CRIMINAL RULES COMMITTEE MEETING

October 7-8, 1996
Gleneden Beach, Oregon

I. PRELIMINARY MATTERS

A. Opening Remarks and Administrative Announcements by the Chair

B. Approval of Minutes of April 1996, Meeting in Washington, D.C.

C. Draft Minutes of Standing Committee Meeting, June 1996.

II. CRIMINAL RULES UNDER CONSIDERATION

A. Rules Published for Public Comment & Pending Further Review by Advisory Committee. (No Memos):

1. Rule 5.1. Preliminary Examination; Production of Witness Statements.

2. Rule 26.2. Production of Witness Statements, Applicability to Rule 5.1 Proceedings.

3. Rule 31. Verdict; Individual Polling of Jury.

4. Rule 33. New Trial; Time for Filing Motion.

5. Rule 35(b). Correction or Reduction of Sentence; Changed Circumstances.

6. Rule 43. Presence of Defendant; Presence at Reduction or Correction of Sentence.

B. Rule Approved by Standing Committee and Forwarded to Judicial Conference.

1. Rule 16(a)(1)(E), (b)(C). Expert Witnesses. (No Memo).

C. Proposed Amendments to Rules of Criminal Procedure

1. Rule 11. Pleas. (Memo).
   a. Rule 11(e); Report of Subcommittee; Impact of Sentencing Guidelines. (Memo).
   b. Rule 11(e)(4); Rejection of Plea Agreement (Memo).
   c. Rule 11(e); Plea Agreement Procedure; Ability of Defendant to Withdraw Plea of Guilty. (Memo)
   d. Rule 11(c); Advice to Defendant; Waiver of Right to Appeal. (Memo).
2. Rule 24(c). Alternate Jurors (Memo).
3. Rule 31(e). Verdict; Forfeiture Procedures. (Memo).
4. Rule 40(a). Commitment to Another District. (Memo).

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

1. Bankruptcy Committee Proposal to Provide for Electronic Service of Motions. (Memo)
2. Rules of Evidence Committee Proposal to Amend Fed. R. Evid. 103 re Preservation of Error. (Memo).

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

1. Status Report on Legislation Affecting Federal Rules of Criminal Procedure (No Memo).
2. Status Report on Restyling the Appellate Rules of Procedure.(No Memo).
3 Other Oral Reports (No Memo).

III. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

Agenda Item I

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

April 29, 1996
Washington, D.C.

The Advisory Committee on the Federal Rules of Criminal Procedure met at the Thurgood Marshall Federal Judiciary Building in Washington, D.C. on April 29, 1996. These minutes reflect the actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Jensen, Chair of the Committee, called the meeting to order at 8:40 a.m. on Monday, April 29, 1996. The following persons were present for all or a part of the Committee's meeting:

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

Also present at the meeting were: Hon. Alicemarie H. Stotler; Chair of the Standing Committee on Rules of Practice and Procedure; Hon. William R. Wilson, Jr., a member of the Standing Committee on Rules of Practice and Procedure and a liaison to the Committee; Professor Daniel R. Coquillette, Reporter to the Standing Committee; Mr. Peter McCabe, Mr. John Rabiej, and Mr. Paul Zing from the Administrative Office of the United States Courts; Mr. Webb Hitt from the Federal Judicial Center, Ms. Mary Harkenrider from the Department of Justice, and Mr. Joseph Spaniol, consultant to the Standing Committee.

The attendees were welcomed by the chair, Judge Jensen, who recognized a new member to the Committee, Professor Kate Stith from Yale Law School. Later in the meeting, Judge Jensen recognized the contributions of Professor Saltzburg, who made a brief appearance, and whose term on the Committee had expired.

II. APPROVAL OF MINUTES OF OCTOBER 1995 MEETING

Following minor changes to the minutes of the October 1995 meeting, Judge Marovich moved that they be approved. Following a second by Judge Smith, 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 by operation of the Rules Enabling Act, amendments to four rules had become effective on December 1, 1995: 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).

IV. RULE 24(a): APPROVED BY STANDING COMMITTEE FOR PUBLICATION AND COMMENT

Attorney Voir Dire

The Reporter informed the Committee that the period for comment on proposed amendments to Rule 24(a) had been completed and presented a brief overview of the comments supporting and opposing the proposal. He also noted that a number of witnesses had provided testimony at two scheduled hearings.

Judge Jensen informed the Committee that the Civil Rules Advisory Committee had decided not to forward a similar amendment in Civil Rule 47 to the Standing Committee. Instead, it hoped to encourage continued discussion and education about the issue of attorney conducted voir dire.

Judge Marovich expressed regret and doubt about the prospects for the proposed amendment and the process used to obtained comments on the amendment. He believed that those judges who believe that attorney conducted voir dire takes too much time should examine their procedures. And, he added, speed is not everything in conducting a criminal trial.

Judge Jensen responded by noting that the Committee's agenda is public and that anyone interested in commenting on a proposal may do so. He also noted that a short article was being prepared for the publication, Third Branch, which would address the

issue of attorney conducted voir dire. Judge Davis questioned whether the proposed amendment had any real chance of succeeding and Mr. Josefsberg stated that he had no strong desire to push forward with an issue that seemed doomed. But, he added, he was also hesitant to completely abandon the proposal. Judge Jensen noted that he too believed that some attempt should be made to monitor attorney participation in voir dire in death penalty cases.

Judge Wilson stated that he believed the proposed amendment should be carried forward to the Standing Committee for its consideration. Judge Marovich added that he was willing to accept the rejection of the proposal on the merits. In response, Judge Jensen observed that the rules enabling act process had worked. In this instance the bench and bar had been sensitized to the debate regarding attorney conducted voir dire. Professor Stith opposed the proposal on the merits and asked whether the Department of Justice had stated a position on the proposal. In response, Ms. Harkenrider indicated that initially, the Department had voted against the proposal because it believed that the judge should maintain control of the courtroom. The Department, however, had voted in favor of seeking public comment and that it was not opposed to a pilot program. Its current position was to oppose the proposed amendment. In particular, she noted that the Department had concerns about pro se defendants questioning the jurors.

PILOT PROGRAMS

Judge Smith expressed reluctance to forward the amendment to the Standing Committee. While he had been initially opposed to the idea of more attorney participation in voir dire, he now believed that the amendment would marginally improve the process and give the appearance of fairness. He did not believe that judges would lose control of the courtroom by permitting attorney conducted voir dire. He agreed with other members who had expressed the view that the process of obtaining comments had been constructive.

Justice Wathen indicated that Maine follows the present federal practice and that intellectually he could not support a proposed amendment which would increase attorney participation. In his view the proposal would result in a significant interference with the jurors. Judge Crow indicated that he too would oppose forwarding the amendment. He had polled the judges in the Tenth Circuit and only one judge favored the proposed change. He added, that in his view, the current voir dire procedures were not "broken."

Judge Dowd noted that he had supported the version of the amendment forwarded to the Standing Committee because that version had included a timely request provision. Now that that provision had been deleted--as a result of conforming both the civil and criminal rule versions--he could no longer support the amendment.

Mr. Martin moved that the proposed amendment to Rule 24(a) be approved by the Committee and forwarded to the Standing Committee. Judge Marovich seconded the motion, which failed by a vote of 3 to 8.

Judge Stotler informed the Committee that an upcoming issue of the Third Branch would contain a short article on the proposed amendments to both the civil and criminal rules. She noted that the publication of the proposals had raised the level of consciousness of the bench and bar and that the issue of attorney-conducted voir dire should be subject to continued study and education.

V. CRIMINAL RULES CURRENTLY UNDER CONSIDERATION BY ADVISORY COMMITTEE

A. Proposed Amendments to Rules; Report of Subcommittee on Local Rules Project.

Judge Davis provide an oral and written report of his subcommittee on the local rules project. That subcommittee, consisting of Judge Davis (chair), Judge Crow, Judge Crigler, and Mr. Pauley, had addressed the question of whether certain local rules, identified by the Local Rules Project, might be worthy of including in the national rules. The subcommittee examined local rules which addressed the following four rules:

Rule 4: In some districts, a local rule requires the arresting officer to notify other members of the court family of the arrest. The subcommittee recommended against adoption of that practice in the national rule.

Rule 16: The subcommittee noted that in some districts, the parties are required to confer on discovery matters before filing a motion. The subcommittee also recommended against adoption of that practice in the national rule.

Rule 30: In fifteen districts, the parties are required to submit proposed jury instructions sometime before trial. The subcommittee also recommended that that practice not be included in the national rule.

Rule 47. The subcommittee noted that it had been recommended that Rule 47 be amended to require the parties to confer or attempt to confer before any motion is filed. That recommendation was also rejected by the subcommittee.

The subcommittee noted in its report that the proposed amendments to the foregoing four rules address "details of practice and procedure about which courts have differing customs and traditions and that are properly the subject of local rules." The report also noted that the members of the subcommittee did not believe that any significant problems existed in any of the foregoing areas.

The proposed amendment to Rule 12, generated some discussion: Two districts require the defense to give notice of an intent to raise the entrapment defense. Although a

majority of the subcommittee had opposed adoption of that practice in the national rule, they believed that the matter should be raised for evaluation by the Committee.

Mr. Pauley indicated that the Department of Justice did not necessarily believe that the proposed notice requirement had merit but thought that the issue should be raised. He recounted a case where there were multiple defendants and after the jury was selected one defendant wanted to raise the defense, which resulted in a severance.

Judge Crow noted that adoption of such an amendment might lead to additional notifications of defenses that may not actually be raised at trial. Judge Crigler added that he did not perceive that any problem existed in this area.

Judge Dowd commented that it would difficult to distinguish between required notice of an entrapment defense and other defenses. He moved that the subcommittee's report be accepted. Judge Smith seconded the motion, which carried by a unanimous vote.

Professor Coquillette thanked the Committee and the subcommittee for assisting in carrying out the congressional mandate that the local rules be studied. In his view, the local rules governing criminal cases had not presented any serious conflicts with the national rules.

B. Rules 5.1 and 26.2, Production of Witness Statements at Preliminary Examinations

The Reporter indicated that in response to the Committee's action at its Fall 1995 meeting, he had drafted proposed amendments to Rules 5.1 and 26.2, which would require the production of a witness' statement at a preliminary examination. Following brief discussion and several changes to the language of the amendments, Judge Crigler moved that the proposed amendments to those two rules be forwarded to the Standing Committee for publication and comment. Judge Davis seconded the motion, which carried by a unanimous vote.

C. Rule 6(e)(3)(C)(iv). Disclosure of Grand Jury Information to State Officials

Judge Jensen provided a brief background on the implementation of Rule 6(e)(3)(C)(4), which permits disclosure of grand jury information to state officials. Although the rule does not explicitly require such, any requests to disclose the information must first be approved by the Assistant Attorney General, Criminal Division. That practice resulted from an assurance in 1984 by the Department of Justice to the Committee when amendments to Rule 6 were being considered. He noted that the

Department had informed the Committee that it favored placing the decision to disclose in the hands of the local United States attorneys.

Mr. Pauley stated that the Department has dutifully followed the stated practice and that it believed it appropriate to inform the Committee of an intent to consider changing the practice. Professor Stith asked for information on how many requests are actually processed through this method. Mr. Pauley responded that approximately 20 or thirty requests were forwarded to the Department and could not think of a single case where it really made a difference that the request was handled at the Department level.

Judge Crigler raised the issue of judicial review of such requests, as currently required by the rule; several members noted that the requirement of review at the national level may be restrictive and that they generally count on the presentations of the attorney for the government.

Ms. Harkenrider indicated that the issue had arisen in the process of reviewing the United States Attorney's Manual and that currently, the Department was interested in de-centralizing various decisions, which be made just as effectively at the local level.

Mr. Josefsberg observed that in most cases there should be no problem with the local United States attorney seeking permission to disclose the information. But, he added, there may be politically sensitive cases where it would better to place the authority at the national level. After brief discussion about the options available to the Committee in addressing the issue, the consensus developed that the Department should be informed of the Committee's view that the current practice should be reaffirmed. No further action was taken on the matter, with the understanding that the Department would convey its response to the Committee at a future meeting.

D. Rule 11(e). Provision Barring Court from Participation in Plea Agreement Discussions

Judge Marovich presented a written and oral report on his subcommittee's consideration of the issue of whether a judge might be permitted to participate in any fashion in plea bargaining. The issue had been discussed at the Committee's Fall 1995 meeting in response to the practice used in the Southern District of California to expedite plea agreements. Under that procedure, a judge, other than a sentencing judge, works with the parties to reach a plea agreement and recommends a particular sentence, a procedure which might be in violation of Rule 11(e) which indicates that the "court" may not participate in plea discussions. The subcommittee, consisting of Judge Marovich (chair), Mr. Martin, and Mr. Pauley recommended that no action be taken to amend the rules. It had learned that it solicited the views of both government and defense attorneys and that the prevailing view was that no change should be made to Rule 11. The

subcommittee also learned that the Southern District of California had discontinued the practice which originally gave rise to the Committee's consideration of the issue.

In the ensuing discussion, the Committee focused on the question of whether some change should be made to the rules to provide for some mechanism for determining the appropriate Sentencing Guidelines before trial. Several members expressed support for such a study; Judge Dowd noted that in Alabama, for example, a guilty plea and plea bargain are presented in conjunction with a presentencing report. Judge Stotler raised the question of whether the rules could be amended to provide for what might informally be called a "criminal motion for summary judgment" which would permit the court to resolve controlling issues of law at the pretrial stage.

Judge Jensen asked the subcommittee to continue its study of the issue and added Professor Stith as a member.

Judge Dowd moved that the subcommittee's report be accepted and Judge Davis seconded the motion, which carried by a unanimous vote.

The Committee also addressed the operation of Rule 11 on the two types of plea agreements reflected in Rule 11(e)(A)(B) and (C). Following brief discussion on the problem of predicting what effect the Sentencing Guidelines might have on a particular agreement, the Reporter was instructed to study Rule 11 and how it actually operates in conjunction with those Guidelines.

E. Rule 16(a)(1)(E), (b)(1)(C). Disclosure of Expert Witnesses

Judge Jensen indicated that when the Judicial Conference had considered the Committee's proposed amendments to Rule 16 at its Fall meeting, it had apparently rejected all of the proposed amendments, including the rather noncontroversial amendment requiring disclosure of expert witness' expected testimony. At its January 1996, meeting the Standing Committee had asked the Advisory Committee to consider whether it wished to resubmit those particular amendments to Rule 16. Judge Jensen asked whether the Department of Justice, which originally proposed the amendment, cared to seek further action.

Mr. Pauley noted that the proposed amendments were minor and had passed through the proposal and comment period without opposition; but he expressed reluctance to trigger further discussion of the rejected amendments which would have required the government to disclose the names and statements of its witnesses before trial.

Judge Jensen noted that the proposed amendment might raise a conflict with the Jencks Act which seemed to concern some members of the Standing Committee.

Professor Stith noted that the Jencks problem already exists in other provisions of Rule 16.

Following consultation between the representatives of the Department of Justice, Mr. Pauley moved that the Committee approve and resubmit the amendments to Rule 16(a)(1)(E) and (b)(1)(C) to the Standing Committee for transmittal to the Judicial Conference, without additional public comment. Judge Dowd seconded the motion, which carried by a vote of 10 to 1.

F. Rule 31(d). Polling of Jurors

The Reporter indicated that as a result of the Committee's action at its Fall 1995 meeting, he had drafted a proposed amendment to Rule 31(d) which would require individual polling of jurors when a polling was requested by a party, or directed by the court on its own motion.

Judge Dowd indicated that although he had no problem with the rule as drafted, he questioned whether the specifics of carrying out the individual polling might be addressed. Mr. Josefsberg observed that the proposed change would be good for both the defense and the prosecution. Following some minor drafting changes, Judge Marovich moved that the amendment be approved and forwarded to the Standing Committee for publication and comment. Judge Smith seconded the motion, which carried by a unanimous vote.

G. Rule 31(e). Forfeiture Proceedings

Mr. Pauley explained a proposal submitted by the Department of Justice which would address the procedures for criminal forfeiture. In the Department's view, there are a number of inadequacies in Rule 31 for determining whether, and to what extent, the defendant had an interest in the property; the Circuits seem split on what the role of the jury should be in making those decisions. The proposed amendment would attempt to resolve the question of the jury's role and defer determination of the extent of the defendant's interest to an ancillary proceeding. Finally, he noted that in *Libretti v. United States*, ---- U.S. ---- (Nov. 7, 1995), the Court held that criminal forfeiture constitutes a part of sentencing in a criminal trial.

Following some additional discussion on whether the jury should have any role in making forfeiture decisions, Judge Jensen, with the concurrence of Mr. Pauley, indicated that the proposal to amend Rule 31(e) would be deferred to the Committee's Fall 1996 meeting to consider whether the amendment should be made to Rule 31 or Rule 32 or some other rule.

H. Rule 33. Motion for New Trial

The Reporter submitted a draft amendment to Rule 33 in accordance with the Committee's action at its Fall 1995 meeting. The proposed amendment would change the triggering event for a motion for new trial on grounds of newly discovered evidence from "final judgment" to an event at the trial level, i.e., the verdict or finding of guilty.

Mr. Pauley indicated that although the amendment would have the practical effect of shortening the period of time for filing a motion for new trial, it would promote consistency. He added that the Department might be willing to consider extending the period of time from two years, as it now reads, to three years, to come closer the approximate time now spent on a typical appeal.

Justice Wathen noted that it seemed odd to require the defendant to file a motion for new trial before the "final judgment," before he or she would know what the final disposition was. Professor Stith questioned why the time could not run from sentencing, to which Mr. Pauley responded that depending on the circumstances, the time expended for sentencing could run considerably longer in some cases. Following brief discussion on whether the time should be extended to three years, Judge Dowd that the proposal be changed to reflect three years. That motion was seconded by Mr. Martin. The motion failed by a vote of 5 to 6. Judge Davis moved that the proposed amendment, as drafted, be forwarded to the Standing Committee for publication and comment. Following a second by Judge Crigler, the motion carried by a vote of 9 to 2.

