that just as discovery and other aspects of pretrial preparation and trial, voir dire is better accomplished through the adversary process. The lawyers know the case better than the judge can, and are better able to frame questions that will support challenges for cause or informed use of peremptory challenges. Many also believe that prospective jurors are intimidated by judges, and are more likely to admit potential bias or prejudgment under questioning by the parties.

Party examination need not mean prolonged voir dire, nor subtle or brazen efforts to argue the case before trial. The court can undertake the initial examination of prospective jurors, restricting the parties to supplemental questioning controlled by direct time limits. Effective control can be exercised by the court in setting reasonable limits on the manner and subject-matter of the examination. Lawyers will not be allowed to advance arguments in the guise of questions, to seek committed responses to hypothetical descriptions of the case, to assert propositions of law, to intimidate or ingratiate, or otherwise to turn the opportunity to seek information about prospective jurors into improper adversary strategies. The district court has ample power to control the time, manner, and subject matter of party examination. The process of determining the limits continues throughout the course of each party's examination, and includes the power to terminate further examination by a person that has misused or abused the right of examination. Among other grounds, termination may be warranted not only by conduct that may impair the trial jury's impartiality but also by questioning that is repetitious, confusing, or prolonged, or

that threatens inappropriate invasion of the prospective jurors' privacy. The determination to set limits or to terminate examination is confided to the broad discretion of the district court. Only a clear abuse of this discretion — usually in conjunction with a clearly inadequate examination by the court — could justify reversal of an otherwise proper jury verdict.

The voir dire process can be further enhanced by use of jury questionnaires to elicit routine information before voir dire begins. Questionnaires can save much time, and may improve in many ways the development of important information about prospective jurors. Potential jurors are protected against the embarrassment of public examination. A prospective juror may be more willing to reveal potentially embarrassing information in responding to a questionnaire than in answering a question in open court. Written answers to a questionnaire also may avoid the risk that answers given in the presence of other prospective jurors may contaminate a large group.

Questionnaires are not required by Rule 47(a), but should be seriously considered. At the same time, it is important to guard against the temptation to extend questionnaires beyond the limits needed to support challenges for cause and fair use of peremptory challenges. Just as voir dire examination, questionnaires can be used in an attempt to select a favorable jury, not an impartial one. Prospective jurors must be protected against unwarranted invasions of privacy; the duty of jury service does not support casual inquiry into such matters as religious preferences, political views, or reading, recreational, and television habits. Indeed the list of topics that might be of

interest to a party bent on manipulating the selection of a favorable jury through the use of sophisticated social-science profiles and personality evaluations is virtually endless. Selection of an impartial jury requires suppression of such inquiries, not encouragement. The court's guide must be the needs of impartiality, not party advantage.

Rule 48. Number of Jurors — Participation in Verdict

The court shall seat a jury of ~~not fewer than six and not more than~~ twelve members. ~~and a~~All jurors shall participate in the verdict unless excused from service ~~by the court pursuant to~~ under Rule 47(c). Unless the parties ~~otherwise~~ stipulate otherwise, (1) the verdict shall be unanimous, and (2) no verdict ~~shall~~ may be taken from a jury ~~reduced in size to~~ of fewer than six members.

COMMITTEE NOTE

Rule 48 was amended in 1991 to reflect the

conclusion that it had been "rendered obsolete by the adoption in many districts of local rules establishing six as the standard size for a civil jury." Six-person jury local rules were upheld by the Supreme Court in *Colgrove v. Battin*, 413 U.S. 149 (1973). The Court concluded that the Seventh Amendment permits six-person juries, and that the local rules were not inconsistent with Rule 48 as it then stood.

Rule 48 is now amended to restore the core of the twelve- member body that has constituted the definition of a civil jury for centuries. Local rules setting smaller jury sizes are invalid because inconsistent with Rule 48.

The rulings that the Seventh Amendment permits six-member juries, and that former Rule 48 permitted local rules establishing six-member juries, do not speak to the question whether six-member juries are desirable. Much has been learned since 1973 about the advantages of twelve-member juries. Twelve-member juries substantially increase the representative quality of most juries, greatly improving the probability that most juries will include members of minority groups. The sociological and psychological dynamics of jury deliberation also are strongly influenced by jury size. Members of a twelve-person jury are less easily dominated by an aggressive juror, better able to recall the evidence, more likely to rise above the biases and prejudices of individual members, and enriched by a broader base of community experience. The wisdom enshrined in the twelve-member tradition is increasingly demonstrated by contemporary social science.

Although the core of the twelve-member jury is

THE UNIVERSITY OF MICHIGAN
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HUTCHINS HALL
ANN ARBOR, MICHIGAN 48109-1215

February 29, 1996

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

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

Bryan A. Garner, Esq.
LawProse, Inc.
Sterling Plaza, 5949 Sherry Lane
Suite 1280, L.B. 115
Dallas, Texas 75225

Re: Style Suggestions, Criminal Rule 24(a), Civil Rule 47(a)

Gentlemen:

I enclose a suggested style revision of Civil Rule 47(a) that would apply to Criminal Rule 24(a) as well. The Note explains the purpose of the changes.

None of these changes has any impact on the substance of the rule. I think they clarify our collective intent.

My recollection is that the Civil Rules Advisory Committee meeting on April 18 and 19 comes one week before the Criminal Rules Advisory Committee meeting. We will confront the recurring question of seriatim review of style issues. The question may go away, however, if we can all agree in advance on a single version. This is my best opening attempt. Let me know what you think.

Thank-you for your help.

Best regards,

Edward H. Cooper

EHC/lm
encl.
c: Hon. Patrick E. Higginbotham

Rule 47. Selecting ~~Selection of~~ Jurors

(a) ~~Examination of~~ Examining Jurors.

(1) The court ~~may~~ shall ~~permit the parties or their attorneys to conduct the examination of~~ examine prospective jurors ~~or may itself conduct the examination~~.

(2) The court shall also permit the parties to orally examine the prospective jurors. The court may in its discretion:

(A) impose reasonable limits of time, manner, and subject matter on examination by the parties, and

(B) terminate examination by a person who violates those limits, or for other good cause.

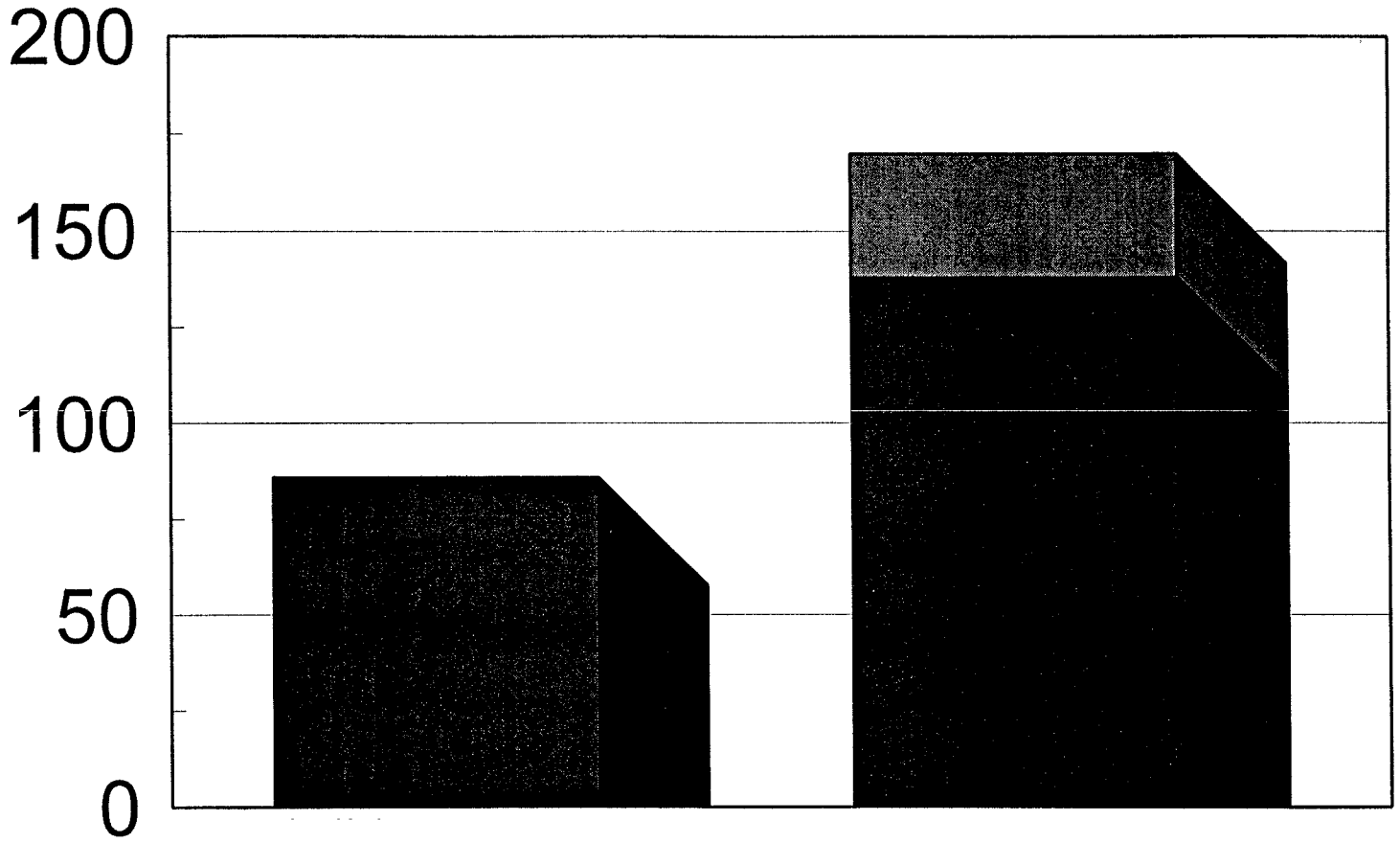
NOTE

(1) "Voir dire" was added as part of the compromise drafting process. It requires a lot of additional and unnecessary words. "Voir dire" has not been in Criminal Rule 24 or Civil Rule 47 for so long that I do not think we need it now.

(2) "But" is not needed to introduce the second sentence if we go to the numbered paragraphs format.

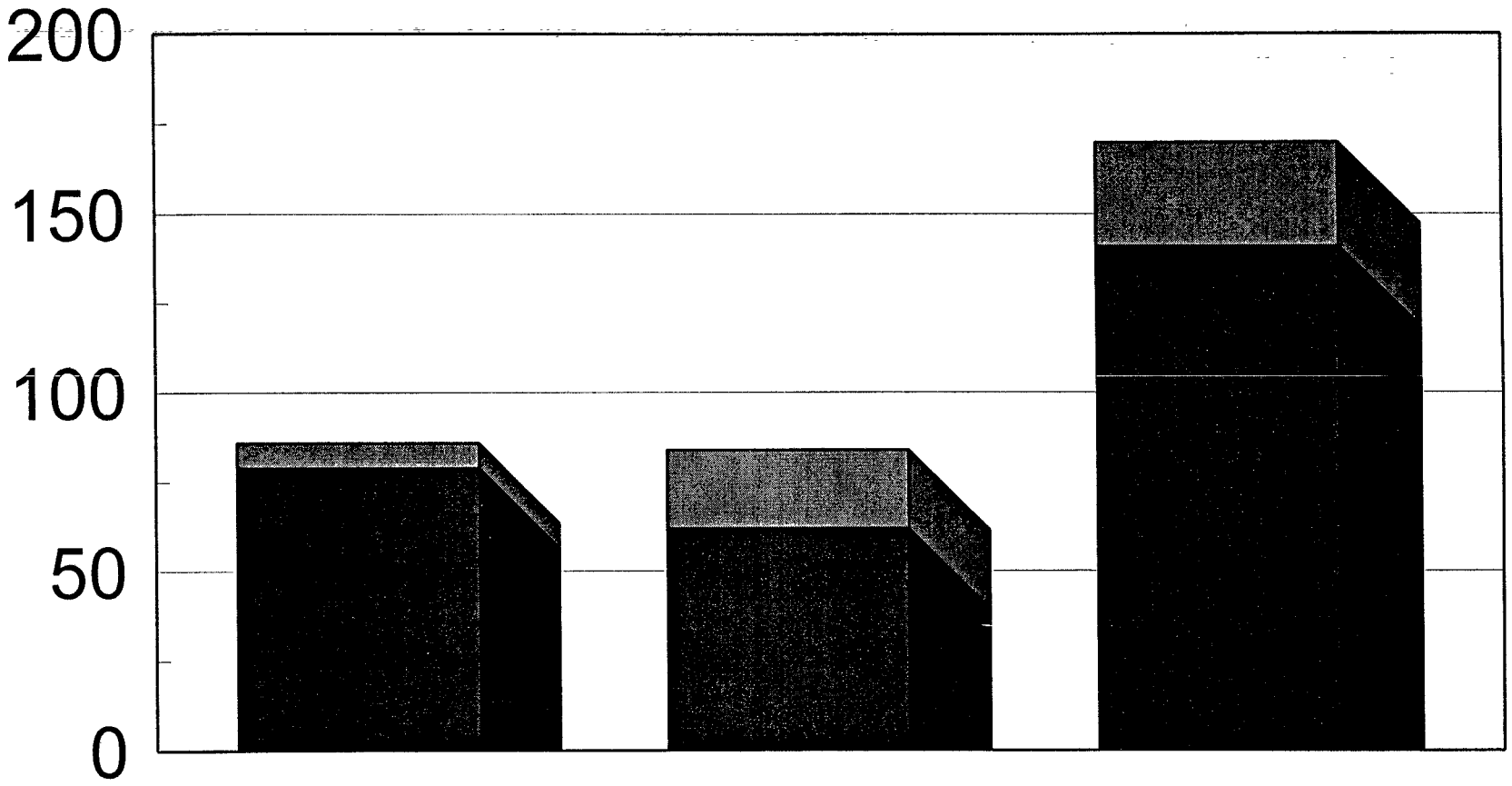
(3) The reason I went to the numbered paragraphs was to solve the problems that arise from the present position of "as the court determines in its discretion." This drafting occurred at the very last minute of discussion in the standing committee, when Joe Spaniol persuaded Bryan Garner to invoke the rule of the immediate antecedent. It leaves two problems. First, some readers may ignore the immediate antecedent and conclude that the court has discretion to deny oral examination by the parties. Second, there is no express statement that the court's discretion extends to termination of examination by a party. I think both problems are resolved by this structure.

COMPOSITE OF VOTERS



	PRE SEPT '95	POST SEPT '95
JUDGES	86	138
NON-JUDGES	0	32

DISTRIBUTION OF VOTES



	PRE SEPT '95	POST SEPT '95	TOTAL
OPPOSED	79	62	141
IN FAVOR	7	22	29

ADVISORY COMMITTEE ON
FEDERAL RULES OF CRIMINAL PROCEDURE

I. SUMMARY OF COMMENTS: CRIMINAL RULE 24

The Committee received one hundred and sixty-two written submissions and heard testimony from eight witnesses [not including testimony at New Oreleans] on the proposed amendment to 24(a). While several were statements filed on behalf of organizations and attorneys in private practice the majority were from Federal District Judges.

The initial eighty-six submissions were received before the proposed amendment was published and distributed for comment. All of those pre-publication were from Federal District Judges. Of these seventy-nine were opposed to the proposed changes to Fed. R. Crim.P. 24, and seven were in favor of the proposed amendment.

The overwhelming majority of the letters received indicate an opposition to the proposed amendments to Rule 24. Key areas of judicial concern are : a) Attorneys would abuse the privilege and use voir dire to begin litigating their cases which would result in a biased jury; b) the time allowed for voir dire would have to be extended c) abuse of jurors with improper questions d) lack of judicial control over the process e) the fact that most of the judges already allow attorneys to participate in the voir dire process thus negating the need for the proposed amendment and f) the trial judge is the only objective member in the courtroom who will ensure the impartiality of the jury.

A total of twenty-nine submissions were in favor of the proposed amendment. Those commentators reasoned that the amendment would provide a more thorough voir dire process, better followup questions and a feeling that they were participating in the process. Attorneys favoring the proposed amendment believed that they knew more about the litigation than the judge and were thus better able to ask the kinds of questions necessary to chose a jury.

Most Judges responded to Attorneys concerns stating that they already allow attorneys to suggest written questions for voir dire and then allow attorneys to either ask follow up questions or submit follow up questions for the judge to ask. Most judges advised that they prepare extensively for the voir dire process.

II. LIST OF COMMENTATORS : CRIMINAL RULE 24

CR-1 Terrence W. Boyle, Federal District Judge,
Elizabeth City N.C. 4-21-95

CR-2 Albert V. Bryan, Senior Federal District Judge
Alexandria VA. 4-21-95

CR-3 J. Calvitt Clarke, Jr. Federal District Judge
Norfolk VA. 4-19-95

CR-4 James C. Fox, Federal District Chief Judge
Wilmington N.C. 5-2-95

CR-5 Marvin J. Garbis, Federal District Judge
Baltimore MD. 5-2-95

CR-6 Elizabeth Hallanan, Federal District Judge
Beckley W.V. 5-26-95

CR-7 Clyde H. Hamilton, Federal Circuit Judge
Fourth Court of Appeals, Columbia S.C. 4-24-95

CR-8 Walter E. Hoffman, Senior Federal District Judge
Norfolk VA. 3-14-95

CR-9 C. Weston Houck, Federal District Chief Judge
Florence S.C. 5-8-95

CR-10 Harry L. Hupp, Federal District Judge
Los Angeles CA. 3-1-95

CR-11 Richard B. Kellam, Senior Federal District Judge
Norfolk VA. 4-20-95

CR-12 John A.MacKenzie, Federal District Judge
Norfolk VA. 4-24-95

CR-13 Robert E. Maxwell, Federal District Judge
Elkins W.V. 4-21-95

CR-14 Robert R. Merhige, Jr. Senior Federal District Judge
Richmond VA. 11-7-94

CR-15	James H. Michael, Federal District Judge Charlottesville VA 5-2-95
CR-16	William T. Moore, Jr. Federal District Judge Savannah GA. 5-10-95
CR-17	J. Frederick Motz, Federal District Judge Baltimore, MD. 5-9-95
CR-18	John F. Nangle, Federal District Judge Savannah GA. 4-10-95
CR-19	William M. Nickerson, Federal District Judge Baltimore MD. 4-25-95
CR-20	J. Clifford Wallace, Chief Circuit Judge Ninth Circuit Court of Appeals, San Diego, CA. 4-25-95
CR-21	H.E. Widener, Jr. Federal Circuit Judge,Fourth Circuit Abingdon VA. 4-19-95
CR-22	Joseph H. Young, Senior Federal District Judge Baltimore MD. 4-24-95
CR-23	G. Ross Anderson, Jr. Federal District Judge Columbia S.C. 12-5-94
CR-24	Joseph F. Anderson, Federal District Judge, Columbia S.C. 12-5-94
CR-25	Sol Blatt, Jr. Senior Federal District Judge, Charleston S.C. 11-7-94
CR-26	Leonie M. Brinkema, Federal District Judge, Alexandria VA. 12-6-94
CR-27	W.Earl Britt, Federal District Judge Raleigh N.C. 12-7-94
CR-28	Frank W. Bullock, Chief Federal District Judge Greensboro N.C. 5-23-95

CR-29	James C,. Cacheris, Chief Federal District Judge Alexandria VA. 10-19-94
CR-30	B. Waugh Crigler, U.S. Magistrate Judge, Charlottesville VA. 10-26-94
CR-31	Robert G. Doumar, Federal District Judge, Norfolk VA. 10-31-94
CR-32	Franklin T. Dupree, Jr. Federal District Judge Raleigh N.C. 11-21-94
CR-33	T. S. Ellis, III, Federal District Judge Alexandria VA. 4-12-95
CR-34	David A. Faber, Federal District Judge Bluefield, W.V. 12-8-94
CR-35	Claude M. Hilton, Federal District Judge Alexandria VA. 1-19-95
CR-36	Raymond A. Jackson, Federal District Judge Norfolk, VA. 12-14-94
CR-37	Judge Frank A.Kaufmann, Senior Federal District Judge Baltimore MD. (no date given)
CR-38	Benson F. Legg, Federal District Judge District of Maryland, 12-12-94
CR-39	Peter J. Messitte, Federal District Judge District of Maryland, 12-13-94
CR-40	Henry Coke Morgan, Federal District Judge Eastern District of VA. 1-12-95
CR-41	Graham C. Mullen, Federal District Judge Western District of N.C. 12-7-94
CR-42	Paul V. Niemeyer, Federal Circuit Judge Baltimore MD.Fourth Circuit Court of Appeals, 10-28-94

CR-43 David C. Norton, Federal District Court
Charleston S.C. 12-8-94

CR-44 Robert E. Payne, Federal District Judge
Eastern District of Virginia, 11-8-94

CR-45 Frederick N. Smalkin, Federal District Judge
Baltimore M.D.12-8-94

CR-46 Rebecca Beach Smith, Federal District Judge
Eastern District of VA. 12-12-94

CR-47 James R. Spencer, Federal District Judge
Richmond VA., 12-5-94

CR-48 William B. Traxler, Jr. Federal District Judge
Greenville S.C., 12-12-94

CR-49 Hiram H.Ward, Senior Federal District Judge
Winston-Salem N.C., 12-8-94

CR-50 Richard L. Williams, Senior Federal District Judge
Richmond VA., 12-7-94

CR-51(a) Henry M. Herlong, Federal District Judge
Greenville SC., 12-8-94

CR-51(b) Judge -------- Federal District Judge
Fourth Circuit- 12-13-94

CR-51(c) Judge Breamc- Federal District Judge
Fourth Circuit 12-8-94

CR-51(d) Robert A. M-----, Federal District Judge
Fourth Circuit 12-2-94

CR-51(e) Federal District Judge
P O Drawer 5009
Beckley WV. 1-23-95

CR-51(f) M-----, Federal District Judge
Fourth Circuit, 12-12-94

CR-51(g)	unknown, no date
CR-51(h)	unknown, 12-22-94
CR-51(i)	unknown, no date
CR-51(j)	unknown, 12-15-94
CR-51(k)	unknown, 12-13-94
CR-51(l)	unknown, 12-13-94
CR-51(m)	unknown, 12-13-94
CR-51(n)	unknown, 12-12-94
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CR-51(s)	unknown, 12-22-94
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CR-51(v)	unknown, 12-13-94
CR-51(w)	unknown, 12-13-94
CR-51(x)	unknown, 12-12-94
CR-52	Anthony A. Alaimo, Federal District Judge Southern District of GA. 5-16-95
CR-53	Lawrence L. Piersol, Federal District Judge District of South Dakota, 5-16-95

CR-54	David Warner Hagen, Federal District Judge District of Nevada, 5-26-95
CR-55	Michael A. Ponsor, Federal District Judge District of Massachusetts, 5-25-95
CR-56	Joanna Seybert, Federal District Judge Eastern District of New York, 6-19-95
CR-57	Arthur D. Spatt, Federal District Judge Eastern District of New York, 6-21-95
CR-58	Thomas C. Platt, Federal District Judge Eastern District of New York, 6-16-95
CR-59	Jacob Mishler, Federal District Judge Eastern District of New York, 6-15-95
CR-60	Judith N. Keep, Chief Federal District Judge Southern District of California, 6-27-95
CR-61	Bill Wilson, Federal District Judge Eastern District of Arkansas, 7-26-95
CR-62	none found
CR-63	Edward Rafeedie, Federal District Judge Central District of California, 9-6-95
CR-64	Prentice H. Marshall, Federal District Judge Northern District of IL. 10-26-95
CR-65	Charles W. Daniels Esq., Law Professor, Civ/Crim Trial Practice, Albuquerque, NM. 11-3-95
CR-66	Wayne R. Andersen, Federal District Judge Norther District of IL. 11-29-95
CR-67	Robert Holmes Bell, Federal District Judge Western District of MI. 10-31-95
CR-68	Martin L. Feldman, Federal District Judge Eastern District of LA. 11-29-95

CR-69	Robert B. Probst, Federal District Judge Northern District of AL. 11-29-95
CR-70	Robert Fogelnest, President, National Association of Defense Lawyers Washington, DC 11-28-95
CR-71	Honorable Harry Hupp, Federal District Judge Central District of California, 11-8-95
CR-72	John W. Bissell, Federal District Judge District of N.J. 12-8-95
CR-73	Richard L. Williams, Federal District Judge Eastern District of VA, 12-12-95
CR-74	J. Houston Gordon, Esq. Covington TN, 11-6-95
CR-75	Thomas C. Platt, Federal District Judge Eastern District of New York,
CR-76	Arthur D. Spatt, Federal District Judge Eastern District of N.Y. 12-8-95
CR-77	Alex Stephen Keller, Esq. Denver CO. 11-13-95
CR-78	none
CR-79	none
CR-80	Jackson L. Kiser, Chief Judge Western District of Virgina 11-14-95
CR-81	Judith N. Keep, Chief Judge Southern District of California, 11-13-95
CR-82	Peter J. Hughes, Esq. San Diego, CA. 11-22-95
CR-83	A. Andrew Hauck, Senior Judge

Central District of California , 11-9-95

CR-84 Ira B. Grudberg, Esq
New Haven, CT. 11-30-95

CR-85 Philip M. Pro, Federal District Judge
District of NV. 12-12-95

CR-86 Robert B. Probst, Federal District Judge
Northern District of AL 12-21-95

CR-87 John W. Sedwick, Federal District Judge
District of Alaska, 12-21-95

CR-88 Clifford A. Reiders, Esq
Williamsport PA, 12-14-95

CR-90 Fred Van Sickle, Federal District Judge
Eastern District of Washington, 12-7-95

CR-91 William F. Dow III, Esq
New Haven, CT 12-4-95

CR-92 William O. Bertelsman, Chief Judge
Eastern District of KY, 12-8-95

CR-93 Lewis A. Kaplan, Federal District Judge
Southern District of New York, 12-6-95

CR-94 Peter C. Dorsey, Chief Judge
District of CT., 12-5-95

CR-95 J. Frederick Motz, Federal District Judge
District MD, 11-30-95

CR-96 Joanna Seybert, Federal District Judge
Uniondale NY, 6-19-95

CR-97 Samuel B. Kent, Federal District Judge
Southern District of TX, 1-17-96

CR-98 Prentice H. Marshall, Federal District Judge
Northern District of IL. 1-12-96

CR-99	Donald D. Alsop, Federal District Judge District of MN, 12-29-95
CR-100	Bruce Comly French, Professor of Law Ohio Northern University, 1-16-96
CR-101	Lucius D. Bunton, Senior Federal District Judge Western District of TX, 1, 25-96
CR-102	Daniel A. Ruley, Esq. Parkersburg WV. 1-11-96
CR-103	Daniel E. Monnant, Esq Wichita KS. 1-22-96
CR-104	Jery Buchmeyer, Chief Judge Northern District of TX. 1-23-96
CR-105	Sam R. Cummings, Federal District Judge Northern District of TX. 1-22-96
CR-106	Carol E. Heckman, Federal District Judge Federal Magistrate Judges Association Buffalo NY. 2-26-96
CR-107	W. Earl Britt, Federal District Judge Eastern District of North Carolina Raleigh, N.C. 1-30-96
CR-108	none available
CR-109	Thomas P. Griesa, Chief Federal District Judge Southern District of New York New York, NY. 2-1-96
CR-110	Paul W. Mollica, Committee Chairman of Federal Courts, Chicago Council of Lawyers Chicago IL. 2-7-96
CR-111	Clarence A. Brimmer, Federal District Judge District of Wyoming, Cheyenne WY. 2-5-96

CR-112 Filemon B. Vela, Federal District Judge
Southern District of Texas
Brownsville TX 2-1-96

CR-113 Edward C. Prado, Federal District Judge
Secretary/Treasurer, 5th Ciruit District Judges Assn
Western District of Texas
San Antonio TX 2-1-96

CR-114 Barefoot Sanders, Federal District Judge
ND of Texas TX 2-9-96

CR-115 Carolyn B. Witherspoon,
President Arkansas Bar Assn
Little Rock Ark 1-31-96

CR-116 John F. Keenan, Federal District Judge
Southern District of New York
New York,NY 2-1-96

CR-117 Samuel B. Kent, Federal District Judge
Southern District of Texas
Galveston TX, 1-17-96

CR-118 George P. Kazen, Federal District Judge
Southern District of Texas
Laredo Tx, 2-1-96

CR-119 John D. Rainey, Federal District Judge
Southern District of Texas
Houston TX, 2-2-96

CR-120 Melinda Harmon, Federal District Judge
Southern District of Texas
Houston Tx., 1-30-96

CR-121 Virginia M. Morgan, Federal Magistrate
President, Federal Magistrate Judges Assn
District of Michigan
Detroit MI, 1-23-96

CR-122 John F. Nangle, Federal District Judge
Southern District of Georgia

Savannah GA, 2-9-96

CR-123 Thomas D. Rutledge, Esq.
Newton MA., 2-16-96

CR-124 Roger W.Titus, Esq.
Rockville Md.2-26-96

CR-125 Gerald Ward Tjoflat, Chief Circuit Judge
Eleventh Judicial Circuit
Jacksonville, FL, 2-22-96

CR-126 Richard G. Stearns Federal District Judge
District of Massachusetts
Boston MA, 2-21-96

CR-127 Terry C. Kern, Federal District Judge
Northern District of OK
Tulsa OK, 2-22-96

CR-128 Richard A. Rossman, Esq.
Chairman, State Bar of MI
Detroit MI, 2-15-96

CR-129 T.F. Gilroy Daly, Federal District Judge
District of Connecticut
Waterbury CT., 2-14-96

CR-130 Robert F. Wise Jr. Chair Federal Procedure Committee
Commercial and Federal Litigation section of NY State Bar
Albany NY., 2-28-96

CR-131 Harriet L. Turney, General Counsel
State Bar of Arizona
Phoenix AZ, 2-27-96

CR-132 A. Joe Fish, Federal District Judge
Northern District of Tx
Dallas Tx., 2-27-96

CR-133 Pamela Liapakis, President
Association of Trial Lawyers of America
Washington DC, 3-1-96

CR-134 Kent S. Hofmeister, Section Coordinator
Federal Bar Association
Dallas Tx., 2-29-96

CR-135 Donald R. Dunner, Esq. Chair
Section of Intellectual Property Law, ABA
Chicago IL., 3-01-96

CR-136 Harry D. Dixon Jr. U.S. Atty
Southern District of GA
Savannah GA., 2-28-96

CR-137 Barry F. Mc Neil, Chair Elect
Section of Litigation, ABA
Dallas TX, 3-05-96

CR-138 Frederick P. Stamp Jr. Chief Federal District Judge
Northern District of WV.
Wheeling WV, 3-05-96

CR-139 Peter Goldberger and William Genego, Co-Chairs
National Assn of Criminal Defense Lawyers
Committee on Rules of Procedure
Washington DC, 2-29-96

CR-140 Anthony C. Epstein, Esq. Co-Chair
Section on Courts, Lawyers and the Administration of Justice
of the District of Columbia Bar
Washington DC. 2-29-96

CR-141 David A. Schwartz, Esq. Executive Committee Mbr.
Criminal Law Section of State Bar of California
San Francisco CA, 2-29-96

CR-142 Joe Kendall, Federal District Judge
Northern District of TX
Dallas Tx., 2-29-96

CR-143 James M. Russ, Esq.
Orlando Florida, 2-23-96

CR-144 Nanci L. Clarence, Esq. Chair
Federal Practice Subcommittee
Litigation Section, State Bar of California
San Francisco CA, 2-28-96

III. LIST OF WITNESSES (HEARING IN OAKLAND CA. 12-15-95) RULE 24

1) Peter Hinton, Esq. Attorney

2) Michael R. Hogan, Chief Judge, Federal District of Oregon,

3) Dr. Judy Rothschild, Trial Consultant.

4) James Farragher Campbell, Esq. Criminal Defense Attorney
National Assn for Defense Attorneys

5) George J. Koelzer, Esq. Attorney,

6) Robert Aitken, Esq. Attorney

7) Elia Weinbach, Esq.

8) Charles Wesselberg, Esq. Law Professor of Trial Advocacy and Criminal Procedure.

IV. COMMENTS: RULE 24

Honorable Terrence W. Boyle (CR-1)
Federal District Judge
Eastern District of North Carolina
Elizabeth City N.C.
4-21-95

Judge Boyle is strongly opposed to attorney conducted voir dire and feels it will interfere with the fairness and efficiency of the current system, which, he feels results from judicial control.

Honorable Albert V.Bryan, Jr. (CR-2)
Federal District Judge
Eastern District of Virginia
Alexandria VA.
4-21-95

Judge Bryan is "vigorously opposed" to the proposed change to Rule 24. If a judge currently wants to allow attorney voir dire he may do so under the current rule. He feels the bar, with its ulterior motives is behind the proposed changes. In a separate letter to Judge Neimeyer, Judge Bryan states that the "timidity on the part of the judiciary has resulted in "playing Possum" in the face of the Speedy Trial Act, and the Sentencing Guidelines. He states that there is absolutely no question that an attorney could pose questions that could not be asked by the judge. He states that the time to conduct voir dire in his district usually takes between half an hour to an hour, as opposed to an average of over 1 hour.

Honorable J. Calvitt Clarke, Jr. (CR-3)
Federal District Judge
Eastern District of VA
Norfolk VA,
4-19-95

Judge Clarke,is "very strongly opposed" to changing Federal Rule 24 He feels it is the duty of the attorney to choose a biased jury. Initially, the rule may be limited in scope but is bound to be enlarged. Any limitation imposed by the judge will be grounds for appeal. He states that lawyers are increasingly being sued for malpractice which will result in lawyers feeling the need to "conduct extensive voir dire to protect themselves."

Honorable James C. Fox (CR-4)
Federal District Judge
Chief Judge Eastern District of North Carolina
Wilmington N.C.
5-2-95

Judge Fox is strongly opposed to the proposed change to rule 24. He feels that the language of the rule invites litigation and argument as to the time allowed for attorney voir dire. He believes that if attorneys are allowed more time, this will encourage them to "court" the jurors and intrude into jurors' personal lives. Judge

Fox feels that "pragmatic retreats from the judiciary's regulation of its own process have been the predicate for the erosion of the judiciary's separate but equal position."

Honorable Marvin J. Garbis, (CR-5)
Federal District Judge
District of Maryland
Baltimore MD.
5-2-95

Judge Garbis is "completely opposed" to attorneys being allowed to conduct voir dire. He opposes any change because attorneys will try to "educate" the jury as to their views and this will greatly increase the chance for a mistrial.

Honorable Elizabeth Hallanan (CR-6)
Federal District Judge
Southern District of West Virginia
Beckley City W.V.
5-26-95

Judge Hallanan is opposed to changes to Rule 24. She believes that the integrity of the jury system will become eroded and " we run the risk of creating an arena marked by confusion and noisy disorder if the voir dire process is handed over to the attorneys."

Honorable Clyde H. Hamilton, (CR-7)
Federal Circuit Judge
U.S. Court of Appeals Fourth Circuit
Columbia S.C.
4-24-95

Judge Hamilton is authorized to advise that with the exception of Neimeyer, every judge in active service and all senior circuit judges on the fourth circuit are strongly opposed to the proposed amendment to Rule 24. Judge Hamilton refers to the O.J. Simpson trial as an example of the circus like atmosphere which has detracted from the administration of justice and contributes to the lowering perception of the legal system in this country. He believes that this will only allow attorneys to grandstand, especially if cameras are allowed in the

courtroom. Judge Hamilton also states that if the judge tries to limit the voir dire examination by the attorney this will create another ground for appeal.

Honorable Walter E. Hoffman (CR-8)
Senior Federal District Judge
Eastern District of Virginia
Norfolk VA.
3-14-95

Judge Hoffman opposes the proposed amendment to Rule 24. He focuses on the term "allowed" in the draft and feels that this will take away the judge's discretion whether to allow attorney voir dire. He also states that allowing attorney voir dire result will "invigorate the emerging parasite industry of jury consultants whose sole purpose is to enable attorneys to select jurors who are biased in favor of their clients' cause." He includes a copy of a Wall Street article which gives examples of some of the invasive, personal questions that are recommended by jury consultants.

Honorable C. Weston Houck (CR-9)
Chief Judge, Federal District Judge
District of South Carolina
Florence S.C.
5-8-94

Judge Houck, advises that his court has carefully reviewed the proposed amendment, and is unanimously opposed to attorneys conducting voir dire, because it is "unnecessary, unduly time consuming, and difficult to control." Any attempt to control it will undoubtedly lead to increased appeals and he feels that many attorneys will press the issue in order to create error. This will ultimately lead to increased displeasure and resentment towards the court system.

Honorable Harry Hupp, (CR-10)
Federal District Judge
Central District of California
Los Angeles, CA
3-31-95

Judge Hupp is opposed to the proposed amendment, because attorneys will attempt to start selling their case during voir dire. He sends as proof of his

argument a copy of an article entitled *Effective Voir Dire* in which the author states that the primary purpose of voir dire is to: a) ascertain jury attitudes b) set the tone for the trial c) introduce concepts and evidence you will deploy during trial, d) obtain public commitments of fairness and open-mindedness, e) place the plaintiff, her witnesses and evidence in a favorable light,f) preview the arguments that will be used in trial g) refute opposition arguments, h) enhance your arguments I)get the jurors to recognize their purpose in the scheme of things.

Honorable Richard B.Kellam, (CR-11)
Senior Federal District Judge
Eastern District of Virginia
Norfolk VA.
4-20-95

Judge Kellam seconds Judge Calvitt Clarke's opinion, *supra*. He states that after 35 years on the bench and 25 years as an attorney, he fails to see any good reason for a change. He also seconds the opinions of Judge Doumar, *infra*, and Judge Bryan, *supra*.

Honorable John A. MacKenzie (CR-12)
Federal District Judge
Eastern District of Virginia
Norfolk VA
4-24-95

Judge MacKenzie believes that the attorneys' sole purpose is to select as biased a jury as "they can conjure up." He states that he has never had an objection raised as to the procure employed in over twenty-seven years.

Honorable Robert E. Maxwell (CR-13)
Federal District Judge
Northern District of West Virginia
Elkins W.V,
4-21-95

Judge Maxwell is opposed to the proposed amendment to Rule 24. He states that when attorneys have been allowed to conduct voir dire, the jurors expressed feelings of harassment, and implied attacks on their integrity and were offended. He also states that on occasion, a question asked by the judge is not

resented by jurors as it would be if asked by the attorney. He submits a copy of the proposed voir dire questions he will ask for a bank robbery case.