I. Rule 35(b). Reduction of Sentence for Substantial Assistance

The Reporter submitted two drafts of an amendment to Rule 35(b) to reflect the Committee's discussion of the issue at its Fall 1995 meeting. Both versions addressed the issue of whether the term "substantial assistance" should include a situation where the aggregate of both pre-trial and post-trial assistance was substantial. The first version included language adopted at that meeting plus bracketed language which would address the issue of possible double dipping by a defendant: "In evaluating whether substantial assistance has been rendered, the court may consider the defendant's presentence assistance, [unless the sentencing court considered such presentence assistance in imposing the original sentence.]." The second version of the amendment, provided by Mr. Pauley, provided a more detailed version of essentially the same approach.

Several members of the Committee expressed concern about whether the amendment needed to address specifically the potential problem of double dipping, noting that if government believes that the defendant has already benefited from non-substantial assistance during sentencing, it need not file a Rule 35(b) motion.

Judge Dowd moved that the proposed amendment in version one (without the bracketed information) be approved and forwarded to the Standing Committee for publication and comment. Following a second by Mr. Martin, the motion carried by a vote of 9 to 1.

J. Rule 43(c)(4). Presence of the Defendant.

The Reporter informed the Committee that the Justice Department had requested the Committee to consider amendments to Rule 43(c)(4) to clarify whether a defendant must be present at a proceeding to reduce a sentence under Rule 35 or to change a sentence under 18 U.S.C. § 3582(c). He indicated that it in the process of amending Rule 43(b), some changes had been made as well to Rule 43(c) cross-referencing Rule 35 which apparently inadvertently changed the existing practice. Mr. Pauley provided additional background information, as reflected in the Department's memo to the Committee, to explain that the various positions taken by the courts on the issue of whether the defendant must be present a proceeding to correct, reduce, or otherwise change the sentence.

Following brief discussion by several members of the Committee about the practical problems of having the defendant appear for a proceeding, and then returned to prison for release, Judge Crigler moved that Rule 43 be amended and forwarded to the Standing Committee for publication and comment. Following a second by Judge Davis, the motion carried by a unanimous vote.

VI. RULES OF APPELLATE PROCEDURE HAVING IMPACT ON CRIMINAL PRACTICE

A. Federal Rule of Appellate Procedure 4. Time for Filing Appeal in Criminal Case

The Reporter informed the Committee that Judge Stotler had inquired whether the Committee desired to make support any changes to Federal Rule of Appellate Procedure 4 as a result of *United States v. Marbley*, ---- F.3d ---- (7th Cir. 1996). In a letter to the Committee, Judge Posner noted that in *Marbley* the defense failed to show excusable neglect for failure to file a timely appeal and that as a result, the defendant would probably argue ineffective assistance of counsel in seeking relief under 28 U.S.C. § 2255. That, he suggests, will only result in more delay when the appellate court might have otherwise waived the untimely filing.

Following brief discussion, the Committee decided to defer to the Appellate Rules Committee on the issue.

B. Federal Rule of Appellate Procedure 9. Release of Defendant in Criminal Case

The Reporter also informed the Committee that Judge Stotler had raised the question of whether the Rules of Criminal Procedure should be amended to reflect the requirements in Appellate Rule 9(a), which requires the court to state reasons for releasing or detaining a criminal defendant. After a brief discussion of the issue, no action was taken. The Committee was generally of the view that Rule 46 currently cross-references 18 U.S.C. §§ 3142, 3143, and 3144, which govern detention and already include very specific requirements for the judicial officer to state reasons and/or findings for detention and conditions for release.

VII. ORAL REPORTS; MISCELLANEOUS

A. Report on Legislation Affecting Rules of Criminal Procedure

Mr. Rabiej informed the Committee that Senator Thurmond had introduced a bill to amend Criminal Rule 31 which would provide for a 5/6 vote on a verdict. Following brief discussion, Judge Jensen indicated that it appeared that the Committee was of the view that Congress should be informed that the proposal should be processed through the Rules Enabling Act procedures which would provide for public comment and input from the appropriate committees in the Judicial Conference.

B. Report on Restyling the Rules of Criminal Procedure

Judge Jensen reported that the effort to restyle the Rules of Criminal Procedure was on hold pending consideration of the restyled Appellate Rules which had been published for comment. The deadline for comments on those rules is December 31, 1996.

C. Report on Activities of Evidence Advisory Committee

Judge Dowd, who serves as the Committee's liaison to the Evidence Rules Committee, reported on proposed amendments to the Rules of Evidence which might have an impact on criminal trials. No action was taken on the proposed changes.

D. Impact of Anti-Terrorism Legislation on Criminal Rules

Judge Jensen indicated that the Committee should be prepared at the Fall 1996 meeting to discuss possible rules amendments resulting from recent legislation, especially in the area of habeas corpus review.

VIII. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

The Committee was reminded that its next meeting would be held at Portland Oregon on October 7-8, 1996.

Respectfully submitted,

David A. Schlueter
Professor of Law
Reporter

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Draft Minutes of the Meeting of June 19-20, 1996
Washington, D.C.

The midyear meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C. on Wednesday and Thursday, June 19-20, 1996. All committee members were present:

Judge Alicemarie H. Stotler, Chair
Judge Frank H. Easterbrook
Judge Thomas S. Ellis, III
Professor Geoffrey C. Hazard, Jr.
Judge Phyllis A. Kravitch
Gene W. Lafitte, Esquire
Judge James A. Parker
Alan W. Perry, Esquire
Sol Schreiber, Esquire
Alan C. Sundberg, Esquire
Chief Justice E. Norman Veasey
Judge William R. Wilson

Deputy Attorney General Jamie Gorelick was unable to be present. Ian H. Gershengorn, Special Assistant to the Deputy Attorney General, participated in the meeting as the voting representative of the Department of Justice.

Supporting the committee were Professor Daniel R. Coquillette, reporter to the committee, Peter G. McCabe, secretary to the committee, John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office of the United States Courts, Mark D. Shapiro, senior attorney in the rules office, and Patricia S. Channon, senior attorney in the Bankruptcy Judges Division.

Representing the advisory committees at the meeting were:

Advisory Committee on Appellate Rules -
Judge James K. Logan, Chair
Professor Carol Ann Mooney, Reporter
Advisory Committee on Bankruptcy Rules -
Judge Paul Mannes, Chair
Professor Alan N. Resnick, Reporter
Advisory Committee on Civil Rules -
Judge Patrick E. Higginbotham, Chair
Professor Edward H. Cooper, Reporter

Advisory Committee on Criminal Rules -
Judge D. Lowell Jensen, Chair
Professor David A. Schlueter, Reporter
Advisory Committee on Evidence Rules -
Judge Ralph K. Winter, Chair
Professor Margaret A. Berger, Reporter

Also participating in the meeting were: Joseph F. Spaniol, Jr. and Bryan A. Garner, consultants to the committee, Mary P. Squiers, project director of the local rules project, and William B. Eldridge, Director of the Research Division of the Federal Judicial Center.

INTRODUCTORY REMARKS

Judge Stotler reported that the Chief Justice had accepted Judge Conti's request to be relieved of service as a committee member for health reasons.

The chair stated that the Judicial Conference, at its March 1996 meeting, had approved the committee's proposed uniform numbering system for local rules, although some members had expressed opposition to the concept of uniform numbering. Following the Conference's action, the Administrative Office distributed a package of materials to the courts explaining how the system was expected to work and providing explanatory materials prepared by the local rules project and the advisory committees.

Judge Stotler reported that the Conference had decided that the courts of appeals should be authorized to decide for themselves whether to allow cameras in appellate court proceedings. It also had requested that the circuits take appropriate steps to prohibit cameras in district court proceedings. The members of the committee then shared information on what actions had been taken in their own circuits to implement these Conference decisions.

Judge Stotler pointed out that the Conference's Committee on Automation and Technology had just launched several initiatives designed to foster the use of automation in the courts, including the filing and service of court papers by electronic means and the application of technology to facilitate courtroom proceedings. She suggested that the committee might wish to establish a special subcommittee to consider these initiatives and asked for volunteers to serve on the subcommittee. Judge Stotler also pointed out that the Advisory Committee on Bankruptcy Rules had established an automation subcommittee several years ago which had provided effective leadership to the rulemaking process in the areas of electronic noticing and filing.

Judge Stotler and the committee expressed their appreciation to Judge Higginbotham and Judge Mannes for their significant contributions to the rulemaking process during their terms as chairs of the Advisory Committee on Civil Rules and the Advisory Committee on Bankruptcy Rules, respectively.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve as written the minutes of the last meeting, held on January 12-13, 1996.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej presented the report of the Administrative Office (AO), as set out in his memoranda of May 13, 1996. (Agenda Item 3) He stated that his office and the AO's Office of Congressional, External, and Public Affairs had been following closely several pieces of legislation in the 104th Congress that would have an impact on the federal rules.

He reported that section 235 of the newly-enacted Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. No. 104-132) contained a provision requiring that closed-circuit television coverage be provided to victims of crime whenever the venue of a trial is changed out-of-state and more than 350 miles from the place where the prosecution would have taken place originally. He stated that the judiciary had been successful in narrowing the scope of the provision and that, as enacted, it would apply to about 10 cases a year. He pointed out that section 235 sunsets when the Judicial Conference "promulgates and issues rules, or amends existing rules [under the rulemaking process], to effectuate the policy addressed by this section." He noted that the provision has been placed on the agenda of the next meeting of the Advisory Committee on Criminal Rules.

Mr. Rabiej said that the judiciary had not been successful in persuading the Congress to reconcile two internally inconsistent provisions of the new Act. Section 103 amended Rule 22 of the Federal Rules of Appellate Procedure, permitting a district judge or a circuit judge to issue a certificate of appealability in a habeas corpus proceeding. Section 102 of the Act, though, amended the underlying statutory provision to permit only a circuit justice or judge to issue the certificate. Although the Congress had been alerted to the discrepancy on several occasions, it had failed to correct the problem and apparently would do nothing until an actual conflict arose under the Act.

Judge Logan stated that the conflicting provisions could create a statutory interpretation problem in almost every habeas corpus case and every section 2255 proceeding. In addition, he pointed out that the Act added proceedings under 28 U.S.C. § 2255 to the list of those requiring a certificate of appealability. Moreover, the caption to FED.R.APP.P. 22, as amended by the Act, refers to "section 2255 proceedings." Yet, the text of the rule enacted by the statute contained no reference to section 2255 proceedings. Judge Logan stated that the Federal-State Jurisdiction Committee of the Judicial Conference had been alerted to these defects in the statute and that he was in regular contact with the chairman of that committee.

One of the members suggested that the committee might solve these problems eventually by amending Rule 22 through the Rules Enabling Act process. He observed, too, that the Act might eventually require rule making because it requires the district courts to make findings regarding the grounds for dismissal of prisoner suits.

He added that there was another serious glitch in the new legislation. The Act provided that an appeal in a habeas corpus proceeding is permitted only if there is a violation of the Constitution. The former law, however, also had permitted appeal when there was a violation of a statute or treaty of the United States. Thus, it appeared that claims that a prisoner's custody violates the laws and treaties of the United States would no longer be appealable. He expressed doubt that such a result had been intended.

Mr. Rabiej reported that the Administrative Office had advised Congress of the discrepancy between FED.R.CIV.P. 4(m), which requires service of process within 120 days, and 46 U.S.C § 742, the Suits in Admiralty Act, which requires that a party "forthwith serve" process on the United States in admiralty cases. He added that the Supreme Court had resolved the issue recently in *Henderson v. United States,* but that efforts were continuing to resolve the matter by legislation in order to eliminate any future confusion.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Eldridge stated that the report of the Federal Judicial Center—providing an update on the Center's publications, educational programs, and research projects—was informational in nature. (Agenda Item 4) He noted that the Center had just been asked to conduct certain empirical research for the committee concerning attorney discipline in the district courts.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Logan presented the report of the advisory committee, as set forth in his memorandum and attachments of June 20, 1996. (Agenda Item 7)

Amendments for Judicial Conference Approval

Judge Logan reported that the advisory committee was recommending that the standing committee approve amendments to four rules that had been published for public comment. But the advisory committee further recommended that the standing committee defer forwarding these rules to the Judicial Conference until after completion of the public comment process regarding the entire package of restyled appellate rules. He noted that it was possible that additional comments might be received on the four rules during the comment period.

FED.R.APP.P. 26.1

Judge Logan stated at the outset that the word "shall" in the caption of Rule 26.1(a) should be changed to "must."

He explained that the proposed amendment would eliminate the requirement that corporate subsidiaries and affiliates be listed in the corporate disclosure statement. Instead, the advisory committee would require that a corporate party disclose all its parent corporations and any publicly-held company owning 10 percent or more of its stock. He added that the proposed amendment had been sent to the Judicial Conference Committee on Codes of Conduct, which had expressed no objection to it.

FED.R.APP.P. 29

Judge Logan noted that the subject of amicus curiae briefs had attracted substantial interest. He noted that, as a result of the public comments, the advisory committee had decided to retain the limitation that an amicus brief be no more than half the length of a party's principal brief, but it had also decided to amend the proposal to allow the court to make exceptions. In response to objections to the requirement that the amicus brief be filed at the same time as the brief of the party being supported, the committee decided to give the amicus seven days to file its brief following the filing of the principal brief of the party being supported.

Judge Logan noted that the committee had added the District of Columbia to the list of entities authorized to file an amicus brief without court permission. It had also deleted the requirement that the amicus obtain the written consent of all the parties and file these consents with the brief. Instead, the committee substituted a simple requirement that the amicus state in the brief that all parties have consented.

The advisory committee also amended subdivision (c) to require that the cover of the brief both identify the party being supported and indicate whether the brief supports affirmance or reversal. Subdivision (f) would be clarified to provide that an amicus may request leave to file a reply. Finally, in subdivision (g) the advisory committee would delete the provision that an amicus be granted permission to participate in oral argument "only for extraordinary reasons."

FED.R.APP.P. 35

Judge Logan stated that the amendments to Rule 33, governing en banc consideration, had attracted several comments. He explained that the advisory committee had accepted a recommendation from the Solicitor General that the rule provide explicitly that a split among the circuits may be a question of "exceptional importance" warranting a rehearing en banc. He noted that while it had been the intent of the advisory committee to list a split in the circuits as one example of a matter rising to the level of exceptional importance, some commentators had read

the amendment as specifying that it was the only grounds for en banc consideration. Accordingly, following the public comment period, the advisory committee amended the rule to make it clear that this was just one example of a situation that raised a question of exceptional importance.

Mr. Gershengorn reported that the Solicitor General had been involved personally in the proposal and was satisfied with the revised language of the proposed amendment.

Judge Logan added that some commentators had interpreted the draft as requiring the court to consider certain matters en banc. In response, the committee revised the amendment and committee note to make it clear that nothing requires a court to rehear any matter en banc.

Judge Logan pointed out that the committee had received two comments opposing the proposed change in terminology from "in banc" to "en banc." He advised that an electronic word search of more than 900 Supreme Court decisions and 40,000 court of appeals decisions had revealed an overwhelming preference for "en banc."

Finally, Judge Logan mentioned that local rules in some circuits require separate petitions for a panel rehearing and a rehearing en banc. The advisory committee, thus, provided that a party is not limited to a total of 15 pages for both documents if a local rule requires separate documents.

FED.R.APP.P. 41

Judge Logan stated that proposed changes to the rule were stylistic, except for one, and they had attracted very little comment. At the suggestion of the Department of Justice, the committee revised subdivision (c) to specify that the mandate of the court of appeals is effective when it is issued. The rule would also be amended to make it clear that the party who files a petition for certiorari in the Supreme Court, rather than the clerk of the Supreme Court, must notify the court of appeals of the filing.

Judge Stotler stated that the discussion of the proposed amendments to the appellate rules had been very informative, but the committee could defer final approval of the proposed amendments until the entire package of restyled appellate rules is presented to the committee.

She then asked for a straw vote on whether any member of the committee would vote against any of the proposed rules. No member voiced an objection.

Amendments for Publication

Judge Logan stated that the advisory committee had decided to defer consideration of any proposed new rule amendments until after completion of the project to restyle the entire body of appellate rules. Nevertheless, recent events—including new prisoner legislation, a proposal to

amend FED.R.CIV.P. 23, and a request from the clerk of the Supreme Court—had caused the committee to recommend for publication a proposed merger of Rules 5 and 5.1 and the complete revision of Form 4.

FED.R.APP.P. 5 and 5.1

Judge Logan stated that the proposed changes had been initiated as a response to a proposal of the Advisory Committee on Civil Rules to amend FED.R.CIV.P. 23 by authorizing an interlocutory appeal from an order granting or denying class certification. The proposed amendment to the civil rule would require a conforming amendment to the appellate rules. In drafting the amendment, the committee was struck by the substantial overlap between Rule 5 (dealing with appeal by permission under 28 U.S.C. § 1292(b)) and Rule 5.1 (dealing with appeal by permission under 28 U.S.C. § 636(c)(5)). It saw an opportunity to combine the two rules and write a new, broader rule that would govern all discretionary appeals, including any additional discretionary appeals that might be authorized in the future by statute or rule.

The advisory committee, thus, decided to revise Rule 5 and eliminate Rule 5.1, regardless of what action might be taken on the proposed amendments to FED.R.CIV.P. 23. In combining the two rules, the committee decided to adopt the provision in Rule 5 that gives a party seven days after service to respond to a petition for leave to appeal, rather than the 14-day period specified in Rule 5.1. Professor Mooney added that the amendment would also make some provisions in Rule 5 broader and less specific than those in the current rule.