Honorable Robert R. Merhige, JR. (CR-14)
Senior Federal District Judge
Eastern District of Virginia
Richmond VA.
11-7-94

Judge Merhige, is opposed to the proposed amendment. He has also received a copy of Judge Bryan's letter and supports that point of view 100 per cent. He feels that attorney participation will place "an unnecessary and time consuming burden on the administration of justice."

Honorable James H. Michael, Jr. (CR-15)
Federal District Judge
Western District of Virginia
Charlottesville VA
5-2-95

Judge Michael is opposed to the proposed amendment. He states that he allows attorneys to submit proposed questions which most of the time are already on his list of questions to ask. He further states that he does have to "screen out" improper questions. He writes: "My confidence in the abilities of the bar is not misplaced, when I reflect on the arguments to be advanced from failure to abide by the rule to the more adventurous denial of due process." He believes the "... unintended consequences will be hard to control." Judge Michael also observes that history is replete with the doctrine of appeasement- give a little and hope they won't ask for more" however, this has never happened and never will.

Honorable William T. Moore, Jr. (CR-16)
Federal District Judge
Southern District of GA.
Savannah, GA
5-10-95

Judge Moore is a "new judge"as he has only been on the bench for six months. He states prior to his appointment, he maintained a very active federal

practice and did not have a problem with judges conducting voir dire. He too is opposed to the proposed amendment.

Honorable J.Frederick Motz (CR-17)
Federal District Judge
District of Maryland
Baltimore MD.
5-9-95

Judge Motz is opposed to the proposed change because: 1) it will lengthen the voir dire process and 2) it is essential that the judges have control of their court rooms from the very beginning of the trial. He states that the proposed amendment will place the power to control the proceedings in the wrong place. "The reason we can assure that the lawyers will act responsibly is that they know we are conferring upon them a privilege we will revoke as soon as it is abused. ...if we give up the power to control, we will abdicate our responsibility to the public to provide prompt and fair trials and to ensure that prospective jurors are treated with courtesy and respect."

Honorable John F. Nangle (CR-18)
Federal District Judge
Southern District of Georgia
Savannah GA
4-10-95

Judge Nangle opposes the proposed amendment to rule 24. He recommends that trial judges be permitted to settle down and attend to the handling of their dockets and refrain from the "unending barrage of interference with the operation of the trial court.

Honorable William M. Nickerson (CR-19)
Federal District Judge
District of Maryland
Baltimore Md.
4-25-95

Judge Nickerson, is opposed to the proposed amendment to Rule 24. He states that the proposed amendment will turn over control to the attorney, and will

severely limit and test the trial judge in regard to the conducting of voir dire in a neutral and fair manner." He too, feels that the change will result in an increase of appeals.

Honorable J. Clifford Wallace (CR-20)
Chief Circuit Judge
Ninth Circuit Court of Appeals
San Diego, CA
4-25-95

Judge Wallace writes on behalf of the Judicial Council of the Ninth Circuit to advise they are all opposed to the proposed amendments. He further states that at present judges can allow attorney participation in the voir dire process but sees no reason to require attorney participation in every case.

Honorable H.E. Widener, Jr. (CR-21)
Federal Circuit Judge
Fourth Circuit Court of Appeals
Abingdon VA.
4-19-95

Judge Widener, has conducted some "hurried research" and advises that the examination of prospective jurors on voir dire by the court or the attorneys has been permissive by rule since at least 1946 and by decision since 1925, possibly even earlier under *Pointer*, 151 U.S. 396 (1894). He suggests that any hue and cry over the issue is "put-on" rather than substance.

Honorable Joseph H. Young (CR-22)
Federal District Judge
District of Maryland
Baltimore MD.
4-24-95

Judge Young, states that he has heard that when attorneys conduct voir dire, the time is extended ten times. He states that attorneys feel they either win or lose their cases based on voir dire. He is opposed to the proposed amendment.

Honorable G. Ross Anderson, Jr. (CR-23)

Federal District Judge
District of South Carolina
Columbia SC
12-7-94

Judge Anderson, states that he tried attorney voir dire and it was a disaster. He advises that the clerks office now mails out the voir dire questions to prospective jurors and finds that jurors are more honest and that this process avoids embarrassing questions. Judge Anderson recounts an experience where the attorney conducting voir dire and a juror became engaged an a heated exchange so much so that Judge Anderson had to seriously consider disqualifying the entire panel. He states that judge-conducted voir dire will ensure a reasonably fair trial jury.

Honorable Joseph F. Anderson Jr. (CR-24)
Federal District Judge
District of South Carolina
Columbia, SC.
12-8-94

Judge J. Anderson states that in extremely complex litigation, he allows the attorneys to conduct voir dire, allowing twenty minutes per side. He is opposed to attorneys conducting the voir dire process. He states that he feels that the current practice which allows judges to use their discretion in allowing attorneys to conduct voir dire is the better practice.

Honorable Solomon Blatt, Jr. (CR-25)
Senior Federal District Judge
District of South Carolina
Charleston SC.
11-7-94

Judge Blatt is opposed to any changes in the current process and hopes it will continue as it has in the past.

Honorable Leonie M. Brinkema, (CR-26)
Federal District Judge
Eastern District of Virginia
Alexandria VA
12-6-94

Judge Brinkema is strongly opposed to the proposed amendment to Rule 24 that would allow attorneys to conduct voir dire. He is particularly opposed to the wording which *requires* attorneys to conduct voir dire. "The only trial participant who truly cares about an impartial, bias-free, and conscientious jury is the trial judge...." She states that if the Judicial Conference is concerned about the quality of voir dire, it should encourage judges to ask more questions. Judge Brinkema states that when the judge conducts voir dire it sets the tone for the trial from the outset and sets a clear message to everyone that the judge is in control of the trial, which enhances efficiency and courtesy throughout the trial.

Honorable W Earl Britt (CR-27)
Federal District Judge
Eastern District North Carolina
Raleigh NC.
12-7-94

Judge Britt is opposed to the proposed amendments to Rule 24, he states that attorneys are trying to select a partial jury, while judge are trying to select an impartial jury.

Honorable Frank W. Bullock Jr. (CR-28)
Chief Federal District Judge
Middle District of North Carolina
Greensboro NC
5-23-95

Judge Bullock is opposed to proposed changes to Rule 24. Speaking on behalf of the judges and magistrate judges of his district, Judge Bullock states that the proposed changes would be time consuming, attorneys would ask personal questions, and try to have jurors express an opinion on the ultimate issue in the case.

Honorable James C. Cacheris (CR-29)
Chief Federal District Judge
Eastern District of Virginia
Alexandria VA
10-19-94

Judge Cacheris, joins Judge Cal Clarks letter of October 14, 1994 and is also opposed to the proposed amendment to Rule 24. He states this will only lengthen the process and will not produce better jurors.

Honorable B. Waugh Crigler (CR-30)
Federal Magistrate Judge
Western District of Virginia
Charlottesville VA
10-26-94

Judge Crigler has sent a response based on responses from the Fourth Circuit voir dire. He has received a 75.3 percent response or 55 responses. He states that almost without exception all are opposed and he feels that the cry for change is coming from a vocal minority.

Honorable Robert G. Doumar (CR-31)
Federal District Judge
Eastern District of Virginia
Norfolk Va
10-31-94

Judge Doumar is opposed to the proposed amendments. He states that fearing that Congress will impose this change on the judiciary is not a good reason. He questions the constitutionality of such an act of Congress. He further states that this will extend the time necessary for voir dire and also is concerned about the questions that might be asked as a material invasion of the venirepersons privacy. His also points to the O.J. Simpson trial as an example of what might happen in Federal Court.

Honorable Franklin T. Dupree Jr. (CR-32)
Federal District Judge
Eastern District of North Carolina
Raleigh NC.
11-21-94

Judge Dupree states that when he was a litigator, he appreciated the opportunity to curry favor with the jury. However, as a federal judge, he appreciates the opportunity to ask the questions and impress on the jurors the importance of the role they are playing in the administration of justice and their obligations to fairness and impartiality. He states that he allows attorneys to

present questions to him for review and these questions are frequently so improper and prejudicial that they are rejected by the trial judge. If the improper question were to be asked, the opposing counsel can only object and be sustained. This would leave the judge with only an " ineffective curative instruction."

Honorable T. S. Ellis, III (CR-33)
Federal District Judge
Eastern District of Virginia
Alexandria VA
4-12-95

Judge Ellis is opposed to attorneys conducting voir dire. He states that he taught the principle of selecting a partial, not impartial jury at the National NITA course for several years. He emphasizes that this is a basic tenet of American Litigation Practice. Judge Ellis states that attorney conducted voir dire would be "... destructive of and repugnant of the fair and expeditious administration of justice."

Honorable David A Faber (CR-34)
Federal District Judge
Southern District of West Virginia
Bluefield WV.
12-8-94

Judge Faber is opposed to attorney conducted voir dire. He states that attorneys will use their participation in voir dire to argue the merits of their case rather than objectively pursue the proper purposes of voir dire. The end result will be an inability of judges to control the process.

Honorable Claude M. Hilton (CR-35)
Federal District Judge
Eastern District of Virginia
Alexandria VA
1-19-95

Judge Hilton is opposed to attorney conducted voir dire. He states that the best way to select an impartial jury is to let the judge conduct voir dire and incorporate proper voir dire questions from counsel.

Honorable Raymond A. Jackson (CR-36)
Federal District Judge
Eastern District of Virigina
Norfolk VA
12-14-94

Judge Jackson "strenuously objects" to the proposed amendment to Rule 24. He states that allowing attorneys to question jurors will only prolong the jury selection process, increase the cost of litigation, and eventually erode the public's confidence in the efficiency of the federal courts.

Honorable Frank A. Kaufman (CR-37)
Senior Federal District Judge
District of Maryland
Baltimore MD
(no date)

Judge Kaufman is opposed to attorney conducted voir dire. He states that too often counsel will try to "sway case rather than get a fair jury."

Honorable Benson E. Legg (CR-38)
Federal District Judge
District of Maryland
Baltimore MD
12-12-94

Judge Legg is opposed to the proposed amendment. In his court, he conducts the voir dire and if "counsel behaves responsibly" he will allow them to ask follow up questions. He will ask any reasonable questions suggested by counsel.

Honorable Peter J. Messitte (CR-39)
Federal District Judge
District of Maryland
Greenbelt MD
12-13-94

Judge Messitte is opposed to attorneys conducting voir dire. He states that it would yield little benefit and lead to jurors becoming inclined towards or against one point of view.

Honorable Henry Coke Morgan, Jr. (CR-40)
Federal District Judge
Eastern District of Virginia
Norfolk VA
1-12-95

Judge Morgan, has reviewed other judges' opinions and feels Judge Brinkema's opinion, (CR-26, *supra*) best expresses his views. He believes that the discretion to conduct voir dire should continue with the Judge. Judge Morgan "vigorously objects" to attorneys being allowed to conduct voir dire.

Honorable Graham C. Mullen (CR-41)
Federal District Judge
Western District of North Carolina
Charlotte NC.
12-7-94

Judge Mullen is in favor of attorneys participating in voir dire. He states that when attorneys feel they are being treated fairly this is communicated to the clients, and acceptance of the system is increased. No loss of control occurs; imposition of time limits and using a jury questionnaire insures a focused voir dire.

Honorable Paul V. Niemeyer (CR-42)
Federal Circuit Judge
Fourth Circuit Court of Appeals
Baltimore MD.
10-28-94

Judge Niemeyer, is in favor of attorney conducted voir dire. He states that in other parts of the country it is allowed and attorneys consider it an important right in prosecuting a case. He feels confident that if the Rules Committee did not act, then Congress would. He notes that a modest change in allowing attorneys to ask follow up questions, while still under judicial control is good. He also supplies data that shows attorney conducted voir dire does not take an appreciable amount of time longer than when the judge conducts voir dire himself.

Honorable David C. Norton (CR-43)
Federal District Judge

District of South Carolina
Charleston SC
12-8-94

Judge Norton is opposed to attorney conducted voir dire. He states that the purpose of voir dire is to provide attorneys enough information to intelligently utilize their strikes. He states the time for proving a case is after the jury is sworn in. He too refers to the O.J. Simpson case as an example of how it might become in the federal system if attorney conducted voir dire were allowed.

Honorable Robert E. Payne (CR-44)
Federal District Judge
Eastern District of Virginia
Richmond VA
11-8-94

Judge Payne is opposed to the proposed amendment. He states three reasons which he feels are the motivating factors behind the "putative" amendment: a) a perceived need to get more information from minorities and women so that the attorney wishing to strike them can better articulate his reasons. b) Attorneys will use the voir dire process to ingratiate themselves to the jury and try to bias them in their favor which has spawned the rise of the jury consultant. Judge Payne then goes through the process used by the jury consultant. c) He believes that this process is demeaning to the courts d) The true purpose of voir dire is subverted by attorneys questions to jurors. e) It is time for the Judiciary to take control of its own business. He states that allowing attorneys to conduct voir dire undercuts the real purpose of the trial. f) there is no federal statutory, Constitutional, or common law right for attorneys to conduct voir dire. g) He takes issue with the sample survey submitted by Judge Niemeyer showing the time taken by allowing attorneys to conduct voir dire. He points out that of the 150 responses, only 125 actually responded, out of six hundred judges. He argues that this is too small a sampling from which to draw a conclusion, nor does it include the appeals process which he feels is sure to follow.

Honorable Frederic N. Smalkin (CR-45)
Federal District Judge
District of Maryland
Baltimore MD
12-8-94

Judge Smalkin is opposed to attorney conducted voir dire. He feels that it will unnecessarily extend the trial, and that attorneys will "scatter the seeds to be harvested during deliberations."

Honorable Rebecca Beach Smith (CR-46)
Federal District Judge
Eastern District of Virginia
Norfolk
12-8-94

Judge Smith is opposed to attorney conducted voir dire. She concurs with the views of Judges Doumar, Payne and Brinkema, *supra*.

Honorable James R. Spencer (CR-47)
Federal District Judge
Eastern District of Virginia
Richmond
12-5-94

Judge Spencer is opposed to attorney conducted voir dire which he views as a complete waste of time.

Honorable William B. Traxler Jr. (CR-48)
Federal District Judge
District of South Carolina
Greenville SC.
12-12-94

Judge Traxler is opposed to attorney conducted voir dire. He states that he normally takes approximately fifteen minutes per case. He believes that the questions he asks provide the attorneys with more than enough information to intelligently select their juries.

Honorable Hiram H. Ward (CR-49)
Senior Federal District Judge
Middle District North Carolina
Winston-Salem NC
12-8-94

Judge Ward is strongly opposed to the proposed amendment. His concerns are waste of time and attorneys misusing voir dire.

Honorable Richard L. Williams (CR-50)
Senior Federal District Judge
Eastern District of Virginia
Richmond VA
12-7-94

Judge Williams is opposed to attorney conducted voir dire. He states that if each side selected six favorable people the result would be a hung jury.

Honorable Henry M. Herlong (CR-51a)
Federal District Judge
District of South Carolina
Greenville SC.
12-8-94

Judge Herlong is opposed to attorney conducted voir dire as he feels that this will take too long.

Honorable _____ (CR-51b)
Fourth Circuit
12-13-94

This judge feels it would lead to a waste of time and money to allow attorneys to conduct voir dire.

Honorable H. Brent McKnight (CR-51c)
Federal District Judge
Western District North Carolina
Charlotte NC
12-8-94

Judge McKnight is opposed to the attorney conducted voir dire. He believes that he is efficient and fair and that allowing counsel to question the jurors would lead to delay. He feels it is important for judges to establish control in their courtrooms from the beginning and feels that it would be unwise to divest judges of that control.

Honorable Robert A. M--- Jr. (CR-51d)
Federal District Judge
in the Fourth Circuit
12-2-94

Judge M--- is opposed to attorney conducted voir dire. He can think of no way to prevent subjecting jurors to embarrassing questions. He feels it would extend the time unreasonably. He too is concerned about attorney behavior with the jury. Judge M--- handled a case in South Dakota where the defense counsel handed him a list of 800 questions, he subsequently reduced the list of questions to fifteen.

Honorable --- (appears to be Judge Hallanan)(CR-51e)
Beckley WV
1/23/95

This Judge is opposed to attorney conducted voir dire and is opposed to turning the process over to attorneys for fear that it will erode the integrity of the jury system and the risk creating an arena marked by confusion and noisy disorder.

Honorable ----- (CR-51f)
in the Fourth Circuit
12-12-94

This Judge is opposed to attorney conducted voir dire as this will allow the attorneys the opportunity to posture. He states that any questions can be raised by submission of the proposed questions.

Honorable -----(CR-51g)
for the Fourth Circuit
2-10-95

This Judge allows attorneys to conduct voir dire and admonishes them not to waste time or attempt to curry favor with the jury. He states that he has rarely had to call them down for abuse of this process and is in favor of the proposal because he believes that attorneys are in the best position to elicit information from jurors and to be able to ask follow up questions. He states that he has allowed this

practice for the past six and one half years and has not seen any excess of time being taken by attorneys conducting voir dire, except in rare instances.

Honorable ____ (CR-51h)
for the Fourth Circuit
12-7-94

This judge is opposed to attorney conducted voir dire. He states that the judge is the only participant interested in an impartial jury.

Honorable ---- (CR-51i)
for the Fourth Circuit
12-22-94

This judge is opposed to attorney conducted voir dire. He states that currently the court has discretion in the matter. To do otherwise would force the judge to allow attorney conducted voir dire and turn control over to the lawyers and divest the court of that control. " It would become an additional advocacy hearing instead of a search for an unbiased jury."

Honorable -----(CR-51j)
for the Fourth Circuit
no date

This judge is opposed to attorney conducted voir dire. "It is time consuming, creates errors for appeal, headaches for trial judges and exposes jurors to a level of personal contact with attorneys that is undesirable."

Honorable -----(CR-51k)
for the Fourth Circuit
12-15-94

This judge opposes attorney conducted voir dire. He feels it would significantly delay the process of juror selection without a significant corresponding benefit to counsel or litigants.

Honorable ------ CR-51l)
for the Fourth Circuit
12-13-94

This judge approves of attorney conducted voir dire,"... so long as it is tightly controlled. He further states it would be an enormous mistake to do anything but leave it to the judges discretion because it has become a tool to circumvent justice."

Honorable ------(CR-51m)
for the Fourth Circuit
12-13-94

This judge is "strongly opposed" to attorney conducted voir dire. He states that the motivation of attorneys differs from that of the judge in conducting voir dire. Lawyers intentionally, or unwittingly as the case may be, are liable to elicit answers that may pollute the entire panel at considerable expense to the court. Lawyers that have been allowed to conduct voir dire have proven to be inefficient and take more time than necessary.

Honorable ----- (CR-51n)
for the Fourth Circuit
12-13-94

This judge is opposed to attorney conducted voir dire and states that too much confusion, delay, redundancy and inefficiency would flow from permitting counsel to question the panel.

Honorable -----(CR-51o)
for the Fourth Circuit
12-12-94

This judge advises he could go either way, but if required to vote he would be opposed to the proposed amendment; he states that in his experience he finds that judges are more efficient in the selection of the jury. He feels strongly that the various courts should remain free to make their own policy for the method of selection.

Honorable ----- (CR-51p)
for the Fourth Circuit
12-12-94

This judge is definitely opposed to attorney conducted voir dire. He states that a fair and balanced voir dire requires that the Judge conduct the voir dire. He adds that counsel can be expected to attempt to use voir dire to argue and influence jurors at the outset of the trial- and this is not the purpose of voir dire.

Honorable ------ (CR-51q)
for the Fourth Circuit
12-9-94

This judge feels it is desirable to allow attorneys to conduct voir dire. He states that this method gives the court and the attorneys a better sense of a jurors stance on controversial issues and possibly aids in eliminating some appeal problems.

Honorable ------(CR-51r)
for the Fourth Circuit
no date

This judge is opposed to allowing counsel question potential jurors during voir dire. He believes that attorneys will try to build rapport with jurors, non-relevant questions would be asked as well as questions prying into the jurors' individual affairs would be most intrusive, and finally he believes that the time required for the selection of juries would triple or quadruple in almost every case.

Honorable -----(CR-51s)
for the Fourth Circuit
12-22-94

(Appears to be a copy of CR-51i) This judge is opposed to attorney conducted voir dire and feels that by allowing the lawyers to conduct voir dire is to turn control over to the lawyers and divest the court of its control. It would become an additional advocacy hearing instead of a search for an impartial jury.

Honorable ------ (CR-51t)
for the Fourth Circuit
12-13-94

(Appears to be a copy of Cr-51l) This judge approves the proposed amendment if it is tightly controlled. It would be an enormous mistake to do

anything but leave it to the judges discretion because it has become a tool to circumvent justice.

Honorable ----- (CR-51u)
for the Fourth Circuit
12-13-94

(Appears to be a copy of CR-51M)

Honorable ----- (CR-51v)
for the Fourth Circuit
12-13-94

(Appears to be copy of CR-51n) This judge opposes attorney conducted voir dire. He states too much confusion, delay, redundancy, and inefficiency would flow from permitting counsel to question the potential jurors.

Honorable-----(CR-51w)
for the Fourth Circuit
12-12-94

(Appears to be a copy of CR-51o)

Honorable ------(CR51x)
for the Fourth Circuit
no date

(Appears to be a copy of CR-51r)

Honorable Anthony A. Alaimo (CR-52)
Federal District Judge
Southern District of GA
Brunswick GA
5-16-95

Judge Alaimo concurs with the opinions expressed by Judge Nangle (CR-18) and feels that judges should be left alone without interference.

Honorable Lawrence L. Piersol (CR-53)
Federal District Judge
District of South Dakota
Sioux Falls, SD
5-16-95

Judge Piersol approves of attorney conducted voir dire and is "sometimes pleasantly surprised with approaches that are better than mine." He believes that when attorneys conduct voir dire, it leaves the judge in a better position to review *Batson* challenges. Judge Piersol offers as an example of a Native American juror who was challenged because it did not appear that the individual was paying attention. However, Judge Piersol points out that it is customary for the Native American to refrain from looking directly at the person who is speaking to them. He offers this as an example of why it is important to encourage full participation by trial lawyers in the jury selection process. He further states that the wording of the proposed amendment will result in discouraging counsel from participating in voir dire examinations.

Honorable David Warner Hagen (CR-54)
Federal District Judge
District of Nevada
Reno NV
5-26-95

Judge Hagen states that the proposed amendment would spawn time loss, issue confusion, question-objection-ruling rounds, and error. "Without a fair and impartial jury, justice is never served." He states that as an attorney, it was his duty to use voir dire to obtain jurors as favorable to his case as possible conditioning them all the while. "But this serves justice only if one accepts the "justice born-in-a- crucible" metaphor taken to the extreme and I do not." He states that the new rule will allow improper questions - the advocates other "proper" questions have been anticipated by the present rule.

Honorable Michael A. Ponsor (CR-55)
Federal District Judge
District of Massachusetts
Springfield MA
5-25-95

Judge Ponsor is strongly opposed to attorney conducted voir dire; he does not understand the mistrust of the discretion of trial judges. He knows of no well founded data that suggests that the current system results in any substantial unfairness. He feels that the new proposals would complicate the process of jury selection ... "encourage manipulative tactics by counsel, and generate endless appeals unrelated to the merits of the cases." " More ominously, this cookie-cutter approach requires an unnecessarily extreme uniformity that ignores the unique legal cultures of the various districts and the practices of the various judges."

Honorable Joanna Seybert (CR-56)
Federal District Judge
Eastern District of New York
Uniondale NY
6-19-95

Judge Seybert concurs with the views expressed by Judges: Arthur D. Spatt, Thomas C. Platt, and Jacob Mishler. She too is opposed to the proposed changes in the federal rules requiring judges to permit attorney voir dire. She believes that the current process is the fairer method as it allows the judges to ask the questions and the attorneys to view and carefully assess the jurors' demeanor and responses. "Trials should be a search for truth and justice and not a form of contest for king and queen of the prom." Judge Seybert questions if anyone has asked what prospective jurors would want. " Has any query been made with respect to what the jurors preference would be?" Judge Seybert also feels that mandatory procedures often result in expansion of senseless appeals. She feels that the "focus should be on training judges on how proper, meaningful voir dire should be conducted rather than abrogating responsibility to trial counsel."

Honorable Arthur D. Spatt (CR-57)
Federal District Judge
Eastern District of New York
Uniondale NY
6-21-95

Judge Spatt is opposed to the proposed amendment and states that all the judges (with one abstention) of the Eastern district of New York, were also opposed to the proposed amendment. They all believe that the current voir dire procedure should be continued and the proposed amendments should be withdrawn. In his previous letter dated June 15, 1995, he states three reasons why he is opposed to the proposed amendment: 1)The changes are unnecessary, 2) The

sole purpose of the judge is to select an impartial jury and 3) The current system has worked well.

Honorable Thomas C. Platt (CR-58)
Federal District Judge
Eastern District of New York
Uniondale NY
6-16-95

Judge Platt is opposed to the proposed amendments. He states that the idea that judges who conduct voir dire did not have previous experience when they do it in their courtrooms is wrong.

Honorable Jacob Mishler (CR-59)
Federal District Judge
Eastern District of New York
Uniondale Ny
06-15-95

Judge Mishler opposed the proposed amendments. He feels the current rule is adequate and points out that any attempt to limit the attorneys in time, manner and subject matter will be fruitless.

Honorable Judith N. Keep (CR-60)
Chief Federal District Judge
Southern District of California
San Diego CA
06-27-95

Judge Keep as Chief Judge, writes on behalf of their District and expresses unanimous opposition to the proposed amendments. They feel that the current rules are adequate and any proposed changes should not be made.

Honorable Bill Wilson (CR-61)
Federal District Judge
Eastern District of Arkansas
Little Rock AR
07-26-95

Judge Wilson, writes a supplemental letter to a previous letter dated July 13, 1995. Judge Wilson favors attorney conducted voir dire and states it will not take longer time, the participants feel part of the process and it will lead to an impartial jury being seated. He fears the voir dire process being squeezed into a cost accounting approach rather than serving justice.

CR-62- none found

Honorable Edward Rafeedie (CR-63)
Federal District Judge
Central District of California
Los Angeles
9-6-95

Judge Rafeedie is apparently not in favor of Rule 24 due to his submission of an example of voir dire: " Do you have any opinion, one way or another, whether it is appropriate for a man to call a woman, whom he has never met before and begin discussion the size of his genitalia to that woman and, if so, what is your opinion.?"

Honorable Prentice H. Marshall (CR-64)
Federal District Judge
Northern District of IL
Chicago IL
10-26-95

Judge Marshall is in favor of Rule 24 amendment allowing attorneys to participate in voir dire. He admonishes the attorneys not to try the case during voir dire, and limits questions to relevant areas. He believes that the parties and counsel have "greater confidence in the jury system when allowed to participate in it."

Charles W. Daniels Esq. (CR-65)
Private Practice/ Law Professor
Albuquerque NM,
11-3-95

Mr Daniels is in favor of the proposed amendments to Criminal Rule 24 because the changes is "more soundly based on trial reality." He gives an example

where a judge did not allow attorney voir dire and they discovered they had seated a mentally ill, probably incompetent juror. He feels that attorneys who have been preparing for months are more sensitive to the subtle issues inherent in the case.

Honorable Wayne R. Anderson (CR-66)
Federal District Judge
Northern District of IL.
Chicago IL
11-1-95

Judge Anderson is strongly opposed to the amendment to Rule 24 and believes that the change would not allow him the power to manage his docket and "do justice on a case by case basis." He does invariably permit attorney voir dire but does so under strict guidelines.

Honorable Robert Holmes Bell (CR-67)
Federal District Judge
Western District of Michigan
Grand Rapids MI
10-31-95

Judge Bell is opposed to the proposed amendment of Rule 24, because he believes that this is not part of the attorneys job but rather belongs to the judge to seat an impartial jury. He observes that the language used in the rule "contains language fraught with appellate review complexity, i.e., "reasonable time limits and subject matter determined by the judges discretion." Judge Bell does not feel that the amendment is a step towards a just fair trial.

Honorable Martin L.C. Feldman (CR-68)
Federal District Judge
Eastern District of Louisiana
11-29-95

Judge Feldman focuses on the wording used in the Note accompanying Rule 24 "that the parties have a presumptive right to participate in the oral questioning of prospective jurors to supplement the court's examination under reasonable limits on time, manner and subject matter." He points out that this phrase is not part of the civil law counter part. He notes that the wording of the test itself is functionally the same, but feels that the Criminal Rule note should not

contain any language about "presumptive right" lest the Notes become the the subject of abuse and needless litigation.

Honorable Robert B. Probst (CR-69)
Federal District Judge
Norther District of Al
Birmingham Al
10-31-95

Judge Probst opposes the proposed amendment to rule 24 because the current situation allows the judge to avoid the improper uses which many lawyers make of voir dire examinations that are recommended as part of trial strategy. He suggests that if a change is to be made it should be restricted to follow up questions to individual jurors when questions by the judge in the courtroom have elicited questionable responses.

Robert Fogelnest, President (CR-70)
National Association of Criminal Defense Lawyers
Washington DC
11-16-95

(Mr. Fogelnest, writes to request permission to testify at the public hearings to be held in Oakland, CA; New Orleans,LA; New York, NY; and in Denver CO.)

Honorable Harry Hupp (CR-71)
Federal District Judge
Central District of California
Los Angeles CA
11-08-95

Judge Hupp (Also CR-10), writes to supplement his previous letter of 3/1/95 He opposes the proposed amendment. He states that purpose of voir dire is principly to expose any cause for excusing jurors and to give lawyers enough information to intelligently exercise peremptory challenges. He cites references to several books by attorneys on how to win in voir dire, quoting relevant passages. He states that he conducts the voir dire and allows attorneys to suggest follow up questions, which are rare since he is very thorough when he conducts voir dire.

Honorable John W. Bissell (CR-72)
Federal District Judge
District of New Jersey
Newark NJ
11-8-95

Judge Bissell opposes the amendment to Rule 24 and favors the retention of the current system. He believes that is a rare situation that would require the attorney to conduct voir dire; his process is to accept written questions from both sides and compose the questions himself. During voir dire, he will then periodically call counsel to sidebar to ask if they have any objections to the voir dire as conducted or requests to supplement which are usually granted and promptly put to the jurors. He also feels that it will take more time, it will not be as effective in exposing jurors bias.

Honorable Richard L. Williams (CR-73)
Federal District Judge
Eastern District of VA
Richmond VA
11-7-95

Judge Williams is opposed to the proposed amendment. "If it ain't broke, don't fix it." He feels that voir dire conducted by attorneys is open to abuse, as attorneys would be tempted to curry favor with the jury, or to ask questions which influence the panel in favor of their client before commencement of the trial.

J. Houston Gordon, Esq. (CR-74)
Covintgon TN
11-6-95

Mr. Gordon strongly supports the proposed amendment. He believes that the trial judge intimidates the jurors with questions and instructions causing potential jurors to be reluctant to answer verbally and honestly. He feels the change is overdue.

Honorable Thomas C. Platt (CR-75)
Federal District Judge
Eastern District of New York
Uniondale NY
11-3-95

Judge Platt (Also CR-58) again writes to voice his strong opposition to the proposed amendments. He feels that the judges should have to option to permit attorney voir dire and not be forced to do so and states that most attorneys are so ingrained with the practice of asking loaded questions they are incapable of doing otherwise. He states that the New York state courts are moving towards following the practice in Federal courts because of the disastrous results in allowing attorney conducted voir dire.

Honorable Arthur D. Spatt (CR-76)
Federal District Judge
Eastern District of NY
Uniondale NY
11-13-95

Judge Spatt has sent two letters,(CR-57) one on behalf of himself and the other on behalf of all the District Judges of the Eastern District of New York (with one abstention). They are all opposed to the proposed amendment and feel that it should be withdrawn. He gives three basic reasons for his opposition: 1) the changes are unnecessary as questions are submitted by counsel to the judge who then phrases them in a neutral manner. 2) the sole object of the trial judge is to select a fair and impartial jury, while attorneys try to select a jury that favors their client. 3) the present system has worked well- why change a fair, expeditious and workable system.

Alex Stephen Keller Esq (CR-77)
Denver Co
11-13-95

Mr. Keller favors the proposed amendments because he feels that the attorneys know more about the case than the judge which results in better voir dire questions.

CR - 78 none

CR- 79 none

Honorable Jackson l. Kiser (CR-80)

Chief Federal District Judge
Western District of Virginia
Danville VA
11-14-95

Judge Kiser opposes the proposed amendment to Rule 24 and believes that it would be a mistake to mandate that the court permits the litigants to conduct oral voir dire of prospective jurors. His concern is primarily the pro se litigants who do not know the boundaries .

Honorable Judith N. Keep (CR-81)
Chief Federal District Judge
Southern District of California
San Diego CA
11-13-95

Judge Keep again writes (see CR-60) on behalf of the District Judges for the Southern District of California and states that are unanimously opposed to the proposed amendments. The Judge feels that it will become a "snake pit" in its application. An error in defining reasonable limits of time, manner and subject matter will logically result in reversible error. The proposed rule will take away judicial control and lead attorneys to "push the envelope" in exercising their voir dire obligations out of malpractice concerns.

Peter J. Hughes Esq. (CR-82)
Private Practice
San Diego CA
11-22-95

Mr. Hughes favors the proposed amendments because he feels that judges are in a hurry to empanel a jury. He also states that in some cases when the judge has allowed both sides to conduct voir dire with time limitations is highly productive. Questions by the judge "simply don't produce the same responses as a colloquy with counsel."

Honorable A. Andrew Hauk (CR-83)
Senior Federal District Judge
and Chief Judge Emeritus
Central District of California
Los Angeles California

11-9-95

Judge Hauk is opposed to the proposed amendments. He feels that the judge should stay in control of the entire case and particularly the voir dire examination of jurors. He states that attorneys use voir dire to "make a pitch" to the jury, this practice became abusive which is why judges conduct voir dire now. He suggests that a compromise be proposed which would allow the attorneys to conduct voir dire but always subject to the control of the court. Judges would scrutinize the questions and stop counsel if the questions exceed proper bounds.

Ira B. Grudberg (CR-84)
Private Practice
New Haven Ct.
11-30-95

Mr. Grudberg states that he has been a practicing attorney for thirty-five years and feels that voir dire solely conducted by the Bench in the presence of all veneer persons is seriously deficient. He states that a little extra time would greatly enhance the ability to get an impartial jurors.

Honorable Philip M. Pro (CR-85)
Federal District Judge
District of Nevada
Las Vegas NV
12-12-95

Judge Pro is opposed to the proposed amendments. He states that he accepts proposed questions from both sides and formulates the questions based on the questions provided. Follow up questions are generally conducted at side bar out of the presence of the other prospective jurors. He feels that the mandatory language of the proposed amendment simply goes too far.

Honorable Robert B. Propst (CR-86)
Federal District Judge
Northern District of Alabama
Birmingham AL
12-21-95

Judge Probst is supplementing his previous letter (CR-69). He suggests that instead of giving attorneys more opportunities to manipulate the system that

the committee instead do away with peremptory strikes. He states that it is usually those best qualified to serve as jurors that are struck first. He feels that attorneys do not want a well qualified jury who understands the issues.

Honorable John W. Sedwick (CR-87)
Federal District Judge
District of Alaska
Anchorage AK
12-21-95

Judge Sedwick is strongly opposed to the proposed amendment. He believes that voir dire should not be given the right to conduct voir dire in Federal Courts. He states that the "modern lawyers" approach is to time consuming and expensive for all concerned. He feels the current trend is demeaning to our entire system of justice because lawyers try to select a jury that is predisposed to a particular outcome. He also states that attorney conducted voir dire is invasive of jurors privacy which is wholly unnecessary. Judge Sedwick suggests that if attorneys feel that judges are not conducting voir dire properly then education of the judge, as well as peer pressure and admonishment by the chief judge would alleviate the alleged problem. "The rule need not and should not, be changed."

Clifford A. Rieders Esq. (CR-88)
Private Practice
Williamsport PA
12-14-95

Mr. Rieders is in favor of the proposed amendments to Rule 24. He feels the wording of the rule should be modified to require judges to allow attorney conducted voir dire rather than the use of the word "may."

CR-89-- None

Honorable Fred Van Sickle (CR-90)
Federal District Judge
Eastern District of Washington
Spokane WA
12-7-95

Judge Van Sickle is opposed to the proposed amendments. He states that in contrast to what was suggested, that jurors are more willing to answer the judges questions than they are the questions posed by counsel. He calls a sidebar and allows jurors to candidly respond to sensitive questions. He feels that if judges are required to allow attorney conducted voir dire it will result in "far more difficulty" than if this is a discretionary practice.

William F. Dow III (CR-91)
Private Practice
New Haven CT
12-4-95

Mr. Dow is in favor of the proposed amendments. He has extensive experience in both civil and criminal areas of practice. His recent experience which allowed him to participate in voir dire left an impression which he found to be " edifying, intelligent, and consistent with the desire to obtain selection of a fair jury."

Honorable William O. Bertlesman (CR-92)
Chief Federal District Judge
Eastern District of Kentucky
Covington KY
12-8-95

Judge Bertlesman is strongly opposed to the proposed amendment. He states his concern that this practice will result in extensive argument and many additional appeals. He proffers a comment that compared the attorneys role with that of Phil Donahue in "getting a conversation going" with the jury panel. He strongly feels that this sort of tactic violates the jurors privacy.

Honorable Lewis A. Kaplan (CR-93)
Federal District Judge
Southern District of New York
New York, New York
12-6-95

Judge Kaplan feels that the proposed amendment would be a mistake. He addresses the concerns in which attorneys feel that they know the case better than the judge. He allows both sides to submit questions, and then allows counsel to suggests additional questions needed for followup. He quotes Professor Richard

Uviller of Columbia Law School "if the judge does his or her job thoroughly, there is really nothing left for the lawyers to do except brainwash the prospective jury."

Honorable Peter C. Dorsey (CR-94)
Chief Federal District Judge
District of Connecticut
New Haven Ct
12-5-95

Judge Dorsey is opposed to the proposed amendment. He feels that by allowing counsel to control the voir dire process, the result will be a protracted process beyond what is necessary to protect the litigants rights.

Honorable J. Frederick Motz (CR-95)
Federal District Judge
District of Maryland
Baltimore MD.
11-30-95

Judge Motz is opposed to the proposed amendment. This was the initial correspondence received and supplemented by (CR-17). He advises that giving attorneys the opportunity to conduct voir dire will lengthen the process. He strongly feels that judges should remain in control of their courtrooms. Although he understands that the proposed rule would allow the judges to stop improper questioning, the initial power to control would belong to the attorneys and not the judge. He states that his assurance of proper attorney conduct is that " they know it is a privilege conferred on them" and would be revoked as soon as it is abused.

Honorable Joanna Seybert (CR-96)
Federal District Judge
Eastern District of New York
Uniondale NY
6-19-95

Judge Seybert is opposed to the proposed changes. (Duplicate of CR-56) She feels that the current method is more fair, that jurors consider questions posed by the judge more seriously than those asked by counsel. Trials should be a search for the truth and not a popularity contest. She feels that most jurors are nervous and embarrassed and don't want to reveal inner thoughts to people they may have to serve with. Judge Seybert feels the proposed amendment would result in

unnecessary appeals and that voir dire should remain with the judge rather than abrogating responsibility to trial counsel.

Honorable Samuel Kent (CR-97)
Federal District Judge
Southern District of TX
Galveston Tx
1-17-96

Judge Kent is opposed to attorney conducted voir dire. He is particularly sensitive when the litigant is appearing pro se. He advises that on at least two occasions, the questions asked by the pro se litigants were inane and abusive and would have resulted in the harassment of the jury panel. He is equally concerned about unstable or highly vindictive pro se litigants in civil actions. He states his concern over what he perceives to be the deterioration of advocacy skills as demonstrated by the BAR. He states that many attorneys come into federal court from the state court systems which allow intrusive and abusive voir dire processes. He feels that by mandating that counsel conduct voir dire will result in a waste of valuable court time and will be counter productive.

Honorable Prentice H. Marshall (CR-98)
Federal District Judge
Northern District of IL
Chicago Il
1-12-96

Judge Marshall is supplementing his previous correspondence (CR-64). He wholeheartedly approves an amendment which would require the trial court to permit the parties to orally examine prospective jurors.

Honorable Donald Alsop (CR-99)
Senior Federal District Judge
District of Minnesota
St. Paul MN
12-29-95

Judge Alsop is opposed to the proposed amendment of Rule 24. He provides a portion of an article which states " voir dire provides a unique opportunity to educate your jury on your case." He feels that this conflicts with "an appearance and reassurance of fairness that has value in itself."

Professor Bruce C. French (CR-100)
Professor of Law
Ohio Northern University
Ada OH
1-16-96

Professor French approves of the proposed amendments especially in light of recent Supreme Court rulings relating to gender and racial bias.

Honorable Lucius Bunton (CR-101)
Senior Federal District Judge
Western District of Tx
Midland Tx
1-25-96

Judge Bunton has conducted a survey of judges in the Western District and concludes that all are opposed to the proposed amendment. He states that all feel that judges should not be mandated to allow attorneys to conduct voir dire. He states that if judges now want to allow attorney voir dire they can do so.

Daniel A. Ruley Esq. (CR-102)
Private Practice
Parkersburg WV
1-11-96

Mr. Ruley endorses the proposed amendment to Rule 24. He feels that judge conducted voir dire is unsatisfactory because: a) the judge does not anticipate follow up questions and b) although a followup question can be suggested to the judge the huddle of counsel,judge and court reporter is a poor practice.

Daniel E. Monnant Esq. (CR-103)
Private Practice
Wichita KS
1-22-96

Mr. Monnant writes on behalf of the Kansas Association of Criminal Defense lawyers and wholeheartedly supports the proposed amendment. He states that although the rule currently allows attorney conducted voir dire it is not

always permitted by the judge. He feels that this is especially important in criminal defense cases where the defendant has a constitutional right to an impartial jury. He feels that only after an active "give and take between counsel and the prospective jurors can counsel exercise challenges for cause and peremptory strikes in an intelligent and effective manner consistent with trial strategy."

Honorable Jerry Buchmeyer (CR-104)
Chief Federal District Judge
Northern District of Texas
Dallas TX
1-23-96

Judge Buchmeyer is opposed to the proposed amendment to Rule 24. He states that he does not allow attorney conducted voir dire in multiple defendant criminal cases and he does not permit attorney conducted voir dire to attorneys who have abused panel members in the past.

Honorable Samuel R. Cummings (CR-105)
Federal District Judge
Northern District of TX
Lubbock Tx
1-22-96

Judge Cummings is opposed to the proposed amendment.

Honorable Carole E. Heckman (CR-106)
United States Magistrate Judge
Federal Magistrate Judges Association
Buffalo NY
2-1-96

Judge Heckman is writing on behalf of the Federal Magistrate Judges Association. She states that they are opposed to the proposed changes because the new rule creates an entitlement to direct participation in jury voir dire by the parties or their counsel. Judge Heckman cites to the "Survey Concerning Voir Dire" conducted by John Shapard and Molly Johnson which states that approximately 60 percent of judges already permit counsel to participate in Voir Dire. Judge Heckman also feels that there is no need for uniformity regarding Voir Dire. She also points out the increasing number of litigants who chose to

represent themselves and who would not be able to conduct an appropriate voir dire. Such a pro se litigant opposing a represented opponent would be disadvantaged.

Honorable W. Earl Britt (CR-107)
Federal District Judge
Eastern District of North Carolina
Raleigh N.C.
1-30-96

Judge Britt again voices his concern (*see* CR-27) and is still opposed to the proposed amendment to Rule 24. His primary concern is that attorney conducted voir dire does not promote the selection of an impartial jury." The adversary process should not and need not begin until after the (hopefully) impartial jury is empaneled. Judge-conducted voir dire assures impartiality in the selection process, saves time, and is fair to both sides. (Judge Britt sends a resolution adopted by the Federal Judges Association opposing the proposed amendment).

CR-108 - None

Honorable Thomas P. Griesa (CR-109)
Chief Federal District Judge
Southern District of New York
New York, NY
2-1-96

Judge Griesa writes on behalf of all the judges of the Southern District of New York, who are opposed to the proposed amendment. Their chief concerns are that attorneys given the leeway allowed in state court would abuse the system as they do in state courts. "Recent years have seen an increase in the number of lawyers whose conduct lies regularly at the outer edge of propriety, both inside and outside the courtroom, and of highly publicized cases, both civil and criminal, that attract such lawyers." Judge Griesa believes that allowing attorney conducted voir dire would undermine the trial judges ability to control the courtroom and undermine the jurors' regard for that authority at the outset of the case.

Paul W. Mollica, Chairman (CR-110)
Federal Courts Committee
Chicago Council of Lawyers

Chicago IL.
2-7-96

Paul W. Mollica, writing on behalf of the Federal Courts Committee of the Chicago Council of Lawyers, approve of the proposed amendment to Rule 24. The Committee believes that only attorneys can conduct the "fair but focused inquiry necessary to assess possible prejudice in a jury panel." and states that judges are not as well prepared as attorneys. The Committee suggests that the rule expressly state that the judge can terminate the privilege on its own initiative if it is abused.

Honorable Clarence A. Brimmer (CR-111)
Federal District Judge
District of Wyoming
Cheyenne WY.
2-5-96

Judge Brimmer is "most definitely opposed to the proposed changes in Federal Criminal Rule 24. He allows attorney participation, but maintains control to ensure that the proper questions are asked and to preserve control over the length of time for questions.

Honorable Filemon B. Vela (CR-112)
Federal District Judge
Southern District of TX
Brownsville TX
02-1-96

Judge Vela is opposed to the proposed amendment and indicates that the adoption of the current proposal will produce "disastrous results" in divisions with large numbers of criminal cases. Judge Vela strongly feels that the time spent on voir dire in Federal District Court is significantly shorter than in State Court.

Honorable Edward C. Prado (CR-113)
Secretary Treasurer, District Judges Assn
of the Fifth Circuit
San Antonio Tx
2-08-96

Judge Prado writes on behalf of the members of the Fifth Circuit District Judges Association which is composed of all sitting District Judges in the Fifth Circuit. He states that of the seventy three that responded, sixty one are opposed and eleven are in favor with one abstention.

Honorable Barefoot Sanders (CR-114)
Federal District Judge
Northern District of Texas
Dallas TX
2-09-96

Judge Sanders is opposed to the proposed changes to Federal Rule Crim P. 24. He notes that the primary purpose of voir dire is to obtain an impartial jury, while attorneys use voir dire as an additional opening statement which is likely to result in the opposite effect. "To say that the judge can prevent improper questions is not realistic; the damage is done by the time the judge takes corrective action." Judge Sanders also indicates that imposition of "reasonable time limits" will result in an issue for appellate review.

Carolyn B. Witherspoon, President (CR-115)
Arkansas Bar Association
Little Rock AR.
1-31-96

Ms. Witherspon writes on behalf of the Arkansas Bar Association which endorses the proposed changes to Rule 24.

Honorable John F. Keenan, (CR-116)
Federal District Judge
Southern District of New York
New York, NY
2-1-96

Judge Keenan writes on behalf of the judges of the Southern District of New York, who are unanimously opposed to the proposed revisions to Rule 24. They feel that to allow attorney conducted voir dire would result in the same abuses that plague the state court system. These abuses result in undermining the judges ability to control the courtroom, and undermine jurors regard for judicial authority at the outset of the case. The proposed rules make it mandatory that a court permit attorney participation, yet are devoid of standards governing such

participation. The judges believe that creation of those standards and the permissible scope of attorney voir dire in advance of trial would alleviate the subsequent torrent of "satellite litigation" likely to go on for years. In their view, the current rules are adequate.

Honorable Samuel B. Kent (CR-117)
Federal District Judge
Southern District of Texas
Galveston Tx
1-17-96

(This is a copy of CR-97) Judge Kent writes as the presiding judge of the Galveston Division of the Southern District of Texas. He "wholeheartedly and vehemently opposes " the proposed amendment and believes that the biggest danger would be in the area of *pro se* litigation.

Honorable George P. Kazen (CR-118)
Federal District Judge
Southern District of Texas
Laredo Texas
2-1-96

Judge Kazen is opposed to the proposed amendment to Rule 24. He feels that the present wording of these rules is entirely adequate. Judge Kazen points out that the commentary states that more judges allow attorneys to conduct supplemental voir dire- if this is true then this indicates that the system is working perfectly well. Judge Kazen also feels that by changing the wording to a mandatory "shall permit" will result in litigation in an effort to define the concept of " reasonableness".

Honorable John D. Rainey (CR-119)
Federal District Judge
Southern District of Texas
Houston Tx
2-02-96

Judge Rainey is opposed to the proposed amendment to Rule 24. His experience as a judge in both the state and federal courts has allowed him to form the opinion that the Federal System of conducting voir dire is far superior. His practice is to allow attorneys the opportunity to ask followup questions, the

attorneys often do not ask followup questions but rather attempt to argue the case. Comments from jurors indicate and overwhelming preference for the federal system.

Honorable Melinda Harmon (CR-120)
Federal District Judge
Southern District of Texas
Houston Tx
1-30-96

Judge Harmon opposes the proposed amendment to Rule 24, despite the fact that she greatly favors attorney conducted voir dire. In her view, making it mandatory would be a mistake. She quotes the old adage that " If you have not won the case before the jury is impaneled, you will not win when the verdict is rendered." She notes that trial attorneys in state court also attempt to "bust" the jury by trying to convince all veniremen that they could not be fair and impartial jurors on the case. Another jury "busting" tactic is to say or do something that will cause a mistrial at the voir dire state, necessitating dismissing the entire panel and calling for another. She believes once the huge concession is granted, there will be a cry for more mandatory rules that will decrease the judges discretion to control the voir dire process. She adds that "If it is determined that the rule should be amended, I hope that a grammarian will review the rules and eliminate split infinitives and the use of a conjunction to begin a sentence."

Honorable Virginia Morgan (CR-121)
President, Federal Magistrate Judges Assn
Detroit MI
1-23-96

Judge Morgan writes on behalf of the Federal Magistrate Judges Association who oppose the proposed amendments to Rule 24. They believe the wording creates an entitlement to direct participation in jury voir dire by the parties or their counsel and that no compelling need for the proposed amendment has been demonstrated. The privacy interests of the potential jurors should be taken into account in fashioning voir dire. Only the judge is uniquely situated to do this. If judicial conducted voir dire is inadequate, proper training is the proper answer rather than the proposed amendment.

Honorable John F. Nangle (CR-122)
Federal District Judge

Southern District of Georgia
Savannah GA
2-09-96

Judge Nangle again (CR-18) writes to voice his opposition to the proposed amendment. He states that he has handled both civil and criminal cases across the country and has not had any objections to his handling the voir dire. He further states that judges should be given more leeway to make that determination rather than be restricted in exercising their judgement since the judges know which attorneys will try to abuse the system.

Thomas Drew Rutledge (CR-123)
Attorney
Newton MA
2-16-96

Mr. Rutledge is in favor of the proposed amendment and states that " any rule that permits an attorney to questions jurors themselves, rather than through a judge, should be adopted."

Roger W, Titus (CR-124)
Attorney
Rockville MD
2-26-96

Mr. Titus, on behalf of the Maryland State Bar Association Liaison to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States forwards a letter from the Section on Criminal Law and Practice. Rule 24 received extensive discussion by an ad hoc committee and a motion was carried that the Maryland State Bar should endorse the proposed amendment. A substantial minority opposed the proposal out of concern that it would "lengthen and complicate the jury selection process and could allow for abuses of the process."

Honorable Gerald Ward Tjoflat (CR-125)
Chief Judge, Eleventh Circuit Court of Appeals
Jacksonville FL
2-22-96

Judge Tjoflat is opposed to the proposed amendment, which he fears the courts of appeals," in order to enforce the amendments will effectively rewrite them." His concerns: a) To obtain a new trial, a party must demonstrate prejudice; is this actual or presumed prejudice? b) If the standard is to be actual prejudice how would the appellant make a showing? c) If counsel proffered the record, he would not be able to proffer the venirepersons answer. That such a record would reveal actual prejudice is highly problematic resulting in the court of appeals being forced to look for presumed prejudice, which is " standardless review: affirmance or reversal at the mere whim of the appellate panel." His concerns: a) an appellant will rarely, if ever, be able to demonstrate actual prejudice- that the trial court's actions adversely affected its substantial rights. This will result in some of the courts of appeals to presume prejudice. b) There will be, as a practical matter, no standard at all, since judges will be unable to predict whether, in a given case, they are committing reversible error. This will result in protracted cases. c) Presiding over lawyer voir dire in a criminal case "will be like sitting on a time bomb." The potential for mistrial will increase. d) the proposed amendments will increase the workload for the courts of appeals by adding claims of error and increasing the time required to process a case.

Honorable Richard G. Stearns (CR-126)
Federal District Judge
Boston MA
2-21-96

Judge Stearns is strongly opposed to the proposed revisions to Rule 24. "Citizen jurors are not clamoring for an inquisition by lawyers into their personal lives. They look instead to the court for protection from the often obnoxious and overreaching prying promoted by proposals like these." Judge Stearns believes that the combination of compulsory voir dire and peremptory challenges will result in a high probability of a malleable jury likely to render astonishing verdicts that undermine the publics confidence in the courts and jury system. Judge Stearns states he is often "dumbstruck at the inappropriateness of many of the questions proposed by counsel." He asks not "... to be forced to implement a practice that serves no fundamental purpose other than to pander to the understandable desire of lawyers to exploit an unwarranted advantage in the contest to manipulate the trial process."

Honorable Terry C. Kern (CR-127)
Federal District Judge
Northern District of Oklahoma
Tulsa OK

2-22-96

Judge Kern is opposed to the proposed amendment of Rule 24. Judge Kern states that his practice closely mirrors that discussion in the Committee Notes; however, in spite of his rules some attorneys consistently try to abuse the procedure. Complaints and appeals will erode the judicial control necessary to prevent widespread abuse extant in the State courts. Currently he is able to warn counsel that abuse or attempts to abuse the process may result in their privileges being stripped.

Richard A. Rossman (CR-128)
Chair, State Bar of MI, U.S. Courts Committee
Detroit MI
2-15-96

Mr. Rossman writes on behalf of the State Bar of Michigan, U.S. Courts Committee, to strongly recommend the adoption of the proposed amendment. He believes that the attorneys have a more thorough knowledge of the details of a case and the subtle factors that may affect a jurors perceptions in voir dire . He states that in the Bench and Bar conference in 1990 a discussion was held in which judges were encouraged to allow attorneys more active participation in the voir dire process. This resulted in more judges allowing attorneys to participate in voir dire. The results were that attorney conducted voir dire did not significantly increase the time needed for jury selection, while continuing to leave the courts to control potential abuses.

Honorable T. F. Gilroy (CR-129)
Federal District Judge
District of Connecticut
Waterbury CT
2-14-96

Judge Gilroy is opposed to the proposed amendments noting his primary concerns as : a) attorney conducted voir dire will result in more time needed to select a jury and b) counsel will use the opportunity to influence potential jurors. The concerns that jurors feel intimidated by judges and attorneys do not obtain enough information to adequately exercise peremptory challenges is unpersuasive because there is no empirical data to support this.

Robert F. Wise, Jr. (CR-130)

Chair, Federal Procedure Committee
of the New York State Bar Association
Albany, NY.
2-28-96

Mr. Wise writes to state that in some districts where attorney conducted voir dire is permitted, there is no apparent difference in the time for selection of juries in comparison were only the judges conduct voir dire. He states that in the districts that do not allow attorney participation, there is no recourse should the court not ask questions deemed essential by counsel; by mandating attorney participation, these essential questions could be asked. He further states that if attorneys are to be able to articulate reasons for peremptory challenges, the attorneys should be allowed to develop the grounds for these challenges. Mr. Wise also states that while attorney conducted voir dire may work well in some districts it may not work will in other districts. Counsel-conducted voir dire has become synonymous with undue delay, intrusive questioning and improper efforts by counsel to precondition the jurors. He also states that additional questioning can be used to search for a constitutionally permissible pretext to exclude jurors that counsel does not want for institutional improper reasons. Mr. Wise summarizes by stating that mandating counsel voir dire in all districts may be a step backward and that the current process works well and permits tailoring of the process to meet the needs of particular districts and types of cases.

Harriet L. Turney (CR-131)
Office of General Counsel
State Bar of Arizona
Phoenix Arizona
2-27-96

Ms. Turney writes to support the proposed changes to Rule 24, regarding attorney conducted voir dire.

Honorable A. Joe Fish, (CR-132)
Federal District Judge
Northern District of Texas
Dallas Tx
2-27-96

Judge Fish opposed the proposed amendment to Rule 24 that would mandate rather than permit attorney participation in voir dire. Judge Fish feels that the current rules are flexible enough to accommodate the different kinds of cases,

different local practices and "sundry styles of court and counsel." Judge Fish indicates that the argument for change is based on assumptions that are unsupported by citation to any empirical data, that the proposed amendments will produce a better or fairer trial. A move toward the State practice of allowing attorney conducted voir dire will not be an improvement.

Pamela A. Liapakis, Esq. (CR-133)
President, Assn of Trial Lawyers of America
Washington DC
3-01-96

Ms. Liapakis writes to enthusiastically support a role for attorneys in voir dire, the Association for Trial Lawyers of America cannot support the proposal as written since they feel the judges role is pre-eminent. They believe the rule should be re-written to "equalize the roles of Judge and attorneys."

Kent S. Hoffmeister, Esq. (CR-134)
Section Coordinator, Federal Bar Assn.
(Marvin H. Morse, Esq., President FBA)
Dallas Texas
2-29-96

Mr. Hoffmeister forwards comments from Mr. Morse, President of the Federal Bar Association, which strongly supports the proposed amended version of Rule 24 (a) as giving the absolute right to participate in the voir dire examination. Mr. Morse writes that the focus should be on how best to secure an intelligent, neutral, impartial and objective jury. The voir dire process should be governed by the "essential demands of fairness" which require a careful voir dire examination when there is a significant likelihood of juror prejudice. Three reasons for supporting the proposed amendments : a) they feel jurors give shorter concise responses to judges questions, b) the concern about the increased time for a voir dire examination is offset by eliminating the potential for hung juries, and c) the fear of giving lawyers a right to participate in the voir dire process will result in losing judicial control and to lawyer abuses is unfounded. Judges always have the sanction of contempt for such "belligerent and uncontrollable lawyers. The FBA believes that attorney participation gives the appearance of greater democracy in the selection of jurors, rather than a rushed or expedited judge conducted voir dire which leaves the impression that time and efficiency are more important than the litigants rights.

Donald R. Dunner, Esq. (CR-135)
Chair, Section of Intellectual Property Law
Chicago IL
3-1-96

Their response is included with the joint submission of the Tort and Insurance Practice Section and the Section on Anti Trust Law.

Harry D, Dixon, Jr. (CR-136)
United States Attorney
Southern District of GA
Savannah GA
2-28-96

Judge Dixon approves of the proposed amendment and states that it is "prudent." Counsel for the parties should be allowed to participate in the voir dire process as it would make the selection of a jury more meaningful.

Barry F, Mc Neil, and Christine Sherry (CR-137)
Chair Elect, Section of Litigation
and Chair, Media Relations Committee
American Bar Association
Chicago, IL
3-05-96

The Section of Litigation expresses its support of the proposed amendment to Rule 24. After an extensive survey of its members and an informal canvassing of its membership in each of 9 Federal Districts to learn how voir dire was treated in the various districts. The results of their findings indicate a) when attorneys are permitted to participate in voir dire the process is fairer for all parties, and life experiences of potential jurors are deemed important in the selection of jurors, b) those districts that do permit attorney voir dire do not complain of abuse, c) those districts that do not allow attorney voir dire have no obvious reasons for this practice d) they propose that questionnaires be used more extensively as a way to cut down time used in voir dire.

Honorable Frederick P. Stamp (CR-138)
Chief Federal District Judge
Northern District of WV
Wheeling WV

3-5-96

Judge Stamp is opposed to the proposed amendments to Rule 24. He has found that it is difficult to properly control what frequently developed into a "Freewheeling phase of the initial part of the trial". He has found that attorneys attempted to argue evidence to prospective jurors, subtly submit legal theories which the court may not have addressed and to attempt to persuade jurors to remove themselves from service by suggesting incorrect standards such as urging jurors to concede that they would be "uncomfortable being on a jury." Judge Stamp adds that the present rules are working well and should not be changed.

Peter Goldberger Esq. (CR-139)
National Association of Criminal Defense Lawyers
Ardmore PA
3-4-96

Mr. Goldberger writes to strongly support the proposed amendment to Rule 24. He believes that judge-conducted voir dire is not conducive to rooting out bias in potential jurors. "Voir dire permits a party to establish a relation, it not a bond of trust, with the jurors. This relation continues throughout the trial." Powers v. Ohio, 499 U.S. 400, 113 L.Ed. 2d 411, 427 (1991). Mr. Goldberger offers a telling anecdote in which the judge did not allow attorney participation in the voir dire process. The judge asked if anyone had such strong feelings about drugs that they could not be fair and impartial--none of the potential jurors raised their hands. Yet when questionnaires were distributed responses to the following question " In light of all the publicity surrounding the drug problem in America, what opinions or feelings if any do you have about people charged with possessing huge quantities of cocaine?" responses were quite strong. The responses included :a) " If found guilty they should have to overdose on the drug until they are dead" b) In 19th Century China opium traffickers were put to death. China has no opium problem today" c) Kill them ! (Deut 19:21). The NACDL believes that attorney participation is necessary to render effective assistance of counsel.

Anthony C. Epstein, Esq. (CR-140)
Section on Courts, Lawyers and the Administration of Justice
of the District of Columbia Bar
Washington DC
2-29-96

Mr. Epstein writes to strongly support the proposed amendments to Rule 24(a). He believes that the proposed amendment represents a reasonable middle

ground between the extremes of unrestricted attorney conducted voir dire and a complete ban on attorney voir dire. They feel attorney participation will help promote the confidence of litigants and the public in the jury trial system. They believe that attorneys are more familiar with the issues better than the judge and are thus able to ask better questions; jurors will respond more candidly with the attorneys than the judge, and it may be difficult for a judge to formulate a question designed to elicit bias or preconceptions without appearing to favor one side or the other. The result will be more information when exercising peremptory challenges. The fact that the judge can cut off the questioning at any time will lead the attorneys to be selective in their questioning and to use wisely the limited right of participation extended by the rule.

David A. Schwartz, Esq. (CR-141)
Criminal Law Section
State Bar of California
San Francisco CA
2-29-96

Mr. Schwartz writes to express his support for the proposed amendment to Criminal Rule 24. He states that there is no phase more important than jury selection which takes on a heightened significance that bears a direct relationship to the consequences of conviction or acquittal. He quotes " Peremptory challenges are worthless if trial counsel is not afforded the opportunity to gain the necessary information upon which to base such strikes." *U.S. v. Ledee,* 549 F.2d 990, 993 (5th Cir.,cert denied, 434 U.S. 902 (1977). Mr. Schwartz states that attorney participation is warranted and should be welcomed by the Courts as it will increase the fairness quotient in federal criminal jury trials.

Honorable Joe Kendall (CR-142)
Federal District Judge
Northern District of Texas
Dallas Tx
2-29-96

Judge Kendall is opposed to he proposed changes based on his personal experience. He has been a State District Judge as well as a Federal District Judge and feels that the Federal system is far better. Judge conducted voir dire tends to be both efficient, fairer, neutral and detached. He states that attorneys will inevitably turn the voir dire process into an opening statement. He feels the use of the word "reasonable" will turn the appellate court into an armchair quarterback.

He feels that if mandated, attorneys will be forced to conduct voir dire rather than be subject to criticism if they do not.

James S. Russ, Esq. (CR-143)
Attorney
Orlando FL
2-23-96

Mr. Russ writes to express his support of the proposed amendment to Rule 24. He believes that judge conducted voir dire is a "sterile exercise which provides minimal information to legal counsel for the purposes of exercising challenges." The judge cannot conduct a meaningful voir dire because he is unfamiliar with the evidence, witnesses, and issues involved in the case. He feels judges are motivated by time constraints rather than selecting a fair and impartial jury.

Nanci L. Clarence, Esq. (CR-144)
Chair, Federal Practice Subcommittee
State Bar of California
San Francisco CA
2-28-96

Ms. Clarence writes to wholeheartedly endorse the proposed amendment. She feels that this will ensure that the parties are given an opportunity to participate in the critical stage of jury selection.

V. TESTIMONY

Eight witnesses testified at a public hearing on the proposed amendments to Rule 24 at the Auditorium of the United States District Courthouse in Oakland California on December 15, 1995. Present were: Hon. Lowell Jensen, Chair of the Criminal Rules Advisory Committee; Hon. Patrick Higgenbotham, Chair of the Advisory Committee on Civil Rules; Hon. William Wilson, Member of the Standing Committee, Liaison to the Advisory Committee on Criminal Rules; Hon. David Dowd, Member of the Criminal Rules Advisory Committee; Attorney Mark Kasanin, Member of the Civil Rules Advisory Committee; Prof. Tom Rowe, Member of the Civil Rules Advisory Committee; Prof. David Schlueter, Reporter for the Criminal Rules Advisory Committee; and Prof. Edward Cooper, Reporter for the Civil rules Advisory Committee.

Peter Hinton,
Former Pres. of CATLA
Attorney in Private Practice

Mr. Hinton is in favor of attorneys having involvement in conducting voir dire. He cites an example where the attorney voir dire was restricted and as the judge was about to swear in the jury, one venireperson asked if it mattered that she was employed by the same firm as Defense counsel. He feels people are more forthcoming with attorneys than they would be with a judge, citing the intimidation factors of the Dias, the Black Robe and formalities of Court.

Honorable Michael Hogan
Federal District Judge
District of Oregon

Judge Hogan, states that in Oregon, every judge allows some attorney voir dire. However, attorneys do not take advantage, in part because judges are careful with Voir dire which is allowed gratuitously. " It's okay to let the camel stick his nose under the tent if you've got a good firm leash on the camel at the time." Here the problem is this rule is putting the leash in the wrong hand. Judge Hogan believes that the thrust of the current literature on voir dire is to take the courtroom away from the judges.

Dr. Judy Rothschild
Trial Consultant/Sociologist
Visiting Scholar UC.Berkeley

Dr. Rothschild has done extensive research in the area of Jury decision making in complex cases. She favors attorneys conducting voir dire for several reasons: a) the attorney has greater knowledge and familiarity with the case and a greater awareness of the areas of concern. b) She address the status differences of those asking the questions. Judges have the ultimate status position in the courtroom, and jurors are more likely to filter out their responses to please the judge. c) Jurors fear public speaking and so to minimize embarrassment will provide minimal responses. d) Research has shown that a substantial number of the population believe 1) that a person brought to trial is probably guilty 2) defendants should be required to prove their innocence 3) defendants should be required to testify e) Judges tend to ask general questions and a system that allows both the judge and counsel for both sides is a better system. Dr. Rothschild also provides a laundry list of jury dislikes. Jurors don't like to be disrespected; they don't like the idea of hurry up and wait; they don't like feeling left out; they don't like jargon,

they don't like expert testimony that they don't understand and they don't like not being allowed to take notes.

James F. Campbell Esq.
Criminal Defense Attorney
National Assn for Defense Lawyers

Mr. Campbell endorses the proposed amendment to Rule 24. In his view it is a question of how best can it be done to ensure a fair trial and impartial jury. He believes it is unlikely that a Defense Attorney would come in and take over the courtroom and it is important for the defendant and the defense attorney to feel that they are participating in the process especially in light of mandatory minimum sentences. He also states that many judges already allow attorney voir dire and. cites studies which indicate that if the attorney is involved in the process the jury selection time is reduced. He testified that because judges are allowing attorney voir dire it must be working; thus for the majority of judges the rule change is not going to affect them.

George Koelzer
Litigation Section of ABA
Los Angeles

Mr, Koelzer is a practitioner and former law professor and has tried hundreds of cases in Federal Court. He argues that judge conducted voir dire is not acceptable in an adversary system since the clients are relying on his or her counsel to exercise judgement in putting forth the clients case. He believes that judges want to move the case along and dispose of it quickly, consistent with the rules of court. He lists disadvantages such as ineffective examination of a prospective juror, the ability of the trial attorney to make effective use of their peremptory challenges or being denied challenges for cause.

Robert Aitken Esq
Trial Attorney (both civil and criminal)
Former Law Professor

Mr. Aitken is strongly in favor of the proposed amendment to rule 24. He states: "it seems mindless to think that an intermediary - the judge- asking the questions rather than the person who is actually conducting the case. As to attorney abuse, the Judge should be capable and have sufficient power and integrity to stop it should it occur.

Elia Weinbach Esq.
Civil Litigation,
Los Angeles, CA

Mr. Weinbach, who has had previous experience with criminal prosecution and feels that the judges handling of voir dire was ineffective and felt that the Judge was more interested in proceeding expeditiously than picking jurors who were unbiased.

Ms. Louise La Mothe
Private Practice
Los Angeles, CA

Speaking as a litigator with 25 years of experience and as a teacher of trial advocacy, Ms. LaMothe, supports the proposed amendments to Rule 24. In her view, although there are abuses by lawyers in conducting voir dire, the judge's questions are sometimes perfunctory and they are not as always as effective in determining more subtle forms of bias. Lawyers. she says are usually more familiar with the case and that permitting them to question the jurors does not add that much time to the trial. In her experience, California state judges have been able to control voir dire practices of the attorneys'

Charles Wesselberg Esq.
Law Professor, Univ. of Southern California
Los Angeles, CA

Professor Wesselberg favors the proposed amendment to Rule 24. He believes that if challenges for cause and *Batson* peremptory challenges are to be exercised intelligently, the attorneys must have input and that meaningful challenges for cause can only be accomplished by being allowed to learn more about the jurors. He advises that as a former Federal Public Defender, questions were suggested to judges who only asked questions that they felt comfortable with. He adds that "if lawyers don't know much about the people who will sit as jurors, it is extremely difficult to exercise challenges on anything other than the grossest form of stereotypes."

Agenda Item IIC 1

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor David A. Schlueter, Reporter

RE: Report of Subcommittee on Local Rules

DATE: March 16, 1996

At the Committee's meeting in Vermont in October 1995, Judge Jensen appointed a subcommittee to consider the possibility of adopting certain local rules as national rules. That subcommittee included Judge Davis (Chair), Judge Crow, Judge Crigler and Mr. Pauley.

The subcommittee's report, which is self-explanatory, is attached. This item will be on the agenda for the April 1996 meeting.

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

W. EUGENE DAVIS
CIRCUIT JUDGE

March 14, 1996

Honorable D. Lowell Jensen
Chairman, Advisory Committee
on Criminal Rules
United States Courthouse
1301 Clay Street, 4th Floor
Oakland, California 94612

Re: Subcommittee Appointed to Consider Incorporation of Certain Local Rules into Federal Rules of Criminal Procedure

Dear Lowell:

The report of this subcommittee is attached. If you have anything further you would like for us to do before the April meeting, please let me know.

I am sending a copy of this report to Dave Schlueter and John Rabiej in case you want to include it in the materials distributed to the Committee members for the meeting.

Sincerely,

W. Eugene Davis

cc: Professor David Schlueter
Mr. John K. Rabiej

Subcommittee Report on advisability of incorporating the subject matter of certain local rules into the Federal Rules of Criminal Procedure

Following receipt of Professor Mary Squiers' report on Local Court Rules, Chairman Jensen appointed this subcommittee to consider and make recommendations on Professor Squiers' suggestions that the subject matter of four local rules be included in the National Rules.

Professor Squires first suggests an amendment to Rule 4 which now requires that the officer executing an arrest warrant make a return to the magistrate judge or other officer before whom the defendant is to be brought pursuant to Rule 5. Professor Squires points out that several districts, by local rule, require the arresting officer to notify other members of the court family such as pretrial services officer, United States marshal or United States attorney, of the arrest.

Next, Professor Squires points out that eight districts have a rule that require the parties to confer about discovery disputes before filing a motion and suggests that Rule 16(d) could be changed to incorporate this practice.

Her next suggestion relates to Rule 30. Rule 30 requires that jury instructions be submitted "at the close of the evidence or such earlier times during the trial as the court reasonably directs". Fifteen districts have local rules requiring counsel to submit jury instructions sometime before trial.

Next, Professor Squires suggests that Rule 47 be amended to require the parties to confer or attempt to confer before any motion is filed.

The final suggested amendment relates to Rule 12(b), which lists the defenses and objections which must be raised by pretrial motion. Two districts have expanded this list by local rule to require the defense of entrapment to be raised by pretrial motion.

For convenience in studying these proposals I attach an exhibit for each of the national rules Professor Squires suggests be amended. Each exhibit includes a summary of Professor Squires' recommendation, the current national rule and one of the local rules that brought these matters to her attention and prompted her recommendation.

The members of the subcommittee have corresponded with each other on these suggested rule amendments and have also conferred by conference telephone. Our conclusions follow:

1. With the possible exception of the suggested amendment to 12(b) (requiring the defendant to give pretrial notice of his intent to rely on the defense of entrapment), we unanimously recommend against the suggested amendments. In our judgment the suggested amendments to Rule 4, Rule 16, Rule 30 and Rule 47 address details of practice and procedure about which courts have differing customs and traditions and that are properly the subject of local rules. Additionally, none of us thought that we have a significant problem in any of these areas that require changes in the national rules.

2. On the suggestion to amend Rule 12(b) (to require the defendant to give pretrial notice of his intent to raise the defense of entrapment), a majority of the subcommittee is inclined to recommend against such an amendment. None of us have experienced any problems with the current rule. However, we considered it prudent to discuss this question at the next meeting to see if any of you believe we have a problem here that needs fixing. We are all willing to reconsider our position if the discussion reveals that some of you have experienced significant problems with the current rule because the government failed to receive adequate notice that the defendant intended to rely on an entrapment defense or in some other respect.

Respectfully submitted,

W. Eugene Davis (Chair)
Sam A. Crow
B. Waugh Crigler
Roger A. Pauley

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

Recommended change to 12(b):

Consider requiring the defense of entrapment be raised through a pretrial motion

Two district courts have such a rule:

M.D. Ala. 30 Attached
S.D. Ga. 212.2

UNITED STATES CODE ANNOTATED
RULES OF CRIMINAL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS
IV. ARRAIGNMENT AND PREPARATION FOR TRIAL

Amendments received to 7-12-95

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

(a) Pleadings and Motions. Pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty, guilty and nolo contendere. All other pleas, and demurrers and motions to quash are abolished and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss o: to grant appropriate relief, as provided in these rules.

(b) Pretrial Motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before tria: by motion. Motions may be written or oral at the discretion of the judge. Th: following must be raised prior to trial:

(1) Defenses and objections based on defects in the institution of the prosecution; or

(2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings); or

(3) Motions to suppress evidence; or

(4) Requests for discovery under Rule 16; or

(5) Requests for a severance of charges or defendants under Rule 14.

(c) Motion Date. Unless otherwise provided by local rule, the court may, at the time of the arraignment or as soon thereafter as practicable, set a time for the making of pretrial motions or requests and, if required, a later date of hearing.

(d) Notice by the Government of the Intention to Use Evidence.

(1) At the Discretion of the Government. At the arraignment or as soon thereafter as is practicable, the government may give notice to the defendant of its intention to use specified evidence at trial in order to afford the defendant an opportunity to raise objections to such evidence prior to trial under subdivision (b)(3) of this rule.

(2) At the Request of the Defendant. At the arraignment or as soon thereafter as is practicable the defendant may, in order to afford an opportunity to move to suppress evidence under subdivision (b)(3) of this rule, request notice of the government's intention to use (in its evidence in chief at trial) any evidence which the defendant may be entitled to discover under Rule 16 subject to any relevant limitations prescribed in Rule 16.

(e) Ruling on Motion. A motion made before trial shall be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict, but no such determination shall be deferred if a party's right to appeal is adversely affected. Where factual issues are involved in determining a motion, the cour:

shall state its essential findings on the record.

(f) Effect of Failure To Raise Defenses or Objections. Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.

(g) Records. A verbatim record shall be made of all proceedings at the hearing, including such findings of fact and conclusions of law as are made orally.

(h) Effect of Determination. If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that the defendant be continued in custody or that bail be continued for a specified time pending the filing of a new indictment or information. Nothing in this rule shall be deemed to affect the provisions of any Act of Congress relating to periods of limitations.

(i) Production of Statements at Suppression Hearing. Rule 26.2 applies at a hearing on a motion to suppress evidence under subdivision (b)(3) of this rule. For purposes of this subdivision, a law enforcement officer is deemed a government witness.

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(As amended Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub.L. 94-64, s 3(11), (12), 89 Stat. 372; Apr. 28, 1983, eff. Aug. 1, 1983.)

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by way of subpoena or other judicial process, to a probation officer of this Court, the probation officer may file a petition seeking instruction from the Court with respect to responding to the subpoena.

Whenever a probation officer is subpoenaed for such records, he shall petition this Court in writing for authority to release documentary records or produce testimony with respect to such confidential court information. In either event, no disclosure shall be made except upon an order issued by this Court.