Judge Logan accepted some stylistic refinements suggested by Chief Justice Veasey, Judge Parker, Mr. Garner, and Mr. Spaniol. Accordingly, subparagraph (b)(1)(E) would read: "an attached copy of (i) the order, decree, or judgment complained of and any related opinion or memorandum; and (ii) any order stating the district court's permission to appeal or finding that any necessary conditions to appeal are met." Judge Logan observed that additional style suggestions could be considered following the public comment period.

The committee voted without objection to approve the proposed amendments for publication.

Chief Justice Veasey pointed out that the committee note tied the justification for the amendments to the proposed changes in FED.R.CIV.P. 23. In response, Judge Logan recommended that the committee note be revised to delete any reference to Rule 23.

Professor Mooney then proceeded to make the recommended changes and later distributed a revised draft of the committee note. Following discussion, she and Judge Logan agreed to accept additional language improvements suggested by Professor Cooper, Mr. Perry, and Mr. Garner.

Chief Justice Veasey moved to approve the committee note as revised.

The committee voted without objection to approve the note for publication.

FORM 4

Judge Logan stated that the clerk of the Supreme Court had asked the committee to devise a new, more comprehensive form for the affidavit in support of an application to proceed in forma pauperis that could be used by both the Supreme Court and the appellate courts. In addition, the recently-enacted Prison Litigation Reform Act of 1996 prescribed new requirements governing in forma pauperis proceedings by prisoners. Among other things, the statute requires a prisoner to submit an affidavit to the court that includes a statement of all assets the prisoner possesses.

Judge Logan said that the advisory committee had used the bankruptcy schedules as a model for the revised affidavit form. The applicant would be required to provide the court with a great deal more information than that specified in the current Form 4.

Mr. Garner stated that the language and format of the form could be improved substantially, but it would take time to make the revisions and test them. Several members pointed out that the law had taken effect in April and that prompt action on approving a new form was necessary to bring the courts into compliance with the new statutory requirements.

Mr. Garner suggested that the committee might wish to approve the substance of the form and allow him, Judge Logan, and others to work on improvements in the language and format. Judge Logan noted that another alternative would be for the committee to approve the revised form for publication with only a few essential changes and leave all further improvements for consideration by the advisory committee at its next meeting.

The committee voted without objection to approve the proposed amendments to the form for publication.

After conferring with Mr. Garner, Judge Logan advised the committee that necessary improvements in the form could be drafted in about a month, in time for them to be incorporated into the publication sent to bench and bar. The revised draft would contain the same information, but it would be made easier to read and easier for prisoners to complete. He suggested that he, Professor Mooney, and Mr. Garner work on a revised draft form, submit it for approval first to the advisory committee, and then to the standing committee for final approval before publication.

The committee voted without objection to authorize the advisory committee to make additional changes in the form and submit the changes to the committee by mail or fax for final approval.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Professor Resnick presented the report of the advisory committee, as set forth in Judge Mannes' memorandum and attachments of May 13, 1996. (Agenda Item 8)

Amendments for Judicial Conference Approval

Professor Resnick explained that the primary purpose of the proposed package of amendments was to implement, or conform to, the provisions of the Bankruptcy Reform Act of 1994. He noted that the advisory committee had received only five public comments on the package and had canceled the scheduled public hearings for lack of witnesses.

FED.R.BANKR.P. 1010

Professor Resnick stated that the proposed amendments to Rule 1010 were purely technical in nature and had not been published for public comment. The amendments would merely correct cross-references in the rule to conform to recent changes made in FED.R.CIV.P. 4 and pending changes in FED.R.BANKR.P. 7004.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference. The committee further voted to approve the amendments without publication.

FED.R.BANKR.P. 1019

Professor Resnick reported that the proposed changes to Rule 1019 were stylistic in nature. He emphasized that the advisory committee recommended deleting from the rule the phrase "superseded case" because it created the erroneous impression that a new case is commenced when a case is converted from one chapter of the Code to another.

FED.R.BANKR.P. 1020

Professor Resnick stated that Rule 1020 was a new rule implementing the provisions of the 1994 Act authorizing a qualified debtor in a chapter 11 case to elect to be considered a small business. The rule would provide the procedure and time limit for the debtor's election.

FED.R.BANKR.P. 2002

Professor Resnick pointed out that Rule 2002(a)(1) would be amended to add a reference to newly-enacted section 1104(b) of the Code, which for the first time would permit creditors in a chapter 11 case to elect a trustee. The amendment would add a reference to section 1104(b) in

the general notice provisions of the rules, thereby requiring that creditors be given notice of the meeting convened to elect a trustee.

In addition, language would be added to Rule 2002(n) requiring that the caption of every notice given by the debtor to a creditor include the information required by newly-enacted section 342(c) of the Code, i.e., the name, address, and taxpayer identification number of the debtor.

FED.R.BANKR.P. 2007.1

Professor Resnick stated that the proposed amendments to Rule 2007 would establish the procedures to be followed for the election of a chapter 11 trustee. He added that the language of the amendment had been modified by the advisory committee following the public comment period to take account of concerns expressed by the Executive Office for United States Trustees. He pointed out that the Executive Office was now in agreement with the language of the proposal.

FED.R.BANKR.P. 3014

Professor Resnick explained that the proposed amendment was technical. It would provide the deadline for secured creditors to elect application of section 1111(b)(2) of the Code. Under the current rule, the election must be made by creditors before the conclusion of the hearing on the disclosure statement. Under the 1994 Act, however, a hearing on the disclosure statement is not always required if the debtor is a small business. The amendment would provide a different deadline for making the election in those cases.

FED.R.BANKR.P. 3017

Professor Resnick stated that the proposed amendments to the rule were mostly stylistic. The rule would also be amended to give the court some flexibility to determine the record date for distributing vote solicitation materials in a chapter 11 case. The current rule requires that these materials, such as ballots, be sent to record holders on the date the court enters its order approving the disclosure statement. The amendment would give the courts discretion to set another date, if circumstances warrant.

FED.R.BANKR.P. 3017.1

Professor Resnick noted that Rule 3017.1 was a new rule to implement section 1125(f) of the Code, enacted by the 1994 Act. The new statute authorizes the court to approve a disclosure statement in a small business case conditionally, subject to final approval after notice and a hearing. The court may combine the hearing on the disclosure statement with the hearing on confirmation of the plan. If the court approves the disclosure statement conditionally, and no timely objection to it is filed, there is no need for the court to hold a hearing on final approval.

FED.R.BANKR.P. 3018

Professor Resnick stated that the proposed amendment to Rule 3018, dealing with voting in chapter 11 cases, was similar to the proposed change in Rule 3017. It would allow the court some flexibility to set the record date for determining which holders of securities were entitled to vote on the plan.

FED.R.BANKR.P. 3021

Professor Resnick explained that the proposed change in Rule 3021 was similar. It would give the court some flexibility to set the record date for determining which holders of securities were entitled to share in distributions.

FED.R.BANKR.P. 8001

Professor Resnick stated that Rule 8001, dealing with appeals to the district court or the bankruptcy appellate panel, had two proposed changes. The first, in subdivision (a), would implement the 1994 statutory provision authorizing an appeal of right from an interlocutory order of a bankruptcy judge increasing or reducing the exclusive time periods under 11 U.S.C. § 1121.

The second proposed amendment, to subdivision (e), would make the rule conform to the 1994 amendment to § 158(c)(1) of the Code, providing that appeals from a bankruptcy judge be heard by a bankruptcy appellate panel (if one is available) unless a party elects to have the appeal heard by the district court.

FED.R.BANKR.P. 8002

Professor Resnick said that Rule 8002(c) would be changed in three ways. First, it would require that a request for an extension of time to file a notice of appeal be *filed*, rather than *made*, within the applicable time period. Second, it would give the court discretion to allow a party to file a notice of appeal more than 20 days after expiration of the time to appeal, but only if: (1) the motion to extend the time were timely filed, and (2) the notice of appeal were filed within 10 days after entry of the court's order extending the time. Third, the amendment would prohibit the court from granting an extension of time to file a notice of appeal from certain designated categories of orders.

FED.R.BANKR.P. 8020

Professor Resnick stated that proposed Rule 8020 was a new rule, adapted from FED.R.APP.P. 38. It would make it clear that a district court, when sitting as an appellate court, or a bankruptcy appellate panel may award damages and costs for a frivolous appeal. There had been some uncertainty in case law as to whether a bankruptcy appellate panel had that authority.

FED.R.BANKR.P. 9011

Professor Resnick stated that Rule 9011 would be amended to conform to recent amendments to FED.R.CIV.P. 11. He pointed out, though, that the 21-day "safe harbor" provisions of Rule 11 would not apply if the improper paper complained of were the bankruptcy petition commencing a case.

FED.R.BANKR.P. 9015

Professor Resnick said that proposed new Rule 9015 would implement the newly-enacted provision of the 1994 Act authorizing bankruptcy judges to try jury cases. It would make certain Federal Rules of Civil Procedure applicable, and it would provide the procedure for obtaining the consent of the parties to have a jury trial tried before a bankruptcy judge.

FED.R.BANKR.P. 9035

Professor Resnick explained that the proposed amendment to Rule 9035 was a technical change dealing only with the six judicial districts in North Carolina and Alabama, where there are no United States trustees. The amendment would provide that the bankruptcy rules apply generally in those states, unless they are inconsistent with "any federal statute." This is a broader term than that used in the existing rule, which refers only to titles 11 and 18 of the United States Code. The 1994 legislation had enacted certain provisions not codified in either title 11 or title 28 that relate to bankruptcy administration matters in these districts.

The committee voted without objection to approve all the proposed amendments to the bankruptcy rules and send them to the Judicial Conference.

Official Forms

Professor Resnick stated that the advisory committee recommended several changes in the Official Forms, as set forth in Agenda Item 8-B. He added that the advisory committee, acting on a recently-received request from the Committee on the Administration of the Bankruptcy System, also recommended one further, minor change. The proposal would add another box to the statistical information section of the petition form to provide better statistical information on estimated assets of debtors in very large cases.

The committee voted without objection to approve the proposed amendments to the forms for publication.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Jensen presented the report of the advisory committee, as set forth in his memorandum and attachments of May 7, 1996. (Agenda Item 5)

Amendments for Judicial Conference Approval

FED.R.CRIM.P. 16

Judge Jensen reported that the Judicial Conference at its March 1996 session had rejected generally the proposed amendments to Rule 16. He added, however, that the opposition voiced at the Conference had been directed exclusively to the proposed amendments to Rule 16(a)(1)(F), which would have required the government to disclose the names of its witnesses before trial.

Following the Conference's action, the advisory committee considered anew the other proposed amendments to Rule 16(a)(1)(E) and 16(b)(1)(C), requiring reciprocal disclosure of information on expert witnesses when the defense gives notice under Rule 12.2 that it intends to present expert testimony on the defendant's mental condition. The advisory committee decided to approve these amendments once again, without further publication, and forward them for approval by the Judicial Conference.

Some members pointed out that there appeared to be a stylistic inconsistency between the language in lines 17-21 ("The summary provided under this subdivision") and that in lines 53-56 ("This summary"). They pointed out that different language had been used to express the identical meaning. **Judge Parker moved to change the language in lines 17-21 to make it consistent with that in lines 53-56. The motion died for lack of a second.**

Concern was also expressed as to whether references in the amendments to the Federal Rules of Evidence were accurate. **Mr. Schreiber moved to change line 16 to state "under Article VII of the Federal Rules of Evidence," rather than "under Rules 702, 703, or 705 of the Federal Rules of Evidence." The motion died for lack of a second.**

Judge Easterbrook moved to change the word "and" to "or" in lines 16 and 43 and to send the amendments to the Conference otherwise as written. The motion carried, and the committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

Amendments for Publication

FED.R.CRIM.P. 5.1 and 26.2

Judge Jensen stated that the proposed changes to Rules 5.1 and 26.2 would require production of a witness' statement after the witness has testified at a preliminary examination hearing. The amendments were parallel to similar changes made in 1993, requiring the production of witness statements at various other evidentiary hearings, including hearings on suppression of evidence, sentencing, detention, invocation or modification of supervised release, and section 2255 motions. He pointed out that, technically, these amendments, like the 1993 amendments, raised a Jencks Act question because the witnesses' statements would be required before trial.

Rule 26.2 would be amended to add a cross-reference to Rule 5.1. It would also be amended to correct a cross-reference to Rule 32, which had been amended recently.

One of the members suggested that the words "may not," appearing on line 8, were ambiguous. Mr. Garner explained that the style committee's convention was to use the words "must not," or "shall not," when describing a prohibition against specified action. The members agreed generally that the latter terminology would improve the rule, but Professor Schlueter advised against changing the language because the wording "may not" appeared in several other parallel rules.

Judge Easterbrook moved that the proposed amendments to Rules 5.1 and 26.2 be published for public comment as written. He added that the advisory committee could resolve the language issues after completion of the public comment period. **The motion was approved without objection.**

FED.R.CRIM.P. 31

Judge Jensen stated that the current rule did not provide a particular method for polling a jury, thereby permitting a jury to be polled collectively. The proposed amendment would require that jurors be polled individually.

The committee voted without objection to approve the proposed amendments for publication.

FED.R.CRIM.P. 33

Judge Jensen stated that the proposed amendment would change the triggering date for newly-discovered evidence to be used as the basis for a new trial. The deadline for filing a motion for a new trial under the current rule is two years from the "final judgment." Case law has interpreted the rule to provide a deadline of two years from the final judgment of the court of

appeals or from the issuance of the appellate court's mandate. The advisory committee recommended that the rule be amended to provide that the two-year period run from "the verdict or finding of guilty" in the district court.

Mr. Garner suggested that the language of the rule could be improved in a number of ways. It was the consensus of the committee that his proposed improvements should be taken into account by the advisory committee after the public comment period.

The committee voted without objection to approve the proposed amendments for publication.

FED.R.CRIM.P. 35(b)

Judge Jensen explained that if a defendant provides substantial assistance to the government before sentencing, the court may—upon motion by the government—make a downward departure in imposing sentence. If the defendant provides substantial assistance after sentencing, the court may reduce the sentence under authority of Rule 35(b). The proposed amendment would authorize a reduction of sentence: (1) if the defendant provides some assistance before sentencing and some assistance after sentencing, and (2) each stage of the assistance, considered separately, may not be substantial, but in the aggregate they are substantial.

He pointed out that the advisory committee had considered the potential problem of a defendant "double-dipping" by obtaining a reduction for assistance at the time of sentencing and then seeking additional credit for the same assistance on a motion for reduction of sentence. He explained that the government can take care of the problem by not making the motion for reduction.

Judge Jensen agreed to a suggestion that the words "to the Government" be deleted from the third line of the committee note. The deletion would avoid taking a stand on the substantive issue of whether substantial assistance warranting a reduction of sentence includes assistance rendered by the defendant to state and local authorities, as well as to the federal government.

The committee voted without objection to approve the proposed amendments for publication.

FED.R.CRIM.P. 43

Judge Jensen stated that the proposed amendment would specify with greater clarity the resentencing proceedings that require the presence of the defendant. The rule would require the defendant's presence at a Rule 35(a) resentencing, i.e., when there has been a reversal by the court of appeals and a remand to the district court for resentencing. On the other hand, the defendant would not have to be present for resentencing under: (1) Rule 35(b), when the

government moves to reduce the sentence in return for the defendant's subsequent assistance, (2) Rule 35(c), when the court must correct the sentence for clear error, or (3) 18 U.S.C. § 3582(c), when the court may reduce the sentence after the Sentencing Commission lowers the applicable sentencing range or where the Bureau of Prisons moves to reduce the sentence for extraordinary and compelling reasons.

The committee voted without objection to approve the proposed amendments for publication.

Information Item

FED.R.CRIM.P. 24

Judge Jensen reported that following the public comment period on proposed amendments to FED.R.CRIM.P. 24(a), dealing with attorney participation in voir dire, the advisory committee decided not to proceed with seeking Judicial Conference approval of the amendments. In this respect, the committee's action paralleled that of the Advisory Committee on Civil Rules, which decided not to proceed with companion amendments to FED.R.CIV.P. 47(a).

Judge Jensen stated that the Rules Enabling Act process had worked very well. The proposed amendments had attracted a large body of thoughtful and informative comments, including responses from many federal judges and from every major attorney association in the country. The advisory committees decided that proceeding with the proposed amendments was not the most effective way to proceed. Rather, the best way to improve the voir dire process was to initiate new programs to educate judges in the most effective ways of conducting voir dire. Judge Jensen added that both he and Judge Higginbotham had spoken to Judge Rya Zobel, Director of the Federal Judicial Center, about presenting voir dire programs both at orientation sessions for newly-appointed judges and at workshops for experienced judges.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Higginbotham presented the report of the advisory committee, as set forth in his memorandum and attachments of May 17, 1996. (Agenda Item 10)

Amendments for Judicial Conference Approval

FED.R.CIV.P. 9(h)

Judge Higginbotham reported that the proposed amendment would resolve an ambiguity in the rule by authorizing an interlocutory appeal in an admiralty case regardless of whether the order appealed from disposes of an admiralty claim or a nonadmiralty claim.

The committee voted without objection to approve the proposed amendment and send it to the Judicial Conference.

FED.R.CIV.P. 48

Judge Higginbotham reported that the proposed amendments to the rule would restore the 12-person jury in civil cases, albeit without alternate jurors. He stated that a number of judges had voiced opposition to the proposal during the public comment period.

He noted that concern had been expressed about the cost of implementing the amendment, especially at a time when appropriated funds for the Judiciary were limited. He explained that the advisory committee had attempted to quantify the costs of the proposal, but in the final analysis costs were not a major consideration when weighed against the value of returning to 12-person juries.