Any copy of a presentence report which this Court chooses to release to the United States Parole Commission pursuant to Title 18, § 4205(e), United States Code, will be provided in the form of a confidential bailment. Each copy of a presentence report which this Court, through its probation officer, provides the United States Parole Commission will bear a legend on its face denoting (1) that the presentence report is a confidential court document, (2) that the Court intends to preserve the confidentiality of the copies of its presentence reports released to the Commission in order for the Commission to serve its statutory functions and that said copies must be returned thereafter.

Rule 29. Pretrial services

Pursuant to the Pretrial Services Act of 1982 (18 U.S.C. 3152-3155) §§ the Court authorizes the U. S. Probation Office for the Middle District of Alabama to establish all pretrial services as provided for by that Act.

Personnel within the Probation Office in the performance of their duties pursuant to this Act shall be designated as Pretrial Services Officers.

Upon notification that a defendant has been arrested, pretrial services officers will conduct a pre-release interview as soon as practicable. The judicial officer setting bail or reviewing bail determination shall review and consider all reports submitted by pretrial services officers.

Pretrial services reports shall be made available to the attorney for the accused and the attorneys for the government and shall be used only for the purpose of fixing conditions of release, including bail determination, otherwise the report shall remain confidential as provided in 18 U.S.C. § 3153 and as provided in the pretrial services confidentiality regulations issued May 9, 1983, by the Director of the Administrative Office of the United States Courts under the authority vested in him by 18 U.S.C. § 3153(c)(2), subject to the exceptions provided therein.

Pretrial services officers shall supervise persons released on bail at the discretion of the judicial officer granting the release or modifications of the release.

Rule 30. Defense of entrapment in criminal cases

Criminal defendants who intend to rely on entrapment as a defense shall, within the time allowed for pleading, file a written pleading notifying the United States of the particular circumstances to be relied upon to substanti-

ate the plea of entrapment. Failure to so present any such defense shall constitute a waiver thereof, but the Court, for good cause, may grant relief from the waiver.

Rule 31. Plea bargain arrangements

It is the policy of this Court not to accept plea bargain arrangements after the Wednesday next preceding the date set for selection of juries in the criminal trial, except under unusual circumstances. Attorneys wishing to plead their clients guilty should notify the United States Attorney as soon as practical and arrange to have their client's case put on a consent docket which will usually be set no later than Wednesday preceding the first day of the term in which the case is scheduled for trial.

This Court is unanimously of the opinion that attorneys, whose professions must ultimately suffer from excessive expenses of litigation, must accept the burden of attempting to limit such expenses. In unusual cases, this Court will invoke the provisions of the statute providing that the Court may assess the costs of frivolous litigation, including the jury expense, against attorneys causing the same.

Rule 32. Assignment of duties to United States Magistrate

A District Judge in his discretion may delegate the following duties to the Magistrate and the Magistrate shall perform such duties:

1. *Authority of United States Magistrate.* (a) Duties under 28 U.S.C. § 636(a). Each United States Magistrate of this Court is authorized to perform the duties prescribed by 28 U.S.C. § 636(a) and may—

   (1) Exercise all the powers and duties conferred or imposed upon United States Commissioners by law and the Federal Rules of Criminal Procedure;

   (2) Administer oaths and affirmations, impose conditions of release under 18 U.S.C. §§ 3141 to 3150, and take acknowledgements, affidavits, and depositions; and

   (3) Conduct extradition proceedings, in accordance with 18 U.S.C. § 3184.

   (b) Disposition of misdemeanor cases—18 U.S.C. § 3401. A full-time magistrate may—

   (1) Try persons accused of, and sentence persons convicted of, misdemeanors committed within this district in accordance with 18 U.S.C. § 3401;

   (2) Direct the probation service of the Court to conduct a presentence investigation in any misdemeanor case; and

   (3) Conduct a jury trial in any misdemeanor case where a defendant so requests and is entitled to trial by jury under the constitution and laws of the United States.

   (c) Duties Under 28 U.S.C. § 636(b). A full-time magistrate may exercise all powers and perform all duties conferred upon magistrates by 28 U.S.C. § 636(b)

Rule 4: Arrest Warrant or Summons Upon Complaint

The current rule requires the officer executing an arrest warrant to make a return to the magistrate judge or other officer before whom the defendant is to be brought pursuant to Rule 5.

Recommended change to 4(d)(4):

> Additional notice required to others involved in processing the defendant through the court system

Several districts have found it helpful to require other members of the court family to get notice of the arrest. Six districts require notice to pretrial services offices and/or United States Marshal:

C.D. Cal. 11.1 attached
D. Haw. 310
N.D. NY 5.1
N. Mar. Isl. 330.1
S.D. Tex. Order 91-26
W.D. Wash. 5

Two districts require the United States Marshal to give notice to the United States Attorney:

C.D. Cal. 11.2
W.D. Wash. 5

Federal Rules of Criminal Procedure, Rule 4

UNITED STATES CODE ANNOTATED
RULES OF CRIMINAL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS
II. PRELIMINARY PROCEEDINGS

Amendments received to 7-12-95

Rule 4. Arrest Warrant or Summons Upon Complaint

(a) Issuance. If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.

(b) Probable Cause. The finding of probable cause may be based upon hearsay evidence in whole or in part.

(c) Form.

(1) Warrant. The warrant shall be signed by the magistrate judge and shall contain the name of the defendant or, if the defendant's name is unknown, any name or description by which the defendant can be identified with reasonable certainty. It shall describe the offense charged in the complaint. It shall command that the defendant be arrested and brought before the nearest available magistrate judge.

(2) Summons. The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a magistrate at a stated time and place.

(d) Execution or Service; and Return.

(1) By Whom. The warrant shall be executed by a marshal or by some other officer authorized by law. The summons may be served by any person authorized to serve a summons in a civil action.

(2) Territorial Limits. The warrant may be executed or the summons may be served at any place within the jurisdiction of the United States.

(3) Manner. The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant at the time of the arrest but upon request shall show the warrant to the defendant as soon as possible. If the officer does not have the warrant at the time of the arrest, the officer shall then inform the defendant of the offense charged and of the fact that a warrant has been issued. The summons shall be served upon a defendant by delivering a copy to the defendant personally, or by leaving it at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein and by mailing a copy of the summons to the defendant's last known address.

(4) Return. The officer executing a warrant shall make return thereof to the magistrate judge or other officer before whom the defendant is brought pursuant to Rule 5. At the request of the attorney for the government any unexecuted warrant shall be returned to and canceled by the magistrate judge

by whom it was issued. On or before the return day the person to whom a summons was delivered for service shall make return thereof to the magistrate judge before whom the summons is returnable. At the request of the attorney for the government made at any time while the complaint is pending, a warrant returned unexecuted and not canceled or summons returned unserved or a duplicate thereof may be delivered by the magistrate judge to the marshal or other authorized person for execution or service.

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10.2. Probation; special conditions. A judge or magistrate judge may order such special conditions of probation as may be consistent with the Constitution and laws of the United States and as may be deemed necessary for the rehabilitation of the defendant.

10.3. Probation; commencement of term. Unless otherwise provided to the contrary, the term of probation shall commence upon pronouncement of sentence even though jail time is required as part of the execution of the sentence, as a condition of probation or sentence under 18 U.S.C. Sec. 3651.

10.3.1. *Probation; commencement of term in appeal case.* Whenever a judgment of conviction provides for probation and a notice of appeal is filed, the period of probation shall not commence until the judgment becomes final after appeal unless the judgment of conviction shall specifically provide to the contrary.

10.4. Probation; violation. The Probation Officer shall promptly advise the judge or magistrate judge who pronounced sentence of any violation of the condition of probation.

10.5. Probation; arrest of violator; duty of Marshal. As soon as practicable after taking into custody any person charged with a violation of probation, the Marshal shall give written notice to the United States Attorney, the Probation Officer and the Clerk of the date of such arrest and the place of confinement of the alleged probation violator.

10.6. Probation violation hearing. The Clerk shall set the viclation of probation for hearing as soon as practicable after the notice of arrest of the alleged violator.

10.7. Probation violation; notice to attorney for defendant. The Clerk shall promptly inform any attorney of record for an alleged probation violator of the arrest of the violator and the place of confinement. If no attorney of record appears or the attorney of record cannot be found, the notice shall be given to the federal Public Defender.

10.8. Probation records. Pre-sentence investigation and reports, probation supervision records, and reports of studies and recommendation pursuant to 18 U.S.C. Sec. 4208(b), 4252, 5010(e) or 5034, are confidential records of this Court.

10.8.1. *Probation records; disclosure to defendant and counsel.* (Repealed pursuant to General Order 325, May 2, 1991)

10.8.2. *Probation records disclosure to parole commission or bureau of prisons.* (Repealed pursuant to General Order 325, May 2, 1991)

Rule 11. Arrest of Federal defendants

11.1. Notice of arrest. It shall be the duty of the Marshal to require all agencies arresting persons for an offense against the laws of the United States, and all jailors who incarcerate any person as a Federal prisoner, to give the Marshal notice of such arrest or incarceration forthwith.

11.2. Notice of arrest; duty of marshal. The Marshal shall, upon receiving

notice or knowledge of the arrest or incarceration of any Federal prisoner, give written notice forthwith to the United States Attorney and the Clerk of the date and fact of such arrest or incarceration and the place of confinement of the person arrested.

11.3. Persons in custody; biweekly list. The report of persons in custody required by F.R. Crim. P. 46(h) shall be delivered promptly to the Criminal Duty Judge. The Criminal Duty Judge shall make whatever orders may be necessary to prevent unnecessary detention.

Rule 12. Stays in criminal cases

After mandate or judgment on appeal is filed in criminal cases, no stay of commitment shall be allowed except as required in the interest of justice.

Rule 13. Orders and judgments

The date and signature line provided for the signature of the judge or magistrate judge shall not appear alone on the last page of the order, judgment, or document tendered for approval.

Rule 14. Settlement conferences in complex criminal cases

14.1. Policy. It is the policy of the Court to facilitate the parties' efforts to dispose of complex criminal cases without trial. It is also the policy of the Court that the judge assigned to preside over a complex criminal case (the trial judge) may ask if parties desire a settlement conference but shall not participate in facilitating settlement. Participation in settlement conferences under this rule shall be completely voluntary.

14.1.1. *Definition.* A "complex case" is a criminal case in which the government estimates that the presentation of evidence in its case-in-chief will require more than sixteen (16) days.

14.1.2. *Assignment of settlement judge.* A settlement judge from the Criminal Settlement Panel shall be randomly assigned to any complex case upon the filing of a request and the approval of the trial judge.

14.1.3. *Role of settlement judge.* The role of the settlement judge shall be limited to facilitating a voluntary settlement between parties in criminal cases. The settlement judge shall not preside over any aspect of the case other than facilitation of a voluntary settlement according to this Rule. All matters related to the case other than settlement shall be handled by the trial judge assigned to preside over that case.

14.2. Request for conference. A settlement conference can be requested only by the attorney for the government and the attorney for the defendant acting jointly. (This rule does not require that all defendants in a multi-defendant case join in the request.)

14.2.1. *Time of request.* A settlement conference may be requested at any time up to the settlement conference cut-off date established by the trial judge. If no cut-off date is established, a settlement conference request may be made at any time up to twenty-one (21) days before the date

Rule 16: Discovery and Inspection

Recommended change to 16(d):

> Require parties to confer about discovery disputes before any motion is filed and to file a certification explaining that such a conference occurred or setting forth reasons why such a conference did not occur.

Eight district courts have such a rule:

E.D. La. 2.11 (also M.D. La. and W.D. La.) Attached
E.D. N.Y. 3(d) (also S.D. N.Y.)
E.D. Pa. 9(c)(2), 9(c)(3)
D.P.R. 408, 409
D. Vt. 2(d)(1)

UNITED STATES CODE ANNOTATED
RULES OF CRIMINAL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS
IV. ARRAIGNMENT AND PREPARATION FOR TRIAL

Amendments received to 7-12-95

Rule 16. Discovery and Inspection

(a) Governmental Disclosure of Evidence.

(1) Information Subject to Disclosure.

(A) Statement of Defendant. Upon request of a defendant the government must disclose to the defendant and make available for inspection, copying, or photographing: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; that portion of any written record containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. The government must also disclose to the defendant the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known by the defendant to be a government agent if the government intends to use that statement at trial. Upon request of a defendant which is an organization such as a corporation, partnership, association or labor union, the government must disclose to the defendant any of the foregoing statements made by a person who the government contends (1) was, at the time of making the statement, so situated as a director, officer, employee, or agent as to have been able legally to bind the defendant in respect to the subject of the statement, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as a director, officer, employee, or agent as to have been able legally to bind the defendant in respect to that alleged conduct in which the person was involved.

(B) Defendant's Prior Record. Upon request of the defendant, the government shall furnish to the defendant such copy of the defendant's prior criminal record, if any, as is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.

(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.

(D) Reports of Examinations and Tests. Upon request of a defendant the

government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

(E) Expert Witnesses. At the defendant's request, the government shall disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case in chief at trial. This summary must describe the witnesses' opinions, the bases and the reasons therefor, and the witnesses' qualifications.

(2) Information Not Subject To Disclosure. Except as provided in paragraphs (A), (B), (D), and (E) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case. Nor does the rule authorize the discovery or inspection of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. s 3500.

(3) Grand Jury Transcripts. Except as provided in Rules 6, 12(i) and 26.2, and subdivision (a)(1)(A) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury.

[(4) Failure to Call Witness.] (Deleted Dec. 12, 1975)

(b) The Defendant's Disclosure of Evidence.

(1) Information Subject to Disclosure.

(A) Documents and Tangible Objects. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.

(B) Reports of Examinations and Tests. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to that witness' testimony.

(C) Expert Witnesses. If the defendant requests disclosure under subdivision (a)(1)(E) of this rule and the government complies, the defendant, at the government's request, must disclose to the government a written summary of testimony the defendant intends to use under Rules 702, 703 and 705 of the Federal Rules of Evidence as evidence at

trial. This summary must describe the opinions of the witnesses, the bases and reasons therefor, and the witnesses' qualifications.

(2) Information Not Subject To Disclosure. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or the defendant's attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, the defendant's agents or attorneys.

[(3) Failure to Call Witness.] (Deleted Dec. 12, 1975)

(c) Continuing Duty to Disclose. If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, such party shall promptly notify the other party or that other party's attorney or the court of the existence of the additional evidence or material.

(d) Regulation of Discovery.

(1) Protective and Modifying Orders. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) Failure To Comply With a Request. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.

(e) Alibi Witnesses. Discovery of alibi witnesses is governed by Rule 12.1.

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(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub.L. 94-64, s 3(20)-(28), 89 Stat. 374, 375; Dec. 12, 1975, Pub.L. 94-149, s 5, 89 Stat. 806; Apr. 28, 1983, eff. Aug. 1, 1983.)

1995 Interim Update

(As amended Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 1994, eff. Dec. 1, 1994.)

complaint or to file any other pleading, the moving party shall attempt to obtain consent for the filing and granting of such motion from all parties having an interest to oppose. If such consent is obtained, the motion shall not be noticed for hearing but thereafter shall be filed, accompanied by a proposed order, with a statement of the consent of opposing counsel. No such motions, when required to be noticed for hearing, shall be accepted for filing unless accompanied by a certificate of counsel for the moving party to the effect that opposing counsel have refused to consent to the filing and granting of such motion. If the Court finds that opposing counsel does not have a good faith reason for failing to consent, the Court may impose such sanctions as it deems proper.

(Added Aug. 19, 1991.)

2.09. Motions for summary judgment. Every motion for summary judgment shall be accompanied by a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried.

2.10E&W. Opposition to summary judgment. Each copy of the papers opposing a motion for summary judgment shall include a separate, short and concise statement of the material facts as to which there exists a genuine issue to be tried. All material facts set forth in the statement required to be served by the moving party will be deemed admitted, for purposes of the motion, unless controverted as required by this rule.

2.10M. Opposition to summary judgment. Each copy of the papers opposing a motion for summary judgment shall include a separate, short and concise statement of the material facts as to which there exists a genuine issue to be tried. All material facts set forth in the statement required to be served by the moving party will be deemed admitted, for the purposes of the motion, unless specifically denied.

2.11W. Discovery motions. No motion relative to discovery shall be accepted for filing unless accompanied by a certificate of counsel for the moving party, stating that counsel have conferred in person or by telephone for purposes of amicably resolving the issues and stating why they are unable to agree or stating that opposing counsel has refused to so confer after reasonable notice. Counsel for the moving party shall arrange the conference. A proposed order shall accompany each motion filed under this paragraph. If the Court finds that opposing counsel has willfully refused to meet and confer, or, having met, willfully refused or failed to confer in good faith, the Court may impose such sanctions as it deems proper.

2.11E&M. Discovery motions. No motion relative to discovery shall be accepted for filing unless accompanied by a certificate of counsel for the moving party, stating that counsel have conferred in person or by telephone for purposes of amicably resolving the issues and stating why they are unable to agree or stating that opposing counsel has refused to so confer after reasonable notice. Counsel for the moving party shall arrange the conference. Any motion filed under this paragraph shall be noticed for hearing. If the Court finds that opposing counsel has willfully refused to meet and confer, or, having met, willfully refused or failed to confer in good faith, the Court may impose such sanctions as it deems proper.

Rule 30: Instructions

Recommend change to Rule 30:

Amend Rule 30 to accommodate local rules requiring submission of jury instructions prior to trial.

Rule 30 requires jury instructions be submitted "at the close of the evidence or at such earlier time during the trial as the court reasonably directs," but fifteen district courts have local rules requiring that jury instructions be submitted sometime prior to trial.

D.Az. 4.17 (2.16) attached
W.D. Ark Order
C.D. Cal. Order
E.D. Cal. Order
S.D. Ga. 230.1
D. Haw. 330-1
N.D. Ind. 110.1
E.D. N.C. 49.00(a)
N.Dak. 23.1(F)
D.P.R. 412
N.D. Tx. 8.1(c)
D. Utah 114(a)
E.D. Wash. 51(c)
W.D. Wash. Cr. R 30(c)
S.D. W. Va. Cr. P. 2.01

Federal Rules of Criminal Procedure, Rule 30

UNITED STATES CODE ANNOTATED
RULES OF CRIMINAL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS
VI. TRIAL

Amendments received to 7-12-95

Rule 30. Instructions

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

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(As amended Feb. 28, 1966, eff. July 1, 1966.)

1995 Interim Update

(As amended Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 25, 1988, eff. Aug. 1, 1988.)

Rule 4.16. Excludable time and motions; Speedy Trial Act

(a) The Clerk shall refuse to accept for filing any motion in a criminal case unless it contains in the opening paragraph a statement as follows:

"Excludable delay under 18 U.S.C. § 3161 (h) ____ will occur as a result of this motion or of an order based thereon." (In the blank space provided, the counsel will insert the specific subparagraph involved, e.g., (1)(A), competency examination of defendant; (3)(A), absence or unavailability of defendant or essential witness.)

(b) Any written order prepared for signature by a United States District Judge or United States Magistrate Judge must contain a final paragraph or statement as follows:

"Excludable delay under 18 U.S.C § 3161(h) ____ is found to commence on ____ for a total of __ days."

(c) All minute orders relating to disposition of criminal motions ruled upon in open court shall contain a statement comparable to that outlined in (b) above.

(d) In any case, or in the case of a defendant proceeding pro per, the Court may, in the interest of justice, waive the necessity of a statement of excludable time.

(e) Motions for joinder of motions to be filed in the future will not be accepted for filing, and any motion for joinder must specifically identify the motions to be joined.

Rule 4.17. Jury instructions

The provisions and requirements of Rule 2.16 of these Rules are applicable to and will be followed in all criminal jury trials.

APPENDICES

A. Interrogatories

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

_____ Plaintiff,	
vs.	Nr. _____
_____ Defendant.	INTERROGATORIES

TO:

peremptory challenges simultaneously and in secret. The Court shall then designate as the jury the persons whose names appear first on the list.

Rule 2.16. Jury instructions

(a) Proposed instructions for the jury shall be presented to the Court at the opening of the trial unless otherwise directed by the Court; but the Court, in its discretion, may at any time prior to the opening of the argument, receive additional requests for instructions on matters arising during the trial. The requested instructions shall be properly entitled in the cause, distinctly state by which party presented, and shall be prepared in all capital letters of even type size. They shall be numbered consecutively and contain not more than one (1) instruction page. Each requested instruction shall be understandable, brief, impartial, free from argument, and shall embrace but one (1) subject, and the principle therein stated shall not be repeated in subsequent requests.

(b) A failure to conform to these requirements in the manner of proposing instructions will, in the discretion of the Court, be deemed sufficient ground for their refusal.

(c) All instructions requested of the Court shall be accompanied by citations of authorities supporting the proposition of law stated in such instructions.

(d) At the time of presenting the instructions to the Court, a copy shall be served upon the other parties.

(e) Objections to an instruction for the jury, or a refusal to give as a part of such jury instructions requested in writing, shall be made out of the presence of the jury and shall be noted by the Clerk in the minutes of the trial or by the reporter if one is in attendance.

Rule 2.17. Findings

In all actions in which findings are required, the prevailing party shall, unless the Court otherwise directs, prepare a draft of the findings and conclusions of law within five (5) days after the rendition of the decision of the Court if the decision was in the presence of counsel, and otherwise within five (5) days after notice of the decision. The draft of the findings and conclusions of law shall be filed with the Clerk and served upon the adverse party. The adverse party shall within five (5) days thereafter file with the Clerk, and serve upon his adversary, such proposed objections, amendments, or additions to the findings as he may desire. The findings shall thereafter be deemed submitted and shall be settled by the Court and shall then be signed and filed. No judgments shall be entered in actions in which findings of fact and conclusions of law are required until the findings and conclusions have been settled and filed. A failure to file proposed findings of fact and conclusions of law and to take the necessary steps to procure the settlement thereof may be grounds for dismissal of the action for want of prosecution or for granting judgment against either party.

Rule 2.18. Judgments

(a) Judgments will be entered in accordance with Rule 58, Federal Rules of

Rule 47: Motions

Recommended change to Rule 47:

> Consider a rule that requires the parties to confer, or attempt to confer, before any motion is filed in an effort to reach agreement.

Three district courts have such a rule:

> D. Mont. 320-2 attached
> N.D. Tex. 5.1
> N.D. Pa. Sample Order (no copy available)

UNITED STATES CODE ANNOTATED
RULES OF CRIMINAL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS
X. GENERAL PROVISIONS

Amendments received to 7-12-95

Rule 47. Motions

An application to the court for an order shall be by motion. A motion other than one made during a trial or hearing shall be in writing unless the court permits it to be made orally. It shall state the grounds upon which it is made and shall set forth the relief or order sought. It may be supported by affidavit.

< General Materials (GM) - References, Annotations, or Tables >

Magistrates do not have the authority to order funds withdrawn from the Court's Registry. When a bond is exonerated, disbursement from the Registry of the Court or release of bonds or notes, may only be made on Order of the Court.

305-2. Persons not to act as sureties. No officer of the Court, nor any member of the Bar, nor his/her office associates or employees shall act as surety.

305-3. Judgment against sureties. Regardless of what may be provided in any security judgment, every surety by entering into it submits himself/herself to the jurisdiction of the Court and irrevocably appoints the Clerk as his/her agent upon whom any papers affecting his/her liability on the instrument may be served. His/her liability shall be joint and several and may be enforced summarily on motion without an independent action. The motion may be served upon the Clerk who shall promptly mail a copy to the surety if his/her address is known. The motion shall be heard as provided in Rule 220-4.

305-4. Deposit of money or United States obligations in lieu of surety. In lieu of surety in any criminal case there may be deposited with the Clerk lawful money or negotiable bonds or notes of the United States. The depositor shall execute a suitable bond, and, if negotiable bonds or notes of the United States are deposited, shall also execute the agreement required by 6 U.S.C. § 15 [see now 31 USCS §§ 9301, 9303] authorizing the Clerk to collect or sell the bonds or notes in the event of default.

305-5. Consent of Court required before defendant may leave District. Bonds may be granted in criminal cases to secure the appearance of a defendant before this Court, or after judgment before the Court of Appeals, where a condition of release on bond is that the defendant obtain consent of the Court before leaving the District.

Rule 320. Motions; notice and objections

320-1. Motions. Upon serving and filing a motion, or within 5 days thereafter, the moving party shall serve and file a brief. The adverse party shall have 10 days thereafter within which to serve and file an answer brief. A reply brief may be served and filed within 10 days thereafter. Upon the filing of briefs, the motion shall be deemed made and submitted and taken under advisement by the Court, unless the Court orders oral argument on the motion. The Court may, in its discretion, order oral argument on its own motion, or upon an application contained in the brief of either party.

Failure to file briefs within the prescribed time may subject any motion to summary ruling. Failure to file a brief by the moving party shall be deemed an admission that, in the opinion of counsel, the motion is without merit, and, failure to file a brief by the adverse party shall be deemed an admission that, in the opinion of counsel, the motion is well taken.

320-2. Notice to opposing counsel, and objections. Within the text of each motion submitted to the Court for its consideration counsel shall note that

opposing counsel has been contacted concerning the motion, and whether opposing counsel objects to the motion. All objections provided for in connection with discovery proceedings in the Federal Rules of Criminal Procedure shall be noticed for hearing at the next date convenient for counsel for all parties and the Court of the Division in which the action is pending, and shall be heard at that time unless otherwise set by the Court.

Rule 325. Pretrial conference; criminal cases

325-1. When pretrial conference held. When deemed advisable by the Court, a Pretrial Conference will be held in criminal cases pursuant to the provisions of Rule 17.1 of the Federal Rules of Criminal Procedure. It is contemplated that one or more conferences will be held in all cases in which a protracted trial is anticipated and in other cases which involve complicated fact or law problems.

Rule 326. Trial

326-1. Impaneling a trial jury. (a) *Examination of jurors.* Examination of jurors in criminal cases shall be in accordance with the Federal Rules of Criminal Procedure.

Alternate jurors may be impaneled in criminal cases in the discretion of the Court in accordance with the provisions of the Federal Rules of Criminal Procedure.

Unless otherwise ordered by the Court the examination of trial jurors will be conducted by the Court. At least 1 day before the date set for trial, counsel shall submit to the Court any questions that counsel wishes the Court to ask the jurors.

(b) *Manner of selection and order of examination of jurors.* From the jury panel 12 jurors, plus a number of jurors equal to the total number of peremptory challenges which are allowed by law, plus the number of alternate jurors who are to be impaneled, shall be called in the first instance. These jurors constitute the initial panel. As the initial panel is called the Clerk shall assign numbers to the jurors in the order in which they are called. If any juror in the initial panel is excused for cause an additional juror shall be immediately called to fill out the initial panel. A juror called to replace a juror excused for cause shall take the number of the juror who has been excused. When the initial panel is filled the parties shall exercise their peremptory challenges as provided by these Rules. When peremptory challenges have all been exercised or waived, the Clerk shall call the names of the 12 prospective jurors having the lowest assigned numbers. These jurors shall constitute the trial jury. If alternate jurors are to be used they shall be those with the next lowest assigned numbers, the alternate jurors to be placed on the trial jury, if needed, in the order of their assigned number.

In criminal cases, in which the Government has 6 and the defense 10 challenges, they shall be exercised in the following order: The first by the Government, the second by the Defense, the next by the Government, the next 2 by the Defense, the next by the Government, the next 2 by the

Agenda Item IIC #2

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Rule 5.1; Amendment re Production of Statements**

DATE: **March 19, 1996**

The Committee voted at its meeting in October 1995 to extend the production of witness statements requirements in Rule 26.2 to Rule 5.1, I have drafted language for both of those rules and a proposed Advisory Committee Note to accompany the changes.

The proposed amendments are attached.

Criminal Rules Committee
March 1996 Draft

Rule 5.1. Preliminary Examination

* * * * *

(d) PRODUCTION OF STATEMENTS. use language of R. 46(i)

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

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

COMMITTEE NOTE

The addition of subdivision (d) mirrors similar amendments made in 1993 which extended the scope of Rule 26.2 to Rules 32, 32.1, 46 and Rule 8 of the Rules Governing Proceedings under 28 U.S.C. § 2255. As indicated in the Committee Notes accompanying those amendments, the primary reason for extending the coverage of Rule 26.2 rested heavily upon the compelling need for accurate information affecting a witness' credibility. That need, the Committee believes, extends to a preliminary examination under this rule where both the prosecution and the defense have high interests at stake.

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

after the witness personally has testified.

Criminal Rules Committee
March 1996 Draft

Rule 26.2. Production of Witness Statements

* * * * *

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

(1) in Rule ~~32(f)~~ 32(c)(2) at sentencing;

(2) in Rule 32.1(c) at a hearing to revoke or modify probation or supervised release;

(3) in Rule 46(i) at a detention hearing; ~~and~~

(4) in Rule 8 of the Rules Governing Proceedings under 28 U.S.C. § 2255; and

(5) in Rule 5.1 at a preliminary examination.

COMMITTEE NOTE

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

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

Agenda Item II C3

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Rule 6(e)(3)(C)(iv); Disclosure of Grand Jury Information to State Officials**

DATE: **March 19, 1996**

At the Committee's meeting in October 1995, Mr. Pauley indicated that the Department of Justice was reviewing the approval and consultation requirements in Title 9 of the United States Attorneys' Manual. One of the provisions being reviewed is the requirement that the Criminal Division must approve any attempts by a United States Attorney's Office to seek judicial authorization under Rule 6(3)(3)(C)(iv) to disclose grand jury information to state officials. The Advisory Committee Note to the 1985 amendment to that rule specifically notes that the Department had represented to the Committee that any such requests would have to be approved by the Assistant Attorney General of the Criminal Division. The Note states in pertinent part:

> The Committee is advised that it will be the policy of the Department of Justice under this amendment to seek such disclosure only upon approval of the Assistant Attorney General in charge of the Criminal Division. There is no intention, by virtue of this amendment, to have federal grand juries act as an arm of the state.

In the attached letter, Deputy Attorney General Jamie Gorelick indicates that "subject to receiving any contrary views the Committee may hold, we believe the rationale for this approval and consultation requirement has become outdated." In a footnote, Ms. Gorelick indicates that if the current provision for approval is deleted from the *Manual*, the Department is considering a revision which would require that the United States Attorney personally approve an application for disclosure.

This item will be on the agenda for the April meeting. I have been unable to locate any additional information about this amendment in the materials I inherited from Steve Saltzburg relating to the 1985 amendment. The fact that the Committee Note specifically included the assurances of the Department could lead one to conclude that the Committee was very concerned about expanding the list of those to whom grand jury materials could be disclosed and relied on the Department's assurance as a necessary limit on such disclosures. Even assuming that the Committee relied on such assurances, and assuming further that the procedure for seeking authorization from Washington, D.C, is outdated, a question before the Committee is whether any amendment should be made to Rule 6.

One option would be to amend Rule 6(e)(3)(C)(iv) to reflect that applications for disclosure must be approved [in writing] by the "United States attorney for the district"--an option being considered by the Department.

Office of the Deputy Attorney General
Washington, D.C. 20530

December 11, 1995

The Honorable D. Lowell Jensen
Chair, Advisory Committee on Criminal Rules
United State District Court for
the Northern District of California
450 Golden Gate Avenue
P.O. Box 36060
San Francisco, CA 94102

Dear Judge Jensen:

I understand that the Criminal Division has reported to you informally that the Department of Justice is conducting a review of approval and consultation requirements set forth in Title 9 of the United States Attorneys' Manual. These provisions generally require United States Attorneys' offices to consult with or obtain the approval of the Department's Criminal Division before taking certain action. In doing so, these requirements serve important purposes, such as ensuring nationwide uniformity or unusual levels of restraint. But they also impose delay and administrative burdens on Department lawyers both in the field and at headquarters. Accordingly, we have been engaged for some time in a process of identifying and eliminating unnecessary approval and consultation requirements.

Among the approval requirements identified as candidates for elimination is one specifically referenced in the published Advisory Committee notes to the Federal Rules of Criminal Procedure. The United States Attorneys' Manual presently provides that approval of the Criminal Division is required before a United States Attorney's office may seek judicial authorization under Rule 6(e)(3)(C)(iv) to disclose federal grand jury proceedings to state officials. In 1985, when seeking a provision in Rule 6(e) that would allow for such disclosure, the Department of Justice represented to the Federal Rules Committees that it would seek such disclosure "only upon the approval of the Assistant Attorney General of the Criminal Division." Subsequently, when the Advisory Committee approved the change, it specifically noted the Department's representation.

Subject to receiving any contrary views the Committee may hold, we believe the rationale for this approval and consultation requirement has become outdated. Since 1985, the need for and degree of cooperation between state and federal law enforcement agencies has increased substantially. Frequently, state officials refer criminal matters to federal authorities for

prosecution. Referral of criminal matters by federal prosecutors to state authorities is also extremely important in many contexts, including prosecutions of drug dealers and violent criminals. Federal grant money is given to state law enforcement officials to assist them in law enforcement initiatives.

The degree and nature of the cooperation between federal and state authorities, and the significance of grand jury materials to the federal/state relationship in a particular case, are largely local matters to which the local United States Attorney typically brings the predominant federal interest and expertise. This is not an issue on which a uniform national approach appears to be necessary. Although restraint is certainly appropriate when transfer of federal grand jury materials to state law enforcement authorities is concerned, the federal rule's requirement of prior judicial approval operates as a meaningful independent check on a United States Attorney's discretion without requiring the approval of the Criminal Division as well.[1]

United States Attorneys have the authority to make other decisions concerning the handling of grand jury material without seeking the prior approval of the Criminal Division. We believe that United States Attorneys can make this similar decision without prior approval from Washington.

I hope that you will put this matter on your agenda for discussion at your next meeting and will advise us of the Committee's views. I appreciate your consideration of this matter, and your assistance.

Sincerely,

Jamie S. Gorelick
Deputy Attorney General

PS -
Greetings from
your old office!
J.

[1] If the Department deletes the approval and consultation requirement in this context, we also have under consideration a revision to the United States Attorneys' Manual to require that the United States Attorney personally approve the application.

Agenda Item IIC 4

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Dave Schlueter, Reporter

RE: Rule 11; Report of Subcommittee

DATE: March 19, 1996

At the Committee's meeting in October 1995, appointed a subcommittee (Judge Marovich (chair), Mr. Martin, and Mr. Pauley) to consider the question of whether Rule 11 should be amended to permit any judge, other than the judge assigned to hear the case, to take part in plea discussions. As noted in the attached memo, the issue had been raised in conjunction with such a practice in the Southern District of California.

Attached is the report of the Subcommittee, which explains why it believes that no amendment should be made to Rule 11 at this point.

This item is on the agenda for the Committee's April meeting in Washington.

January 22, 1996

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

Dear Judge Jensen:

We have, as a subcommittee, completed the assignment of looking at any proposed amendment to Rule 11.

Since we did not see the giving of advisory opinions to be the function of our Advisory Committee, we did not consider rendering any opinion as to whether the procedure adopted in the Southern District of California is permissible under Rule 11 as written or not. As we saw our function, we were to determine whether or not we should promulgate a rule change which clearly would make the procedure permissible everywhere, including California.

We have solicited opinions from various U.S. Attorneys, various Federal Defenders, and from the Department of Justice. The responses were unanimous. All respondents felt that at this time it would be appropriate for the Committee to take no action on the suggested change to Rule 11. It was felt that there was no sufficient reason to justify a rule change to Rule 11 that could have unpredictable and wide ranging consequences throughout the country. I am enclosing copies of Mr. Pauley's and Mr. Martin's correspondence to me.

It is also important to note, that the question is now moot even in the Southern District of California due to the position taken by the U.S. Attorney's office. It is our understanding that the U.S. Attorney no longer participates in those conferences.

Given the mootness of the question in California and the lack of support for any rule change in other jurisdictions, your subcommittee would respectfully recommend that no action be taken at this time.

Sincerely yours,

George M. Marovich
United States District Judge

c/Henry A. Martin
Roger A. Pauley
David A. Schlueter

U. S. Department of Justice

Criminal Division

Washington, D.C. 20530

NOV 9 1995

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

Dear Judge Marovich:

Having received your letter of November 2, 1995, we agree with your description of the Subcommittee's mission as being limited to whether or not to recommend that there be a Rule 11 change that would clearly authorize the procedure formerly utilized in the Southern District of California of the parties' enlisting on a voluntary basis the participation of a federal judge other than the sentencing judge in the conduct of plea negotiations. Your letter also seeks the views of the Department on this question.

The Department does not favor an amendment of Rule 11 that would specifically authorize participation in plea discussions by federal judges. We think the plea bargaining process has functioned quite well under Rule 11 for many years and that the unique experiment in San Diego with using "outside" judges to help reach criminal case settlements is not sufficient to justify a change to Rule 11 that could have unpredictable and wide-ranging consequences throughout the country.

Best wishes.

Sincerely,

Mary Frances Harkenrider
Roger A. Pauley

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Jude T. Lenahan
Caryll S. Alpert
Assistant Federal Public Defenders

December 13, 1995

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

RE: Advisory Rules Committee; Suggested Amendment to Rule 11

Dear Judge Marovich:

I discussed the question of a proposed amendment to Rule 11 with those present at the Annual Conference for Federal Public and Community Defenders and Chief Assistants last week in Miami, Florida. I was informed by the representative from San Diego that the question is moot in the Southern District of California now due to the position taken by the U.S. Attorney's Office. Among the other defenders, there was some discussion about the relative advantages and disadvantages of the court participating in one way or another in settlement conferences. In the end, there was no consensus of opinion nor any significant interest at this time in sponsoring or promoting any change to Rule 11. Therefore, as the representative of the defenders to the Advisory Committee, I think it would be appropriate for the Committee to take no action at this time on the suggested change to Rule 11.

Sincerely yours,

Henry A. Martin

HAM:drh

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Rule 11(e); Provision Barring Participation by Court in Plea Agreement Discussions**

DATE: **September 7, 1995**

Judge Jensen learned during the Ninth Circuit Conference that courts in the Southern District of California refer criminal cases to another judge for settlement conferences. *See United States v. Torres*, 999 F.2d 376 (9th Cir. 1993)(noting practice). Assuming that a court wishes to use that procedure, Rule 11(e) may prohibit such, depending on how one reads the rule, i.e., does the current rule prohibit any judge from taking part, or only the presiding or sentencing judge?

As the Advisory Committee Note to Rule 11(e)(1)(attached) makes clear, the language prohibiting participation by the court reflects the prevailing rule that for several reasons the court should not be a party to the plea bargaining. The caselaw generally follows that position. *See, e.g., United States v. Garfield*, 987 F.2d 1424 (9th Cir. 1993)(rule prohibiting all forms of judicial participation in plea bargaining is absolute, and without regard to motives of judge, is plain error). The Ninth Circuit, however, in *Torres*, *supra*. concluded that the sentencing judge had not participated in violation of Rule 11. The parties, said the court, "had already hammered out their agreement with the assistance of [another judge]." The *Torres* decision is attached.