He pointed out that one of the most compelling reasons in favor of the proposal was the greater inclusion of minorities on juries. He emphasized that it was important public policy to have a cross-section of the community participating in the jury process. He added that the reduction in jury size from twelve persons to six had severely limited the representation of minorities on federal juries.

He noted that the advisory committee had considered the issue of courtroom availability and had found that virtually all courtrooms used by district judges had jury boxes large enough to accommodate at least 12 jurors. On the other hand, a number of magistrate judges did not have their own 12-person jury courtrooms. Nevertheless, they could, when necessary, obtain access to larger courtrooms in their courthouse.

He stated that all empirical studies had shown that the dynamics of the 12-person jury were different from those of smaller juries. Twelve-person juries were less inclined to be dominated by one or two strong-willed persons, and they were less likely to render inappropriate verdicts.

Finally, Judge Higginbotham emphasized that the proposed amendment represented a strong statement in support of the role of the civil jury itself. He added that juries were a fundamental component of the American form of government, and the civil jury was enshrined in the Constitution. The proposed amendment would return the federal courts to centuries of tradition.

One of the members stated that he found the argument regarding diversity to be persuasive, but not the arguments concerning history and custom. He added that a compelling case had not been made that 12-person juries render better decisions than 6-person juries. Moreover, the proposed amendment would in fact allow a verdict to be rendered by as few as six

jurors. Another member added that the amendment was an interesting sociological proposal, but that it was opposed by most trial judges and by the Court Administration and Case Management Committee of the Judicial Conference.

Another member countered that his experience in the federal and state courts clearly demonstrated—and the universal opinion of practitioners in his state confirmed—that 12-person juries rendered more rational decisions than 6-person juries.

Several members stated that the *Batson* decision was simply not effective in practice and that the proposed amendment was the best assurance of obtaining representative juries in the federal courts.

Mr. Gershengorn reported that the Department of Justice was strongly of the view that the benefits of 12-person juries—better representativeness and better verdicts—were worth the additional costs.

One of the members stated that he would have preferred an amendment that would have relaxed the requirement of a unanimous verdict among the 12 jurors. Judge Higginbotham responded that the advisory committee had decided at the outset that unanimity would be retained. He added that the unanimity requirement was not the cause of hung juries, and that a very small percentage of juries are hung.

The committee voted by 9-2 with one abstention to approve the proposed amendments and send them to the Judicial Conference.

Amendments for Publication

FED.R.CIV.P. 23

1. Committee Process

Judge Stotler pointed out that the Advisory Committee on Civil Rules had been studying class actions for several years, and it had invited many interested parties to participate in its deliberations. In an effort to gather as much information as possible before drafting specific amendments to Rule 23, the committee had convened large meetings tantamount to public hearings to discuss class action issues with interested attorneys, judges, and academics. She complimented the committee on seeking out the best information possible from knowledgeable persons on complicated and controversial issues.

She stated that the advisory committee had only recently decided upon the final language of its draft proposal. She suggested that recent correspondence objecting to publication of the proposal was probably attributable to the recent nature of the advisory committee's action,

coupled with the very public nature of its deliberations. She noted that copies of all recent correspondence had been distributed to each member of the standing committee, and she urged the members to take their time and work through the advisory committee's proposal carefully and thoroughly.

Judge Higginbotham noted that correspondence opposing the proposed changes had been received from many members of the academic community. He stated that the views expressed had been made with the best of intentions and should be regarded as very positive because they demonstrated the importance of the proposed amendments and the public attention they would receive. He added that it was vital that the committee hear from the users of the system. He pointed out, however, that there is a prescribed public comment period, and the commentators could appear at the hearings, present their views in person, and respond to questions.

Judge Higginbotham stated that the advisory committee had begun its review of class actions six years earlier at the direction of the Judicial Conference to study mass tort and asbestos cases. During the first round of consideration, under Judge Pointer's leadership, the committee had approved a set of proposed revisions to Rule 23 based in large part on a proposal by the American Bar Association. The committee, however, had not sought approval of the revisions because of the press of other matters on its agenda.

Judge Higginbotham explained that after he had become chairman, the advisory committee returned to Rule 23 and decided that it needed to reach out widely and learn as much as it could about class actions. This required not just seeking reactions to a particular proposal for amending the rule, but also a broad effort to deal with basic concepts and to explore the practical operation of all aspects of class actions.

Judge Higginbotham pointed out that the advisory committee had invited prominent class action lawyers to attend its meetings and discuss class action issues. It had also convened symposia and meetings on class actions with practitioners and scholars at university settings in Philadelphia, Dallas, New York, and Tuscaloosa. Many people had participated in these gatherings, and they had been encouraged to speak freely and share their differing viewpoints. Judge Higginbotham stated that the lawyers and academics had been generous with their time, and he thanked them for their contributions to the work of the advisory committee.

2. Substantive Issues

Judge Higginbotham pointed out that Rule 23 does not lend itself to neat analysis. It is peculiarly dependent on experience and practice. He emphasized that there are many different categories of class actions, ranging from securities cases, to product liability cases, to tort cases, to civil rights cases. The practical problems of class action litigation and the interests and viewpoints of the participants vary substantially from one category of litigation to another.

He also stressed at the outset that there is a critical difference between (b)(1) and (b)(2) classes, on the one hand, and (b)(3) classes on the other. In a (b)(1) or (b)(2) class, claimants have no right to opt out of the class. On the other hand, the right to opt out is key to the operation of a (b)(3) class. He stated that in the case of a (b)(3) settlement class, plaintiffs have the choice of either accepting the proposed settlement offer or refusing it and assuming the risk of prosecuting their cases individually. Accordingly, from a plaintiff's viewpoint, a claimant in a (b)(3) settlement action has greater rights than a claimant in a case that is first certified and then proceeds later to settlement.

Judge Higginbotham stated that the advisory committee had considered a number of proposals to revise Rule 23. In the end, the members took a very cautious approach and decided to adopt a "minimalist" draft. As an example, the committee had considered a proposal to require the court to look at the merits of the case and the strength of the proponent's claim as an element in determining whether to certify the class. After examination, though, the committee decided that the price of that inquiry was simply too great, for, among other things, it would require a minitrial.

Judge Higginbotham then described in turn each of the eight proposed changes that the advisory committee would make in Rule 23. He emphasized that the eight changes were stated distinctly, but they were interrelated and reinforced each other.

1. The list of factors pertinent to the court's findings of predominance and superiority would be expanded. A new subparagraph (b)(1)(A) would require the court to consider the practical ability of individual class members to pursue their claim without class certification.

2. Subparagraph (b)(3)(B) would be revised to make it clear that the court must look at alternatives to a class action. The amendment would emphasize the autonomy of individual claimants to determine their own destiny.

3. The word "maturity" would be added to subparagraph (b)(3)(C), thus requiring the court to look not only at the ability of plaintiffs to prosecute their claims, but also at the extent to which there has been development or maturity of the claims.

4. A new subparagraph (b)(3)(F) would be added, requiring the court to weigh the probable relief to individual class members against the costs and burdens of the class litigation.

5. New paragraph (4) would explicitly authorize settlement classes.

6. In subdivision (c) the requirement that the court certify a class "as soon as practical" after commencement of the action would be changed to "when

practical" after commencement of the action. Read in conjunction with other proposed changes above, requiring the court to look at the maturity of claims and to consider other alternatives to a class action, the amendment would remove the incentive in the present rule for a judge to certify a class quickly.

7. Subdivision (e) would be amended to require that the court hold a hearing on settlements in class actions. Even though courts routinely hold hearings on settlements, the rule would now explicitly require it.

8. New subdivision (f) would authorize interlocutory appeals of district court orders granting or denying certification of a class.

Finally, Judge Higginbotham pointed out that the advisory committee had decided not to address "futures" classes, which are the subject of ongoing case law development. He also emphasized that the proposed amendments did not deal with (b)(1) or (b)(2) class actions, but only with (b)(3) class actions. The committee had insisted on retention of the right of a claimant to opt out of a settlement class. Moreover, the amendments did not dispense with the Rule 23(a) prerequisites or the notice requirements of (b)(3).

3. Views of the Members

The chair asked the members first for any general comments they had regarding the proposed amendments to Rule 23.

Chief Justice Veasey suggested that it would be helpful if the committee note were expanded to include some of the introduction and background just enunciated by Judge Higginbotham. The note would also benefit by: (1) updating the case law to include the *Georgine* case, and (2) addressing some of the concerns expressed in recent correspondence to the committee. Judge Higginbotham responded that the note could be expanded to discuss *Georgine*, but interested parties were very much aware already of the issues and the case law, and they would submit knowledgeable and helpful comments during the public comment period.

Mr. Perry stated that it was clear from the committee note that the opt-out provision applied to settlement classes. Yet, he asked whether the rule itself should be amended to provide explicitly that a settlement class under (b)(4) is governed by all the provisions applicable to (b)(3) classes, including a right of opt-out.

Judge Higginbotham responded that the text might be expanded, but the advisory committee had concluded that the language of the amendment provided clearly that a settlement class is a (b)(3) class. He added that it could not reasonably be interpreted as dispensing with the opt-out provision and other requirements associated with a (b)(3) class. He suggested that confusion on this point had been introduced because some people who had read the text had not

read the committee note. He recommended that the language of the rule be published without change and that drafting improvements be considered as part of the public comment process.

Mr. Schreiber stated that he had spent 30 years in class action work, as a plaintiff's lawyer, a defense lawyer, a judge, a teacher, and a special master. He argued that the proposed amendments were defendant-oriented and would cripple class actions. The central premise of the advisory committee, he said, had been that something had to be done to address mass tort problems. But by attempting to solve those problems by amending Rule 23, the committee would set up an entirely new class action structure that would spawn many new problems. He added that the proposed amendments would prevent consumer class actions and cause great disturbance in securities and antitrust class actions, unless the advisory note were expanded to identify explicitly what a judge may and may not do under the rule.

Judge Stotler then took up each of the eight suggested amendments to the rule in order, soliciting comments from the members on each.

Mr. Schreiber stated that the advisory note accompanying subparagraphs (b)(3)(A) and (b)(3)(B) had to be expanded to specify that the judge must take into account the tremendous cost of class litigation. For example, an individual plaintiff might have a large claim for $200,000, but the potential relief could well be dwarfed by the cost of maintaining the class action and obtaining discovery, which might may run into millions of dollars.

Mr. Schreiber expressed reservations about subparagraph (C), dealing with the maturity of related litigation involving class members. He alluded to a Seventh Circuit case in which, he said, the trial judge had decertified a class action on the grounds that a handful of the plaintiffs had tried and lost their individual cases and the defendants apparently would have refused to settle the cases under any circumstances. He argued that as a result of the court's decertification of the class and the plaintiffs' inability to pursue a class action, they had to settle for 30-40 percent of what similarly-situated claimants later received in Japan. He strongly recommended that a decision to decertify a class should not be based on only a few cases. He said that he was not opposed in general to the concept that the maturity of related litigation should be a pertinent factor in the court's certification decision, but it should be explained more fully in the advisory committee note.

Judge Easterbrook responded that in the Seventh Circuit case described, there had been 13 trials at the time of the class decertification decision. The defendants had prevailed in twelve cases, and the plaintiff had prevailed in one case, winning about a million dollars. The case ended up being settled for the actuarial value of plaintiff verdicts in the set of 13 litigated cases. He stated that the key issue was that the trial judge must determine in each case the appropriate number of cases that constitute maturity of related litigation.

Mr. Sundberg pointed out that he had been involved in the case personally and believed that the issue of maturity of litigation had not been dispositive of the case. There were many other important factors that had a major influence on the outcome of the case.

Mr. Schreiber stated that if the amendment and committee note were published without change, a huge number of people would testify at the hearings to express their concerns and objections. As a result, the advisory committee would have to reexamine the amendments, correct them, and republish them. Judge Higginbotham responded that the public comment period was a vital part of the rules process. If the public comments demonstrated that changes in the amendments or note were needed, the advisory committee would make the changes and republish the proposal, if necessary..

Mr. Schreiber argued that proposed new subparagraph (b)(3)(F) was the most troublesome provision of all because it appeared to weigh the claims of individual litigants against the total cost of the class litigation. He proposed that the committee note state clearly that the totality of all the claims, rather than each individual claim, be compared to the costs of the litigation. In its present form, he stated, the amendment could literally end all consumer cases. He added that, alternatively, the problems could be resolved by revising the language of the rule itself.

Judge Ellis said that the language of the rule was not clear on the point and might have to be revised. He added, though, that sending the proposal back to the advisory committee would serve no useful purpose since the committee had studied the matter long and hard. Rather, the time had come to solicit the advice of the public and make any needed changes later.

Judge Ellis continued that there was a question as to whether the amendments fell within the bounds of the Rules Enabling Act because it could be argued that they affected substantive rights. He suggested that there was a fundamental ideological fight between people who believe that class actions should be used for certain purposes and people who believe that they ought not to be used for those purposes. He concluded that publication of the amendments would generate a very important debate and lead to helpful suggestions for improvements.

Judge Easterbrook suggested that a court should not compare the probable relief to individual class members against the total costs of class litigation. Rather, it could compare either: (1) individual claims against the pro-rata cost per class member, or (2) the aggregate benefits to all class members against the aggregate costs of the litigation. He added that he believed that the proposed amendment was perfectly clear in this respect, but if the public comments were to show that it was not clear, the language could be adjusted.

Mr. Sundberg said that the language could perhaps stand some clarification, but it should be published in its present form. The bench and bar would understand the issues, provide helpful insights, and suggest language improvements.

Professor Coquillette noted that, as a technical matter, it would aid electronic research if subparagraphs (b)(3)(C) and (b)(3)(D) were not renumbered.

Judge Easterbrook suggested that the text of paragraph (c)(2), referring to paragraph (b)(3), should be amended to include a specific reference to (b)(4). Professor Cooper responded that the advisory committee had decided not to adopt that approach. It had drafted (b)(4) to provide that a settlement class is a class certified under (b)(3). If (c)(2) were amended to include a reference to (b)(4), it would carry the implication that a (b)(4) class is not a (b)(3) class. He added that another way to clarify the matter would be to replace the words "under subdivision (b)(3)," as they appear in (b)(4), with the words "request certification of a subdivision (b)(3) class." Judge Easterbrook concluded that any language changes should be deferred to the public comment period.

Judge Higginbotham added that the advisory committee had decided as a matter of policy not to dispense with the (b)(3) requirements in a settlement class action. Stylistic refinements to reinforce that point could be made after the comment period without requiring publication of the amendments.

Mr. Schreiber stated that he supported the addition of paragraph (b)(4) to the rule. But he recommended that the committee note be expanded: (1) to specify the factors that a judge must consider in determining whether to certify a settlement class, and (2) to address the issue of future claimants. He added that the *Georgine* opinion had discussed these matters well, and they needed to be included in the committee note.

Judge Stotler explained that the *Georgine* opinion had been issued after the advisory committee had settled on the language of the amendment and committee note. She suggested that *Georgine* should be addressed, and it might be advisable to refer to the case in the publication sent to bench and bar.

Judge Higginbotham said that he found the *Georgine* decision to be troubling, and it was in conflict with the holdings of five other circuits. In *Georgine*, the court of appeals would require the trial judge, in considering whether to certify a class, to engage in the hypothetical exercise of determining whether or not the case could be tried. He added that the *Georgine* opinion, applied literally, would bar certification of the breast implant cases and a great many securities cases.

Mr. Schreiber stated that the basis of the *Georgine* holding was that the court had found no typicality on the part of the representative party, who was a present claimant attempting to represent future claimants. He added that he believed that Judge Becker would find settlement classes appropriate in certain cases.

Chief Justice Veasey stated that the public comment period would be better informed if the committee note were enhanced to discuss: (1) the important cases, including *Georgine*, and (2) the factors relevant to determining whether the probable relief to class members justifies the costs and burdens of class litigation. Judge Higginbotham responded that the committee note could easily be expanded to include a citation to *Georgine*.

Professor Hazard stated that he strongly supported publishing the amendments and agreed with the observations of Judge Easterbrook, Chief Justice Veasey, and Mr. Schreiber regarding revisions to the rule and note. He added, though, that the changes should be made following the public comment period.

He said that he had reached the conclusion that settlement classes were necessary. They appeared to be what most class actions were about. He explained that under (b)(4), the lawyers may negotiate a deal before they file the case and seek certification of the class. The proposed settlement they reach requires court approval to constitute a contract, because if the court does not certify the class, a condition essential to the settlement fails to materialize, and the deal is effectively canceled. In essence, the issue is not one of judicial approval, for the court ultimately must approve every settlement. Rather, the key question is whether the lawyers should be able to bargain without superintendence of the judge or be compelled to bargain under what could be the court's close superintendence.

In other words, it boiled down to the question of whether the rules should legitimate the pre-filing settlement contracting process. He concluded that he was satisfied that there were good reasons for permitting that process. The trial judge still must make a gestalt decision—based on all the facts in each particular case—as to whether the particular class suit, as configured by the lawyers, is on balance a good thing. He emphasized that the subject was multidimensional and involved many variables. Accordingly, it just did not lend itself to an easy, definitive resolution in a rule of procedure.

Professor Hazard added that some of the academics who had written to the committee had misunderstood the rule and the significance of the (b)(3) requirements, which the advisory committee had intended to be applicable in settlement class actions. They had also been unrealistic in addressing what the real social alternatives would be to a settlement class in large, continuing tort situations. He said that he was satisfied that the asbestos cases, for example, had reached the point where settlement was the only sensible way to deal with them.

He argued that the *key* question in *Georgine* should have been whether the proposed settlement was on balance a good thing. He regretted that the opinion had not been more explicit in acknowledging that issue.