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

Secure Guilty Pleas, 112 U.Pa.L.Rev. 865, 904 (1964). Discussions without benefit of counsel increase the likelihood that such discussions may be unfair. Some courts have indicated that plea discussions in the absence of defendant's attorney may be constitutionally prohibited. See Anderson v. North Carolina, 221 F.Supp. 930, 935 (W.D.N.C.1963); Shape v. Sigler, 230 F.Supp. 601, 606 (D.Neb.1964).

Subdivision (e)(1) is intended to make clear that there are four possible concessions that may be made in a plea agreement. First, the charge may be reduced to a lesser or related offense. Second, the attorney for the government may promise to move for dismissal of other charges. Third, the attorney for the government may agree to recommend or not oppose the imposition of a particular sentence. Fourth, the attorneys for the government and the defense may agree that a given sentence is an appropriate disposition of the case. This is made explicit in subdivision (e)(2) where reference is made to an agreement made "in the expectation that a specific sentence will be imposed." See Note, Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas, 112 U.Pa.L.Rev. 865, 898 (1964).

Subdivision (e)(1) prohibits the court from participating in plea discussions. This is the position of the ABA Standards Relating to Pleas of Guilty § 3.3(a) (Approved Draft, 1968).

It has been stated that it is common practice for a judge to participate in plea discussions. See D. Newman, Conviction: The Determination of Guilt or Innocence Without Trial 32-52, 78-104 (1966); Note, Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas, 112 U.Pa.L.Rev. 865, 891, 905 (1964).

There are valid reasons for a judge to avoid involvement in plea discussions. It might lead the defendant to believe that he would not receive a fair trial, were there a trial before the same judge. The risk of not going along with the disposition apparently desired by the judge might induce the defendant to plead guilty, even if innocent. Such involvement makes it difficult for a judge to objectively assess the voluntariness of the plea. See ABA Standards Relating to Pleas of Guilty § 3.3(a), Commentary at 72-74 (Approved Draft, 1968); Note, Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas, 112 U.Pa.L.Rev. 865, 891-892 (1964); Comment, Official Inducements to Plead Guilty: Suggested Morals for a Marketplace, 32 U.Chi.L.Rev. 167, 180-183 (1964); Informal Opinion No. 779 ABA Professional Ethics Committee ("A judge should not be a party to advance arrangements for the determination of sentence, whether as a result of a guilty plea or a finding of guilt based on proof."), 51 A.B.A.J. 444 (1965). As has been recently pointed out:

> The unequal positions of the judge and the accused, one with the power to commit to prison and the other deeply concerned to avoid prison, at once raise a question of fundamental fairness. When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office. His awesome power to impose a substantially longer or even maximum sentence in excess of that proposed is present whether referred to or not. A defendant needs no reminder that if he rejects the proposal, stands upon his right to trial and is convicted, he faces a significantly longer sentence. United States ex rel Elksnis v. Gilligan, 256 F.Supp. 244, 254 (S.D.N.Y. 1966).

On the other hand, one commentator has taken the position that the judge may be involved in discussions either after the agreement is reached or to help elicit facts and an agreement. Enker, Perspectives on Plea Bargaining, in President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 108, 117-118 (1967).

The amendment makes clear that the judge should not participate in plea discussions leading to a plea agreement. It is contemplated that the judge may participate in such discussions as may occur when the plea agreement is disclosed in open court. This is the position of the recently adopted Illinois Supreme Court Rule 402(d)(1) (1970), Ill.Rev.Stat.1973, ch. 110A, § 402(d)(1). As to what may constitute "participation," contrast People v. Earegood, 12 Mich.App. 256, 268-269, 162 N.W.2d 802, 809-810 (1968), with Kruse v. State, 47 Wis.2d 460, 177 N.W.2d 322 (1970).

Subdivision (e)(2) provides that the judge shall require the disclosure of any plea agreement in open court. In People v. West, 3 Cal.3d 595, 91 Cal.Rptr. 385, 477 P.2d 409 (1970), the court said:

> [T]he basis of the bargain should be disclosed to the court and incorporated in the record. * * *
>
> Without limiting that court to those we set forth, we note four possible methods of incorporation: (1) the bargain could be stated orally and recorded by the court reporter, whose notes then must be preserved or transcribed; (2) the bargain could be set forth by the clerk in the minutes of the court; (3) the parties could file a written stipulation stating the terms of the bargain; (4) finally, counsel or the court itself may find it useful to prepare and utilize forms for the recordation of plea bargains. 91 Cal.Rptr. 393, 394, 477 P.2d at 417, 418.

The District of Columbia Court of General Sessions is using a "Sentence-Recommendation Agreement" form.

Upon notice of the plea agreement, the court is given the option to accept or reject the agreement or defer its decision until receipt of the presentence report.

The judge may, and often should, defer his decision until he examines the presentence report. This is made possible by rule 32

sum of the damages listed in No. 5. The amount of damages the jury listed in No. 6 is far greater than the amount of the purported refund. Special Interrogatory No. 7, which asked the jury whether the rate reduction refunded damages, has meaning only if it is interpreted to ask whether it refunded *any* damages. Reading No. 7 as NPPD suggests, as asking whether the rate refund in the amount of $1,527,301 refunded *all* the damages Nucor suffered, which the jury had determined to be in the amount of $7,492,430, renders this interrogatory meaningless. Common sense dictates that a "refund" of $1,527,301 cannot fully compensate damages of $7,492,430.

III. CONCLUSION

We hold NPPD's motion under Rule 60(b) for partial satisfaction of the judgment was untimely, and that the district court had no jurisdiction to consider the motion. We vacate the district court's August 31, 1992, order amending the judgment.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Enrique TORRES, Defendant-Appellant.

No. 92-50549.

United States Court of Appeals,
Ninth Circuit.

Submitted May 25, 1993 *.

Memorandum Filed June 1, 1993.

Order and Opinion Filed July 21, 1993.

Defendant was convicted in the United States District Court for the Southern District of California, John S. Rhoades, Sr., J., following his guilty plea to offense of importing marijuana into the United States. Appeal was taken. The Court of Appeals held that: (1) defendant's negotiated plea agreement validly waived right to appeal sentence, regardless of district court's subsequent denial of downward sentencing adjustment expected by defendant in light of his role as mere "mule" in bringing drugs across border, and (2) district judge did not participate in plea bargaining despite stating that agreement did not shock him.

Affirmed in part and dismissed in part.

1. Criminal Law ⇐1026.10(2.1)

Defendant's negotiated plea agreement validly waived right to appeal sentence, regardless of district court's subsequent denial of downward sentencing adjustment expected by defendant in light of his role as mere "mule" in bringing drugs across border; defendant claimed that expected adjustment was basis for plea agreement, but defendant had affirmed under oath his understanding that district court was not bound by plea agreement, and defendant's prior record had not been disclosed at time of plea negotiations.

2. Criminal Law ⇐1139

Whether district court judge improperly participated in plea negotiations is legal question which is reviewed de novo.

3. Criminal Law ⇐273.1(2)

District judge did not participate in plea bargaining despite stating that agreement did not shock him; agreement already had been reached during discussions before another judge, district judge in question clearly stated that he could not agree to follow plea agreement, and parties' presentation of agreement was mere matter of procedure before change of plea hearing. Fed.Rules Cr.Proc.Rules 11, 11(e)(1), 18 U.S.C.A.

* The panel unanimously finds this case suitable for disposition without oral argument. Fed. R.App.P. 34(a); 9th Cir.R. 34-4.

Stephanie R. Thornton and Antonio F. Yoon, Law Graduate, Federal Defenders of San Diego, Inc., San Diego, CA, for defendant-appellant.

Roger W. Haines, Jr., Asst. U.S. Atty., San Diego, CA, for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of California.

Before: HUG, WIGGINS, and THOMPSON, Circuit Judges.

ORDER

The memorandum disposition filed June 1, 1993 is redesignated a per curiam opinion.

OPINION

PER CURIAM:

Enrique Torres seeks to appeal his sentence of 33 months, imposed under the United States Sentencing Guidelines ("Guidelines"), following his guilty plea to importing 117 pounds of marijuana into the United States in violation of 21 U.S.C. §§ 952 and 960 and 18 U.S.C. § 2. Torres claims the district court's refusal to depart downward pursuant to *United States v. Valdez-Gonzalez*, 957 F.2d 643 (9th Cir.1992), rendered void his waiver of the right to appeal his sentence. Alternatively, he claims he should be allowed to withdraw his guilty plea because the district court committed plain error by participating in the plea negotiations. We have jurisdiction under 28 U.S.C. § 1291 and we affirm the conviction. We decline to exercise jurisdiction to review Torres's sentencing claims and we dismiss them.

A. Facts

Torres was arrested on February 5, 1992, less than a mile north of the Mexico–United States border with 117 pounds of marijuana in the back of his truck. The crime of importation, to which he pleaded guilty, exposed him to a maximum of 20 years imprisonment and a $1 million fine.

The government's initial investigation showed that Torres had a clean record. In fact, he had sustained four prior convictions under different aliases for illegal entry and related offenses.

Torres entered into a plea agreement under which the government promised to recommend a downward adjustment for acceptance of responsibility and a sentence at the low end of the applicable guideline range. The parties also agreed that Torres would argue for a downward departure pursuant to *Valdez-Gonzalez*, which the government would oppose only as a matter of policy.[1] The written agreement stipulated "there is no agreement as to defendant's criminal history category," and "[t]he defendant is aware that any estimate of the probable sentencing range that he may have received from his counsel or the government is a prediction, not a promise, and is *not binding* on the court." Torres, finally, "expressly waive[d] the right to appeal his sentence ... if [he was] sentenced pursuant to the Government's recommendation or to less time in custody."

In accordance with the criminal case settlement procedures of the Southern District of California, the parties discussed the terms of the proposed plea agreement with District Judge Earl Gilliam. Judge Gilliam approved of the agreement, and the parties conveyed Judge Gilliam's approval to District Judge John Rhoades, the sentencing judge. Both Judge Gilliam and Judge Rhoades were told that Torres had no criminal history. At the conclusion of the parties' meeting with Judge Rhoades, he said, "As you know, under Rule 11 I can't agree that I am going to follow what you say but it doesn't shock me." A week later, Torres pleaded guilty.

By the time Torres was sentenced, the probation office had discovered his criminal record, which changed his criminal history category from I to III. At sentencing, the government recommended and the court granted a two-level downward adjustment for acceptance of responsibility, but the court ruled as a matter of law that a *Valdez* depar-

1. In *Valdez-Gonzalez*, we agreed with the district court that the role in the drug trade played by "mules" may constitute a mitigating circumstance of a kind or to a degree not taken into account by the Sentencing Commission in formulating the Guidelines.

ture was inappropriate in light of Torres's criminal history. The court sentenced Torres according to the government's recommendation to the lowest possible term of imprisonment within the appropriate Guidelines range.

B. Waiver

[1] Although a defendant's waiver of his right to appeal is generally enforceable, *United States v. Navarro-Botello*, 912 F.2d 318, 321–22 (9th Cir.1990), *cert. denied*, — U.S. —, 112 S.Ct. 1488, 117 L.Ed.2d 629 (1992), we have considered a defendant's claims that he was sentenced in violation of a negotiated plea agreement. *United States v. Serrano*, 938 F.2d 1058, 1060 (9th Cir.1991). To determine whether a plea agreement was violated we look to "what the parties ... reasonably understood to be the term of the agreement." *United States v. Sutton*, 794 F.2d 1415, 1423 (9th Cir.1986) (citations omitted).

Torres argues that the district court's "refusal to consider" a *Valdez* departure frustrated "the premise upon which [his appeal] waiver was predicated," thus rendering the waiver void. We disagree. Torres got everything he bargained for. The government and the defense, the only parties bound by the plea agreement, performed as promised. Torres's attorney requested a downward departure under *Valdez* and the government did not strenuously oppose the motion. The district court considered the motion at some length before denying it.[2]

If Torres acceded to the plea agreement because he expected to get a *Valdez* departure, his expectation was wholly unreasonable. Torres was reminded at every turn that the district court was not bound by the agreement, and he affirmed under oath that he understood this. Because no one breached the agreement, we uphold Torres's waiver of his right to appeal. Accordingly, we decline to address Torres's other sentencing arguments.

C. Rule 11 Violation

[2] Whether a district court judge improperly participated in plea negotiations is a legal question which we review de novo. *United States v. Bruce*, 976 F.2d 552, 555 (9th Cir.1992). The government and the defendant may "engage in discussions with a view toward reaching [a plea] agreement ... [but] the court shall not participate in any such discussion." Fed.R.Crim.P. 11(e)(1). Torres argues that, by remarking, "as you know under Rule 11 I can't agree that I am going to follow what you say but it doesn't shock me," Judge Rhoades violated Rule 11. Torres claims that but for Judge Rhoades's illegally offering his "seal of approval" to the agreement, he "would not have proceeded with the guilty plea," and that therefore, he should be allowed to withdraw his plea. We disagree.

[3] Judge Rhoades did not participate in plea bargaining. The parties had already hammered out their agreement with the assistance of Judge Gilliam. Its presentation to Judge Rhoades was simply the next step, according to procedures in the Southern District, before the change of plea hearing. Moreover, Judge Rhoades's comment was not a "seal of approval" on the agreement. Far from violating Rule 11, his comment reflects his awareness of and care to observe its prohibitions. We discern no impropriety. Thus, we decline to allow Torres to withdraw his plea.

AFFIRMED in part and DISMISSED in part.

2. The district court said at the sentencing hearing, "I have reread the *Valdez* case. I'll concede that in most respects he may fit what is now called the profile for the *Valdez* case. He's poor. He lives in Mexico. He's got a job that doesn't pay much money. He's got a child that's sick, and he's got a family. But there is one big difference. In *Valdez*, ... and I reread it yesterday, Mr. Valdez had no criminal history. That's at page ... 645. Valdez had no prior criminal record in either Mexico or the United States. And that's not the case here. So I would not be inclined to follow *Valdez*."

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Rule 11; Recent Decision Addressing Rule 11(e)(4).**

DATE: **March 22, 1996**

Attached is correspondence from Judge Davis forwarding Judge Kazen's letter suggesting that the Committee might be interested in discussing the Eighth Circuit's recent decision in *United States v. Harris* (attached). At Judge Davis' suggestion I am also attaching the Fifth Circuit's en banc decision in *United States v. Ashburn.*

This item is on the April agenda for discussion.

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

W. EUGENE DAVIS
CIRCUIT JUDGE

March 21, 1996

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

Dear Dave:

Is it too late to put this letter on the agenda?

Sincerely,

W. Eugene Davis

Enclosure

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
POST OFFICE BOX 1060
LAREDO, TEXAS 78042

CHAMBERS OF
JUDGE GEORGE P. KAZEN

(210) 726-2237
FAX (210) 726-2348

February 28, 1996

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

Dear Gene:

Prompted by the opinion in United States v. Harris, 70 F.3d 1001 (8th Cir. 1995), I write to you in your capacity as a member of the Advisory Committee on Criminal Rules.

Briefly, the Harris court reversed a sentence because the judge departed upward, contrary to the plea bargain. The plea bargain was clearly made under Rule 11(e)(1)(B), as illustrated by the language of footnote 3 in the opinion. The Defendant was told that the recommended sentence was nonbinding and that "he may not withdraw his plea if the court rejects the above recommendations of the parties regarding sentencing factors." Nevertheless, Harris held that the parties "had a reasonable expectation that the court would sentence Harris within the appropriate guideline range for his offense of conviction." The court then launched into a discussion of the value of plea bargains and how they involve "a degree of trust" between defendants and prosecuting bodies. While that proposition may be true, it is ultimately the role of the court to determine the appropriate sentence, subject to appellate review. If all plea bargains are "binding on the court," notwithstanding explicit language to the contrary, simply because they reflect a spirit of cooperation and trust between the prosecutor and the defense, the entire sentencing process becomes a mockery and confirms what many critics already say, namely that the prosecutor is now also the sentencing judge.

What is troubling about Harris is its reliance on Rule 11(e)(4), and this is what prompts my letter. That section says that if the court rejects the plea agreement, it must notify the defendant and "afford the defendant the opportunity to then withdraw the plea." The defendant is also to be told that if he persists in a guilty plea "the disposition of the case may be less favorable...than that contemplated by the plea agreement."

It has always been my belief that Rule 11(e)(4) can only apply to a plea bargain under Rule 11(e)(1)(C). This is because a Rule 11(e)(1)(B) agreement is one where the defendant pleads "with the understanding that (the recommended sentence) shall not be binding upon the court." Moreover, Rule 11(e)(2) specifically states that in an (e)(1)(B) agreement, "the court shall advise the defendant that if the court does not accept the recommendation or request, the defendant nevertheless has no right to withdraw the plea." That language is meaningless if (e)(4) applies to an (e)(1)(B) agreement. Nevertheless, the Harris court clearly applied the provisions of (e)(4) to an (e)(1)(B) agreement. (Compare footnotes 3 and 5 of the Harris opinion).

I urge your Committee to address this situation.

Sincerely yours,

George P. Kazen

GPK/gsh

L.Ed.2d 603 (1994); *United States v. $405,089.23 U.S. Currency*, 33 F.3d 1210, 1218 (9th Cir.1994), *amended on denial of reh'g*, 56 F.3d 41 (9th Cir.1995) (concluding that although under *Firearms* the law was clear that civil forfeitures did not constitute punishment for double jeopardy purposes, the Supreme Court has since "changed its collective mind"), *petition for cert. filed*, 64 U.S.L.W. 3161 (U.S. Aug. 28, 1995) (No. 95-346).

As the majority holds, Clementi's criminal conviction does not implicate double jeopardy concerns because jeopardy does not attach upon the mere filing of an administrative claim. Thus, we should leave to another day, in a proper case, the appropriate analysis of whether and under what circumstances a civil penalty may constitute punishment for the purpose of double jeopardy analysis.

UNITED STATES of America, Appellee,

v.

Kevin Guy HARRIS, Appellant.

No. 95-2047.

United States Court of Appeals, Eighth Circuit.

Submitted: Oct. 20, 1995.

Decided Dec. 1, 1995.

Defendant pleaded guilty to aiding and abetting transfer of stolen property in interstate commerce. The United States District Court for the District of Minnesota, Robert G. Renner, J., sentenced defendant. Defendant appealed. The Court of Appeals, Heaney, Circuit Judge, held that district court erred by departing upward from Sentencing Guidelines based on conduct addressed by count dismissed pursuant to parties' plea bargain.

Reversed and remanded.

Criminal Law ⇐1265

District court erred in considering conduct from count dismissed pursuant to plea agreement as basis for departing upward from Sentencing Guidelines under provision permitting departure if court finds aggravating or mitigating circumstance not adequately taken into consideration by Sentencing Commission. U.S.S.G. § 5K2.0, 18 U.S.C.A.

Richard H. Kyle, Jr., Minneapolis, Minnesota, argued, for appellant.

D. Gerald Wilhelm, Minneapolis, Minnesota, argued, for appellee.

Before FAGG, LAY, and HEANEY, Circuit Judges.

HEANEY, Circuit Judge.

Appellant, Kevin Guy Harris, pleaded guilty pursuant to a plea agreement to aiding and abetting the transfer of stolen property in interstate commerce. Harris appeals the district court's sentence, which included an upward departure pursuant to section 5K2.0 of the guidelines to punish Harris for his participation in a robbery that preceded his offense of conviction. We reverse and remand.

BACKGROUND

On April 18, 1994, Harris was charged by indictment with conspiracy to transfer stolen property in interstate commerce in violation of 18 U.S.C. §§ 371 and 2314 (count I) and aiding and abetting the transfer of stolen property in interstate commerce in violation of 18 U.S.C. § 2314 (count II). On January 18, 1995, Harris pleaded guilty to both counts in the indictment after negotiating a plea bargain with the government. The government agreed to file a downward departure motion pursuant to section 5K1.1 of the guidelines in return for Harris's cooperation in the prosecution of four other defendants. With respect to Harris's sentence, the parties' guideline calculations anticipated a total offense level of 13 and a criminal history

category of IV, yielding a custody range of 24 to 30 months before any departure for substantial assistance to authorities.

During the presentence investigation, the parties to the plea agreement discovered that Harris's guilty plea to conspiracy exposed him to a significantly longer sentence than either party had intended under the agreement. A plea to count I of the indictment included a stipulation that Harris participated in an armed robbery and would have triggered use of the offense severity level assigned to armed robbery (level 26) rather than that assigned to the interstate transportation of stolen merchandise (level 13). The result of the inclusion of count I would have been a guideline range of 70 to 87 months, far above the range contemplated by the parties to the plea agreement. Harris and the government, therefore, reached a new agreement whereby Harris would withdraw his plea to count I and the government would dismiss count I at sentencing. The parties made a joint motion to withdraw Harris's plea to count I of the indictment and the court granted the motion by order dated February 14, 1995. The sentencing calculations in the amended plea agreement filed with the court were identical to those in the original plea agreement.

On April 7, 1995, the government dismissed count I as promised and the court sentenced Harris on count II. Prior to sentencing, Harris objected to the presentence report's recommendation that the court depart upward from the guideline range to account for Harris's role in the armed robbery. As anticipated in the plea agreement, the court found that the total offense level for count II was 13, that Harris's criminal history category was IV, and that the guideline range was 24 to 30 months. The court explicitly granted the government's motion for downward departure pursuant to section 5K1.1 of the guidelines and 18 U.S.C. § 3551. In addition, however, the court departed upward pursuant to section 5K2.0[1] of the guidelines deeming Harris's participation in the armed robbery that preceded his offense of conviction to be relevant conduct not adequately reflected in the applicable guideline sentence. Although the court made no specific findings as to the degree of either the upward or downward departure, they appear to have canceled each other out. The court imposed a sentence of 30 months incarceration. This appeal followed.

DISCUSSION

Up until the time of sentencing, this case presented an instance in which the plea bargaining process functioned smoothly for both parties. The deal struck between Harris and the government is clear. Their intentions were straightforward. Moreover, each party fulfilled its obligations under the agreement. Harris pleaded guilty to aiding and abetting the transfer of stolen property in interstate commerce. He also fully cooperated with the government in its investigation, which substantially assisted in securing guilty pleas from Harris's co-defendants.[2] The government dismissed count I of the indictment and made a motion to the court for a downward departure. Although both parties understood that the court was not bound by their guideline calculations,[3] once the court accept-

1. Section 5K2.0 empowers a sentencing court to depart from the guidelines "if the court finds 'that there exists an aggravating or mitigating circumstance of a kind, or to a degree not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.'" U.S.S.G. § 5K2.0 (quoting 18 U.S.C. § 3553(b)).

2. The government summed up Harris's cooperation as follows:

> I can only tell the court that Mr. Harris has been completely forthright with me, as far as I know. The information he has provided is accurate, as far as I know. It has been confirmed by other sources other than Mr. Harris. He was willing to testify. He gave us information that we didn't already have. And his information did result in the plea of other defendants in this case, and, in fact, in completely resolving the case by means of pleas of guilty all the way around.

Sentencing Tr. at 10.

3. The plea agreement provided:

> The defendant understands that he will be sentenced in accordance with the applicable sentencing guidelines under the Sentencing Reform Act of 1984. The proper application of those guidelines is a matter solely within the discretion of the court. The above stipulations are not binding on the court.... The defen-

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ed the plea agreement, they had a reasonable expectation that the court would sentence Harris within the appropriate guideline range for his offense of conviction. At oral argument, the government explained that the court's decision to impose the 30–month sentence placed the government in the unusual and uncomfortable position of having to defend a sentence it never intended Harris to receive.

The sentencing court erred in considering conduct from the dismissed count as the basis for an upward departure under section 5K2.0 in clear opposition to the intentions of the parties as embodied in their plea agreement.[4] A contrary rule would allow the sentencing court to eviscerate the plea bargaining process that is vital to the courts' administration. As this court has recently noted:

> [W]hile the district court is not bound by stipulations entered into between the parties, plea bargaining is certainly a favorable way to dispose of many of the criminal cases present on the increasingly-crowded district court dockets. Meaningful plea bargaining requires a degree of trust between defendants and prosecuting bodies. Lest they desire to have trials on all criminal matters, district courts should be wary of conduct which tends to undermine the trust [defendants] place in the deals they strike with prosecutors.

United States v. Shields, 44 F.3d 673, 675 n. 2 (8th Cir.1995). The plea bargain is recognized as an important part of our criminal justice system. In exchange for a guilty plea, the government dismisses certain charges or downgrades the offenses charged. In exchange for this benefit, the defendant often provides invaluable cooperation to the government. By its nature, plea bargaining involves certain risks to both parties. Permitting sentencing courts to accept a defendant's guilty plea and yet disavow the terms of and intent behind the bargain, however, would bring an unacceptable level of instability to the process.

Unquestionably, the district courts may consider conduct from uncharged or dismissed counts for certain purposes under the guidelines. First, such conduct can factor into the offense level as a specific offense characteristic, including victim-related and role-in-the-offense adjustments. *See* U.S.S.G. § 1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)); *United States v. Sheahan*, 31 F.3d 595 (8th Cir. 1994). For example, in this case Harris received a two-level increase to his base offense pursuant to section 3A1.3 of the guidelines because the victim was physically restrained in the course of the robbery that preceded the offense of conviction. In addition, section 4A1.3(e) allows a court to depart from a defendant's criminal history score based on "prior similar adult criminal conduct not re-

dant understands and agrees that he may not withdraw his plea if the court rejects the above recommendations of the parties regarding sentencing factors, or denies the motion of the United States for a downward departure.

Amended Plea Agreement ¶ 6 at 5. It is important to note that in sentencing Harris, the court did not reject the sentencing factors as laid out in the plea agreement nor did it deny the government's motion for a downward departure. Instead, it departed upward, sua sponte, to account for the conduct embodied in the dismissed count of the indictment.

4. On appeal, the government contends that this court permits use of conduct from dismissed counts to support an upward departure pursuant to section 5K2.0 of the guidelines and cites to *United States v. Karam*, 37 F.3d 1280 (8th Cir. 1994), *cert. denied*, — U.S. —, 115 S.Ct. 1113, 130 L.Ed.2d 1077 (1995). The government's reliance on *Karam* for this proposition, however, is totally misplaced. In *Karam*, the defendant was subject to a ten-year mandatory minimum sentence that trumped any guideline sentence. Although the court included drug quantities from dismissed counts to determine the defendant's offense level, the ultimate sentence it imposed constituted a significant downward departure from the otherwise applicable statutory minimum. This court concluded that the extent of the departure was unreviewable. *Karam*, 37 F.3d at 1285 (citing *United States v. Albers*, 961 F.2d 710, 712 (8th Cir.1992)). Two other facts further distinguish our situation from *Karam*. First, Karam's lawyer did not object to the presentence report, which included the drug quantities from the dismissed counts in the total quantity. Second, and most important, the court considered the conduct in the dismissed counts to be relevant conduct under section 1B1.3 rather than a basis for an upward departure under section 5K2.0. The guidelines allow consideration of dismissed counts as relevant conduct within the meaning of section 1B1.3. *See id.* at 1285. Therefore, contrary to the government's assertion, *Karam* does not address the issue specifically raised by this case.

sulting in a criminal conviction." Finally, according to section 1B1.2(c) of the guidelines, instances of misconduct to which the defendant stipulates when entering a plea are treated like convictions and trigger application of multiple count analysis as set forth in sections 3D1.1–1.5. It was the application of this provision to the original plea agreement that led to the parties' joint motion to withdraw Harris's guilty plea to count I so that his sentence would more accurately reflect the parties' intentions.

The circuit courts are divided, however, on the question of whether conduct from dismissed counts may be used as a basis for an upward departure under section 5K2.0. Although we note that each case implicates a different constellation of variables under the guidelines, our holding is generally consistent with the Third and Ninth Circuits. *See United States v. Thomas*, 961 F.2d 1110, 1120–21 (3rd Cir.1992) (holding that the district court erred by departing upward to compensate for the government's decision not to charge the defendant with a more serious crime); *United States v. Faulkner*, 952 F.2d 1066, 1069–71 (9th Cir.1991) ("It would be patently unfair if the court were allowed to hold [the defendant] to his part of the bargain—his plea of guilty to five counts—while simultaneously denying him the benefits promised him from the bargain by relying on the uncharged and dismissed counts in sentencing him."); *United States v. Castro–Cervantes*, 927 F.2d 1079, 1082 (9th Cir.1990) ("[F]or the court to let the defendant plead to certain charges and then to be penalized on charges that have, by agreement, been dismissed is not only unfair; it violates the spirit if not letter of the bargain."); *but see United States v. Kim*, 896 F.2d 678, 684 (2nd Cir.1990) (holding that the court may use conduct in dismissed counts to support an upward departure), *followed by, United States v. Ashburn*, 38 F.3d 803, 807 (5th Cir.1994), *cert. denied*, —— U.S. ——, 115 S.Ct. 1969, 131 L.Ed.2d 858 (1995) *and United States v. Zamarripa*, 905 F.2d 337, 341 (10th Cir.1990).

It is important to recognize that the sentencing court had valid alternative means to impose a different sentence in this case if that was its objective. First, Rule 11(e) of the Federal Rules of Criminal Procedure gives the court discretion to reject a plea bargain that it believes to be unduly lenient.[5] In addition, the guidelines provide that where a plea agreement includes the dismissal of any charges or an agreement not to pursue potential charges, the court should accept the plea only if it determines that the charges adequately reflect the seriousness of the actual offense behavior and only if the agreement does not undermine the statutory purposes of sentencing or the sentencing guidelines. U.S.S.G. § 6B1.2. Moreover, once it accepted the plea, the court had significant latitude in applying the guidelines. For example, the court could have made its own calculations of Harris's offense level and criminal history, rather than accept the calculations embodied in the plea agreement. Moreover, the court could have rejected the government's motion for downward departure pursuant to § 5K1.1. All of these options represented known risks to Harris when he entered into a bargain with the government. The district court chose not to exercise any of these options.

The court was not entitled to defeat the parties' expectations by imposing a more severe sentence using Harris's role in the armed robbery that preceded the offense of conviction to depart upward pursuant to § 5K2.0. For that reason, we remand the case to the district court with instructions either to resentence Harris in a manner consistent with this opinion or to reject the plea agreement and allow Harris the opportunity to withdraw his plea as directed by Rule 11(e)(4) of the Federal Rules of Criminal Procedure.

5. Moreover, Rule 11(e)(4) outlines the procedure the court must follow if it rejects a plea agreement. Among the requirements, the court must inform the defendant that if he or she "persists in a guilty plea ... the disposition of the case may be less favorable to the defendant than contemplated by the agreement." Fed.R.Crim.P. 11(e)(4). Thus, the rules recognize the reasonable expectation parties to a plea agreement have in the disposition contemplated by that agreement.

of alternatives . . ., of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted." 40 C.F.R. § 1508.9(b).

[12] While an EA must contain a discussion of alternatives, the range of alternatives that the Forest Service must consider "decreases as the environmental impact of the proposed action becomes less and less substantial." *Olmsted Citizens for a Better Community v. United States*, 793 F.2d 201, 208 (8th Cir.1986) (upholding consideration of a limited range of alternatives when a finding of no significant environmental impact was made). Notably, the district court in *Sabine* pointed out that "[a]lthough consideration of some range of alternatives is essential to any environmental assessment, it makes little sense to fault an agency for failing to consider more environmentally sound alternatives to a project which it has properly determined, through its decision not to file an impact statement, will have no significant environmental effects anyway." *Sabine River Auth. v. United States Dep't of Interior*, 745 F.Supp. 388, 399 (E.D.Tex.1990) (internal quotation marks omitted), *aff'd*, 951 F.2d 669 (5th Cir.), *cert. denied*, — U.S. —, 113 S.Ct. 75, 121 L.Ed.2d 40 (1992). *Accord Missouri Mining, Inc. v. Interstate Commerce Comm'n*, 33 F.3d 980, 984 (8th Cir. 1994); *City of New York v. United States Dep't of Transp.*, 715 F.2d 732, 744 (2d Cir. 1983), *appeal dismissed*, 465 U.S. 1055, 104 S.Ct. 1403, 79 L.Ed.2d 730 (1984).

[13] We disagree with the district court. As we see it, the EAs prepared by the Forest Service for the nine timber sales appear likely to satisfy NEPA's requirements. First, eight of the nine EAs consider four alternatives: a no action alternative, an uneven-aged management alternative, and two even-aged management alternatives. The ninth EA considers the four above alternatives and an additional uneven-aged management alternative. The EAs also discuss the need for the proposal, the agencies and persons consulted, and the environmental effects of each alternative, including the effects each alternative would have on wildlife, vegetation, soils, water, air, recreation, and cultural resources. The EAs examine the mitigating measures that would be taken with each alternative, as well as the social and economic factors affecting each alternative.

When evaluating whether an EA complies with NEPA, we must be careful to avoid confusing NEPA's requirements for an EIS with those for an EA. This case is unique because the LRMP has been remanded for reanalysis and harvest-method decisions are to be made on a compartment-level basis. However, this fact affects the NFMA analysis more than the NEPA analysis. The EAs in this case remain "rough-cut, low-budget" documents that are tiered to the FEIS and that incorporate the still-relevant objectives and requirements of the LRMP. When examined under this light, we conclude that the EAs adequately address the need for the proposal, the alternatives, the environmental consequences, and the agencies and persons consulted.

VI.

We conclude that the district court erred in granting the preliminary injunction. We VACATE AND REMAND.

UNITED STATES of America, Plaintiff–Appellee,

v.

Philip Scott ASHBURN, Defendant–Appellant.

No. 93–1067.

United States Court of Appeals, Fifth Circuit.

Nov. 15, 1994.

Defendant was convicted in the United States District Court for the Northern District of Texas, John H. McBryde, J., of two counts of bank robbery, and was sentenced

to term of 180 months. Defendant appealed. The Court of Appeals vacated defendant's sentence and remanded, 20 F.3d 1336, and reconsideration en banc was granted. The Court of Appeals, Robert M. Parker, Circuit Judge, held that: (1) conduct forming basis for counts of defendant's indictment which were dismissed pursuant to plea bargain could be considered as basis for upward departure; (2) district court offered adequate justification for departing upward more than twice recommended guideline range on grounds defendant's criminal history category significantly underrepresented seriousness of defendant's criminal history or likelihood that defendant would commit further crimes; and (3) departing upward from potential sentence of 78 months to 180 months was not unreasonable.

Panel opinion reinstated in part and vacated in part; sentence affirmed.

Goldberg, Circuit Judge, filed dissenting opinion in which DeMoss, Circuit Judge, joined.

DeMoss, Circuit Judge, filed dissenting opinion in which Goldberg, Circuit Judge, joined.

1. Criminal Law ⇐1147

Court of Appeals reviews district court's decision to depart upward from Sentencing Guidelines for abuse of discretion. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.App.

2. Criminal Law ⇐1287(4)

Conduct forming basis for counts of defendant's indictment which were dismissed pursuant to plea bargain could be considered as basis for upward departure under sentencing guideline permitting such departure if criminal history category does not adequately reflect seriousness of defendant's past criminal conduct. U.S.S.G. § 4A1.3(e), p.s., 18 U.S.C.A.App.

3. Criminal Law ⇐1287(3, 4)

"Prior" in sentencing guideline provision permitting consideration of prior similar adult criminal conduct not resulting in criminal conviction in determining whether to depart upward, does not exclude separate offenses that were part of series of crimes that resulted in present arrest and conviction; instead, "prior" allows consideration of all similar adult criminal conduct not resulting in conviction that occurred prior to sentencing. U.S.S.G. § 4A1.3(e), p.s., 18 U.S.C.A.App.

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

4. Criminal Law ⇐1265

Defendant's acceptance of plea agreement that included dismissal of two bank robbery counts, pursuant to sentencing guideline provision permitting court to accept plea agreement that includes dismissal of charges if remaining charges adequately reflect seriousness of actual offense behavior, was not inconsistent with subsequent decision to depart upward from applicable guideline range based on dismissed charges; plea agreement contained no language that could have led defendant to believe that dismissed counts could not be used as basis for upward departure, and clearly stated there was no agreement as to what sentence would be. U.S.S.G. §§ 4A1.3, p.s., 6B1.2, p.s., 18 U.S.C.A.App.; 18 U.S.C.A. § 2113(a).

5. Criminal Law ⇐1321(2)

In sentencing defendant for bank robbery, district court offered adequate justification for departing upward more than twice recommended guideline range on grounds defendant's criminal history category significantly underrepresented seriousness of defendant's criminal history or likelihood that defendant would commit further crimes; district judge expressed concern that defendant had committed two series of bank robberies less than two years after his release from supervision following prior conviction, and cited robberies committed earlier that had not resulted in conviction. U.S.S.G. § 4A1.3, p.s., 18 U.S.C.A.App.

6. Criminal Law ⇐1321(2)

In departing upward more than one criminal history category under Sentencing Guidelines, district court is not required to examine each intervening criminal history category where it is evident from stated grounds for departure why the bypassed

criminal history categories were inadequate. U.S.S.G. § 4A1.3, p.s., 18 U.S.C.A.App.

7. Criminal Law ⇐1287(1), 1289

In sentencing defendant for bank robbery, departing upward from potential sentence of 78 months under Sentencing Guidelines to 180 months was not unreasonable, in light of evidence of numerous instances of past criminal conduct, which were not considered in criminal history calculation, and overwhelming evidence that defendant was inclined to return to similar course of behavior. U.S.S.G. § 4A1.3, p.s., 18 U.S.C.A.App.

Timothy J. Henry, Timothy Crooks, Asst. Federal Public Defenders, Ira R. Kirkendoll, Federal Public Defender, Fort Worth, TX, for appellant.

Christopher Stokes, Joe C. Lockhart, Asst. U.S. Attys., Richard H. Stephens, U.S. Atty., Fort Worth, TX, Delonia Watson, Asst. U.S. Atty., Dallas, TX, for appellee.

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

Before POLITZ, Chief Judge, GOLDBERG, KING, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHÉ, WIENER, BARKSDALE, E. GARZA, DeMOSS, BENAVIDES, STEWART and PARKER, Circuit Judges.

ROBERT M. PARKER, Circuit Judge:

This case requires us to examine again the subject of departures under Section 4A1.3 of the Federal Sentencing Guidelines. Specifically, we must address whether conduct that formed the basis for counts of an indictment dismissed pursuant to a plea agreement may be considered in departing upward from the Guidelines, and we must revisit the issue of the justification required for such a departure under *United States v. Lambert*, 984 F.2d 658 (5th Cir.1993) (en banc).