Mr. Schreiber said that he approved of the proposed change in subdivision (c). It would replace the current requirement that the court make a decision as to whether the class action

should be maintained "as soon as practicable" with a requirement that the court make the decision "when practicable." He pointed out that the change would reflect current reality, since most cases are not certified within 60 or 90 days.

Judge Easterbrook said that the proposed change in subdivision (e), requiring a hearing on dismissal or compromise of a class action, was fine in principle. He questioned, though, whether a hearing is necessary when there is no opposition to the dismissal or compromise. He suggested that the advisory committee might want to consider substituting the words "opportunity for a hearing." Judge Higginbotham responded that the suggestion would be taken into account by the advisory committee.

Mr. Schreiber asked why class certification decisions warranted an interlocutory appeal when: (1) other types of equally important matters cannot be appealed, and (2) the courts of appeals were overburdened. He doubted whether a special exception was needed for class actions. Judge Higginbotham responded that the advisory committee was of the view that class actions as a matter of policy did in fact warrant a special path, at least to the extent that a party could request leave to appeal a certification decision. He concluded that the courts of appeals would have little difficulty in distinguishing between those matters that warrant an interlocutory appeal and those that do not.

Judge Higginbotham pointed out that class action certification issues had come before the appellate courts only in mandamus cases. The proposed new Rule 23(f) would recognize reality and authorize a discretionary, interlocutory appeal, rather than force the appellate courts to continue relying on the extraordinary writ.

Mr. Sundberg strongly supported the interlocutory appeal provision. He said that experience in the Florida state courts—where there is an interlocutory appeal as of right from a certification decision—had demonstrated that these appeals had not created caseload burdens for the appellate courts. Moreover, the proposed interlocutory appeal would be purely discretionary, and it was clearly preferable to having the appellate courts stretch to use the mandamus remedy.

Judge Higginbotham added that the advisory committee had not addressed a number of other issues in the proposed amendments because it had concluded that they should continue to be developed through decisional law. Professor Hazard added that the advisory committee had been wise in deciding not to address the issue of future claims in the proposal.

Judge Stotler called for the vote on sending the proposed amendments to Rule 23 out for public comment, with a citation or two added to the committee note. **The committee voted without objection to approve the proposed amendments for publication.**

Mr. Schreiber requested that the members of the advisory committee be given a report of the standing committee's discussions regarding the Rule 23 proposal. He said that the members

had raised serious concerns that needed careful examination. Judge Stotler asked Mr. McCabe to provide an detailed record of these concerns for consideration by the advisory committee.

Informational Items

FED.R.CIV.P. 26

The advisory committee had decided not to seek Judicial Conference approval of proposed amendments to Rule 26(c), governing protective orders. Rather, it had concluded that Rule 26(c) should be held for further consideration as part of a new project to study the general scope of discovery authorized by Rule 26(b)(1) and the scope of document discovery under Rules 34 and 45.

Judge Higginbotham pointed out that at one time the standards for document discovery had been more stringent than those for oral discovery, in that they required a showing of good cause. He stated that members of the bar had expressed strong sentiments to the advisory committee that the linkage of the two kinds of discovery had caused problems and should be reconsidered. He added that the issue would be considered at the next meeting of the advisory committee.

Judge Higginbotham reported that the March 1997 meeting of the advisory committee would be held in conjunction with a national conference of lawyers, judges, and professors to discuss the final study and report required under the Civil Justice Reform Act of 1990. He noted that the conference would be sponsored by RAND and the American Bar Association, and it should prove to be very useful for the rules process.

He also reported that the American College of Trial Lawyers and the Litigation Section of the American Bar Association, among others, had appointed liaisons who attend the meetings of the advisory committee and provide constructive comments on rules issues.

FED.R.CIV.P. 47

As noted in the report of the Advisory Committee on Criminal Rules, both the criminal and civil advisory committees had concluded that consideration of the proposed amendments to FED.R.CIV.P. 47(a) and FED.R.CRIM.P. 24(a), requiring attorney participation in voir dire, should be postponed in favor of efforts to encourage mutual education between bench and bar on the values of lawyer participation in the voir dire examination of prospective jurors.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Winter presented the report of the advisory committee, as set forth in his memorandum and attachments of May 15, 1996. (Agenda Item 9)

Amendments for Judicial Conference Approval

F.R.EVID. 407

Professor Berger explained that the proposed amendment would make two changes in the rule, both of which would reflect the decisional law in effect in most circuits. First, the advisory committee would extend the subsequent remedial measures rule explicitly to cover product liability cases. Second, the committee would make it clear that the rule applied only to remedial measures taken after occurrence of the event producing the injury or harm. The committee had not accepted a recommendation made by several commentators that the rule also apply to remedial measures taken after manufacture of the product, but before occurrence of the event.

Judge Winter stated that the proposed amendments had been more controversial than anticipated. Professor Berger added that the objections raised to the proposal during the public comment period had been directed only to the timing of the remedial measures. No objections had been voiced to extending the rule explicitly to products liability cases.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

F.R.EVID. 801

Judge Winter stated that the proposed amendment to Rule 801(d)(2) restated the Supreme Court's ruling in *Bourjaily v. United States* that a court must consider the contents of a coconspirator's statement in determining the existence of the conspiracy and the participation of the person against whom the statement is used. The amendment would also provide that the statement of the coconspirator alone would not be sufficient to establish the existence of the conspiracy. The court would have to consider other evidence and the circumstances surrounding the statement. Judge Winter stated that this result was implied in *Bourjaily*, but the advisory committee had thought it wise to address the matter explicitly in the rule. He added that the amendment would also extend the reasoning to cover statements offered under subparagraphs (C) and (D) of the rule.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

F.R.EVID. 803, 804, and 807

Judge Winter stated that Rule 803(24) and Rule 804(b)(5) would be transferred to proposed new Rule 807. Relocation of the residual exceptions to the hearsay rule would facilitate possible future additions to Rules 803 and 804.

between the Department of Justice and the states over the power to regulate the conduct of government attorneys in certain matters.

Professor Coquillette reported that he had presented seven options for addressing attorney conduct in the federal courts, including:

1. *Promulgate a uniform federal rule or rules, through the Rules Enabling Act process, that would establish a single code governing professional conduct in every federal district court.*

   Professor Coquillette reported that this option had attracted no support.

2. *Do nothing at all.*

   Professor Coquillette stated that this option had received almost no support. Rather, there was a sense among the participants that some action should be taken with regard to attorney conduct rules. Ms. Gorelick added, however, that the Department of Justice would prefer to have no action taken rather than have rules promulgated that would adversely impact government lawyers.

3. *Promulgate a uniform federal rule, through the Rules Enabling Act process, that would adopt as the standard for attorney conduct in a federal district court the standards adopted by the highest court of the state in which the federal district is located.*

   Professor Coquillette stated that three participants in an informal straw vote had favored this option, with the understanding that a federal district court could not opt out of a specific state rule of attorney conduct. On the other hand, four participants had supported this option as long as it explicitly authorized the district court to opt out of specific state rules.

   Professor Coquillette emphasized that all participants favored "dynamic conformity" with state law, that is, the federal court would conform to state law as it is amended from time to time.

4. *Prepare a model rule on attorney conduct that would be adopted by the individual district courts on a voluntary district-by-district basis.*

   Professor Coquillette reported that five participants had favored this option. He noted that they had found the alternative attractive in large part because it could be accomplished relatively quickly and would not involve either the Rules Enabling Act process or the Congress.

5. *Promulgate uniform federal rules addressing a limited number of important matters that arise frequently and involve the heart of the litigation process, such as conflicts of interest or lawyers serving as witnesses. By default, all other conduct matters would be governed by state law.*

   Professor Coquillette reported that this option had been endorsed by five participants.

6. *Promulgate only a uniform federal rule on choice of law.*

   Professor Coquillette reported that this option had received no support.

7. *Promulgate a uniform federal default rule providing that if a district court did not adopt a local rule on attorney conduct, state rules of conduct would apply.*

   Professor Coquillette reported that this option had been supported by one participant.

Professor Coquillette reported that he had asked the special study conference for guidance as to what course of action they might want to recommend to the rules committee. In response, the participants, by an 11-5 straw vote, recommended that he draft a model local rule on attorney conduct for the district courts. The rule might be generally similar to one approved in 1978 by the Court Administration Committee of the Judicial Conference, specifying that attorney conduct in each federal district should be governed by the rules of the state in which the district is located, except to the extent that the district court chooses to promulgate a different local rule.

He stated that even those participants who favored a uniform federal rule on attorney conduct saw no harm in starting with a model local rule. He further stated that a majority of the special study conference was of the view that no action should be taken to draft uniform rules under the Rules Enabling Act, especially while delicate negotiations were continuing between the Department of Justice and the Conference of Chief Justices.

Professor Coquillette added that the members of the special study conference had asked that he and the Federal Judicial Center gather empirical data on: (1) experience in those districts that had adopted the 1978 model rule, (2) experience in those federal courts that handle attorney discipline matters directly, rather than refer them over the state authorities, (3) experience with attorney discipline in the courts of appeals under FED.R.APP.P. 46, and (4) applicable federal decisional law involving discipline of attorneys. Professor Coquillette stated that he would also try to distinguish the bankruptcy cases in his decisional law search.

Chief Justice Veasey suggested that another option would be defer taking any action at all, at least as long as the negotiations between the Department of Justice and the state chief justices were continuing. Several other committee members agreed, and Judge Stotler suggested that the reporter proceed with the suggested research, draft a model rule, and have it available at the next meeting without making specific recommendations to the committee.

REPORT OF THE STYLE SUBCOMMITTEE

Judge Parker stated that the restyling efforts of the subcommittee would be confined to the Federal Rules of Appellate Procedure until completion of the comprehensive project to restyle those rules. He offered the continuing services of the style subcommittee and Mr. Garner to the advisory committees and their reporters to assist in drafting and editing proposed amendments to the rules. He also advised that copies of the *Guidelines for Drafting and Editing Court Rules* had been sent by the Administrative Office to every federal judge, court executive, and member of Congress.

At several points during the meeting, members expressed concern over a tendency by the committee to spend substantial time during its meetings in redrafting the language of proposed amendments and committee notes, including amendments and notes that had not yet been published. Some members expressed the view that it was appropriate for the standing committee to resolve drafting problems, style defects, and inconsistencies in terminology before rules are published for comment. Others, though, voiced the contrary opinion that drafting issues should be deferred for consideration by the advisory committee following the public comment process.

The members reached a consensus that drafting problems ideally should be resolved by the advisory committee before a rule amendment or committee note is submitted to the standing committee for authority to publish. They agreed that: (1) any member who has a concern with particular language in a proposed amendment or note should raise the concern immediately with the chair or reporter of the appropriate advisory committee in time for it to be resolved in advance of the standing committee meeting, and (2) whenever possible, the advisory committees should seek the advice of the style subcommittee and its consultant before submitting proposed amendments to the standing committee.

LONG RANGE PLANNING

Professor Coquillette reported that the Long Range Planning Subcommittee's *Self-Study of Federal Judicial Rulemaking* had been extremely valuable and was being implemented in many different ways. He said that several of the recommendations in the study had been brought to the attention of the Chief Justice at a meeting in December 1995, and several others lay within the

special authority of the chair of the committee. All in all, 13 of the study's 16 recommendations had been implemented already or required no further action.

Two of the remaining three recommendations addressed the issue of creating local options in the national rules. The final recommendation called for a change to a two-year cycle as the norm for the rulemaking process. These recommendations would be taken into account by the standing committee and the advisory committees on an ongoing basis.

Judge Stotler noted that the Long Range Planning Subcommittee had been discharged, and she stated that the committee had officially received the subcommittee's report and would publish it. She then thanked the subcommittee for its efforts and accomplishments. She advised that she would write to personally thank Professor Thomas Baker, who was the primary author of the study.

FUTURE COMMITTEE MEETINGS

Judge Stotler reported that the next meeting of the committee would be held on Wednesday through Friday, June 8-10, 1997, in Tucson, Arizona.

She further reported that the summer 1997 meeting will be held on Wednesday through Friday, June 18-20, in Washington, D.C.

Respectfully submitted,

Peter G. McCabe
Secretary

Agenda Item IIC-1

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Dave Schlueter, Reporter

RE: Possible Amendments to Rule 11

DATE: September 6, 1996

A number of items on the Committee's agenda focus on possible amendments to Rule 11. If the Committee decides to propose amendments to Rule 11, I will prepare the draft and Committee Note for the Spring meeting.

I am attaching a copy of Rule 11, as it now appears. I have added line numbers for easier reference and Committee discussion.

Rule 11. Pleas

(a) ALTERNATIVES.

(1) *In General.* A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(2) *Conditional Pleas.* With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

(b) NOLO CONTENDERE. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective

administration of justice.

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

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole or supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense; and

(2) if the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding and, if necessary, one will

be appointed to represent the defendant; and

(3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right against compelled self- incrimination; and

(4) that if a plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and

(5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement.

(d) INSURING THAT THE PLEA IS VOLUNTARY.

The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or the defendant's attorney.

(e) PLEA AGREEMENT PROCEDURE.

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

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

(2) *Notice of Such Agreement.* If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), 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.

(3) *Acceptance of a Plea Agreement.* If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) *Rejection of a Plea Agreement.* If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in a guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) *Time of Plea Agreement Procedure.* Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) *Inadmissibility of Pleas, Plea Discussions, and Related Statements.* Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(A) a plea of guilty which was later withdrawn;

(B) a plea of nolo contendere;

(C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or

(D) any statement made in the course of plea

discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

(f) DETERMINING ACCURACY OF PLEA. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(g) RECORD OF PROCEEDINGS. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the

inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

Agenda Item IIC-1a

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

FROM: **Professor David A. Schlueter, Reporter**

RE: **Rule 11(e); Report of Subcommittee**

DATE: **September 4, 1996**

At the Committee's April 1996 meeting in Washington, D.C., a subcommittee chaired by Judge Marovich (Members: Mr. Pauley, Mr. Martin & Professor Stith), reported on the question of whether a trial court might be able to participate in plea discussions, notwithstanding the provisions of Rule 11(e). That inquiry had been prompted by a practice in the Southern District of California, which has since been discontinued. The subcommittee's written report was included in the agenda book for the April 1996 meeting.

During the Committee's discussions, however, the view was expressed that perhaps some attention should be given to the possible impact of the sentencing guidelines on plea agreements and the question of whether the court should, or could, be bound by an agreement incorporating the guidelines. Judge Jensen asked the subcommittee to continue its discussions of those points and any other related issues.

Attached is correspondence between the members of that subcommittee, which will present an oral report at the Committee's October meeting.

Also attached is a copy of a letter appearing in the Federal Sentencing Reporter which offers a summary of a survey taken of probation officers regarding the sentencing guidelines and pretrial agreements. Finally, I am attaching a copy of *United States v. Aguilar*, 884 F.Supp. 88 (E.D. New York)(Weinstein, J.) which addresses sentencing guidelines vis a vis plea agreements.

This agenda item is one of several dealing with potential amendments to Rule 11.

July 22, 1996

Roger A. Pauley
Henry A. Martin
Professor Kate Stith

Dear Colleagues:

Summer is rolling right along after a very late start in Chicagoland. We have recently been hit by more rain in a short time than even Noah could handle.

In the meantime, our October Rules Committee meeting approaches, and we were appointed as a sub-committee to consider if there is a way to decide guideline issues under the existing Rules of Criminal Procedure prior to the defendant's decision to go to trial or plead guilty. I suppose you could consider this a procedure that would effectively be a criminal motion for summary judgment.

Assuming that such a procedure is not available under the rules, our next decision is to decide whether to leave well enough alone or whether we should suggest some procedure that would permit the practice. Of course, we could conclude that such a procedure would be more of a hindrance than a benefit.

In any event, I need your input on the subject, and an early response would be appreciated.

Sincerely yours,

George M. Marovich
United States District Judge

mm

U. S. Department of Justice

Criminal Division

Washington, D.C. 20530

July 29, 1996

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

Dear Judge Marovich:

This is in reply to your letter of July 22, 1996, relating to the mission of the Subcommittee to which we were appointed to consider whether there is a way, or if not whether one should be provided under the Federal Rules of Criminal Procedure, to decide guidelines issues in advance of trial or plea.

In informal consultation with others within the Department of Justice we have given this matter considerable thought. Our preliminary conclusion is that the problem, if any, is not such as to warrant a rules amendment that might affect the system in major and unforeseeable respects. From our perspective, it does not appear the Sentencing Guidelines have created impediments to guilty pleas. Indeed, guilty pleas have increased since the Guidelines have become effective. We do not doubt that there are some few additional defendants who might plead guilty if they were able to obtain a pretrial determination (favorable to them) of a guidelines issue.[1] However, creating a mechanism by which such a determination could be secured would likely cause the vast bulk of defendants, who would have pleaded guilty in any event, to take advantage of the same mechanism, thereby needlessly burdening the courts.

That said, we would not be averse to having the Subcommittee consider the desirability of a Rule 11 amendment to create a type of 11(e)(1)(C) plea under which the parties, although not agreeing to a specific sentence, could agree to a sentencing range or to the applicability of a particular guideline, sentencing factor, or policy statement, and which agreement would be binding on the courts if accepted. Currently, stipulations in

[1]Some others might be motivated to go to trial, however, if the determination was unfavorable.

plea agreements are not binding either on the courts or the parties. See Guidelines § 6B1.4(d); United States v. Wagner, 994 F.2d 1467, 1475-6 (10th Cir. 1993). Although the result in Wagner -- allowing the defendant to appeal as "incorrect" the application of a guideline to which he had agreed in a plea stipulation -- could be prevented in many cases by the government's insisting on a waiver of the right to appeal as part of the plea agreement, no device of which are aware could prevent the trial court from accepting the plea yet not following the stipulation. A new type of plea under which the parties could bind the court to accept the stipulation if it accepted the agreement might cause some defendants not now willing to plead guilty to do so. For example, Rule 11(e)(1)(C) might be amended to read:

> "(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular sentencing guideline, sentencing factor, or policy statement is applicable to the case." (proposed new matter underscored).

Please understand that at this point this suggestion has not been approved within the Department and is merely put forth for purposes of discussion. On that basis, we would be interested in learning the reaction of yourself and the other Subcommittee members. We look forward to seeing you in October.

Sincerely,

Roger A. Pauley

Roger A. Pauley

Mary Frances Harkenrider

Mary Frances Harkenrider

cc: Professor Kate Stith
Henry A. Martin, Esquire

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Paul R. Bottei
Assistant Federal Public Defenders

July 29, 1996

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

Dear Judge Marovich:

Thanks for your letter of July 22. Unfortunately, I was out of town and did not receive it until my return today. I must also thank you for reminding me of our Subcommittee's project. I have been so busy since our meeting in Washington that I have not even had a chance yet to review my notes of that meeting.

My initial thoughts on the questions involved are two. First, the Rules as currently written neither facilitate nor prohibit some pretrial or pre-plea determination of guidelines issues. I say that based not upon any careful, studious analysis of the Rules, but on anecdotal information from other defenders who have obtained predisposition resolution of at least some guideline factors. However, to the extent this happens, it is obviously more product of the creativity and pragmatism of those involved than it is the product of the Rules. Second, it occurs to me that if we address only whether Rule 11 should be amended to allow (encourage? facilitate?) predisposition sentencing issue resolution without looking at other areas of the Rule affected by guideline sentencing practices, we run the risk of piecemeal or patchwork rulemaking. While we might look at some amendment to Rule 11, starting with Roger's and Mary's suggestion, since that was what our Subcommittee was asked to do, might we not suggest to the full Committee a more comprehensive analysis of the existing Rules to account for the changes wrought by guideline sentencing?

In spite of these initial comments, since I am on the Committee as an institutional representative, I would like an opportunity to get some feedback from other defenders to make me a more effective member of our Subcommittee. With your indulgence, I would like a week or two to solicit thoughts of other defenders via our internal e-mail network. I can then report back to our Subcommittee as to whether there is any consensus among the federal defender community about where to go on this issue.

Thanks again for your timely reminder. I promise to try harder not to let it slip away again.

Sincerely yours,

Henry A. Martin

HAM:drh
Via Fax
cc: Roger A. Pauley, Esq.
Mary Frances Harkenrider, Esq.
Professor Kate Stith

July 30, 1996

Roger Pauley
Henry Martin
Professor Kate Stith

By Facsimile

Dear Colleagues:

I received a fax on July 29th from Roger Pauley and Henry Martin and copies of same have been forwarded to our other committee members.

I am inclined to share Roger's thinking about our project. I do not see the Sentencing Guidelines as being an impediment to guilty pleas. In reviewing our court data for the past year, I see that 81.5% of the total number of defendants charged in 1995 (694 out of 902) entered guilty pleas. It is my opinion, supported by no empirical data whatever, that defendants and their counsel have come to recognize that the guidelines are a fact of life regardless of how they may be despised, and there are advantages to be gained by pleading guilty early on, particularly if you know that the Government can prove its case.

I agree that a procedure to obtain pretrial determination of a guideline issue may result in a few additional pleas, but I can see where a great many defendants might avail themselves of the procedure and we may be shifting the determination of guideline issues pretrial rather than at sentencing where we have the benefit of a complete pre-sentence investigation report. Therefore, I am not sure that we will achieve our goal of facilitating pleas without paying too high a price.

Roger Pauley
Henry Martin
Professor Kate Stith

Page 2

However, efficiency is only one goal and certainty is surely another. It seems that the defendant has a right to know the range of punishment he is facing. In looking over some recent cases in the 7th Circuit, the voluntariness of some guilty pleas has been the subject of scrutiny and some pleas have been set aside as involuntary where defendants were not properly advised of the impact of supervised release on the issue of maximum possible punishment, as an example. The rationale is that a plea cannot be voluntary if the "knowing" prong is not satisfied.

For that reason, I find Roger's suggestion (as non-committal as it may be) to create a new type of 11(e)(1)(c) plea to be appealing. Coupled with an appeal waiver, it seems to promote the desired certainty while at the same time reducing the amount of appeals. I also agree with Henry that the full committee might want to do a more comprehensive analysis of Rule 11.

I would appreciate the thoughts of all the committee members and would hope that we could get a more definite position from the Justice Department on this matter. We who are familiar with the rule making process have come to appreciate the great weight that the Department's opinions have on the final decision.

Sincerely,

George M. Marovich
United States District Judge

mm
enclosures

P.S. My new fax number is: 312-408-5141

Yale Law School

KATE STITH
Professor of Law

Hon. George Marovich
Henry Martin
Roger Pauly

July 31, 1996

By Mail

Dear Colleagues,

I regret that due to my absence from my office, I did not read your faxed letters until yesterday. My tentative bottom-line is [A] interest in Roger's proposed amendment to Rule 11(e)(1)(C), with an important additional amendment; and [B] interest in Henry's suggestion that Rule 11 be reviewed more comprehensively.

A. Rule 11(e)

Let me review our short history. The case that brought us together, *United States v. Harris*, 70 F.3d 1001 (8th Cir. 1995), seems to have been erroneous in its interpretation of Rule 11(e)(4). Shortly after our meeting, I reviewed the history of that provision including all Committee Notes to amendments since 1974. It was clear enough to me that subsection (e)(4) of Rule 11 was intended to relate only to pleas under subsection (e)(1)(C) insofar as these pleas are premised on a specific sentence, and to pleas under (e)(1)(A) insofar as these pleas are premised on formal dismissal of other charges.

But the court in *Harris* read (e)(4) to refer also to plea agreements that stipulate to sentencing facts or calculations under the Guidelines. This reading would bind sentencing judges to Guideline-agreements even though the plea agreement states that the judge is not bound. Roger's idea of explicitly recognizing the existence of Guideline-agreements as a form of (e)(1)(C) plea—where the parties and the judge recognize that the judge is bound—makes a great deal of sense. Certainly it is better than the *Harris* approach of binding the judge even though it is not a (e)(1)(C) plea. To completely undo the confusion caused by (and evidenced by) *Harris*, we must make clear in our Committee Note that an (e)(1)(C) plea is the *only* way to bind the sentencing court to the terms of a Guideline-bargain.

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I do not see the issue raised by *Harris* as having much to do with the incidence of guilty pleas. Rather, the problem with *Harris*, from my perspective at least, is that it would upset the relative balance of authority over federal sentences. If Guideline-agreements always bind the sentencing judge, then the Sentencing Commission and sentencing judges would play a smaller role, while defense attorneys and prosecutors would play a larger role than has historically been the case in the federal courts. As you are aware, pleas under Rule 11(e)(1)(C) are not that common—though I gather they are becoming more common even without Roger's proposed change.

My concern with Roger's proposal is that it is not complete. If it is the only amendment to (e)(1), it could conceivably make binding Guideline-agreements a routine form of plea, especially if government attorneys begin setting forth all Guideline-bargains as (e)(1)(C) agreements. I would not relish giving sentencing judges even less authority over sentencing than they presently have. I suppose, however, that judges can protect themselves by refusing to accept a Guideline-agreement as an (e)(1)(C) plea. *In this regard, it would be important to make clear that parties may submit agreements regarding Guideline facts and calculations also an (e)(1)(B) plea.* Thus, it seems to me that Roger's proposed language should also be added to Rule 11 (e)(1)(B), as follows:

> "(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence or sentencing range, or that a particular sentencing guideline, sentencing factor, or policy statement is applicable to the case, with the understanding that such recommendation or request shall not be binding upon the court; or" (proposed new matter underscored).

I think that if we were writing Rule 11(e) from scratch, we would probably word all of it a little differently, to take better account of the Guidelines. But if we are going to stick with the present structure of three types of pleas—(e)(1)(A), (e)(1)(B), and (e)(1)(C)—then Roger's amendment, as supplemented by the additional amendment stated above, is constructive. It would be helpful to sentencing judges, prosecutors, and defense attorneys if everybody understood when a Guideline-bargain is (and is not) binding on the sentencing judge. The present situation is fraught with ambiguity.

B. Rule 11 In General

As to Rule 11 more generally, I am thinking along the same lines as Judge Marovich. The major problem I see with Rule 11 relates to notice—or, I should say, lack of notice. Those defense attorneys who do not understand the Guidelines too often find that a plea bargain that involves, for instance, the dismissal of certain counts does their clients precious little good. As the Second Circuit put it several years ago:

> "[W]e are quite troubled by the escalating number of appeals from convictions based on guilty pleas in which the appellant claims that he was unfairly surprised by the severity of the sentence imposed under the Guidelines. In particular, we note the distressingly large number of appeals involving defendants indicted for drug offenses who, at the time of tendering their pleas, were apparently unaware of the quantity of drugs that could be included in calculating their base offense levels."

United States v. Pimentel, 932 F.2d 1029, 1033 (2d Cir. 1991). The court went on to urge more "sentence bargaining" under the Guidelines. That is preaching to the converted, however. There is no problem for those defendants whose attorneys understand Guideline bargaining; the problem is for the other defendants.

It seems to me that *this* problem goes far beyond *Harris*. The fundamental question is how to take account of mandatory sentencing rules in the charging and plea process. I do not think that our current rules—written as they were in an era of discretionary sentencing and only peripherally bandaged since then—do a very good job. The challenge is to come up with amendments which are parsimonious and clear and neither prolong the process of Guideline adjudication nor result in fewer guilty pleas. (I don't think the last of these would be a problem if greater notice were given the defendant, by the way; there could be some change in sentencing outcomes, however.)

Let me know where we are.

Best,

Kate Stith
Professor of Law

Criminal Division

U. S. Department of Justice

Washington, D.C. 20530

September 5, 1996

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

Dear Judge Marovich:

In response to your letter of September 4, 1996, we also would hope that the Subcommittee report would express support for the Rule 11(e)(1)(C) amendment we suggested (and in that regard, we have no objection to the conforming amendment to Rule 11(e)(1)(B) suggested by Professor Stith). To further embellish our original proposal, we recommend -- for purposes of parallelism and to underscore the difference between an (e)(1)(B) agreement and an (e)(1)(C) agreement -- that (e)(1)(C) should end with the clause "with the understanding that the agreement shall be binding on the court if the plea is accepted" (in contradistinction to (e)(1)(B) which ends with a similar clause save for the inclusion of "not" after "shall". Thus, Rule 11(e)(1)(C) would read:

> "(C) agree that a specific or sentencing range is the appropriate disposition of the case, or that a particular sentencing guideline, sentencing factor, or policy statement is applicable to the case, with the understanding that the agreement shall be binding on the court if the plea is accepted. (Proposed new matter underlined).
>
> As Professor Stith noted in her letter, this amendment would not confer any additional power on the parties as compared to the court, since judges remain free to reject an (e)(1)(C) agreement for any reason, or even without stating a reason.

As to the notion of a more comprehensive examination of Rule 11, we are somewhat uneasy about what this might entail. We certainly have no problem with looking at any other amendments to address the issues raised by United States v. Harris, 70 F.3d 1001 (8th Cir. 1995) (the amendment we have proposed, however,

indirectly addresses Harris by implying that only an (e)(1)(C) agreement is binding on the court), but would not want to sign on to the concept of an overall review of Rule 11 without some further idea of perceived specific problem areas. To the extent the Subcommittee, and the Committee, can identify and provide sound solutions for recurring and important problems that have arisen under Rule 11, we would prefer that such amendments move forward promptly, without awaiting the results of a more generalized and amorphous examination of the Rule.

Sincerely,

Roger A. Pauley

Mary Frances Harkenrider

cc: Henry Martin, Esq.
Professor Kate Smith

PROBATION OFFICERS ADVISORY GROUP SURVEY

The materials that follow grew out of a meeting held by the Sentencing Commission with its Probation Officers Advisory Group in Washington in November 1995. The Advisory Group is chaired by Francesca D. Bowman, Chief United States Probation Officer for the District of Massachusetts.

After voicing concerns to the commissioners at the November meeting that "plea agreements do not always represent the true facts of the case," the Probation Officers Advisory Group undertook to validate its perceptions by carrying out a nationwide survey of federal probation offices and report back to the Commission. Ms. Bowman pursued the survey in the ensuing two months and sent the results to Chairman Richard P. Conaboy and his colleague on January 30, 1996. The transmittal letter, the survey summary, and a selection of written responses added by probation officers when responding to the survey, are shown below. The editors of FSR reorganized and condensed the survey results for purposes of space and clarity.

The Commission has not yet formally responded to these materials. Ms. Bowman's reply on April 30, 1996, to an individual letter from Commissioner Michael Goldsmith is reprinted at page 342 infra.

PROBATION OFFICERS ADVISORY GROUP to the United States Sentencing Commission

January 30, 1996

Honorable Richard P. Conaboy, Chairman
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Conaboy:

As promised, the Probation Officers Advisory Group conducted a survey to attempt to validate a perception that the Group voiced at the fall meeting in November—that is, that plea agreements do not always represent the true facts of the case. Also, that there is an increase in the lack of information coming from the government for the probation officer to present to the court, with the result that the court cannot make a meaningful decision about accepting a plea agreement.

Method

In constructing the survey, we assumed that most plea agreements contain guideline calculations. Even if calculations were not the norm, we presumed that respondents would take guideline calculations as a proxy for stipulated facts.

We received responses from 85 districts. Each district response is meant to represent a consensus for that district. At first, it was my intention to provide only a summary of the comments. But as I compiled the numbers and read through the comments, it became apparent that where the particular question did not quite fit the circumstance of the district, the representatives wrote comments that told another story. Certain themes began to emerge and I have therefore taken the liberty of including all the comments. The comments of each district in each Circuit are grouped under the Circuit and separated by dash (—). Therefore, a comment that follows a dash (—) represents the comment of one district within the Circuit. District comments often represent a consensus among officers within the district. It is reported that some districts had so many different opinions within their district that a consensus was difficult to come to. Comments that merely mirrored the percentage without further comment are not included. In other words, if a district indicated that 100% of the time they prepared the presentence report, I did not add the comment that said, "We always prepare the presentence report." There were instances, however, when the percentages picked up by the district did not mirror the comment, indicting that the question was perhaps not properly asked. Therefore, I submit that the comments may help provide a clearer picture of what the probation officers believe.

Emergent Issues

While I am hesitant to draw sweeping conclusions from this survey it is safe to say that a few patterns have emerged. Question one shows that 39% of the respondent districts employ plea agreements that contain guideline calculations in 55% or more of the cases. Questions three, four and five show that in most districts the Probation Officer prepares the Offense Conduct section of the presentence report with information supplied by the government. While respondents indicate that usually the government is cooperative in supplying information, there are notable exceptions when the government wants to protect a plea agreement. This issue emerges more clearly at Question six. There we learn that only 18.5% of the respondent districts report that all calculations set for in the agreement are supported by accurate and complete offense facts in 80% or more of the cases, while 39.5% report that this occurs 50% or less of the time. Finally, at Question nine, while 31% of the respondent districts report that 80% or more of

PROBATION OFFICERS' SURVEY

the time the court weighs both sides of a dispute and defers to that which is most provable/accurate, the comments make it clear that while courts do weigh both sides and often hold hearings, they almost universally defer to the plea agreement, especially when it is more favorable to the defendant than the presentence report. This may indicate that courts, as well as the parties, believe the guidelines are too harsh.

Comments show that there are many diverse ways that the prosecutor and defense counsel can manipulate the system. But it appears that the prosecutor controls the process. Furthermore, if there is a policy in Washington as to how the prosecutors should conduct themselves, it is not being implemented uniformly in the 85 districts who responded to this survey.

This survey is admittedly an unscientific effort. Nevertheless, the reactions from 85 districts bear a closer look. Because there are many policy issues raised in the opinions expressed by the officers, I must stress that the results of this survey in no way represent the position of the Administrative Office, nor of the Criminal Law Committee. These comments represent only the opinions of officers who were polled.

We hope that this survey, in providing a picture of the different practices employed around the country, will provide a context for discussion in your efforts to simplify, clarify and improve the guidelines. As usual, we stand ready to assist in any way we can.

Sincerely,
Francesca D. Bowman, Chair

er reached ARC. In any event, it is undisputed that ARC's approval was never obtained as required by the agreement.

Granted, this latter delinquency regarding notice constitutes a breach of contract. Nevertheless, it is relevant to the conversion claim because it prevented ARC from discovering that its property was being utilized by Willims, Hernandez and Rosales, and eviscerated its contractual right to pass upon the suitability of those three individuals to participate in its ticket sales program. Therefore, the conversion, as well as the breach of contract which is intertwined with that conversion, are each a proximate cause of plaintiff's loss, and Fuksman was individually involved in both. Accordingly, he, along with the corporation is liable to plaintiff for the resulting loss. The question then becomes in what amount.

Generally, "the proper measure of damages in an action for conversion is the value of the property, that is, the amount required to replace the goods at the time and place of the ... conversion by the wrongdoer, unless special circumstances require the adoption of a different measure of damages...." 23 *N.Y.Jur.2d*, Conversion, § 66. Such "special circumstances" are present here for the dimensions of the loss occasioned by the conversion of ARC's blank ticket stock and airline validation plates was readily foreseeable. *See generally id.*, § 73. Indeed, the items themselves are essentially devoid of intrinsic worth. Their value—as Fuksman's trial testimony indicates he well understood—is derived from their ability to generate substantial amount of revenue via airline ticket sales. Under the circumstances, the $202,877.64 loss was a natural and proximate consequence of defendants' conversion of ARC's property.

CONCLUSION

Plaintiff having prevailed on its conversion claim, its other causes of action seeking the same relief will not be addressed. Moreover, plaintiff's claim for punitive damages is denied because there is unsufficient evidence as to the attendant circumstances of defendants' conduct to support such an award.