Pursuant to a plea agreement, Philip Scott Ashburn pled guilty to two counts of bank robbery in violation of 18 U.S.C. § 2113(a). The district court determined that the appropriate range for Ashburn's offense under the Sentencing Guidelines was 63 to 78 months. However, the court also determined that this range did not adequately reflect Ashburn's criminal history or likelihood of recidivism and thus departed upward, sentencing Ashburn to 180 months imprisonment.

Ashburn appealed his sentence. A panel of this court affirmed in part, but held that remand was required because the district court improperly considered the dismissed counts of the indictment as a basis for the upward departure and had not offered sufficient justification for a departure under Section 4A1.3.[1] On reconsideration *en banc*, we conclude that the departure was not improper, and we affirm the sentence imposed by the district court.

I. BACKGROUND

On August 26, 1992, Ashburn, along with a co-defendant, was indicted for a single-count of bank robbery in violation of 18 U.S.C. § 2113(a). A superseding indictment charged Ashburn with three additional counts of bank robbery. Ashburn pled guilty to Counts 3 and 4. In return for the guilty plea, the government agreed to dismiss counts 1 and 2 and to forego prosecution of two additional attempted robberies.

Count 3 charged Ashburn with a bank robbery which occurred on July 3, 1992 in which $4,167 was stolen from the Bank of America in Fort Worth, Texas. Count 4 charged Ashburn with a robbery in which approximately $32,000 in cash was stolen from the American Bank of Hurst, Texas on July 31, 1992. The dismissed counts charged Ashburn with robbing Arlington National Bank in Arlington, Texas on December 27, 1991 and Sunbelt Savings in Fort Worth, Texas on January 17, 1992.

The presentence investigation report (PSR) prepared prior to Ashburn's sentencing revealed that in 1984 he had pled guilty to armed bank robbery in Portland, Oregon. For this offense, Ashburn served a six year sentence in the custody of the Attorney General under the Federal Youth Corrections

1. *United States v. Ashburn*, 20 F.3d 1336 (5th Cir.1994).

Act, formerly codified at 18 U.S.C. § 5010(b). The PSR assessed three criminal history points against Ashburn for this prior conviction, producing a Criminal History Category of II.[2] The defendant's presentence report from the District of Oregon indicates that in addition to the offense to which Ashburn pled guilty, he had committed four other bank robberies in Oregon and one in Salt Lake City, Utah.[3]

After appropriate enhancements and a three level reduction for Acceptance of Responsibility, Ashburn's Total Offense Level was determined to be 25.[4] With this offense level and a Criminal History Category of II, the Guidelines provided for a sentencing range of 63 to 78 months. The court, dissatisfied with this range, notified the parties of its provisional intention to depart upward from the guideline range.

To support the upward departure, the government called Federal Bureau of Investigation (FBI) agent, Deborah Eckert, who testified at the sentencing hearing about her investigation into several robberies and attempted robberies for which Ashburn was believed to be responsible. Agent Eckert described an interview she conducted with Ashburn's co-defendant, April Jeanette English. In that interview, English asserted that Ashburn admitted to her that he had committed two earlier robberies in December of 1991 and January of 1992. These two robberies had been confirmed in detail and were charged in counts 1 and 2 of Ashburn's indictment.

English also told Eckert that on April 17, 1992, Ashburn called English from Key West, Florida and told her "I just did a job." Eckert confirmed that a bank robbery was reported in Key West, Florida on the specified day.[5] Eckert also testified regarding evidence of Ashburn's involvement in attempted robberies of the Watauga State Bank in Watauga, Texas on July 24, 1992, and the Arlington National Bank in Arlington, Texas on July 17, 1992.[6]

The district court concluded that Criminal History Category II did not adequately reflect the seriousness of Ashburn's past conduct or the likelihood that he would commit additional crimes. The judge therefore departed upward, sentencing Ashburn to serve concurrent 180 month terms of imprisonment on Counts 3 and 4. The court also sentenced Ashburn to a 3 year term of supervised release, and a mandatory $100 assessment. On appeal, Ashburn contends that the district court erroneously calculated his offense level and criminal history category and made various errors in its decision to depart upward.

A panel of this court found that Ashburn's objections to the offense level and criminal history category were without merit.[7] However, the panel held that the district court failed to adequately explain its reasons for the upward departure.[8] In addition, the panel majority held that the counts dismissed pursuant to the plea bargain should not have been considered in effecting an upward departure.[9] The dissent argued that nothing in the plea agreement or the Guidelines precluded the district court from using the dismissed counts to enhance the defendant's

2. The Guidelines include only prior sentences, not prior offenses or prior conduct, in calculating the criminal history category. U.S.S.G. § 4A1.1.

3. The report also notes that "Ashburn was unquestionably the ringleader in these bank robberies. He planned them, recruited accomplices to assist him and was in charge of dividing the proceeds afterwards." In addition, the report indicates that a loaded revolver was used in three of the robberies.

4. Under the Guidelines, bank robbery is a non-groupable offense. U.S.S.G. § 3D1.2(d). Thus, the dismissed counts could not be considered in the offense level calculation under the relevant conduct provision as a part of the same course of conduct or common scheme or plan. U.S.S.G. § 1B1.3(a)(2).

5. Ashburn was not charged with this robbery.

6. As a part of the plea bargain, the government agreed not to prosecute Ashburn for these two attempts.

7. 20 F.3d at 1338–43.

8. 20 F.3d at 1344–46.

9. 20 F.3d at 1346–48.

sentence.[10]

We ordered that this case be reheard *en banc*. We reject Ashburn's appeal with regard to the offense level and criminal history calculations for the reasons set out in the panel opinion.[11] However, we find it necessary to reconsider the panel's holdings with respect to the district court's departure.

II. DISCUSSION

A district court may depart upward from the Sentencing Guidelines if the court finds that an aggravating circumstance exists that was not adequately taken into consideration by the Sentencing Commission. 18 U.S.C. § 3553(b). Whenever a defendant is sentenced, the district judge is required to "state in open court the reasons for its imposition of the particular sentence." 18 U.S.C. § 3553(c). If the court departs upward from the Guidelines, the court must also state "the specific reason for the imposition of the sentence different from that described." Id.

[1] "Our review of a sentence under the guidelines is 'confined to determining whether a sentence was imposed in violation of law or as a result of an incorrect application of the sentencing guidelines.'" *United States v. Shipley*, 963 F.2d 56, 58 (5th Cir.) (quoting *United States v. Nevarez–Arreola*, 885 F.2d 243, 245 (5th Cir.1989)) (internal quotations omitted), *cert. denied*, — U.S. —, 113 S.Ct. 348, 121 L.Ed.2d 263 (1992); 18 U.S.C. § 3742(e). We review the district court's decision to depart upward for abuse of discretion. *United States v. McKenzie*, 991 F.2d 203, 204 (5th Cir.1993). We affirm a departure from the Guidelines "if the district court offers 'acceptable reasons' for the departure and the departure is 'reasonable.'" *United States v. Lambert*, 984 F.2d 658, 663 (5th Cir.1993) (en banc) (quoting *United States v. Velasquez–Mercado*, 872 F.2d 632, 637 (5th Cir.1989)).

A. Consideration of Dismissed Counts in Upward Departure

[2] Ashburn contends that the sentencing court improperly considered the December 1991 and January 1992 robberies as a basis for upward departure because this conduct formed the basis for the counts of Ashburn's indictment which were dismissed pursuant to his plea bargain. We find this argument unpersuasive.

The circuits are split on this question. The Third and Ninth Circuits[12] have held that the defendant does not get the benefit of his plea bargain when the district court departs upward based on the dismissed counts of the indictment. The Second and Tenth Circuits,[13] on the other hand, have held that prior criminal conduct related to dismissed counts of an indictment may be used to justify an upward departure. We are inclined to agree with the latter view.

United States Sentencing Commission Guidelines Manual (U.S.S.G.) § 4A1.3 authorizes a court to depart upward "[i]f reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes...." In deciding whether to depart because of the defendant's criminal history, subsection (e) expressly authorizes the court to consider "prior similar adult criminal conduct not resulting in a criminal conviction." U.S.S.G. § 4A1.3(e) (Policy Statement).

[3] Neither this guideline nor its commentary suggests that an exception exists for prior similar criminal conduct that is the subject of dismissed counts of an indictment.[14] Section 1B1.4 provides that in deter-

10. 20 F.3d at 1350.

11. The panel opinion was vacated in its entirety when we granted rehearing *en banc*. 5th Cir.R. 41.3. Parts II.A. and B. of the panel opinion are reinstated by this decision.

12. *United States v. Thomas*, 961 F.2d 1110, 1121 (3d Cir.1992); *United States v. Castro–Cervantes*, 927 F.2d 1079 (9th Cir.1990).

13. *United States v. Zamarripa*, 905 F.2d 337 (10th Cir.1990); *United States v. Kim*, 896 F.2d 678 (2d Cir.1990).

14. We do not interpret the word "prior" in subsection (e) so narrowly as to exclude separate offenses that were part of the series of crimes that resulted in the present arrest and conviction. *Contra United States v. Coe*, 891 F.2d 405, 409–10 (2d Cir.1989) ("where a defendant commits a

mining "whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law."[15] We have found no statute, guidelines section, or decision of this court that would preclude the district court's consideration of dismissed counts of an indictment in departing upward.

[4] The guidelines provisions on plea agreements are not to the contrary. Section 6B1.2 provides that the court may accept a plea agreement that includes the dismissal of charges or an agreement not to pursue potential charges if the remaining charges "adequately reflect the seriousness of the actual offense behavior". U.S.S.G. § 6B1.2(a) (Policy Statement). Ashburn contends that acceptance of a plea agreement subject to this standard is inconsistent with a subsequent decision to depart upward from the applicable guideline range. We disagree.

Ashburn pled guilty to two counts of bank robbery. In all respects, these counts were similar to the counts dismissed and the attempted robberies not charged. The two count conviction subjected the defendant to a maximum sentence of forty years imprisonment. 18 U.S.C. § 2113(a). Under the circumstances, we must agree with the district court's implicit finding that the two count plea adequately reflected Ashburn's "actual offense behavior".

Such a finding, however, does not guarantee that a defendant's criminal history category will adequately reflect the defendant's past criminal conduct or the likelihood that he will commit other crimes. If it does not, the court is authorized to make a separate determination on the need for departure in sentencing under section 4A1.3. We decline the defendant's invitation to hold that this determination is precluded once a plea agreement is accepted under section 6B1.2.

In addition, the plea agreement Ashburn accepted contained no language that could have led him to believe that the dismissed counts could not be used as the basis for an upward departure. The plea agreement provided that the government would dismiss counts 1 and 2 of the indictment and would not prosecute Ashburn for the attempted robberies occurring on July 17 and July 24, 1992. The government has complied completely with those obligations.

Moreover, the plea agreement clearly stated that there was no agreement as to what the sentence would be, that no one could predict with certainty what guideline range would be applicable, and that the defendant would not be allowed to withdraw his plea if the court departed from the applicable guideline range. Thus, the language of the plea agreement in no way implies a limitation on the court's power to consider relevant information or to depart from the guideline range. Indeed, the agreement clearly contemplates the possibility that the court would depart upward when all of the relevant information was considered. Therefore, Ashburn could not reasonably have inferred from the plea agreement that the district court was barred from considering the dismissed counts in its departure determination.

B. Adequacy of Departure Justification

[5] Under section 4A1.3, an upward departure "is warranted when the Criminal History Category significantly under-represents the seriousness of the defendant's crim-

series of similar crimes, it would be elevating form over substance to regard the early episodes in the series as "prior criminal history" simply because the defendant pled guilty to the last in the series, rather than the first.") Instead, we read "prior" to allow consideration of all similar adult criminal conduct not resulting in conviction that occurred prior to sentencing.

15. The commentary to this section provides, in part, that

> [a] court is not precluded from considering information that the guidelines do not take into account. For example, if the defendant committed two robberies, but as part of a plea negotiation entered a guilty plea to only one, the robbery that was not taken into account by the guidelines would provide a reason for sentencing at the top of the guideline range. In addition, information that does not enter into the determination of the applicable guideline sentencing range may be considered in determining whether and to what extent to depart from the guidelines.

Commentary to U.S.S.G § 1B1.4.

inal history or the likelihood that the defendant will commit further crimes." U.S.S.G. § 4A1.3 (Policy Statement). In *United States v. Lambert*,[16] we considered the procedure a district court must follow when departing upward under this provision. We held that the district court should consider each intermediate criminal history category, and should state for the record that it has done so. In addition, the court should explain why the criminal history category as calculated under the guidelines is inappropriate, and why the category it chooses is appropriate. *Id.* at 662–63.

> At the same time, we made it clear that we do not ... require the district court to go through a ritualistic exercise in which it mechanically discusses each criminal history category it rejects en route to the category that it selects. Ordinarily the district court's reasons for rejecting intermediate categories will clearly be implicit, if not explicit, in the court's explanation for its departure from the category calculated under the guidelines and its explanation for the category it has chosen as appropriate.

Id. at 663. Using this reasoning, we find that the district court offered adequate justification for the sentence it imposed.

At the sentencing hearing, the district judge indicated on the record that his concern was caused by the fact that the defendant committed a series of bank robberies in 1983 and then another series of robberies beginning in 1991, less than two years after his release from supervision following the 1984 conviction. Since Ashburn's criminal history calculation was based solely on the guilty plea to one count of robbery in 1984, the court felt that the indicated guideline range did "not adequately reflect the seriousness of this defendant's past criminal conduct and, perhaps more importantly, the likelihood that he will commit other crimes."

The district judge determined that had the defendant previously been convicted of the robbery offenses committed in December of 1991, January of 1992, and April 1992, he would have had nine additional criminal history points. Under the court's calculations, Ashburn then would have a total of twelve criminal history points and a corresponding Criminal History Category of V. Using this criminal history category and Ashburn's offense level of 25, the judge determined a hypothetical guideline range of 100 to 125 months.

The court then cited the robberies committed in the early 1980s that did not result in conviction and concluded that "if they were to be taken into account, the Criminal History Category VI would not be sufficient to take into account his past criminal conduct." The court also referred to the attempted robberies that the government agreed not to prosecute. The court stated that given the "likelihood the defendant will commit other crimes ... as well as the seriousness of his past criminal conduct" the court would impose a "rather drastic upward departure from what the guideline range contemplates." The judge then sentenced Ashburn to a term of imprisonment of 180 months, found by indexing the Criminal History Category of VI with an offense level of 29.

[6] The justification offered by the district court clearly indicates why the sentencing range recommended by the Guidelines was inappropriate and why the court found the sentence imposed to be appropriate. The district court did not expressly examine each intervening criminal history category. However, we do not require the district court to go through such a "ritualistic exercise" where, as here, it is evident from the stated grounds for departure why the bypassed criminal history categories were inadequate. *Lambert*, 984 F.2d at 663.

In *Lambert*, we indicated that we could conceive of a "very narrow class of cases" in which the district court's departure was so great that we would require "explanation in careful detail" of the district court's reasons for finding lesser adjustments in the defendant's criminal history score inadequate. *Id.* Although the sentence imposed in this case was more than twice the recommended guideline range, it was not the sort of drastic departure we referred to in *Lambert*. In fact, we note that the instant departure is not

16. 984 F.2d 658 (5th Cir.1993) (en banc).

significantly greater than departures previously approved by this court. *See United States v. McKenzie*, 991 F.2d 203, 205 n. 7 (5th Cir.1993); *Lambert*, 984 F.2d 658 (affirming departure sentence that was twice guideline range).

C. Reasonableness of the Departure

[7] The final question we must address is whether the district court's departure from the Sentencing Guidelines was reasonable in light of the court's articulated justification. We hold that it was. Although the ultimate sentence rose from a potential 78 months under the guidelines to 180 months, this result is not unreasonable in light of the evidence of numerous instances of past criminal conduct, which were not considered in the criminal history calculation, and the overwhelming indication that the defendant was inclined to return to a similar course of behavior.

III. CONCLUSION

Parts II.A. and B. of the panel opinion are REINSTATED, all other parts of the panel opinion remain VACATED, and the sentence imposed by the district court is, therefore, AFFIRMED.

GOLDBERG, Circuit Judge, with whom DeMOSS, Circuit Judge, joins, dissenting:

This case calls for us to examine the range of information a sentencing court may consider in upwardly departing from the sentencing guidelines. The majority opinion takes a skyward view of the information a sentencing court may consider; I would prefer to keep the informational vistas of sentencing courts a little closer to the horizon.

Thousands of pages and countless words have been written in connection with the sentencing guidelines. The issues in this case require that we add a few more pages to the existing wisdom of this most dynamic area of law. In this case the sentencing guidelines indicated a nadir sentence of 63 months, and the sentencing court took some astronomical route to attain an apogeic sentence of 180 months. Believing that the course taken by the sentencing court was both uncharted and out of bounds, I would reverse. So, let us put on the habiliments of an astronaut as we journey into the world of the sentencing guidelines.

I

The controversy presented to this en banc court is whether a sentencing court can consider dismissed charges in upwardly departing from the sentencing guidelines, and the degree to which a sentencing court must explain its actions when it decides to depart from the guidelines. The defendant in this case, Philip Scott Ashburn, was charged with four counts of armed bank robbery. Pursuant to a plea bargain, Ashburn pleaded guilty to two counts of armed bank robbery in return for a dismissal of the remaining two counts and a promise not to prosecute other crimes which he was suspected of committing. After the sentencing court accepted the guilty plea, it decided that Ashburn's Criminal History Category did not adequately reflect the seriousness of his criminal conduct or his likelihood of recidivism. The court noted that if Ashburn had been convicted of the crimes he had been charged with, as well as other crimes he was suspected of committing, he would have a Criminal History Category of VI. The court then sentenced Ashburn as if he *had* been convicted of those crimes that were either dismissed or never charged in the first place. This resulted in a sentence of 180 months, or 230 percent of the maximum guideline range for the crimes for which Ashburn was actually convicted.

The sentence imposed by the sentencing court was not permitted by the guidelines, and was lacking in the full and adequate justification required by the guidelines for a departure. Each issue will be addressed in turn.

II

The majority argues that dismissed charges may be taken into account by a sentencing court in augmenting a defendant's Criminal History Category. To support this conclusion, the majority makes a three-step argument. First, it cites U.S.S.G. § 4A1.3

for the proposition that a sentencing court may upwardly depart from the sentencing guidelines if it finds aggravating or mitigating factors the sentencing commission did not consider in formulating the guidelines. The majority points to this as proof of the wide latitude sentencing courts have in evaluating data which their sentencing decisions will be based upon. The majority's argument also implies that, in developing the guidelines, the sentencing commission did not consider the use of dismissed charges to augment a defendant's Criminal History Category. Second, the majority cites U.S.S.G. § 1B1.4 to support the proposition that the sentencing court may consider any information concerning the background, character and conduct of the defendant when determining whether a departure is permitted, unless the use of that information is prohibited by law. The thrust of this argument is similar to that of the first argument, i.e., sentencing courts may select from a wide range of information in determining whether to depart from the guidelines. Finally, the majority claims that considering dismissed charges does not affect Ashburn's settled expectations with regard to his plea bargain agreement. The majority asserts that the plea bargain agreement made no guarantees about the length of the sentence, and as such, the departure did not violate the letter of the agreement. The majority's argument will now be reviewed more thoroughly with the hope of showing that each strand of this triad is weak and unsupportable.

A. *Has The Sentencing Commission Considered Dismissed Charges In Connection With The Criminal History Category?*

The majority believes that § 4A1.3 creates an aperture for considering dismissed charges in augmenting the Criminal History Category because that section sanctions consideration of any factor not contemplated by the sentencing commission. The issue then turns on whether the sentencing commission contemplated using dismissed charges in connection with departures in the Criminal History Category. There are indications that the sentencing commission *did* consider the issue, and did not intend to permit the consideration of dismissed charges in augmenting the Criminal History Category.

Control over the information a sentencing court may consider in applying the guidelines is the sentencing commission's main tool in imposing order in the criminal sentencing process. In response to this need for limiting the information sentencing courts may rely upon, some courts have adopted the doctrine of negative implication in determining whether the sentencing commission has considered a matter. In other words, if the sentencing commission has adequately considered the relevance of a factor to the sentencing process, then that factor, as well as *related circumstances*, shall not be a proper basis for departure. *United States v. Mason*, 966 F.2d 1488 (D.C.Cir.1992) (the guidelines' consideration of related factors precludes defendant's mode of apprehension from being a suitable basis for departure); *see also*, Robert H. Smith, *Departure Under the Federal Sentencing Guidelines: Should a Mitigating or Aggravating Circumstance be Deemed "Adequately Considered" Through "Negative Implication?"*, 36 Ariz. L.Rev. 265 (1994).

This doctrine is particularly important here because the sentencing commission amended U.S.S.G. § 6B1.2 in 1992 to allow sentencing courts to augment the defendant's *Relevant Conduct Category* based on charges dismissed pursuant to a plea bargain.[1] It would seem that in passing this amendment, the sentencing commission considered the impact of charges dismissed pursuant to a plea bargain, and did not find it necessary to extend consideration of this information to the Criminal History Category. As such, the majority's reliance on U.S.S.G. § 4A1.3 is misplaced, as it appears that the sentencing commission must have considered the role of dismissed charges in relation to the Criminal

1. It is clear from that record that the sentencing court's departure was based on the inadequacy of the Criminal History Category (U.S.S.G. § 4A1.3(e)), and not the Relevant Conduct Category (U.S.S.G. § 1B1.3(b)). Nor could such a departure have been made, since the conviction in this case was for a non-groupable offense; namely robbery (U.S.S.G. § 2B3.1). Non-groupable offenses are specifically exempted from inclusion within the Relevant Conduct Category.

History Category and, by omission, has prohibited their combination.

B. *Does Consideration Of Dismissed Charges In The Augmentation Of The Criminal History Category Violate Any Law?*

The majority finds further support for its argument in U.S.S.G. § 1B1.4 and the commentary thereto. This section provides that a court may consider "any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law." U.S.S.G. § 1B1.4. Furthermore, the commentary to this section specifically states that, "[f]or example, if [a] defendant commit[s] two robberies, but as part of a plea negotiation entered a guilty plea to only one, the robbery that was not taken into account by the guidelines would provide a reason for sentencing at the top of the guideline range." The majority believes that this section and its accompanying commentary explicitly permit a sentencing court to consider dismissed charges in augmenting a defendant's Criminal History Category. In fact, the effect of U.S.S.G. § 1B1.4 and its commentary lead me to a contrary conclusion.

Section 1B1.4 of the U.S.S.G. permits sentencing courts to rely on any information not prohibited by law in departing from the guidelines. The majority stated that it could find "no statute, guidelines section, or decision of this court that would preclude the district court's consideration of dismissed counts of an indictment in departing upward." However, U.S.S.G. § 6B1.2(a), comment., which implies that sentencing courts should only accept plea agreements that adequately reflect the seriousness of the actual offense behavior, seems to prohibit the consideration of counts dismissed pursuant to a plea agreement. The language in this section closely tracks that of Fed.R.Crim.P. 11(e), which requires that, if a sentencing court has accepted a plea bargain, then the sentence promulgated should embody the disposition agreed to in the plea bargain agreement. Then Chief Judge Breyer of the First Circuit relied on both U.S.S.G. § 6B1.2 and Fed.R.Crim.P. 11(e) in querying why a guilty plea should be accepted if the agreement that brought the plea about did not call for an adequate sentence. He stated:

> The court seems to have departed from the guidelines so that defendant's sentence would reflect the conduct charged in the remaining eleven counts of the indictment (counts that were dismissed in exchange for his guilty plea). But if the court believed that defendant's punishment should reflect that conduct, why did it accept the plea bargain in the first place?

United States v. Plaza-Garcia, 914 F.2d 345, 348 (1st Cir.1990); *Cf. United States v. Greener*, 979 F.2d 517, 521 (7th Cir.1992) (upholding a district court's rejection of a plea bargain because it did not adequately reflect the defendant's actual offense conduct). The majority, however, is not persuaded by the argument that U.S.S.G. § 6B1.2 and Fed.R.Crim.P. 11(e) prevent the augmentation of the Criminal History Category based on charges dismissed pursuant to a plea bargain. Instead, the majority states that the sentencing court was permitted to accept Ashburn's guilty plea, and still disavow the sentence agreed to in the plea bargain agreement upon a determination that the suggested sentence did not adequately reflect the seriousness of Ashburn's criminal conduct or his likelihood of recidivism. The majority's construction will eviscerate Rule 11(e) of the Federal Rules of Criminal Procedure.

The majority opinion's reliance on the commentary accompanying U.S.S.G. § 1B1.4 also calls for a response. That commentary speaks to how a sentencing court would be justified in sentencing a defendant at the upper limits of the *guideline range* in reliance on charges dismissed pursuant to a plea bargain. The majority quotes this language in footnote 15 of its opinion, ostensibly to demonstrate that this commentary justifies the result in this case. In fact, the precise language of this commentary speaks only to a sentence at the upper limits of the *guideline range.* For instance, if the hypothetical guideline range were 63 to 78 months, then the fact that certain charges were dismissed would justify the sentencing court to choose a sentence closer to the ceiling than the floor of the appropriate guideline range. The

command of the commentary to U.S.S.G. § 1B1.4 is that sentencing courts have discretion within the guideline range, but cannot substitute one range for another. There is nothing in the commentary to U.S.S.G. § 1B1.4 to justify a departure beyond the guideline range. On the contrary, this commentary's implication is that departures from the guideline range based on dismissed charges are actually prohibited.

C. *Does Considering Dismissed Charges Violate A Defendant's Reasonable Expectation Of The Plea Bargaining Agreement?*

As a final measure in justifying the departure by the sentencing court, the majority argues that the plea bargain did not contain any language that would lead Ashburn to believe that the dismissed counts would not be used against him in sentencing. The reason the majority urges this view is that a defendant's reasonable expectation from the plea bargaining agreement is constitutionally protected, and that if the prosecution breaches its agreement with the defendant, then the defendant may demand specific performance of the agreement or withdraw his plea altogether. *Santobello v. New York*, 404 U.S. 257, 263, 92 S.Ct. 495, 499, 30 L.Ed.2d 427 (1971). To avoid this difficulty the majority parses the language of the plea bargain agreement to find that it "contained no language that could have led him to believe that the dismissed counts could not be used as a basis for an upward departure." In the plea bargain agreement, the prosecution stated that it would not prosecute the charges that were dismissed. Based on this reading, the majority argues that Ashburn's expectations were met since it was the sentencing court, and not the prosecution, that employed the dismissed charges in making a departure.

Since the government promised in the plea bargain agreement that the robberies that took place on July 17 and 24, 1992 would not be pursued, the prosecution violated the plea bargain agreement by presenting Agent Deborah Lynn Eckert's testimony concerning those bank robberies. However, the majority's argument goes further than whether the prosecution crossed a line forbidden by a plea bargain agreement in the testimony of one of its witnesses. More significantly, the majority implies that when a defendant accepts the dismissal of certain charges in return for his guilty plea, he has not bargained for any reduction in prison exposure. Addressing this argument requires a determination of what it means to have a criminal charge "dismissed," or what constructions of the word "dismissed" are reasonable. To answer these questions one must first consider, in broad strokes, what are the consequences of being charged with a crime.

For most persons, being charged with a crime has many consequences: shame, remorse, a reduction in life-chances, loss of freedom, and other associated difficulties. As such, having a criminal charge dismissed brings several benefits to the one charged, not least of which is the avoidance of prison. However, for a defendant facing a multiple count indictment, each additional charge loses its stigmatic quality and simply amounts to the possibility of a lengthier sentence. Once a defendant is at the point were he is poised to admit his guilt, there is little, if any, moral uplift in knowing that two of the four counts that he has been charged with are being dropped. Clearly, a defendant in these circumstances accepts a plea bargain that dismisses certain charges for only one reason: to spend less time in the penitentiary by not having the dismissed charges counted against him at sentencing.

The majority's argument concerning a defendant's expectations of the consequences of dismissing certain charges in a plea bargain is simply not plausible in light of a realistic awareness and understanding of a defendant's perspective on the effect of dismissing charges. Neither Ashburn, nor any other defendant, would ever agree to a guilty plea if he did not believe, quite reasonably, that the charges being dismissed would not be counted against him at sentencing. The result the majority urges results in the counterintuitive effects apparent in the case of Ashburn's sentencing. For instance, the guideline range for the counts Ashburn actually plead guilty to resulted in an intermediate range of a little under six years. Had he instead been tried and convicted of all four

counts, the upper limit of the guideline range he would have been exposed to would have been less than nine years. *See,* U.S.S.G. § 3D1.1 *et seq.* (relating to the guideline's treatment of multiple count offenses). However, the sentence actually imposed on Ashburn, and affirmed by the majority today, is 180 months, or fifteen years. The result, which the majority finds reasonable, is that by entering a plea bargain agreement, Ashburn was given a sentence that was almost twice as long as if he had gone to trial and been convicted on all four counts.

Furthermore, upwardly departing based on the Criminal History Category and dismissed counts is not necessary to achieve the objectives of the sentencing court in Ashburn's sentence. The sentencing court departed from the guidelines because it believed that Ashburn's Criminal History Category did not accurately reflect the extent of his experience with committing robberies. However, the proper way to address the inadequacy of the sentence was not to factor in the dismissed charges. Instead, the sentencing court should have exercised its powers under Fed.R.Crim.P. 11(e) and rejected the plea bargain if it felt that the agreement was too lenient. If the leniency of the agreement did not become apparent until after the presentence investigation, which very often occurs in the period between the submission of a guilty plea and sentencing, then the sentencing court should have offered Ashburn the opportunity to withdraw his plea.

By rejecting the plea bargaining agreement, the sentencing court could have forced further negotiation between Ashburn and the prosecution, and the parties could possibly have come to an agreement that more accurately reflected the realistic sentencing possibilities Ashburn faced. If Ashburn was to be exposed to additional prison time based on the "dismissed" charges, he should have been so informed, and without this knowledge he could not have knowingly waived his rights in pleading guilty. Trial courts must ascertain that a defendant's guilty plea is made in a knowing and informed manner, *Boykin v. Alabama,* 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); *North Carolina v. Alford,* 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), and with the confusion the majority invites in its opinion by allowing dismissed charges to creep back in at the sentencing stage, such a knowing and informed waiver is nearly impossible to achieve.

Apart from the patent unfairness of the majority's argument, there are several negative consequences that will flow from it. The most significant of these is the impact it will have on the plea bargaining process. The plea bargain is an essential component of our criminal justice system, by which all involved benefit. In exchange for a guilty plea, the government promises the defendant that it will either drop certain charges or downgrade the offense charged. In return, the defendant pays for whatever benefit he receives with his cooperation. By agreeing to a plea bargain, the defendant waives several rights, most prominent of which is the right to trial by jury. Plea bargains also benefit society as a whole, since guilty pleas reduce the number of cases on our overburdened court dockets. Our system of criminal justice has come to depend on defendants foregoing their right to a jury trial; if each criminal defendant, regardless of the merits of his case, were to insist on his right to a jury trial, our courts would not be able to function. Studies have supported the efficacy and centrality of the plea bargaining process to our criminal courts. *See,* Milton Heumann, *Plea Bargaining* 24–35 (1977) (setting forth empirical evidence that plea bargaining is less a response to case pressure than a rational method for the resolution of criminal innocence or guilt).

It is indisputable that the plea bargain benefits all involved, and is vital to the maintenance of order in our criminal justice system. However, the majority's reasoning will make plea bargaining a much more unstable and haphazard process. Defendants and their counsel will be unable to properly evaluate the consequences of a plea bargaining agreement, for they will never know if the sentencing court will disregard the parties' compact by considering charges that both the prosecution and defense agreed would not be a factor at sentencing. Obviously, when faced with such a decision, many defendants who would otherwise admit their guilt and

accept their sentence will find it more attractive to test the prosecution's case at trial.

III

The majority's conclusion that the departure justifications were adequate is also unsupportable. This court has previously outlined the procedure for making such a determination in *United States v. Lambert*, 984 F.2d 658 (5th Cir.1993) (en banc). In *Lambert*, this court held that a departure will be affirmed if the sentencing court offers acceptable reasons for its departure and if said departure is reasonable. *Id.* at 663. In order to depart under U.S.S.G. § 4A1.3, a sentencing court should first consider increasing the defendant's Criminal History Category to the next level, and if that is not satisfactory, then each subsequent level should be considered. *Id.* at 661. Also, *Lambert* called on a sentencing court to state for the record why the criminal history category provided by the guidelines was inappropriate, and why the category it chooses is appropriate. *Id.* at 663. However, recognizing the complexities inherent in setting a sentence appropriate to every defendant, "we do not ... require the district court to go through a ritualistic exercise in which it mechanically discusses each criminal history category it rejects en route to the category it selects." *Id.*

A. *Were The Sentencing Court's Departure Justifications Adequate?*

The sentencing guidelines are an ambitious attempt to impose order on a process that many felt was too chaotic. Sentencing a fellow human being is a demanding process that requires evaluating deeds, demeanor and circumstances that elude quantification. Nevertheless, the guidelines are an effort to achieve that ideal for the sake of equity, and wisely, the guidelines recognize that it is not possible to envision all of the factors that go into a criminal sentence. As such, they permit departures where these extraordinary and unforeseen factors are present. However, in order to avoid making a sham of the noble goal of the guidelines, some degree of articulation is required for a departure to be considered reasonable. The threshold of reasonableness required by the guidelines was not met by the sentencing court in this case.

In justifying its decision to depart, the sentencing court used an economy of speech that left much to the imagination. The actual transcript of the rationale provided by the sentencing court occupies approximately one and one-half, double-spaced, typed pages. The sentencing court first announced that it was going to depart, and then stated that if the defendant had been convicted of the two dismissed counts, his Criminal History Category would be V instead of II. Then the sentencing court stated that if the robberies the defendant committed "in the early 1980s" were taken into account, Ashburn's Criminal History Category would increase to level VI. The sentencing court also made a cryptic allusion to several "attempted robberies" that it was also taking into consideration. Since the sentencing court felt that the defendant's current Criminal History Category did not adequately reflect these aspects of Ashburn's background, it decided that a "rather drastic upward departure" was in order.

It is true that *Lambert* does not require the sentencing court to "go through a ritualistic exercise in which it mechanically discusses each Criminal History Category it rejects en route to the category that it selects." *Id.* at 663. Yet what the sentencing court provided here barely amounts to a recitation of the obvious. Stripped of what little preamble the sentencing court provided, the departure amounted to a mention of the defendant's previous criminal activity and a conclusion that these past acts demonstrate that it should upwardly depart from the guidelines due to the "likelihood the defendant will commit other crimes" and "the seriousness of his past criminal conduct." These phrases are, almost verbatim, the ones found in the policy statement to U.S.S.G. § 4A1.3: an upward departure "is warranted when the Criminal History Category significantly under-represents the *seriousness of the defendant's criminal history* or the *likelihood that the defendant will commit further crimes*," (emphasis provided). Essentially, the sentencing court repeated the exact phrases found in the guidelines. I think that the

reasonableness requirement for departure justifications requires more that a mere recital of the same words that authorize a departure. If that is all that is required, then any explanation for departures is a meaningless exercise, and a noble goal of the sentencing guidelines is in jeopardy.

It is inherent in the exercise of reviewing the adequacy of departure justifications that reasonable minds will differ. However, if the explanations provided by the sentencing court here are reasonable, then virtually nothing can be characterized as unreasonable. The cursory justifications provided by the sentencing court in this case are particularly problematic when one considers the degree of the departure. As the majority noted, *Lambert* anticipated a narrow class of cases where the departure is so great as to require a detailed explanation of the reasons for the departure. The majority then blithely states that the departure here was not of the magnitude required to invoke the additional *Lambert* scrutiny. However, Ashburn was given a sentence that was practically triple that which he would have been subjected to under the guidelines. Again, if the departure here was not sufficiently marked to justify a careful accounting of the reasons for the deviation, then I fail to see what kind of departure does justify a *Lambert* elaboration.

B. *Propriety Of The Grounds For The Departure*

Not only are the explanations provided by the sentencing court insufficient to justify a departure of such magnitude, but there are also difficulties with the explanations themselves. For example, the sentencing court relied on the "robberies that occurred back in the early 1980s" in raising Ashburn's already augmented Criminal History Category from level V to level VI. It is assumed that these "early 1980s" robberies the sentencing court referred to were the crimes Ashburn was charged with in his 1984 conviction for armed bank robbery. Ultimately he was convicted of one count of armed bank robbery, and the other charges were dismissed. It is unclear from the sentencing court's explanation whether it relied on the robbery Ashburn was ultimately convicted on in 1984. If this were the case, that conviction would have been counted twice, as Ashburn's presentence report already gave him three criminal history points for this 1984 conviction. Such double counting would be improper, yet one cannot deduce whether the sentencing court relied on the 1984 conviction due to the paucity of its explanations.

There is one other difficulty with the propriety of the reasons asserted by the sentencing court in justifying its upward departure. The sentencing court relied, in part, on the two charges that the plea bargain dismissed, and one other unindicted robbery Ashburn allegedly committed. For each of these items, the sentencing court added three criminal history points. However, by assessing three criminal history points for each of these items, they are being treated as if they were full-fledged convictions. The problem with this approach is that it fails to distinguish between previous convictions (which also merit three criminal history points) and other events ranging from dismissed counts to conduct the prosecution may never have intended to be a basis for an indictment. It is not clear that U.S.S.G. § 4A1.3(e) permits ascribing the same number of criminal history points to past criminal conduct as to prior convictions. If this were the case, then what would be the point in defining what a prior conviction is and basing the Criminal History Category on prior convictions.

IV

In closing, I would like to point out that some of the issues in this case have caused a circuit split. The circuits have split over whether dismissed charges may be used to augment the Criminal History Category. The Second and Tenth Circuits have held that dismissed charges may be so used. *See, United States v. Kim*, 896 F.2d 678 (2nd Cir.1990); *United States v. Zamarripa*, 905 F.2d 337 (10th Cir.1990). Conversely, the Third and Ninth Circuits have held that such a use is not permitted. *See, United States v. Thomas*, 961 F.2d 1110 (3rd Cir.1992); *United States v. Castro-Cervantes*, 927 F.2d 1079 (9th Cir.1990). Hard cases make bad law.

All would admit that this case is hard because the defendant is not a sympathetic character. However, the nature of the defendant's acts seem to overshadow the consideration of sections, commentaries and policy statements of the sentencing guidelines, and the circumvention of this body of rules leads the majority to create bad law. For these reasons, I respectfully dissent.