For the reasons above stated, plaintiff is entitled to judgment against Inter Transit Travel, Inc. and against Luis R. Fuksman for $202,877.64, with interest and costs.

SO ORDERED.

UNITED STATES of America

v.

Nicholas AGUILAR, Defendant.

No. 92 CR 1228 (JBW).

United States District Court,
E.D. New York.

May 2, 1995.

Defendant was indicted for conspiring to distribute cocaine, and Probation Department argued that court should impose sentence required under Guidelines rather than lesser sentence agreed to in plea negotiation. The District Court, Weinstein, Senior District Judge, held that court could accept plea agreement which called for defendant to be sentenced outside of requirements of Sentencing Guidelines.

Ordered accordingly.

1. Criminal Law ⇐1241

In permitting sentence bargaining outside of Sentencing Guidelines, Sentencing Commission explicitly rejected argument that guidelines that fail to control and limit plea agreements would leave untouched a loophole large enough to undo good that sentencing guidelines would bring. U.S.S.G. § 6B1.2(c), p.s., 18 U.S.C.A.

2. Criminal Law ⇐273.1(2)

Court may accept or reject plea agreement calling for specific sentence, but court may not modify the agreement. U.S.S.G.

§ 6B1.2(c), p.s., 18 U.S.C.A.; Fed.Rules Cr. Proc.Rule 11(e)(1)(C), 18 U.S.C.A.

3. Criminal Law ⇐273.1(2)

District court may accept plea agreement which calls for defendant to be sentenced outside of requirements of Sentencing Guidelines. U.S.S.G. § 6B1.2(c), p.s., 18 U.S.C.A.; Fed.Rules Cr.Proc.Rule 11(e)(1)(C), 18 U.S.C.A.

Brian Moriarty, U.S. Atty.'s Office, Brooklyn, NY, for U.S.

Robert Wolf, New City City, for defendant.

Memorandum and Order

WEINSTEIN, Senior District Judge.

This case concerns one of a large class of federal criminal prosecutions to which the Guidelines do not, as a practical matter, apply—those disposed of by plea agreement under Federal Rule of Criminal Procedure 11(e)(1)(C). For an earlier view of this case, *see United States v. Mosquera*, 813 F.Supp. 962 (E.D.N.Y.1993) (describing procedures for multi-defendant prosecution).

I. FACTS

The defendant was indicted for conspiring to distribute cocaine in violation of 21 U.S.C. §§ 846 and 841(a)(1). According to the government, he headed a 600–kilo distribution network.

In accordance with a global plea agreement covering twelve of sixteen defendants, Aguilar pled guilty to a single conspiracy count. The agreement stated:

> Pursuant to Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure, the Office [of the United States Attorney] and the defendant agree that a specific sentence of 188 months is the appropriate disposition of [Aguilar's] case.

Plea Agreement at 2 (August 13, 1993).

Without this arrangement, the defendant's Guidelines sentence would have been 360 months in prison. In its presentence report, the Probation Department recommended that the court impose that term. Although noting that an agreement had been reached "[p]ursuant to Rule 11(e)(1)(C)," Presentence Report at 3 (Oct. 6, 1993), the Department stated:

> [T]he Probation Department's independent investigation and guideline calculations yield a guideline imprisonment range of 360 months to life. Assuming the accuracy of our guideline computations, *the Court can only impose a sentence of 188 months via a downward departure* .... However, no downward departure factors are apparent to the Probation Department, and the adversaries have not proposed any [such] factors.

Id. (emphasis added). Thus, in the view of the Probation Department, the agreement was unenforceable as incompatible with the Guidelines.

II. LAW

A. The Guidelines

Support for the Probation Department's position—that the sentence must fall within the otherwise-applicable Guidelines range—is found in Guidelines § 6B1.2(c). That section provides:

> In the case of a plea agreement that includes a specific sentence, the court may accept the agreement if the court is satisfied either that:
>
> (1) the agreed sentence is within the applicable guidelines range; or
>
> (2) the agreed sentence departs from the applicable guidelines range for justifiable reasons.

The commentary to this section goes on to define "justifiable reasons" as those reasons that would support a departure under the Guidelines. *See Guidelines Manual* (Nov. 1, 1994) § 6B1.2, at 322 (Commentary) (defining "justifiable reasons" as meaning "*i.e.*, that such departure is authorized by 18 U.S.C. § 3553(b)"). Section 3553(b) of Title 18 of the United States Code, in turn, has been held to mean that departures must follow Guidelines procedures. *See, United States v. DeRiggi*, 45 F.3d 713, 716 (2d Cir. 1995) (Section 3553(b) "assign[s] controlling weight to the Guidelines").

A 1989 amendment substituted the present language—requiring compliance with § 3553(b)—for a less demanding standard: that the agreement "not undermine the basic purposes of sentencing." *See* Amendment to the Commentary to Guidelines § 6B1.2 (Amendment 295) (Nov. 1, 1989). *Cf. Fields v. United States*, 963 F.2d 105, 108 (6th Cir.1992) (under the Guidelines, "[a] sentencing judge could no longer be forced to abide by an agreed to sentence where that sentence did not conform to the Guidelines, as that would eviscerate their purpose"); *United States v. Kemper*, 908 F.2d 33, 36–37 (6th Cir.1990) (explaining that a presentence report is required even in 11(e)(1)(C) cases, because court must determine if agreed-upon sentence is within Guidelines).

Thus, under § 6B1.2, a sentence that cannot be justified under the Guidelines must arguably be rejected by the court. This conclusion, however, is placed in doubt by the Introduction to the *Guidelines Manual*. There, the Sentencing Commission stated its intention not to "make major changes in [pre-Guidelines] plea agreement practices." *Guidelines Manual*, Chapter 1, Part A, at 7 (Nov. 1, 1994). Its reason: "Nearly ninety percent of all federal criminal cases involve guilty pleas" and significant changes in the plea bargaining system could, consequently, "make the federal system unmanageable." *Id.* at 6–7.

With this prior practice in mind, the Commission decided that the acceptance or rejection of plea agreements would continue to be governed by Federal Rule of Criminal Procedure 11(e). *Id.* at 7. As for the Guidelines, according to the Sentencing Commission, they *"create a norm to which courts will likely refer* when they decide whether, under Rule 11(e), to accept or to reject a plea agreement or recommendation." *Id.* (emphasis added). For further discussion of the decision by the Commission to permit sentence bargaining outside the Guidelines system, and its results, *see, e.g.*, Stephen G. Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L.Rev. 1, 31 (1988) (Guidelines reflect Commission's intention to leave the state of plea bargaining "where it found it"); Eric Komitee, Note, *Bargains Without Benefits: Do the Sentencing Guidelines Permit Upward Departures to Redress the Dismissal of Charges Pursuant to Plea Bargains?*, 69 N.Y.U. L.Rev. ——, —— (forthcoming 1995) (Commission hoped Guidelines would "create an environment in which the prosecution and defense no longer worked 'in the dark' when bargaining. Even this modest goal, however, has not met with any significant level of success.").

[1] In reaching the decision to permit sentence bargaining outside the Guidelines, the Commission explicitly rejected the argument that "guidelines that failed to control and limit plea agreements would leave untouched a 'loophole' large enough to undo the good that sentencing guidelines would bring." *Guidelines Manual* at 7.

B. Rule 11

Federal Rule of Criminal Procedure 11 provides for plea agreements that result in dismissal of charges (Rule 11(e)(1)(A)), sentence recommendations (Rule 11(e)(1)(B)), or sentence agreements (Rule 11(e)(1)(C)). Rule 11(e)(1)(C) states:

> The attorney for the government and the attorney for the defendant ... may ... agree that a specific sentence is the appropriate disposition of the case.

The Rule explains that "the court may accept or reject [such an] agreement." *Id.*; *see also United States v. Andrade–Larrios*, 39 F.3d 986, 990 (9th Cir.1994) (Rule 11(e)(1)(C) "remove[s judge's] discretion"); *United States v. Nolan*, No. 93–35311, 1994 WL 196756 1994 U.S.App. LEXIS 12357, at *5 (9th Cir. May 18, 1994) (court must impose 11(e)(1)(C) sentence unless "plainly unjust or unfair"). Rule 11(e) makes no reference to the Guidelines. This stands in contrast to Rule 11(c), which was amended in 1989 to require the court, before accepting a plea agreement, to inform the defendant that it "is required to consider any applicable sentencing guidelines." Fed.R.Crim.P. 11(c)(1) (1989). *Cf. United States v. Baker*, 853 F.Supp. 1084, 1089 (N.D.Ill.1994) (noting impossibility of departure from 11(e)(1)(C) agreement, "as there is no way to deduct two points from fifteen years"); *see also* 18 U.S.C. § 3742(c)

(permitting appeal of 11(e)(1)(C) sentence only if it violates plea agreement).

C. Caselaw

[2] The court of appeals for this circuit has held that, under Rule 11(e)(1)(C), a court may "accept or reject [an agreement calling for a specific sentence], *but . . . may not modify it.*" *United States v. Cunavelis*, 969 F.2d 1419, 1422 (2d Cir.1992) (emphasis added). In *Cunavelis*, a plea agreement stipulated that after the district court determined the base offense level for the defendant, the court would deduct four levels. At sentencing, the defendant asked the court to consider a further departure, despite the plea agreement. The district court declined to do so. Affirming, the court of appeals held that plea bargains executed pursuant to Rule 11(e)(1)(C)—"in contrast to the precatory nature of agreements made under subdivision (e)(1)(B)—are binding on the district court." *Id.* at 1422. *See also United States v. Braimah*, 3 F.3d 609, 611–12 (2d Cir.1993) (approving *Cunavelis* procedure, described by the court as a waiver of defendant's right to be sentenced pursuant to the Guidelines).

More recently, in *United States v. Toro*, No. 94–1184 (2d Cir. Dec. 30, 1994) (unpublished, but related), one of the defendants asked the court to depart, sua sponte, below the sentence called for in her plea agreement. The court observed that, given the defendant's family circumstances, it had the power to depart; nonetheless, it declined to do so in light of the plea negotiations. Affirming, the court of appeals stated:

> [T]he court in fact did not have the authority to depart. . . . Once a district court has accepted an agreement made pursuant to Fed.R.Crim.P. 11(e)(1)(C), "it may not modify it."

Toro at 2 (quoting *Cunavelis*, 969 F.2d at 1422). In *Toro*, the agreed-upon sentence was far below the sentence called for by the Guidelines.

The decisions in *Toro* and *Cunavelis* are consistent with this circuit's general regard for plea agreements. The court of appeals has consistently endorsed the use of plea agreements—including those reached under Rule 11(e)(1)(C)—as essential to the operation of the courts. *See, e.g., United States v. Stanley*, 928 F.2d 575, 582 (2d Cir.) ("[I]f plea bargains could not alter sentences, most defendants would have little interest in bargaining."), *cert. denied*, 502 U.S. 845, 112 S.Ct. 141, 116 L.Ed.2d 108 (1991).

In *United States v. Pimentel*, 932 F.2d 1029, 1033 (2d Cir.1991), the court urged prosecutors to engage in sentencing bargaining so as to ensure that defendants are not caught off guard at sentencing, thereby reducing the "steady parade of appeals that squander scarce judicial resources and waste the government lawyers' time." *Id.* The court observed that sentence-bargaining made more sense under the Guidelines than before:

> Today, under the Guidelines, the discretion of federal courts with regard to sentencing is greatly restricted. Given that the Guidelines have so circumscribed the judiciary's traditional role in sentencing, we think it even less likely now than before that judges would resist sentence bargains as undue or unseemly intrusions on the judicial function.

932 F.2d at 1033. If the court was aware of the irony of this position—that *ad hoc* bargaining that deliberately circumvents the Guidelines is compatible with a system designed to eliminate disparity in sentencing and encourage openness and truth—it did not say so. The supposed public interest in determinate sentencing, in the view of the court of appeals, did not outweigh the advantages of private deal-making.

Nor was the court, in *Stanley*, concerned about the "circumscribed" role of the district court in sentencing. It noted that "our decision today . . . transfers discretion from the district judge to the prosecutor," 928 F.2d at 583 (citation omitted), but that any problem posed by such a shift is "open to Congress or the Commission" to deal with. *Id.*

III. CONCLUSION

[3] Under the caselaw, despite the assertion of the Guidelines' authors that their system would apply to nearly every federal conviction, *see Guidelines Manual* at 10 (Nov. 1, 1994), under Rule 11(e)(1)(C) a large

class of defendants may be sentenced outside the Guidelines. This conclusion, while contrary to the theory of the Guidelines, and to their pretensions of uniformity and truth in sentencing, produces an acceptable result in this and other cases.

Had the court been required to impose the Guidelines sentence, the defendant would have been imprisoned for 30 years—far longer than required for deterrence or any other rational justification for punishment—at great expense to the taxpayers. Moreover, the system would have been deprived of the benefits of negotiations that resulted in the acceptance of twelve guilty pleas at one time. Thus, substantively and procedurally, the agreement produced a more acceptable result than would have resulted from adherence to the Guidelines.

The defendant is sentenced to the agreed-upon sentence, 188 months in prison, plus five years of supervised release and a $50 assessment.

So ordered.

Jennie PETIX, Plaintiff,

v.

KABI PHARMACIA OPHTHALMICS, INC. Individually and as a Corporate Successor in Interest to Intermedics Intra Ocular, Inc., and Intermedics, Inc., Defendants.

No. 92–CV–503A.

United States District Court,
W.D. New York.

March 31, 1995.

State law strict liability and negligence claims were asserted against manufacturer of anterior chamber intraocular lenses that manufacturer had voluntarily withdrawn from market. On manufacturer's motion for summary judgment, the District Court, Foschio, United States Magistrate Judge, held that: (1) Medical Device Amendments to Food, Drug and Cosmetic Act (FDCA) preempted claims related to manufacturers' postwithdrawal conduct as well as its pre-withdrawal conduct, and (2) manufacturer could not be denied preemption on ground that its voluntary withdrawal of product from market was attempt to circumvent notice requirements imposed by Food and Drug Administration (FDA).

Motion granted.

1. Products Liability ⇐46

States ⇐18.65

Medical Device Amendments to Food, Drug and Cosmetic Act (FDCA) preempted failure-to-warn claim arising after manufacturer voluntarily withdrew its anterior chamber intraocular lenses for market; although it was contended that preemption did not apply once product was withdrawn from market, holding manufacturer liable for postwithdrawal conduct would be contrary to Congress' intent in encouraging researchers to develop new products. Federal Food, Drug and Cosmetic Act, § 521(a), as amended, 21 U.S.C.A. § 360k(a).

2. States ⇐18.3

Valid state law may be preempted where Congress expressly preempts state law or Congress evidences intent to completely occupy given field, or if compliance with both federal and state law is impossible, and state law is barrier to achieving full purposes and objectives of Congress.

3. States ⇐18.5, 18.11

Party claiming preemption has burden of proof and must establish that Congress has spoken clearly and made its intention to preempt unmistakable or, alternatively, must demonstrate that federal law preempts state law to extent that state law actually conflicts with or frustrates purpose of federal law.

4. Products Liability ⇐46

States ⇐18.65

Manufacturer that voluntarily withdrew its anterior chamber intraocular lenses from

Agenda Item IIC - 1b

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Dave Schlueter, Reporter

RE: Rule 11(e)(4). Rejection of Plea Agreement

DATE: September 3, 1996

Attached are Rule 11(e)(2), (4) materials forwarded by Judge Davis, who has asked that they be included in the agenda book for discussion.

This matter was discussed very briefly at the Committee's April 1996 meeting without any final resolution. Given its close relation to the issues raised in the correspondance and suggestions by Judge Marovich's Rule 11 subcommittee, which is covered by a separate memo, it might be discussed in more detail with that agenda item. In any event, this issue will be on the agenda.

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

W. EUGENE DAVIS
CIRCUIT JUDGE

August 15, 1996

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

Dear Dave:

This will confirm our telephone conversation on the Rule 11 issue you placed on the agenda at my request at the spring meeting. Because I cannot recall whether Judge Jensen referred this matter to Judge Marovich's committee, I write to you with copies to Judge Jensen and Judge Marovich to try to clarify this item.

You will recall that I asked you to place this on the agenda at the request of Judge George Kazen, who was concerned about a decision by the Eighth Circuit in **United States v. Harris**, 70 F.3d 1001 (8th Cir. 1995).[1] I attach a copy of Judge Kazen's letter for ready reference.

In **Harris**, the following occurred:

1. The defendant entered a guilty plea to the interstate transfer of stolen property pursuant to a plea agreement under Rule 11(e)(1)(B). When the defendant entered the plea, the court told him that any recommendation made by the parties as to sentence was not binding and the defendant "may not withdraw his plea if the court rejects the above recommendation of the parties regarding sentencing factors."

2. When the presentence report was prepared, it revealed that the defendant had some involvement in an armed robbery that apparently was related to the stolen merchandise that was transferred interstate.

3. The court, at sentencing, accepted the PSR recommendation to depart upwardly because of the defendant's participation in the armed robbery. As a result, the court's sentence exceeded the sentence contemplated by the parties.

4. On appeal, the Eighth Circuit concluded that the parties "had a reasonable expectation that the court would sentence Harris

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[1] See also the dissenting opinion in **United States v. Ashburn**, 38 F.3d 803, 812 (5th Cir. 1994), which seems to agree with the **Harris** reasoning.

. . . within the guideline range and because the parties' expectation was not met, the defendant had the right under Rule 11(e)(4) to withdraw his plea.

I believe the court erroneously interpreted Rule 11(e)(4) to apply to a plea agreement entered under 11(e)(1)(B). It seems obvious to me that Rule 11(e)(4) applies only to a plea agreement entered into under 11(e)(1)(A) or 11(e)(1)(C). Rule 11(e)(2) makes this clear:

> If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), 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.