DeMOSS, Circuit Judge, with whom, GOLDBERG, Circuit Judge, joins, dissenting:

I join in all that Judge Goldberg has stated in his comprehensive dissent, and add these additional words of dissent because I feel so strongly that the district judge, and my colleagues in the majority opinion, are in error in their justification of the basis for, and quantum of, the upward departure by the district judge in this case.

On page 8 of the government's supplemental en banc brief, there is a verbatim quotation of the transcription of the district judge's explanation at the sentencing hearing for why he was departing upward. As I read that text, it seems clear that the district judge relied on two sets of circumstances:

A. The robbery in December 1991 (count 1 of the indictment which was dismissed), the robbery in January 1992 (count 2 of the indictment which was dismissed), and the robbery in 1993 (un-indicted and the government agreed not to indict), which would add three criminal history points each "if he [Ashburn] had *earlier been convicted of these robberies*" [emphasis added]; and

B. The robberies "that occurred back in the early 1980's" which "if taken into account" would push Ashburn's criminal history past category VI.

In approving the upward departure, the majority opinion relies primarily on Section 4A1.3(e) which permits consideration of "prior similar adult criminal conduct not resulting in a criminal conviction" in making such an upward departure.

I have serious doubts as to the propriety of the district judge's reliance on the three robberies described in sub-paragraph "A" above. First of all, the robberies in 1991 and 1992 constituted counts 1 and 2 of the same indictment under which Ashburn is being sentenced. The plea agreement expressly provided that those two counts be dismissed, and to assume convictions on those counts as the district judge did, violates the express terms of the plea agreement. Secondly, if a sentencing judge assumes conviction on dismissed counts, you no longer have "conduct not resulting in a criminal conviction" as defined in sub-part (e). Rather you have additional convictions under a multi-count indictment which would necessitate processing under Section 3D1.1 *et seq.* relating to multiple counts; and the effects of those additional convictions would show up, not in the criminal history table, but in the determination of "combined offense level" (*see* example 1 on page 246 of the *1993 Guidelines Manual*). In this case, the net result of including counts 1 and 2 in the determination of combined offense level would be to move the offense level up two steps from 25 to 27; with no change in the criminal history category of II, the guideline range would be 78 to 97.

Finally, to assume conviction as to the dismissed counts and then attribute three criminal history points for each assumed conviction, just as you would for an actual prior conviction, renders the point structure as defined by the guidelines for determining criminal history utterly meaningless. In short, if "prior similar adult conduct not resulting in a conviction" can be ascribed the same number of points as assigned to an actual prior conviction, there is no distinction between the two.

Under Rule 11(e) of the Federal Rules of Criminal Procedure, the district judge may accept or reject a plea agreement which provides for dismissal of counts or charges. That Rule further gives the judge the right to "defer his decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report." It is apparent in this case that after reading the presentence report, the district judge felt the defendant was getting off too light. In my view, the district judge's remedy then is to reject the plea agreement and force the de-

fendant to plead guilty to all counts of the indictment or stand trial and risk conviction on all counts. In either of those alternative events, the multiple count analysis under section 3D1.1 *et seq.* would have been required to determine the resulting sentence, and that analysis focuses on the combined offense level and not criminal history. Instead, the district judge decided to upwardly depart on the basis of "assumptions," which I find clearly erroneous, and to an extent that produces a sentence which is double what would have been the guideline sentence had the defendant in fact pleaded guilty to all four counts.

These same criticisms are equally applicable to the district judge's use of the "robberies back in the early 1980s" described in Subparagraph B. above as justification for taking Ashburn's criminal history "past Category VI." As in the instant prosecution, Ashburn pled guilty in 1984 to one count of a multi-count indictment charging various events of bank robbery and the remaining counts were dismissed. So, not only do we have dismissed counts of the current indictment but also dismissed counts of a prior indictment, which was the source of a prior conviction, being used as the basis for determination of "prior adult similar conduct." Given the proclivity of prosecutors to file multi-count indictments and the frequency with which some of those counts get dismissed pursuant to plea bargains, there is a veritable "mother lode" of upward adjustments awaiting to be mined out of Section 4A1.3(e) if the district judge's application is correct. The majority seeks to bless its affirmance of the district judge's interpretation in this case by stating that it is joining the Tenth Circuit and the Second Circuit in holding that prior criminal conduct related to dismiss counts of an indictment may be used to justify an upward departure. That blessing is misplaced in this case for nothing in *Zamarripa* (Tenth Circuit) nor *Kim* (Second Circuit) dealt with dismissed counts of prior indictments in the criminal history; and our court therefore is making completely new law as to the "robberies in the early 1980s" in this case. I respectfully suggest that such new law is not contemplated by the guidelines and will turn Section 4A1.3(e) into a Pandora's box, the opening of which we will come to regret.

Furthermore, as indicated in Subparagraph B. above, the district judge was even more cryptic in articulating his thought process as to the "early 1980s robberies" than he was as to the counts described in Subparagraph A. He simply said "If taken into account", these 1980s robberies would push the criminal history category past Category VI. He gave no indication of the number of robberies he "took into account" nor did he indicate the points per robbery he allocated as he did in describing the other robberies in Subparagraph A. above. He made no attempt to articulate any special circumstances about the "early 1980s robberies" which persuaded him to make an adjustment. So, simply by stating he took these early 1980 robberies into account, the district judge departed further upward from the guideline range of 100—125 months (O.L. 25—C.H. V) to 151—188 months (O.L. 29—C.H. VI) to reach the ultimate sentence of 180 months. The majority opinion rationalizes its approval of the district judge's articulation of his reasons by citing portions of *Lambert* abjuring "ritualistic exercises" and by pointing out that on a percentage basis the upward departure in this case is not that different from the upward departure approved in *Lambert*. But in the real terms of months and years to be served in prison, the departure in this case from an initial guideline range of 63—78 months (5–6½ years) to a final sentence of 180 months (15 years) is the very kind of departure we had in mind when we stated in *Lambert*:

> "In a very narrow class of cases, we can conceive that the district court's departure will be so great that, in order to survive our review, it will need to *explain in careful detail*, why lesser adjustments in the defendant's criminal history score would be inadequate." Page 663.

I respectfully dissent from the conclusion that the district judge satisfied *Lambert*.

Agenda Item II C5

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Rule 16(a)(1)(E), (b)(1)(C), Disclosure of Expert Witnesses**

DATE: **March 20, 1996**

In 1995, the Committee submitted to the Standing Committee two amendments to Rule 16 for approval and transmittal to the Judicial Conference. The first amendment, to subdivisions (a)(1)(E) and (b)(1)(C), would have required both the prosecution and defense to disclose information about their expert witnesses. Those amendments were generally non-controversial and generated very few comments during the publication process.

The second amendment, to subdivisions (a)(1)(F) and (b)(1)(D), would have required both sides to disclose, before trial, the names and statements of their witnesses. These amendments were highly controversial and were further changed by the Standing Committee at its July 1995 meeting.

As reported by Judge Jensen at this Committee's October 1995 meeting in Vermont, the Judicial Conference ultimately rejected all of the amendments to Rule 16. At the Standing Committee meeting in Los Angeles in January 1996, the question about the status of the "expert witness" amendments to Rule 16 was questioned; Judge Jensen responded that the matter would be raised for discussion at the Committee's next meeting.

Attached is a draft of the proposed amendments to Rule 16, governing disclosure of expert witnesses and the pertinent portions of the Advisory Committee Note. The word "shall" has been retained. This item is on the agenda for the April meeting.

Rule 16. Discovery and Inspection[1]

(a) GOVERNMENTAL DISCLOSURE OF EVIDENCE.

(1) Information Subject to Disclosure.

* * * * *

(E) EXPERT WITNESSES. At the defendant's request, the government shall disclose to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) of this rule and the defendant complies, the government shall, at the defendant's request, 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. ~~This~~ The summary provided under this subdivision shall

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

~~must~~ describe the witnesses' opinions, the bases and the reasons for those opinions ~~therefor~~, and the witnesses' qualifications.

(2) *Information Not Subject to Disclosure*. Except as provided in paragraphs (A), (B), (D), and (E) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or any other government agent ~~agents in connection with the investigation or prosecution of~~ investigating or prosecuting the case. Nor does the rule authorize the discovery or inspection of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.

* * * * *

(b) THE DEFENDANT'S DISCLOSURE OF EVIDENCE.

(1) *Information Subject to Disclosure*.

* * * * *

(C) EXPERT WITNESSES. Under the following circumstances, the defendant shall, at the government's request, disclose to the government a written summary of testimony that the defendant intends to use under Rules 702, 703, and 705 of the Federal Rules of Evidence as evidence at trial: (i) if ~~If~~ the defendant requests disclosure under subdivision (a)(1)(E) of this rule and the government complies, or (ii) if the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition. ~~the defendant, at the government's request, must disclose to the government a written summary of testimony the defendant intends to use under Rules 702, 703 and 705 of the Federal Rules of Evidence as evidence at trial.~~ This summary ~~must~~ shall describe the witnesses' opinions ~~of the witnesses~~, the bases and reasons for those opinions ~~therefor~~, and the witnesses' qualifications.

* * * * *

COMMITTEE NOTE

Subdivision (a)(1)(E). Under Rule 16(a)(1)(E), as amended in 1993, the defense is entitled to disclosure of certain information about expert witnesses which the government intends to call during the trial as well as reciprocal pretrial disclosure by the government upon defense disclosure. This amendment is a parallel reciprocal disclosure provision which is triggered by a government request for information concerning defense expert witnesses as to the defendant's mental condition, which is provided for in an amendment to (b)(1)(C), *infra*.

Subdivision (b)(1)(C). Amendments in 1993 to Rule 16 included provisions for pretrial disclosure of information, including names and expected testimony of both defense and government expert witnesses. Those disclosures are triggered by defense requests for the information. If the defense makes such requests and the government complies, the government is entitled to similar, reciprocal discovery. The amendment to Rule 16(b)(1)(C) provides that if the defendant has notified the government under Rule 12.2 of an intent to rely on expert testimony to show the defendant's mental condition, the government may request the defense to disclose information about its expert witnesses. Although Rule 12.2 insures that the government will not be surprised by the nature of the defense or that the defense intends to call an expert witness, that rule makes no provision for discovery of the identity, the expected testimony, or the qualifications of the expert witness. The amendment provides the government with the limited right to respond to the notice provided under Rule 12.2 by requesting more specific information about the expert. If the government requests the specified information, and the defense complies, the defense is entitled to reciprocal discovery under an amendment to subdivision (a)(1)(E), *supra*.

Agenda Item IIC 6

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Rule 31(d); Individual Polling of Jurors**

DATE: **March 20, 1996**

The Committee voted at its October 1995 meeting (*See* Minutes, October 1995, pages 6-7) to amend Rule 31(d) to address individual polling of the jurors. A draft amendment, which would accomplish that change, is attached. Also attached is a copy of *United States v. Miller* which was considered by the Committee at that meeting.

Criminal Rules Committee
March 1996 Draft

Rule 31. Verdict

court shall poll the jurors

* * * * *

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

* * * * *

COMMITTEE NOTE

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

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

The Committee is persuaded by the authorities and practice that the advantages of conducting an individual poll of the jurors should be the required practice. The amendment, however, leaves to the court the discretion as to whether to conduct a separate poll for each defendant, each count of the indictment or complaint or on other issues.

Present: BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ROTH, LEWIS, MCKEE, SAROKIN and WEIS,* Circuit Judges.

SUR PETITION FOR REHEARING

Aug. 8, 1995

The petition for rehearing filed by appellee in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judge Hutchinson would have granted rehearing.

UNITED STATES of America, Appellee,

v.

Carol A. MILLER a/k/a Carol Miller Salemo, Appellant.

No. 95-1039.

United States Court of Appeals, Third Circuit.

Argued April 20, 1995.

Decided July 5, 1995.

Defendant was convicted in the United States District Court for the Eastern District of Pennsylvania, James McGirr Kelly, J., of bank fraud and interstate transportation of a stolen vehicle. Defendant appealed. The Court of Appeals, Weis, Circuit Judge, held that: (1) denial of individual poll of jurors was not an abuse of discretion; (2) defendant was not entitled to defense of duress; (3) government did not improperly use witness; and (4) Court of Appeals did not have appellate jurisdiction over claim that district court erred in refusing to depart downward.

Affirmed.

1. Criminal Law ⇐1175

Collective poll of jurors as to whether they agreed with verdict as announced by foreperson, rather than individual poll of jurors, was not reversible error where case was relatively simple, there was a short period of deliberation by the jury, and there was no indication in record that any juror displayed reluctance or disagreement with the verdict.

2. Criminal Law ⇐874

Concerned with circumstances in which collective polling might not have desired effect and lead to unnecessary challenges to finality of jury verdicts, Court of Appeals for the Third Circuit adopted a supervisory rule for the district courts within the circuit providing that whenever a party timely requests that jury be polled, procedure be conducted by inquiry of each juror individually, rather than collectively, leaving to the discretion of district courts whether a separate inquiry should be conducted for each count of an indictment or complaint, for each of a number of defendants, or for a variety of issues.

3. Criminal Law ⇐632(3.1)

A court may rule pretrial on a motion to preclude a defendant from presenting a duress defense where government contends that evidence in support of that position would be legally insufficient.

4. Criminal Law ⇐38

Defendant was not entitled to assert defense of duress in prosecution for bank fraud and interstate transportation of a stolen vehicle based on alleged threats by her husband to injure her if she did not carry out conduct which formed basis of prosecution where husband was in prison in another part of country so there was no immediate threat of death or serious injury, there was a reasonable opportunity to escape threatened harm,

addition, I note my full agreement with the scholarly analysis the Court adduces to support its rejection of Grace's contention that it has a Seventh Amendment constitutional right to a jury trial on its CERCLA claims.

* Senior Circuit Judge Weis voted only as to panel rehearing.

and defendant produced no legally sufficient evidence that she lacked the opportunity to contact law enforcement officers about threats.

5. Criminal Law ⇐706(2)

Although testimony of defendant's housekeeper under oath at trial of defendant's husband differed from unsworn statements that she gave to FBI agent, it did not follow that government could not believe housekeeper's in-court version of events was the truthful one and, accordingly, government did not act improperly in calling housekeeper to testify about her in-court version of events.

6. Criminal Law ⇐1023(11)

Court of Appeals lacked appellate jurisdiction over claim that district court erred in refusing to depart downward after being advised of defendant's claims of duress, ill-will, and diminished capacity, where district court was aware of its power to depart downward but, in the exercise of discretion, chose not to do so.

Samuel C. Stretton (argued), West Chester, PA, for appellant.

Emily McKillip (argued), Asst. U.S. Atty., Michael R. Stiles, U.S. Atty., Walter S. Batty, Jr., Asst. U.S. Atty., Philadelphia, PA, for appellee.

Before: STAPLETON, HUTCHINSON, and WEIS, Circuit Judges.

OPINION OF THE COURT

WEIS, Circuit Judge.

In this criminal case, defendant contends that the trial court erred when it denied her request for an individual jury poll and instead conducted a collective inquiry. In the circumstances, we conclude that the trial court did not commit reversible error, but we adopt a prospective supervisory rule requiring that jurors shall be polled individually rather than collectively. We also affirm the trial court's rulings rejecting a duress defense and permitting the government to call a witness whom it had impeached in a previous trial.

Defendant Carol A. Miller was convicted on charges of bank fraud, 18 U.S.C. § 1344, and interstate transportation of a stolen vehicle, 18 U.S.C. §§ 2, 2312. She was sentenced to a prison term of twenty-seven months concurrent on both counts, followed by supervised release for three years, and ordered to pay restitution in the amount of $44,500.00.

In February 1991, defendant and her husband, George P. Salemo, engaged in a check-kiting scheme through which they defrauded the Meridian Bank in Allentown, Pennsylvania. Using proceeds from that operation, they purchased an automobile for $98,024.00.

On March 27, 1991, the husband was arrested in Florida. On that same day, defendant, who was also in Florida at the time, telephoned her home in Allentown, Pennsylvania and directed the housekeeper to take the automobile from the garage and park it on a designated side street. On the following day, defendant returned to Allentown.

On March 29, 1991, at the behest of the Meridian Bank, the Court of Common Pleas of Philadelphia County served an order on defendant enjoining her and her husband from disposing of any of their assets. On the next day, the defendant's brother arrived in Allentown. He located the automobile and drove it to Arizona. On April 8, 1991, defendant flew to Arizona and, on the following day, sold the car for $89,000.00 in Las Vegas, Nevada.

Before trial, the district court granted the prosecution's motion *in limine* to bar defendant from presenting evidence of duress. After the jury returned guilty verdicts on each count charged in the indictment, defendant requested an individual poll of the jurors. The district judge refused to do so but inquired of the jurors collectively.

Defendant has appealed, raising four issues:

(1) The district court's denial of an individual poll of the jurors;

(2) Exclusion of the defendant's duress evidence;

(3) The government's use of a witness in this case that it had impeached in a former trial; and

(4) Failure of the district court to depart downward from the Guideline sentence.

I.

Following the charge of the court, the jury deliberated for about an hour and then returned to the courtroom to deliver its verdict. The record shows that the following occurred:

"THE COURT: Members of the Jury, I understand you have reached a verdict and the way the verdict is to be taken will be as follows: First the Clerk of Court will ask the foreperson as to the results of the verdict form. Then, of course, you should listen intently while it's going on and then the other 11 persons will be asked whether they agree as a group. You will be asked whether you agree with the verdict as announced by the foreperson.

"If you do, of course, you will say 'yes.' If you do not agree with the verdict, of course, you should say 'no.' So listen carefully. If you agree when you are asked collectively, you say 'yes.' If you do not agree, please let us know. Thank you.

"Would the Clerk take the verdict.

"THE CLERK: Would the foreperson please rise?

"Have the Members of the Jury reached a verdict by answering the jury verdict form?

"THE FOREPERSON: Yes.

"THE CLERK: How do you find the defendant as to Count 1, bank fraud?

"THE FOREPERSON: Guilty.

"THE CLERK: As to Count 2, interstate transportation of [a] stolen vehicle?

"THE FOREPERSON: Guilty.

"THE CLERK: Thank you.

"THE COURT: You may be seated.

"[DEFENSE COUNSEL]: Your Honor, I ask the jury be polled.

"THE COURT: I am going to do it collectively. I won't do it individually.

"[DEFENSE COUNSEL]: I ask for it individually.

"THE COURT: I deny it.

"THE CLERK: Members of the Jury, harken onto your verdict as the Court has recorded it in the issue joined this indictment, Number 94-406 and Carol A. Miller, also known as Carol A. Salemo, you find the defendant guilty in the manner and form as she stands indicted as to Count 1, and so say you all?

"THE JURY: Yes.

"THE COURT: Does any[one] find her not guilty as to Count 1?

(No response).

"THE CLERK: As to Count 2, your verdict is 'guilty' and so say you all?

"THE JURY: Yes.

"THE COURT: Does anyone say 'not guilty' as to Count 2?

(No response)

"THE COURT: All right. Would you take the verdict form?"

Defendant contends that the denial of an individual poll violated Fed.R.Crim.P. 31 and due process as well. Fed.R.Crim.P. 31(d) does not specify any specific form but provides only that before a verdict is recorded, "the jury shall be polled at the request of any party or upon the court's own motion."

In *Humphries v. District of Columbia*, 174 U.S. 190, 194, 19 S.Ct. 637, 639, 43 L.Ed. 944 (1899), the Supreme Court characterized polling as "an undoubted right" and explained that "[i]ts object is to ascertain for a certainty that each of the jurors approves of the verdict as returned; that no one has been coerced or induced to sign a verdict to which he does not fully assent." Judge Maris, writing for the Court in *Miranda v. United States*, 255 F.2d 9, 17 (1st Cir.1958), described the right of the defendant to have the jury polled as being "of ancient origin and of basic importance," designed "to give each juror an opportunity, before the verdict is recorded, to declare in open court his assent to the verdict...."

Although not of constitutional dimension, the right to a poll has its roots in the early common law. *United States v. Shepherd*, 576 F.2d 719, 724 (7th Cir.1978). In 2 Sir Matthew Hale, *The History of the Pleas of the*

Crown 299–300 (1st Am. ed. 1847), the text reads:

"Now touching the giving up of their verdict, if the jury say they are agreed, the court may examine them by poll, and if in truth they are not agreed, they are fineable. 29 *Assiz.* 27. 40 *Assiz.* 10.

"If the jurors by mistake or partiality give their verdict in court, yet they may rectify their verdict before it is recorded, or by advice of the court go together again and consider better of it, and alter what they have delivered. *Plow. Com.* 211. *b. Saunder's* case.

"But if the verdict be recorded, they cannot retract nor alter it."

An additional advantage to polling is the likelihood that it will discourage post-trial efforts to challenge the verdict on allegations of coercion on the part of some of the jurors. *See Audette v. Isaksen Fishing Corp.*, 789 F.2d 956, 961 n. 6 (1st Cir.1986).

We have acknowledged the importance of the right to poll the jury, *see Government of Virgin Islands v. Hercules*, 875 F.2d 414, 418 (3d Cir.1989), *United States v. Grosso*, 358 F.2d 154, 160 (3d Cir.1966), *rev'd on other grounds*, 390 U.S. 62, 88 S.Ct. 709, 19 L.Ed.2d 906 (1968), but have not prescribed a specific method of doing so. In *Hercules*, we held that a district court erred in refusing to take a poll and by relying instead upon the fact that all of the jurors had signed the verdict slip as an indication of agreement. However, we acknowledged that the prevailing view is that the method chosen is within the discretion of the trial judge. *Hercules*, 875 F.2d at 418; *United States v. Aimone*, 715 F.2d 822, 832–33 (3d Cir.1983); *see also United States v. Sturman*, 49 F.3d 1275, 1282 (7th Cir.1995); *Audette*, 789 F.2d at 959; *United States v. O'Bryant*, 775 F.2d 1528, 1535 (11th Cir.1985); *United States v. Carter*, 772 F.2d 66, 67 (4th Cir.1985); *United States v. Mangieri*, 694 F.2d 1270, 1282 (D.C.Cir.1982); *accord* 3 Charles A. Wright, *Federal Practice & Procedure* § 517, at 33 (2d ed. 1982 & Supp.1995); 8A James W. Moore, *Moore's Federal Practice* ¶ 31.07, at 31-67 (2d ed. 1995).

The general rule of discretion has been applied in a variety of circumstances. It has been cited when the question was whether the poll should be taken on each count of an indictment or as to each of several defendants; whether polling should continue after a juror expressed some misgivings about the verdict; and whether re-polling should be allowed. These variations differ, however, from the individual versus collective issue.

A number of courts have concluded that in the particular circumstances presented, a collective poll was permissible. *United States v. Hiland*, 909 F.2d 1114, 1139 n. 42 (8th Cir.1990); *Posey v. United States*, 416 F.2d 545, 554 (5th Cir.1969); *Turner v. Kelly*, 262 F.2d 207, 211 (4th Cir.1958); *see Carter*, 772 F.2d at 68 (showing of hands). Nevertheless, the preference of the appellate courts, and most district courts, has been for an individual jury poll.

In *Carter*, 772 F.2d at 68, the Court "strongly" suggested individual polling, stating: "We find that such a procedure best fulfills the purpose of a jury poll." In *Turner*, 262 F.2d at 211, the Court remarked, "[I]ndividual questioning would appear to be consonant with the etymological derivation of the term, and with the apparent trend of authority." *See also Audette*, 789 F.2d at 960; *Shepherd*, 576 F.2d at 722 n. 1; *United States v. Sexton*, 456 F.2d 961, 967 (5th Cir. 1972) ("correct" procedure is to poll individual jurors).

A respected treatise likewise agrees that individual polling is preferable. In IV Charles E. Torcia, *Wharton's Criminal Procedure* § 586, at 152 (12th ed. 1976), the author says: "There is usually no prescribed mode of polling the jury. Any clear and concise form of inquiry is sufficient. The question put to *each* juror may be simply, 'Is this your verdict?' " (emphasis added and footnotes omitted).

In *Hercules*, 875 F.2d at 419 n. 8, we noted that the ABA Standards Relating to Trial by Jury called for polling each juror individually, and we agreed "that this method is the most desirable." The ABA Standards for Criminal Justice § 15–4.5 provide that the "poll shall be conducted by the court or clerk of court asking each juror individually whether the verdict announced is his or her ver-

dict." The commentary to that standard reads: "The jurors are to be questioned individually, which is what is generally understood to be contemplated by the right to have the jury polled." Although conceding that, in some jurisdictions, a collective inquiry is sufficient, the commentary warns that "[t]his procedure is not permitted under the standard, for it saves very little time while creating a risk that a juror who has been coerced to go along with the majority will not speak up."

Although our preferred method under *Hercules* has been individual polling, we are bound by our precedent to review the procedure followed in the case before us as one that is within the discretion of the district court. As such, we look to the record to determine whether the collective method chosen by the trial judge here failed to provide a realistic opportunity for a potential dissenting juror to reveal his or her opposition before the verdict was recorded.

[1] In this connection, it is significant that before the verdict was announced, the district judge told the jurors that they should listen attentively because they would soon be asked as a group whether they agreed with the verdict as announced by the foreperson. As noted earlier, after responding collectively in the affirmative to the clerk's inquiry, "So say you all?," the jurors were then asked by the judge, "Does anyone say 'not guilty.'" No juror responded to that question.

When that proceeding is considered against the backdrop of a relatively simple case, a short period of deliberation by the jury, and no indication in the record that any of the jurors displayed reluctance or disagreement with the verdict, we cannot say that the district court abused its discretion. Accordingly, in this instance, we conclude that the collective poll did not constitute reversible error.

However, we are concerned that in other circumstances collective polling may not have the desired effect and may lead to unnecessary challenges to the finality of jury verdicts. Although we have previously expressed our strong preference for individual juror inquiries (the practice that apparently is generally followed in the district courts), uniformity has not been achieved. Accordingly, we consider it necessary to adopt a supervisory rule for the district courts within this circuit.

[2] In the future, whenever a party timely requests that the jury be polled, the procedure shall be conducted by inquiry of each juror individually, rather than collectively. Recognizing that circumstances in each case may vary widely, we leave to the discretion of the district courts—keeping in mind the purposes of the polling rule—whether a separate inquiry should be conducted for each count of an indictment or complaint, for each of a number of defendants, or for a variety of issues.

II.

[3, 4] Before the trial began, the district court conducted a hearing on the government's motion *in limine* to bar the defendant from producing evidence of alleged duress.[1] Defendant testified to a history of physical and psychological abuse by her husband, George Salemo. In addition, she asserted that he had threatened her, her brother, and her mother. Because Salemo had purported ties with organized crime, she believed that he had the ability to carry out his threats, even while incarcerated.

Defendant testified that she signed the checks and sold the car at Salemo's direction, as a result of his threats to injure her. She did not complain to the police, fearing it would be ineffectual because of Salemo's work for the Pennsylvania Crime Commission.

A witness who had previously served with the Crime Commission testified that prior to the check-kiting scheme, Salemo had been an informant for the Commission and had been released from prison in return for his cooper-

1. A court may rule pretrial on a motion to preclude a defendant from presenting a duress defense where the government contends that the evidence in support of that position would be legally insufficient. *E.g., United States v. Sarno*, 24 F.3d 618, 621 (4th Cir.1994), *United States v. Villegas*, 899 F.2d 1324, 1343 (2d Cir.1990).

ation. However, the arrest in Florida in 1991 was at the instigation of the Crime Commission.

The district court refused to allow the evidence of duress to be introduced. Ruling from the bench, the district judge found that because Salemo was in prison in another part of the country, there was no immediate threat of death or serious injury, no evidence of immediate retaliation tied to the sale of the car, nor a lack of reasonable opportunity to escape the threatened harm. Moreover, the court concluded that defendant produced no legally significant evidence that she lacked the opportunity to contact law enforcement officers.

As the Supreme Court observed in *United States v. Bailey*, 444 U.S. 394, 409, 100 S.Ct. 624, 634, 62 L.Ed.2d 575 (1980), at common law, duress excused criminal conduct when the actor was "under an unlawful threat of imminent death or serious bodily injury." The defense is not often successful. "[I]f there was a reasonable, legal alternative to violating the law, a chance both to refuse to do the criminal act and also to avoid the threatened harm, the defense[ ] will fail." *Id.* at 410, 100 S.Ct. at 635 (internal quotation omitted).

In *United States v. One 107.9 Acre Parcel of Land Located in Warren Township, Bradford County, Pa.*, 898 F.2d 396, 399 (3d Cir. 1990), we determined that "[i]n a criminal law context, ... duress contains three elements:

(1) an immediate threat of death or serious bodily injury;

(2) a well-grounded fear that the threat will be carried out; and,

(3) no reasonable opportunity to escape the threatened harm."

See also United States v. Santos, 932 F.2d 244, 249 (3d Cir.1991). To the same effect, see *United States v. Paolello*, 951 F.2d 537, 541 (3d Cir.1991), which added an additional factor – that a defendant should not recklessly place herself in a situation in which she would be forced to engage in criminal conduct.

Our review of the record persuades us that the factors of time and distance are fatal to the defendant's claim of duress. Her husband was in jail, many miles removed, when he threatened to kill her and her family. Shortly thereafter, defendant talked to an FBI agent and to a representative of the Crime Commission, but to neither did she disclose the threats.

There was ample opportunity for defendant to communicate her claims of duress to law enforcement officials. She thus failed in her obligation to notify the authorities rather than to violate a criminal law. The district court did not err in barring the defense of duress.

III.

[5] Defendant further contends that the government acted improperly in calling Debra Moser, the defendant's housekeeper, to testify. Defendant argues that because the prosecution had impeached that witness in the earlier trial of George Salemo, it should not take an inconsistent position at her trial.

In 1992, Moser told Thomas Fry, an FBI agent, that she knew nothing about how the car was moved from the defendant's garage and out of the Allentown area. However, during Salemo's trial in October 1993, Moser, called as a witness by the defense, admitted that she had moved the car out of the garage and had hidden it. The government then impeached the witness with the statement she had given to agent Fry.

During the defendant's trial, Moser testified—this time on behalf of the government—to the same version of events that she had given in Salemo's case. She said that defendant had instructed her to move the car from the garage. Although at odds with the statement previously given to the FBI agent, the testimony of the witness at both trials was consistent.

Relying on *Mesarosh v. United States*, 352 U.S. 1, 77 S.Ct. 1, 1 L.Ed.2d 1 (1956), defendant contends that the government's use of Moser to support its case poisoned the trial. The circumstances presently before us, however, are a far cry from *Mesarosh* where the government conceded after the trial in that case that it had substantial doubts about the credibility of its principal witness, a paid

informant. Here, by contrast, there is no allegation that Moser committed perjury. Her testimony under oath at the Salemo trial differed from the unsworn statement that she had given to the FBI agent, but it does not follow that the government could not believe that her in-court version was the truthful one.

Moreover, unlike *Mesarosh*, the government made its FBI statement available during the defendant's trial so that she was free to use it on cross-examination. As the Court of Appeals for the Eighth Circuit said in a somewhat similar situation, "Here, the poison of perjury by [the witness] . . . was admitted at trial and the antidote of cross-examination was available and used by the defendant." *United States v. Wiebold*, 507 F.2d 932, 935 (8th Cir.1974).

In *United States v. Hozian*, 622 F.2d 439, 442 (9th Cir.1980), the Court found no impropriety in the government's use of a witness whom it had sought to impeach in a previous trial. The Court pointed out that the defendant had ample opportunity to develop the matter on cross-examination. To the same effect, see *United States v. Tamez*, 941 F.2d 770, 776 (9th Cir.1991); *United States v. Cervantes*, 542 F.2d 773, 776 (9th Cir.1976).

We are persuaded that the district court did not err in permitting Moser to testify.

IV.

[6] The defendant's final point is that the district court erred in refusing to depart downward after being advised of her claims of duress, ill health, and diminished capacity. The record demonstrates that the district court was aware of its power to depart downward, but in the exercise of discretion, chose not to do so. In such circumstances, we do not have appellate jurisdiction over this issue. *United States v. Denardi*, 892 F.2d 269, 272 (3d Cir.1989).

Accordingly, the judgment of the district court will be affirmed.

In re JASON REALTY, L.P., Debtor.

FIRST FIDELITY BANK, N.A.

v.

JASON REALTY, L.P., Appellant.

JASON REALTY, L.P., Appellant,

v.

FIRST FIDELITY BANK, N.A.

Nos. 94-5691, 95-5133.

United States Court of Appeals,
Third Circuit.

Argued May 24, 1995.

Decided July 6, 1995.

Sur Petition for Rehearing Aug. 4, 1995.

Chapter 11 debtor filed motion for continued use of cash collateral consisting of rents from mortgaged property. The United States Bankruptcy Court for the District of New Jersey granted motion, and mortgagee appealed. The District Court, 1994 WL 774537, Anne E. Thompson, Chief Judge, reversed, and debtor appealed. Mortgagee also moved for relief from automatic stay, and debtor filed cross-motion seeking to compel mortgagee to pay operating expenses for real property. The Bankruptcy Court granted relief from automatic stay and denied cross-motion, and debtor appealed. The District Court affirmed, and debtor appealed. Following consolidation of appeals, the Court of Appeals, Aldisert, Circuit Judge, held that: (1) assignment agreement evidenced absolute assignment of title to rents, with debtor receiving license to collect rents, and, thus, rents were not estate property, and (2) mortgagee was entitled to relief from automatic stay when debtor lacked equity in rents and rents could not be used to fund reorganization plan.

Affirmed.

1. Bankruptcy ⇐3782

Interpretation and application of assignment of rents contract and Bankruptcy Code

Agenda Item IIC 7

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

FROM: **Professor David A. Schlueter, Reporter**

RE: **Rule 33, Time for Filing Motion for New Trial**

DATE: **March 21, 1996**

In September 1995, Mr. John C. Keeney, Acting Assistant Attorney General, Criminal Division, proposed that Rule 33 be amended to provide greater consistency in the time permitted for filing a motion for new trial on the ground of newly discovered evidence. At its October 1995 meeting in Vermont, the Committee approved in principle an amendment to Rule 33 which would use an event in the trial court to begin the running of the two-year period for filing a motion for new trial on the grounds of new evidence. *See* Minutes, Oct. 1995 Meeting, at page 7.

In a subsequent letter to Judge Jensen, Mr. Keeney has indicated that the Department of Justice suggests that the starting point be the "verdict or finding of guilty." He offers two reasons for using that language. First, it provides more consistency than using the imposition of sentence because the time for actually imposing the sentence after the verdict may vary greatly among defendants and cases. Second, that language tracks the same language used elsewhere in the rule for filing a motion for new trial on grounds other than newly discovered evidence.

Attached is a draft of the proposed amendment and the pertinent portions of Mr. Keeney's letters.

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

Criminal Rules Committee
March 1996 Draft
Rule 33

Rule 33. New Trial.

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

COMMITTEE NOTE

As currently written, the time for filing a motion for new trial on the ground of newly discovered evidence runs from the "final judgment." The courts, in interpreting that language, have uniformly concluded that that language refers to the action of the Court of Appeals. *See, e.g., United States v. Reyes*, 49 F.3d 63, 66 (2d Cir. 1995)(citing cases). It is less clear whether that action is the appellate court's judgment or the issuance of its mandate. In *Reyes*, the court concluded that it was the latter event. In either case, it is clear that the present approach of using the appellate court's final judgment as the triggering event can cause great disparity in the amount of time available to a defendant to file timely a motion for new trial. This would be especially true if, as noted by the Court in *Reyes*, *supra* at 67, an appellate court stayed its mandate pending review by the Supreme Court. *See also Herrera v. Collins*, 113 S.Ct. 853, 865-866 (1993)(noting divergent treatment by States of time for filing motions for new trial).

Criminal Rules Committee
March 1996 Draft
Rule 33

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

Criminal Division
U. S. Department of Justice

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

September 18, 1995

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

Dear Judge Jensen:

I am writing on behalf of the Department of Justice to request that the Advisory Committee on Criminal Rules consider an amendment to Rule 33, F.R. Crim. P., to change the point from which the two-year time limit runs for filing a motion for a new trial on the ground of newly discovered evidence.

Rule 33 provides that such a motion must be filed "within two years after final judgment." Although the appellate courts that have considered this language have uniformly construed "final judgment" as referring to action by the court of appeals, see United States v. Reyes, 49 F.3d 63 (2d Cir. 1995) (collecting cases), we believe that a preferable approach, followed by many states, would be to calculate the time from the imposition of sentence by the district court.[1] Such a change would provide greater certainty and fairness, since it would eliminate the disparity arising from the fact that the resolution of appeals may consume widely varying amounts of time depending, inter alia, on the difficulty of the issues presented and differences in caseload among the courts of appeals.

The current appellate court "trigger" for starting the time under Rule 33 results in an additional ambiguity since it is not clear what the triggering event is -- affirmance of the conviction or the issuance of the mandate. Recently, in

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[1]Notwithstanding the uniform construction of Rule 33 as referring to an event in the court of appeals, there is a strong textual argument, from the clause beginning "but if an appeal is pending", that the drafters contemplated that "final judgment" was an event in the district court.

United States v. Reyes, supra, the Second Circuit held that the issuance of the mandate was the operative "final judgment" for purposes of Rule 33. This, however, has the effect of creating even further uncertainty and disparity, since whether or not an appellate court stays its mandate often has little if any relevance to the policies underlying the existence of a time limit for the filing of Rule 33 motions, which by case law must allege the existence of new evidence such as would have probably produced an acquittal, e.g., United States v. Wake, 948 F.2d 1422, 1435-6 (5th Cir. 1991). For example, a defendant may have a very substantial claim that the statute under which he was convicted is invalid as applied. Such a case may well merit a stay of mandate, but it is hard to see why the granting of such a stay should extend that defendant's time for subsequently filing a Rule 33 motion based on newly discovered evidence.

The Supreme Court in Herrera v. Collins, 113 S. Ct. 853 (1993), included a useful historical discussion and summary of both Rule 33 and comparable provisions in all 50 states, in the course of considering (and answering in the negative) the question whether the Constitution requires that federal courts entertain on writ of habeas corpus a newly discovered evidence claim brought by a capital defendant well beyond Texas' 60-day limit. See id. at 865-6. The Court noted that of the more than forty states that have time limits for bringing new trial motions based on newly discovered evidence, eighteen have limits of between one and three years, similar to the federal rule. Nothing in Herrera v. Collins caused the Court to explore the point at which the time limits under those varying state laws or Rule 33, F. R. Crim. P., begin to run, the issue we seek to raise here. We have examined the eighteen state provisions with time limits comparable to Rule 33, however, and have found that most of those jurisdictions[2] make the triggering event an action in the district court as opposed to the court of appeals. Like these states, we believe that it makes sense to commence the running of the applicable time period from the action of the district court, and suggest that the imposition of sentence (rather than the entry of verdict or finding of guilt) is the most appropriate event.

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[2]I.e., Connecticut, Louisiana, Maine, Maryland, Nebraska, Nevada, New Hampshire, Oklahoma, Rhode Island, and Vermont. Six states use the same language -- "final judgment" -- as the federal rule: Alaska, Delaware, Kansas, New Mexico, North Dakota, and Wyoming.

Accordingly, we urge that Rule 33 be amended by substituting "imposition of sentence" for "final judgment." [3]

Sincerely,

John C. Keeney

John C. Keeney
Acting Assistant Attorney General

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[3]The Committee should be aware that we sought from the Administrative Office of the United States Courts any data as to the frequency with which Rule 33 motions based on newly discovered evidence are filed or granted. Although we believe the number of such cases is not large, we were advised that no such information is available.

U.S. Department of Justice

Criminal Division

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

January 11, 1996

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

Dear Judge Jensen:

* * * * *

On another matter, I would like to address the Committee's request in regard to the Department's proposal, discussed at the Advisory Committee's last meeting, to amend Rule 33, F.R. Crim.P. As you no doubt recall, after considerable debate, the Committee voted by a large margin to adopt in concept a change to the Rule that would make the time run from a district court event, such as the verdict or plea or the imposition of sentence, rather than from an event in the court of appeals, such as the affirmance of the conviction or the issuance of the mandate, which is how the Rule is currently interpreted. The Committee, however, left the

question of particular amendatory language for its next meeting, and asked the Department to suggest a specific formulation for consideration at that time.

In our original proposal, we had suggested that the "imposition of sentence" was the appropriate event to trigger the running of Rule 33's two-year time period. However, on further reflection, we are inclined to prefer the alternative suggestion made by Judge Davis during the Committee's discussion that the triggering event be the "verdict or finding of guilty."

A number of States use the verdict or finding of guilty as the point from which the time commences for filing new trial motions based on newly discovered evidence. We support this formulation for Rule 33, for two reasons. First, it serves -- even better than our original "imposition of sentence" idea -- to achieve the objective of the amendment, which is to assure that all defendants have an equal and uniform period in which to file such motions. Having the time run from the verdict or finding of guilty advances this goal better than would using the imposition of sentence as the trigger, because the time at which sentence is imposed after verdict or finding of guilty may vary widely among defendants, particularly when sentence is deferred to await anticipated cooperation. Second, use of the phrase "verdict or finding of guilty" in the second sentence of Rule 33 has the virtue of consistency with the third sentence, which employs the same language when addressing the time for making new trial motions on any grounds other than newly discovered evidence. We therefore endorse Judge Davis' suggestion and urge its adoption by the Committee at the upcoming meeting in April.

Sincerely,

John C. Keeney

John C. Keeney
Acting Assistant Attorney General
Criminal Division

Agenda Item IIC 8

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

FROM: **Professor David Schlueter, Reporter**

RE: **Rule 35(b); Amendment to Recognize Pre-sentencing Assistance**

DATE: **March 21, 1996**

At its October 1995 meeting in Vermont the Committee considered a proposal to change Rule 35(b) to permit the court to take into account the combined pre-sentencing and post-sentencing assistance in deciding whether a defendant had provided "substantial" assistance. Upon motion and a 7-3 vote, the Committee approved an amendment adding the words, "In evaluating whether substantial assistance has been rendered, the court may consider the defendant's pre-sentence assistance." There was some concern expressed, however, that that language would not prevent a defendant from receiving double credit for pre-sentencing assistance. The consensus was that I should draft alternative language which might address that concern.

Attached are two versions which provide some alternative solutions to amending language and a proposed Committee Note which would probably fit either version. The first version reflects the Committee' s vote with additional suggested language in brackets. The second version is based upon language submitted by Mr. Pauley to me at the meeting in Vermont.

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

Criminal Rules Committee
Rule 35(b)
March 1996 Draft

Rule 35. Correction or Reduction of Sentence [VERSION 1]

* * * * *

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

* * * * *

Criminal Rules Committee
Rule 35(b)
March 1996 Draft

Rule 35. Correction or Reduction of Sentence [VERSION 2]

* * * * *

(b) REDUCTION OF SENTENCE FOR CHANGED CIRCUMSTANCES. The court, on motion of the Government made within one year after the imposition of the sentence, may reduce a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense, in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code. The court may consider a government motion to reduce a sentence made one year or more after imposition of the sentence where the defendant's substantial assistance involves information or evidence not known by the defendant until one year or more after imposition of sentence. If, after imposition of the sentence, a defendant has provided assistance of the kind required by this subdivision but the assistance was not substantial, the Government may nevertheless make, and the court may grant, a motion under this subdivision if (1) the defendant provided such assistance prior to the imposition of sentence, (2) the defendant had not previously received a reduction of sentence for such assistance, and (3) the aggregate of such prior assistance and that provided after the imposition of the sentence was substantial. The court's authority to reduce a sentence under this ~~subsection~~ subdivision includes the authority to reduce such sentence to a level below that established by statute as a minimum sentence.

* * * * *

Criminal Rules Committee
Rule 35(b)
March 1996 Draft

COMMITTEE NOTE

The amendment to Rule 35(b) is intended to fill a gap in current practice. Under the Sentencing Reform Act and the applicable guidelines, a defendant who has provided "substantial" assistance to the Government before sentencing may receive a reduced sentence under United States Sentencing Guideline § 5K1.1. And a defendant who provides substantial assistance after the sentence has been imposed may receive a reduction of the sentence if the Government files a motion under Rule 35(b). In theory, a defendant who has provided substantial assistance both before and after sentencing could benefit from both § 5K1.1 and Rule 35(b). But a defendant who has provided, on the whole, substantial assistance may not be able to benefit from either provision because each provision requires "substantial assistance." As one court has noted, those two provisions contain distinct "temporal boundaries." *United States v. Drown*, 942 F.2d 55, 59 (1st Cir. 1991).

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

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

Agenda Item IIC 9

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Rule 43(c)(4); Presence of Defendant at Resentencing Proceedings**

DATE: **March 22, 1996**

As noted in the attached correspondence from Mr. John Keeney, the Department of Justice has proposed that Rule 43(c)(4) be amended to provide that a defendant need not be present at a proceeding to reduce a sentence under Rule 35 or to change a sentence under 18 U.S.C. § 3582(c).

As noted in Mr. Keeney's letter, Rule 43 was amended last year to address the issue of sentencing an absent defendant. However, as sometimes happens, in the process of discussing the proposed change, several members of the Standing Committee offered additional suggestions on the format of the rule and in the process, Rule 43(c) was restructured; some pen and ink changes were made to the rule and the words "or reduction" were omitted from (c)(4).

To the best of my knowledge, the Criminal Rules Committee did not discuss, or resolve, the specific question of whether the exceptions in Rule 43(c) should extend to resentencing proceedings. The Department's letter provides that opportunity. Proposed amending language is included in Mr. Keeney's letter at page 4.

This item will be on the agenda for the April meeting.

U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General

Washington, D.C. 20530

January 11, 1996

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

Dear Judge Jensen:

I am writing in part to suggest that Rule 43 be amended to clarify the kinds of resentencings that require the presence of the defendant.[1] As the Fifth Circuit has observed, prior to the Sentencing Reform Act of 1984 (SRA) "the relationship between Rule 35 and 43 was relatively clear." United States v. Moree, 928 F.2d 654 (1991). But that is no longer the case. Before the SRA, Rule 35 contained a subdivision (b) that permitted a court (with or without a party's motion) to reduce a sentence within 120 days after the conviction and sentence became final. Subdivision (a) permitted the court to correct an illegal sentence at any time, and to correct a sentence imposed in an illegal manner within the time provided in subdivision (b). Rule 43(a) then provided (and still provides) that the defendant must be present at the "imposition of sentence," except as otherwise provided in the Rule. Rule 43(c)(4) during this period provided that a defendant need not be present "at a reduction of sentence under Rule 35."

In the SRA, Congress completely rewrote Rule 35. Consistent with the SRA'S establishment of a determinate sentencing system, subdivision (b) was recast to permit a reduction of sentence only upon motion of the government within one year after its imposition to reflect a defendant's subsequent, substantial assistance. Subdivision (a), consistent with the SRA'S creation of a guidelines system with the right of appeal of sentence in certain circumstances, was amended to require the "correction" of a sentence upon remand from a court of appeals. Rules 43(a) and

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[1] We are aware that Rule 43 was recently amended, (effective December 1, 1995) but the principal purpose of that amendment -- to permit in absentia sentencing of fugitive defendants -- was unrelated to the issue of presence at resentencings. Unfortunately, as we point out later, another amendment of Rule 43 at that same time which altered Rule 43(c)(4) has exacerbated the problem with respect to presence at resentencings.

(c)(4), however, were unchanged, and still required the presence of the defendant at the "imposition of sentence," except at a "reduction of sentence under Rule 35."

In 1991, Rule 35 was amended pursuant to the Rules Enabling Act process to add a subdivision (c) that permits a court to "correct" a sentence within seven days after its imposition where the sentence was imposed as a result of arithmetical, technical or other clear error. And most recently, effective December 1, 1995, Rule 43(c)(4) was amended so that the operative term "reduction" was replaced by "correction", thus providing that a defendant's presence is not obligatory at a resentencing "when the proceeding involves a correction of sentence under Rule 35" (emphasis supplied).

This history of Rules 35 and 43 and their current wording give rise to a host of interpretive problems with respect to the question of the defendant's entitlement to be present during various kinds of resentencings under Rule 35. One issue, addressed by the court in Moree, supra (before the most recent change to Rule 43(c)(4)) was whether or not a correction of a sentence on remand under Rule 35(a) should be considered a "reduction" of sentence -- at which the defendant need not be present -- when the correction resulted in a lower sentence. The court held that a sentence imposed on remand under subdivision (a), after the appellate court had vacated the original sentence, was not a "reduction" and that the defendant was entitled to be present. The court construed Rule 43(c)(4) to require the defendant's presence at a resentencing that properly is characterized as a proceeding to "impose a new sentence after the original sentence has been set aside," as opposed to a proceeding, such as a reduction of sentence under Rule 35(b), merely to "modify an existing sentence" (at which the defendant need not be present). 928 F.2d, at 655. See also United States v. Behrens, 375 U.S. 162, 165-6 (1963); United States v. Patterson, 42 F.3d 246 (5th Cir. 1994). It is unclear, however, whether the same result would be reached today in Moree under the most recent amendment to Rule 43(c)(4), which states that presence is not required at a "correction" of sentence under Rule 35, a term that seems to apply to both subdivisions (a) and (c) of Rule 35, but not (as in the past) to subdivision (b).

In sum, it is presently unclear under Rules 35 and 43 which resentencings under Rule 35 now require the presence of the defendant and which do not. Read literally, and giving effect to the most recent amendment of Rule 43(c)(4),[2] it can be argued

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[2] We are not convinced that giving the amendment substantive effect is justified. The change, which would be highly significant if intended, is unaccompanied by any explanation in the Committee Note. According to the committee minutes it appears to have originated in June 1993, in a draft prepared by the then chairman of the Advisory Committee, Judge Hodges, in

that, under Rule 43, a defendant need not be present at a "correction" of sentencing under Rule 35(a) or (c), but must be present at a "reduction" of sentence proceeding under subdivision (b). We doubt that this was intended or represents sound policy. For example, resentencings under subdivision (b) -- at which the defendant's presence was expressly made not obligatory by Rule 43(c)(4) for many decades until the most recent amendment -- would seem plainly to be the sorts of resentencings at which the defendant's presence ought not to be mandated by the Rules. See United States v. Birnbaum, 421 F.2d 993, 998 (2d Cir.), cert. denied, 397 U.S. 1044 (1970) (upholding the constitutionality of not requiring the defendant's presence at a sentence reduction proceeding); United States v. McCray, 468 F.2d 446, 450 (10th Cir. 1972) (same). By the same token, we agree with the result in Moree that resentencings upon remand from the court of appeals under Rule 35(a), although styled as a "correction" of sentence and thus currently arguably exempted from Rule 43(a), ought as a policy matter to entitle the defendant to be present.

Rule 35(c) resentencings to correct a sentence within seven days for arithmetical, technical, or other clear errors pose a more difficult issue. Considerable caselaw exists that antedates the 1991 addition of Rule 35(c) to the effect that, when a district court corrects a sentence to be in compliance with the sentencing guidelines or with other applicable law such as a minimum sentence, the defendant must be present, at least where the correction results in a sentence increase. See, e.g. United States v. Cook, 890 F.2d 672, 675 (4th Cir.1989); Thompson v. United States, 495 F.2d 1304, 1307 (1st. Cir. 1974); Caille v. United States, 487 F.2d 614, 616 (5th Cir. 1973). However, we doubt whether, where the error corrected is truly of an arithmetical or clerical nature as contemplated by the 1991 amendment which substantially narrowed the former ability of district judges to enter sentencing corrections, compare United States v. Rico, 902 F.2d 1065 (2d Cir.1990), either the Constitution or policy considerations mandate that the defendant be present, since there is no meaningful function that the parties can perform. See United States v. Nolley, 27 F.3d 80 (4th Cir. 1994).

Finally, another significant problem is that Rule 43 does not address resentencings occasioned by 18 U.S.C. 3582(c). Such resentencings may occur either by the action of the United States Sentencing Commission in making retroactive a guideline amendment reducing the applicable guideline sentence (in which case the district court has substantial discretion under the statute and guidelines, §1B1.10, whether or not to give the defendant the benefit of the reduced guideline), or upon motion of the Bureau

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order to effect stylistic changes designed to achieve parallelism among the (then five) proposed paragraphs of subsection (c). Thus it may well be that the dropping of the term "reduction" was inadvertent.

of Prisons to reduce a sentence based on "extraordinary and compelling reasons." We believe that the defendant's presence should not be compulsory in either circumstance, although of course the court could require the defendant's attendance if desired. Both types of resentencing proceedings can only result in a reduction, not an increase, in sentence. Both also invoke the district court's broad discretion. Both, therefore, are analogous, in our view, to pre-SRA reduction of sentence proceedings under "old" Rule 35(b), at which the defendant's presence was not required.

We are especially concerned about resentencings brought about through guideline retroactivity. As you may know, the Sentencing Commission has made numerous guideline changes retroactive, including some that could affect hundreds or thousands of prisoners. It presently has under consideration the retroactivity of a recent guideline amendment reducing the sentences for so-called "safety valve" drug defendants under 18 U.S.C. 3553(f), which could involve some 4-6000 incarcerated defendants. A requirement that all such defendants must be brought to court at the time a new sentence is imposed would create enormous expense and burdens for the Marshals Service and could create additional opportunities for escape, thus jeopardizing public safety. We understand that judges have been advised in this regard by the Administrative Office of the United States Courts that they have discretion as to whether the defendant should be present at such proceedings, and that the practice up to now has not been to require the prisoner's attendance during such resentencings. However, we are concerned that the present text of Rule 43 could make it difficult to sustain this practice if challenged.

Accordingly, both to clarify the relationship of Rule 43 to the various kinds of Rule 35 resentencings and to provide that presence of the defendant is not mandatory at resentencings under 18 U.S.C. 3582(c), we urge that Rule 43(c)(4) be amended to read as follows: "when the proceeding involves a correction or reduction of sentence under Rule 35(b) or (c) or 18 U.S.C. 3582(c)." Under this formulation, presence would be required at a resentencing after remand under Rule 35(a), but not at any other resentencings under Rule 35 or section 3582(c).

Your and the other members' consideration of this proposal is greatly appreciated.

On another matter, I would like to address the Committee's request in regard to the Department's proposal, discussed at the Advisory Committee's last meeting, to amend Rule 33, F.R. Crim.P. As you no doubt recall, after considerable debate, the Committee voted by a large margin to adopt in concept a change to the Rule that would make the time run from a district court event, such as the verdict or plea or the imposition of sentence, rather than from an event in the court of appeals, such as the affirmance of the conviction or the issuance of the mandate, which is how the Rule is currently interpreted. The Committee, however, left the

question of particular amendatory language for its next meeting, and asked the Department to suggest a specific formulation for consideration at that time.

In our original proposal, we had suggested that the "imposition of sentence" was the appropriate event to trigger the running of Rule 33's two-year time period. However, on further reflection, we are inclined to prefer the alternative suggestion made by Judge Davis during the Committee's discussion that the triggering event be the "verdict or finding of guilty."

A number of States use the verdict or finding of guilty as the point from which the time commences for filing new trial motions based on newly discovered evidence. We support this formulation for Rule 33, for two reasons. First, it serves -- even better than our original "imposition of sentence" idea -- to achieve the objective of the amendment, which is to assure that all defendants have an equal and uniform period in which to file such motions. Having the time run from the verdict or finding of guilty advances this goal better than would using the imposition of sentence as the trigger, because the time at which sentence is imposed after verdict or finding of guilty may vary widely among defendants, particularly when sentence is deferred to await anticipated cooperation. Second, use of the phrase "verdict or finding of guilty" in the second sentence of Rule 33 has the virtue of consistency with the third sentence, which employs the same language when addressing the time for making new trial motions on any grounds other than newly discovered evidence. We therefore endorse Judge Davis' suggestion and urge its adoption by the Committee at the upcoming meeting in April.

Sincerely,

John C. Keeney

John C. Keeney
Acting Assistant Attorney General
Criminal Division

Agenda Item II D #1

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Fed. R. App. P. 4; Time for Filing Appeal in Criminal Cases**

DATE: **March 22, 1996**

In the attached correspondence, Judge Stotler raises the question of whether Federal Rule of Appellate Procedure 4 (attached) should be amended to address the problem raised in *United States v. Marbley* (attached).

This item will be on the April agenda for discussion by the Committee.

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

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

March 19, 1996

Honorable James K. Logan
United States Circuit Judge
100 East Park, Suite 204
P.O. Box 790
Olathe, Kansas 66061

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

Re: Possible FRAP 4(b) Amendment

Dear Judges:

Enclosed please find Chief Judge Posner's letter and the Seventh Circuit opinion describing why a late-filed notice of appeal in a criminal case actually protracts the inevitable appeal (inevitable because the district court will find ineffective assistance of counsel as the reason for the missed deadline and months later grant a § 2255 petition).

Should FRAP 4(b) be amended?

Sincerely,

Alicemarie H. Stotler

enclosures (2)
cc: John K. Rabiej (w/enc.)

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MAR 1996

United States Court of Appeals
For the Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604

FEB 16 1 41 PM '96

Chambers of
Richard A. Posner
Chief Judge

Tel. 312-435-5806
Fax 312-435-7545

February 12, 1996

Hon. Alicemarie H. Stotler
United States District Court
U. S. Courthouse
751 W. Santa Ana Blvd.
Santa Ana, CA 92701

Dear Judge Stotler:

At Frank Easterbrook's suggestion, I am enclosing a recent opinion I wrote questioning the appropriateness of the requirement in the appellate rules that a criminal defendant be required to prove excusable neglect in order to be permitted to file an untimely appeal. The principal effect of the requirement is that if neglect is inexcusable, the defendant argues that his counsel was ineffective, and so he gets his untimely appeal through 28 U.S.C. § 2255—only with more delay than if the district court or court of appeals could have waived the 10-day requirement in the first place. Maybe this is something that the standing committee on rules should look into.

Sincerely,

Richard A. Posner

Enclosure

In the

United States Court of Appeals

For the Seventh Circuit

No. 94-2658

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ODELL MARBLEY,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. 94 CR 12—Larry J. McKinney, *Judge.*

ARGUED JANUARY 23, 1996—DECIDED FEBRUARY 9, 1996

Before POSNER, *Chief Judge*, and BAUER and EVANS, *Circuit Judges.*

POSNER, *Chief Judge.* The defendant was convicted by a jury of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), and was sentenced to 108 months in prison. The only ground of the appeal is that no reasonable jury could have found the defendant guilty beyond a reasonable doubt of the offense with which he was charged. Appeals on this ground rarely succeed and there is no reason to suppose this case an exception. The gun was found in the back of a car driven by the defendant (he fled when the police stopped him) and the girlfriend's explanation for the presence of the gun—that the car was hers and the gun had been given her as payment

for a "trick," though her standard price is $50 and the gun and ammunition found with it were worth more than $500—was not credible.

Yet although we are given no reason to doubt that a rational jury could have disbelieved the girlfriend, Rule 4(b) of the Federal Rules of Appellate Procedure prevents us from reaching the merits of the appeal and dispatching this case once and for all. The rule fixes a ten-day limit for appeals in a criminal case unless the defendant shows excusable neglect. The judgment in this case was entered on June 10, 1994, and the notice of appeal was not filed until July 8, almost thirty days later. In the notice of appeal appears the statement that "counsel for defendant, through inadvertence and excusable neglect failed to file the notice of appeal within the required ten (10) days and requests the District Court, pursuant to FRAP 4(b) to extend the time for filing an additional thirty (30) days." Counsel vouchsafed no fuller or further explanation of why the neglect could be thought excusable. Yet the government did not oppose the motion, and the district judge granted it without a statement (written or, so far as appears, oral—there is no indication of any hearing on the matter) of reasons. The government does not contest our jurisdiction. Asked at argument why not, its lawyer told us that he believes that judges prefer to decide cases on their merits.

There was neglect in missing the ten-day deadline, and no indication the neglect was excusable. The defendant's current lawyer speculates that the lawyer who filed the notice of appeal was busy with other matters. The government's lawyer could offer no better explanation than that the defendant's lawyer "blew the time."

If Rule 4(b) gave the district judge carte blanche to allow untimely appeals, our jurisdiction would be secure. The rule does not do this. It requires that the neglect resulting in the failure to comply with the ten-day deadline be "excusable." If counsel seeking forgiveness for a late filing fails to offer any excuse but merely recites that

he *has* an excuse, the judge cannot determine whether the late filing was the result of excusable neglect and we cannot determine whether the judge's finding of excusable neglect has a rational basis. It is true that the belated notice of appeal in this case cited "inadvertence" as well as "excusable neglect" in extenuation of the untimely filing. But "inadvertence," without more, is not an excuse. It is merely a synonym for "neglect," and our court and the other courts of appeals have made clear that not every instance of neglect to file on time is excusable. *Prizevoits v. Indiana Bell Tel. Co.*, No. 95-1813 (7th Cir. Feb. 2, 1996); *United States v. Clark*, 51 F.3d 42, 44 (5th Cir. 1995); *United States v. Hooper*, 43 F.3d 26, 29 (2d Cir. 1994). Since we have been given no reason to believe that the neglect here was excusable and suspect that it was not, we are compelled to dismiss the appeal for want of jurisdiction.

We are not happy with this result, which we reach only under compulsion of the rule. The fact that the notice of appeal was filed on July 8 rather than June 20 has no positive, and probably a negative, significance for the policy of expediting criminal proceedings. The lost time could easily be made up at a later stage in the appellate process by requiring the appellant to file his brief earlier than he would otherwise have to do (as we are empowered to require by Fed. R. App. P. 31(a) and 7th Cir. R. 3.1(a)), while our action in dismissing the appeal will, paradoxically, delay the final resolution of the criminal proceeding. For consider what comes next. Either the defendant's new counsel will make a compelling showing of excusable neglect by the old, leading to a well-grounded finding by the district judge of excusable neglect and so to reinstatement of the appeal, or counsel will file a motion under 28 U.S.C. § 2255 to vacate the conviction on the ground that by failing to perfect the appeal the defendant's original counsel caused the defendant to lose the right to effective counsel that the Sixth Amendment confers on him. If the motion was granted, as it would have to be since there is no suggestion that the defendant bore any responsibility for his lawyer's failure to file a timely appeal, *United States v.*

Nagib, 56 F.3d 798, 800-801 (7th Cir. 1995); *Castellanos v. United States*, 26 F.3d 717, 719 (7th Cir. 1994); *United States v. Stearns*, 68 F.3d 328, 330-31 (9th Cir. 1995), the appeal would again be reinstated.

It might be better to permit untimely appeals in any criminal case in which the district judge and the court of appeals agreed that the appeal should be heard. Although criminal judgments used not even to be appealable, today the right of a criminal defendant to appeal is considered so fundamental that the usual consequence of an inexcusable failure to perfect the appeal is merely to have the appeal heard later through the Sixth Amendment route described above. See, e.g., *Stutson v. United States*, 116 S. Ct. 600 (1996) (per curiam). This oblique approach serves no one's interest that we can see and introduces real delay into the system of criminal justice. But although we think Rule 4(b) is ripe for reexamination we are bound by it and the appeal must therefore be

DISMISSED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA AO7XXXC-92-001—Midwest Law Printing Co., Inc., Chicago—2-9-96

Rule 4. Appeal as of Right—When Taken

(a) *Appeal in a Civil Case.—*

(1) Except as provided in paragraph (a)(4) of this Rule, in a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 must be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date when the clerk received the notice and send it to the clerk of the district court and the notice will be treated as filed in the district court on the date so noted.

(2) A notice of appeal filed after the court announces a decision or order but before the entry of the judgment or order is treated as filed on the date of and after the entry.

(3) If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

(4) If any party files a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion under the Federal Rules of Civil Procedure:

(A) for judgment under Rule 50(b);

(B) to amend or make additional findings of fact under Rule 52(b), whether or not granting the motion would alter the judgment;

(C) to alter or amend the judgment under Rule 59;

(D) for attorney's fees under Rule 54 if a district court under Rule 58 extends the time for appeal;

(E) for a new trial under Rule 59; or

(F) for relief under Rule 60 if the motion is filed no later than 10 days after the entry of judgment.

A notice of appeal filed after announcement or entry of the judgment but before disposition of any of the above motions is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the entry of the order disposing of the last such motion outstanding. Appellate review of an order disposing of any of the above motions requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment shall file a notice, or amended notice, of appeal within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last such motion outstanding. No additional fees will be required for filing an amended notice.

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be *ex parte* unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(6) The district court, if it finds (a) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may, upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

(7) A judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

(b) *Appeal in a Criminal Case.*—In a criminal case, a defendant shall file the notice of appeal in the district court within 10 days after the entry either of the judgment or order appealed from, or of a notice of appeal by the Government. A notice of appeal filed after the announcement of a decision, sentence, or order—but before entry of the judgment or order—is treated as filed on the date of and after the entry. If a defendant makes a timely motion specified immediately below, in accordance with the Federal Rules of Criminal Procedure, an appeal from a judgment of conviction must be taken within 10 days after the entry of the order disposing of the last such motion outstanding, or within 10 days after the entry of the judgment of conviction, whichever is later. This provision applies to a timely motion:

(1) for judgment of acquittal;

(2) for arrest of judgment;

(3) for a new trial on any ground other than newly discovered evidence; or

(4) for a new trial based on the ground of newly discovered evidence if the motion is made before or within 10 days after entry of the judgment.

A notice of appeal filed after the court announces a decision, sentence, or order but before it disposes of any of the above motions, is ineffective until the date of the entry of the order disposing of the last such motion outstanding, or until the date of the entry of the judgment of conviction, whichever is later. Notwithstanding the provisions of Rule 3(c), a valid notice of appeal is effective without amendment to appeal from an order disposing of any of the above motions. When an appeal by the government is authorized by statute, the notice of appeal must be filed in the district court within 30 days after (i) the entry of the judgment or order appealed from or (ii) the filing of a notice of appeal by any defendant.

A judgment or order is entered within the meaning of this subdivision when it is entered on the criminal docket. Upon a showing of excusable neglect, the district court may—before or after the time has expired, with or without motion and notice—extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Fed. R. Crim. P. 35(c), nor does the filing of a motion under Fed. R. Crim. P. 35(c) affect the validity of a notice of appeal filed before entry of the order disposing of the motion.

(c) *Appeal by an Inmate Confined in an Institution.*—If an inmate confined in an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a notarized statement or by a declaration (in compliance with 28 U.S.C. § 1746) setting forth the date of deposit and stating that first-class postage has been prepaid. In a civil case in which the first notice of appeal is filed in the manner provided in this subdivision (c), the 14-day period provided in paragraph (a)(3) of this Rule 4 for another party to file a notice of appeal runs from the date when the district court receives the first notice of appeal. In a criminal case in which a defendant files a notice of appeal in the manner provided in this subdivision (c), the 30-day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's receipt of the defendant's notice of appeal.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Nov. 18, 1988; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 27, 1995, eff. Dec. 1, 1995.)

Agenda Item II D #2

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

FROM: **Professor David Schlueter, Reporter**

RE: **Fed. R. App. P. 9(a); Stating Reasons for Release or Detention of Defendant in Criminal Case**

DATE: **March 22, 1996**

Judge Stotler's letter to Judge Jensen (attached) raises the question of whether the Rules of Criminal Rules Procedure should be amended to address the requirement in Federal Rule of Appellate Procedure 9(a) that the court state reasons for releasing or detaining a defendant in a criminal case. A copy of Rule 9 is attached along with the Committee Note for the 1994 amendments which inserted a requirement that reasons be stated.

If the Committee is inclined to amend a criminal rule to mirror specifically the requirements of Rule 9, or at least reference that rule, Criminal Rule 46 might be a good candidate. Rule 46 currently cross-references 18 U.S.C. §§ 3142, 3143, and 3144 governing detention, which include general requirements for the judicial officer to state reasons and/or findings for detention and conditions for release.

This item will be on the agenda for the April meeting.

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

MEMORANDUM

November 6, 1995

To: Judge D. Lowell Jensen

From: Judge Alicemarie H. Stotler

Re: Federal Appellate Rule 9

Appellate Rule 9(a) requires a district judge to state the reasons for an order regarding release or detention of a defendant in a criminal case (copy enclosed). At its recent meeting, the Appellate Rules Advisory Committee questioned whether this directive to a district judge would be better placed, or should at least be somehow referenced, in the Criminal Rules. Some members seem to recall previously referring the question to the Criminal Rules Advisory Committee, but I have been unable to locate any discussion of it in recent (April 1993-present) minutes of the Criminal Rules Committee.

Are you aware of any activity on this front? I do know that many district judges are not aware of the 1994 amendment requiring reasons for either detention or release. If the committee has not received this suggestion previously, perhaps you wish to consider including it on the committee's agenda for the next meeting.

Enclosure

cc: Judge James K. Logan
Prof. Carol Ann Mooney
Prof. David Schlueter
Mr. John K. Rabiej

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placed party's attorney between a rock and a hard place" in that he could comply with contempt order and dismiss state court proceeding, thereby rendering moot his contention that permanent injunction entered by district court did not require him to dismiss such suit, or he could spend each business day in custody, thereby suffering irreparable harm if it should be determined that contempt order was not appropriate, and granting of stay could not cause substantial harm to party's opponent, in light of fact that controversy as to effect of federal proceeding on state proceeding had been going on for more than ten years. Reading & Bates Petroleum Co. v. Musslewhite, C.A.5 (Tex.) 1994, 14 F.3d 271.

Alleged infringer was entitled to stay pending appeal of judgment entered in patent action; alleged infringer demonstrated substantial legal question existed regarding validity of patent and that it had substantial chance of prevailing, and substantial amount of relevant record evidence indicated that alleged infringer's reasonably expected harm would be both catastrophic and irreparable. Standard Havens Products, Inc. v. Gencor Industries, Inc., C.A.Fed. (Mo.) 1990, 897 F.2d 511, on subsequent appeal 953 F.2d 1360, certiorari denied 113 S.Ct. 60, 121 L.Ed.2d 28, on remand 810 F.Supp. 1072.

18. Miscellaneous relief denied

City board of elections was not entitled to stay of district court's order directing board to place candidate's name on ballot; board's motion for stay was made in the first instance in the Court of Appeals and board misused judicial process by seeking stay six days before January election and after board had fostered candidate's expectation that district court's judgment would be final determination of matter by sending him letter confirming how his name would appear on ballot. Hirschfeld v. Board of Elections in City of New York, C.A.2 (N.Y.) 1993, 984 F.2d 35.

Broker failed to establish entitlement to stay pending appeal of district court order appointing trustee for broker under the Securities Investor Protection Act (SIPA). Securities Investor Protection Corp. v. Blinder, Robinson & Co., Inc., C.A.10 (Colo.) 1992, 962 F.2d 960.

Stay of execution of preliminary injunction, barring state officials from prosecuting state gaming laws on Indian land, was not warranted pending appeal; delay in resolution of merits would cause severe economic hardship to operators of gambling facilities on Indian property and state would not suffer similar hardships, and state could still enforce gambling law by obtaining approvals from federal officers. Sycuan Band of Mission Indians v. Roache, S.D.Cal.1992, 788 F.Supp. 1498.

19. —— Dismissal

Appeal would be dismissed because of appellant's failure to provide trial transcript; appellant's contentions, that district court's findings were both insufficient and clearly erroneous, depended for their resolution on examination of facts elicited at trial. Syncom Capital Corp. v. Wade, C.A.9 (Ariz.) 1991, 924 F.2d 167.

20. Questions reviewable

Stay of district court judgment or agency order pending appellate court review does not render otherwise final decision unripe for review. Platte River Whooping Crane Critical Habitat Maintenance Trust v. F.E.R.C., 1992, 962 F.2d 27, 295 U.S.App.D.C. 218, rehearing denied 972 F.2d 1362, 297 U.S.App.D.C. 354.

II. BOND

47. Scope of liability

Prevailing plaintiffs, who successfully defended their judgment on appeal, were not entitled to greater relief than that provided for either in original judgment or terms of supersedeas bond. Burghart v. Frisch's Restaurants, Inc., C.A.10 (Okl.) 1989, 865 F.2d 1162.

Rule 9. Release in a Criminal Case

(a) Appeal from an Order Regarding Release Before Judgment of Conviction. The district court must state in writing, or orally on the record, the reasons for an order regarding release or detention of a defendant in a criminal case. A party appealing from the order, as soon as practicable after filing a notice of appeal with the district court, must file with the court of appeals a copy of the district court's order and its statement of reasons. An appellant who questions the factual basis for the district court's order must file a transcript of any release proceedings in the district court or an explanation of why a transcript has not been obtained. The appeal must be determined promptly. It must be heard, after reasonable notice to the appellee, upon such papers, affidavits, and portions of the record as the parties present or the court may require. Briefs need not be filed unless the court so orders. The court of appeals or a judge thereof may order the release of the defendant pending decision of the appeal.

(b) Review of an Order Regarding Release After Judgment of Conviction. A party entitled to do so may obtain review of a district court's order regarding release that is made after a judgment of conviction by filing a notice of appeal from that order with the district court, or by filing a motion with the court of appeals if the party has already filed a notice of appeal from the judgment of conviction. Both the order and the review are subject to Rule 9(a). In addition, the papers filed by the applicant for review must include a copy of the judgment of conviction.

(c) Criteria for Release. The decision regarding release must be made in accordance with applicable provisions of 18 U.S.C. §§ 3142, 3143, and 3145(c).

(As amended Apr. 29, 1994, eff. Dec. 1, 1994.)

1994 Amendments

Rule 9 has been entirely rewritten. The basic structure of the rule has been retained. Subdivision (a) governs appeals from bail decisions made before the judgment of conviction is entered at the time of sentencing. Subdivision (b) governs review of bail decisions made after sentencing and pending appeal.

Subdivision (a). The subdivision applies to appeals from "an order regarding release or detention" of a criminal defendant before judgment of conviction, *i.e.*, before sentencing. *See* Fed. R. Crim. P. 32. The old rule applied only to a defendant's appeal from an order "refusing or imposing conditions of release." The new broader language is needed because the government is now permitted to appeal bail decisions in certain circumstances. 18 U.S.C. §§ 3145 and 3731. For the same reason, the rule now requires a district court to state reasons for its decision in all instances, not only when it refuses release or imposes conditions on release.

The rule requires a party appealing from a district court's decision to supply the court of appeals with a copy of the district court's order and its statement of reasons. In addition, an appellant who questions the factual basis for the district court's decision must file a transcript of the release proceedings, if possible. The rule also permits a court to require additional papers. A court must act promptly to decide these appeals; lack of pertinent information can cause delays. The old rule left the determination of what should be filed entirely within the party's, discretion; it stated that the court of appeals would hear the appeal "upon such papers, affidavits, and portions of the record as the parties shall present."

Subdivision (b). This subdivision applies to review of a district court's decision regarding release made after judgment of conviction. As in subdivision (a), the language has been changed to accommodate the government's ability to seek review.

The word "review" is used in this subdivision, rather than "appeal" because review may be obtained, in some instances, upon motion. Review may be obtained by motion if the party has already filed a notice of appeal from the judgment of conviction. If the party desiring review of the release decision has not filed such a notice of appeal, review may be obtained only by filing a notice of appeal from the order regarding release.

The requirements of subdivision (a) apply to both the order and the review. That is, the district court must state its reasons for the order. The party seeking review must supply the court of appeals with the same information required by subdivision (a). In addition, the party seeking review must also supply the court with information about the conviction and the sentence.

Subdivision (c). This subdivision has been amended to include references to the correct statutory provisions.

NOTES OF DECISIONS

6. Revocation of probation

Release pending appeal of order revoking supervised release could be granted only upon showing of exceptional circumstances; exceptional circumstances include raising of substantial claims upon which appellant has high probability of success, serious deterioration of health while incarcerated, and any unusual delay in process of appeal. U.S. v. Lodhi, C.A.5 (Tex.) 1994, 21 F.3d 606.

7. Matters considered—Generally

Defendant convicted of accepting a bribe as a public official was not entitled to have his sentence stayed pending appeal; although defendant was not likely to flee or pose danger to any other person or to community, defendant failed to show that appeal was likely to result in reversal. U.S. v. Ruffin, E.D.Va.1991, 779 F.Supp. 385.

20. —— Clearly erroneous standard

Because allegation of churning is allegation of fraud, it must be pleaded with particularity; generalized and conclusory allegations that defendants' conduct was fraudulent are insufficient. Craighead v. E.F. Hutton & Co., Inc., C.A.6 (Ohio) 1990, 899 F.2d 485.

25. Miscellaneous relief denied

Failure to decide contemnor's appeal of contempt order within 30 days of filing was nonjurisdictional; release would not be granted contemnor where delay in hearing appeal was primarily caused by delay in forwarding of record from district court and failure of both parties to give prompt notice that appeal was covered by statute. Grand Jury v. Gassiraro, C.A.1 (Mass.) 1990, 918 F.2d 1013.

Rule 10. The Record on Appeal

[See main volume for text of (a)]

(b) The Transcript of Proceedings; Duty of Appellant to Order; Notice to Appellee if Partial Transcript is Ordered

[See main volume for text of (1) and (2)]

(3) Unless the entire transcript is to be included, the appellant shall, within the 10–day time provided in paragraph (b)(1) of this Rule 10, file a statement of the issues the appellant intends to present on the appeal, and shall serve on the appellee a copy of the order or certificate and of the statement. An appellee who