It makes no sense at all to apply 11(e)(4) to a plea agreement under 11(e)(1)(B) in the face of the last sentence quoted above.

In summary, my sole concern is the role of Rule 11(e)(4) in this circumstance: does it only apply to plea agreements entered into under 11(e)(1)(A) and (C) or does it also apply to plea agreements under 11(e)(1)(B)? It seems clear to me that the intent was to apply 11(e)(4) only to the 11(e)(1)(A) and (C) plea agreements. If the committee thinks the problem is serious enough to require a rule change, one fix would be to modify the first phrase in Rule 11(e)(4) to read: "If the court rejects the plea agreement <u>under (e)(1)(A) and (C)</u>, . . .

Sincerely,

W. Eugene Davis

cc: Honorable D. Lowell Jensen
Honorable George M. Marovich

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) 726-2349

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

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-

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.

Agenda Item IIC-1C

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Rules 11(e), 32(e). Ability of Defendant to Withdraw Guilty Plea; Inconsistency with Sentencing Guidelines**

DATE: **September 4, 1996**

Attached are Rule 11 materials which Judge Jensen believes the Committee should address. The Ninth Circuit in the attached case, *United States v. Hyde*, 82 F.3d 319 (9th Cir. 1996), indicated that the "plea agreement and the plea are inextricably bound up together," and that a decision to postpone a decision on whether to accept the agreement also postpones a decision to accept the plea. Citing Sentencing Guideline § 6B1.1(c), which requires a court to defer its decision on accepting a nonbinding sentencing recommendation until after it has reviewed PSR, the court recognized that the Guidelines "undoubtedly take away much of the discretion that a district court would otherwise have." 82 F.3d at 321.

The court concluded that before the judge accepts both the plea and the plea agreement, a defendant may withdraw his or her plea for any, or no, reason. This seems at odds with Rule 32(e), which requires a "fair and just reason" for withdrawal and Rule 11(e)(1)(C), which indicates that the judge *may* defer the decision to accept or reject an 11(e)(1)(A) or (C) agreement until there has been an opportunity to consider the presentence report.

Also attached is the *Forrester* decision, which is cited in *Hyde*, and which stands for the proposition that the policy statements interpreting the Sentencing Guidelines are binding on the federal courts.

This matter, along with several other Rule 11 matters, will be on the agenda for the Fall meeting. The Committee may wish to consider what, if any, amendment should be made to Rule 11 and/or Rule 32 concerning the timing of withdrawals of guilty pleas. Currently, Rule 11 says nothing about the procedures or timing for withdrawal of a plea. Perhaps, a provision similar to Rule 32(e) should be included in Rule 11.

search and their post search neglect of sanitary and medical concerns was protected by a good faith belief that they were acting reasonably, and thus entitled to qualified immunity. The argument about whether the verdict in Koch's case is inconsistent because of something peculiar to Eighth Amendment violations as distinguished from Fourth Amendment violations must be resolved before we decide whether there is to be a remand for further proceedings on the question of damages.

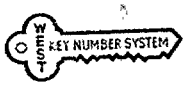
The *Vaughan II* panel must have considered whether, if the jury found that the manner of the search and the post search acts or omissions of the searching officers violated the Eighth Amendment, the jury could then find that qualified immunity protected the officers.

After scrutinizing the printed evidence of the deliberations of the *Vaughan II* panel, we are not persuaded that the court should apply to Koch's verdict the same kind of verdict-saving analysis it was able to apply to the Fourth Amendment violations. There the court said: "If conflicting evidence makes more than one reasonable decision possible, the panel must defer to the jury's choice." [Citation omitted.] *Vaughan II* at 1469. The court went on to hold that two choices were open to the jury because, on the Fourth Amendment claims, the jury could have found that the prison officers acted without probable cause to search, but had a good faith belief that they had probable cause, and thus could have found a search violation but it was protected by qualified immunity. That quest for two choices open to the jury does not apply with equal force to the Eighth Amendment violations. By the time the officers completed the conduct that the jury found to be "cruel and unusual" the element of probable cause to search had already run its course in the Fourth Amendment phase of the case and had no further application to the Eighth Amendment phase. *See Hamilton v. Endell*, 981 F.2d 1062, 1066 (9th Cir. 1992)(an Eighth Amendment deliberate indifference violation is inconsistent with a finding of qualified immunity).

We hold that the verdict, as to Koch's Eighth Amendment claim, was inconsistent. The options which the *Vaughan II* court described as available to the jury in considering qualified immunity for the Fourth Amendment violations do not appear to have been available to the jury in considering the claim based on cruel and unusual punishment (sanitary and medical neglect) as distinguished from the questions of probable cause to search that were involved in the Fourth Amendment claims.

Accordingly, this case must be remanded again to the trial court for further proceedings.

REVERSED AND REMANDED.



UNITED STATES of America, Plaintiff–Appellee,

v.

Robert E. HYDE, Defendant–Appellant.

No. 95–10113.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted April 8, 1996.

Decided April 30, 1996.

Defendant indicted for mail and wire fraud moved to withdraw guilty plea before acceptance of plea agreement, but after acceptance of plea. The United States District Court for the Northern District of California, Saundra Brown Armstrong, J., denied motion. Defendant appealed. The Court of Appeals, Fernandez, Circuit Judge, held that defendant was entitled to withdraw guilty plea without fair and just reason, inasmuch as motion to withdraw was made before acceptance of plea agreement.

Reversed and remanded.

Ferguson, Circuit Judge, concurred and filed a separate statement.

1. **Criminal Law** ⇐1149

Court of Appeals reviews for abuse of discretion district court's denial of motion to withdraw guilty plea.

2. **Criminal Law** ⇐274(2)

Failure to apply correct legal principles in ruling on motion to withdraw guilty plea is "abuse of discretion."

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

3. **Criminal Law** ⇐274(9)

Defendant was entitled to withdraw guilty plea, without offering reason for withdrawal, when motion to withdraw was made before district court accepted plea agreement, even though district court had accepted plea; court's reservation of ruling on acceptance of plea agreement until presentence report was received necessarily postponed decision as to whether to accept plea. Fed. Rules Cr.Proc.Rule 32(e), 18 U.S.C.A.

4. **Criminal Law** ⇐274(9)

If court defers acceptance of guilty plea or of plea agreement, defendant may withdraw his plea for any reason or for no reason, until time that court does accept both plea and plea agreement. Fed.Rules Cr. Proc.Rules 11(e), 32(e), 18 U.S.C.A.

Jonathan D. Soglin, Oakland, California, for defendant-appellant.

Joel R. Levin, Assistant United States Attorney, San Francisco, California, for plaintiff-appellee.

Appeal from the United States District Court for the Northern District of California; Saundra B. Armstrong, District Judge, Presiding. No. CR-91-00672-SBA.

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

Opinion by Judge FERNANDEZ; Concurrence by Judge FERGUSON.

FERNANDEZ, Circuit Judge:

Robert Elmer Hyde was indicted for mail fraud and wire fraud. *See* 18 U.S.C. §§ 1341, 1343, 2(b). He then entered into a plea agreement and entered his guilty plea. The district court accepted the guilty plea but reserved ruling on the acceptance of the plea agreement until it had seen the presentence report. Long before that report was prepared, Hyde moved to withdraw his plea. The district court determined that he had not given a sufficient reason to justify withdrawal. Thus, it denied his motion and went forward to judgment and sentencing. Hyde appealed. We reverse and remand.

STANDARD OF REVIEW

[1, 2] We review for an abuse of discretion the district court's denial of a motion to withdraw a guilty plea. *See United States v. Alber*, 56 F.3d 1106, 1111 (9th Cir.1995). A failure to apply the correct legal principles is an abuse of discretion. *See Hunt v. National Broadcasting Co., Inc.*, 872 F.2d 289, 292 (9th Cir.1989).

DISCUSSION

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

> We need not decide whether Washman had a "fair and just" reason for withdrawing his plea pursuant to Fed.R.Crim.P. 32(e) because we hold that Washman should have been allowed to withdraw his plea without offering any reason. The reason is that, at the time Washman moved to withdraw from the plea agreement, the district court had not yet accepted the

plea. Under our precedent, Washman and the Government were not bound by the plea agreement until it was accepted by the court.

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

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

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

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

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

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

CONCLUSION

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

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

REVERSED and REMANDED for further proceedings.

FERGUSON, Circuit Judge, concurring.

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

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

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

162 F.2d 354, 365 (9th Cir.1947); *Cain v. Universal Pictures Co.*, 47 F.Supp. 1013, 1017–18 (S.D.Cal.1942). Here, however, Roley fails to produce any evidence that appellees engaged in actionable conduct after February 7, 1988. Indeed, his assertions rely on naked allegations and speculation. Consequently, Roley fails to demonstrate that either a genuine issue of material fact exists, or that the district court incorrectly applied the relevant law. The district court's summary judgments are AFFIRMED.

UNITED STATES of America, Plaintiff–Appellee,

v.

John William FORRESTER, Defendant–Appellant.

No. 93–10137.

United States Court of Appeals, Ninth Circuit.

Submitted Dec. 16, 1993 *.

Opinion Jan. 13, 1994.

Opinion Withdrawn March 25, 1994.

Decided March 25, 1994.

Petition was filed to revoke probation of defendant previously convicted, on guilty plea, of robbery of bank. United States District Court for the District of Nevada, Lloyd D. George, Chief Judge, entered order revoking defendant's probation and imposing sentence, and defendant appealed. The Court of Appeals, David R. Thompson, J., held that: (1) Sentencing Guidelines' policy statement on revocation of probation was not binding on district court; (2) probation revocation statute controlled in event of any conflict; and (3) trial court properly imposed 33–month sentence on revocation of defendant's probation, as representing an allowable sentence at time of initial sentencing.

Affirmed.

Skopil, J., concurred in result and filed opinion.

1. Criminal Law ⇐1232

In general, policy statements interpreting Sentencing Guidelines are binding on federal courts. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.App.

2. Criminal Law ⇐982.9(1)

Sentencing Guidelines' policy statement on revocation of probation, which dealt only with revocation statute and which did not purport to interpret any sentencing guideline, was merely advisory and did not bind court in imposing sentence upon revocation of defendant's probation. U.S.S.G. § 7B1.4, p.s., 18 U.S.C.A.App.; 18 U.S.C.A. § 3565(a)(2).

3. Criminal Law ⇐982.9(7)

Federal statute providing that, upon revocation of defendant's probation for bank robbery, district court could impose any sentence that was available at time of initial sentencing controlled, to the extent that there was any conflict, over Sentencing Guidelines' policy statement regarding appropriate sentencing range once probation was revoked. 18 U.S.C.A. § 3565(a)(2); U.S.S.G. § 7B1.4, p.s., 18 U.S.C.A.App.

4. Criminal Law ⇐982.9(7)

Although Sentencing Guidelines' policy statement on revocation of probation was not binding on district court, district court had to consider policy statement in deciding what sentence to impose following revocation of defendant's probation. U.S.S.G. § 7B1.4, p.s., 18 U.S.C.A.App.

5. Criminal Law ⇐982.9(7)

District court could impose a 33–month sentence upon revoking defendant's proba-

* This panel unanimously finds this case suitable for disposition without oral argument. Fed. R.Civ.P. 34(a); 9th Cir.R. 34–4.

tion, on ground that this represented an allowable sentence that could have been imposed at time of its initial sentencing following defendant's guilty plea to charge of bank robbery, where district court considered Sentencing Guidelines' policy statement on what was appropriate sentence and rejected that recommendation as inappropriate when defendant's original sentence was result of downward departure. 18 U.S.C.A. § 3565(a)(2); U.S.S.G. § 7B1.4, p.s., 18 U.S.C.A.App.

Franny A. Forsman, Asst. Federal Public Defender, Las Vegas, NV, for defendant-appellant.

Will B. Mattly, Asst. U.S. Atty., Las Vegas, NV, for plaintiff-appellee.

Appeal from the United States District Court for the District of Nevada.

Before: SKOPIL, THOMPSON and RYMER, Circuit Judges.

ORDER

The opinion filed January 13, 1994 is withdrawn and the opinion and separate concurrence filed concurrently herewith are filed in its stead.

OPINION

DAVID R. THOMPSON, Circuit Judge:

We consider the following question in this appeal: To what extent is a district court obliged to consider the policy statements of Chapter 7 of the United States Sentencing Guidelines in imposing a sentence when it revokes a defendant's probation?

FACTS AND PROCEEDINGS

The appellant, John William Forrester, is a gambling addict and recovering alcoholic. In May 1991, he and his wife of one month moved to Las Vegas to seek a fresh start. A few weeks later, Forrester gambled and lost $13,000 that belonged to his wife. This was virtually all the money the couple had. Desperate to recover at least some of the money, Forrester, who was unarmed, robbed a bank. Although the police had no suspects, a remorseful Forrester turned himself in and confessed to the crime. He pleaded guilty to bank robbery. He was 42 years old and had no history of prior criminal conduct.

At his sentencing hearing, the district court took pity on him. Instead of sentencing him to prison for between 33 and 41 months, as prescribed by the applicable guideline range, the court departed downward and gave him five years probation.

Approximately 18 months later, the United States Probation Department filed a petition to revoke probation. Forrester had violated several general conditions of his probation. He had also violated some of the special conditions: He had entered at least one gambling establishment, had failed to participate in a required mental health and substance abuse program, and had failed to submit to drug and alcohol monitoring.

At his revocation hearing, Forrester and the government agreed that the admitted probation violations were all Grade C violations under Guideline § 7B1.1, his criminal history category was I, and the revocation table at section 7B1.4 set his sentencing range at 3 to 9 months.

The district court revoked Forrester's probation. Rejecting the 3 to 9 month range of section 7B1.4, the court sentenced him to 33 months in prison, the low end of the applicable guideline range for his crime of bank robbery. This appeal followed.

DISCUSSION

Forrester argues the district court was bound by the policy statements of Chapter 7, and hence should have sentenced him within the 3 to 9 month range. Alternatively, he argues that even if the district court was not bound to sentence him within this range, it had to consider and apply Chapter 7's policy statements, as required by *Stinson v. United States*, — U.S. —, —, 113 S.Ct. 1913, 1917, 123 L.Ed.2d 598 (1993), and *Williams v. United States*, — U.S. —, —, 112 S.Ct. 1112, 1119, 117 L.Ed.2d 341 (1992); and, he contends, the district court failed to do so. We reject these arguments.

[1] In general, policy statements interpreting sentencing guidelines are binding on federal courts. *See United States v. Levi*, 2 F.3d 842, 845 (8th Cir.1993). In *Williams*, — U.S. at —, 112 S.Ct. at 1119, the Supreme Court held, "Where ... a policy statement prohibits a district court from taking a specified action, the statement is an authoritative guide to the meaning of the applicable guideline." In *Stinson*, — U.S. at —, 113 S.Ct. at 1917, relying on *Williams*, the Court stated, "The principle that the Guidelines Manual is binding on federal courts applies as well to policy statements."

In *Williams* and *Stinson*, however, the Court considered policy statements in U.S.S.G. Chapters 4 and 5 that interpreted specific sentencing guidelines. In those two cases, the Court reasoned policy statements interpreting the guidelines are an integral part of the guidelines themselves. *See Stinson*, — U.S. at ———, 113 S.Ct. at 1917–18; *Williams*, — U.S. at ———, 112 S.Ct. at 1119–20.

[2] In contrast, there are no guidelines in Chapter 7. Instead, there are only policy statements pertaining to the federal statute applicable to probation revocation. *See* Chapter 7, Sentencing Guidelines; 18 U.S.C. § 3565 (1988). Because Chapter 7 deals only with the applicable statute, 18 U.S.C. § 3565, and does not purport to interpret a guideline, *Stinson* and *Williams* do not require a sentencing court to follow Chapter 7's policy statements when imposing sentence upon a revocation of probation. *See Levi*, 2 F.3d at 845. *See also* U.S.S.G. Ch. 7, Pt. A3(a) (comment by the Sentencing Commission that it opted to promulgate advisory policy statements in Chapter 7 for the revocation of probation, because policy statements provide both the Commission and the courts with "greater flexibility" than guidelines).

[3] Moreover, the policy statement with which we are concerned in this case appears to be inconsistent with the statute to which it pertains. This statute, 18 U.S.C. § 3565, provides in pertinent part:

> (a) Continuation or revocation.—If the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may
>
> ....
>
> (2) revoke the sentence of probation and impose any other sentence that was available under subchapter A at the time of the initial sentencing.

Applying section 3565(a)(2) to the facts, the sentencing court in the present case clearly was within its statutory authority when it sentenced Forrester to a 33–month prison term, a sentence allowable at the time of Forrester's initial sentencing. Because this sentence differs from the 3 to 9 month sentence prescribed by the policy statement in section 7B1.4, the policy statement and the statute appear to be in conflict.[1]

In *Stinson*, — U.S. at —, 113 S.Ct. at 1919, the Court held commentary inconsistent with the guideline it purports to interpret is not binding. Because the policy statement in this case is apparently in conflict with 18 U.S.C. § 3565(a)(2), the statute controls.

[4] Even though the statute and not the policy statements of Chapter 7 controlled the district court in this case, Forrester is correct in arguing that the sentencing court had to consider the policy statements. The statute requires this. Section 3553(a)(5) (1993) provides: "The court, in determining the particular sentence to be imposed, shall consider ... any pertinent policy statement issued by the Sentencing Commission ... that is in effect on the date the defendant is sentenced." *See also United States v. Baclaan*, 948 F.2d 628, 631 (9th Cir.1991) (citing 18 U.S.C. § 3553(a)(5)).

[5] Here, the district court considered Chapter 7. In footnote 1 of its order revoking probation it stated that "even if [it] sentenced Defendant under Chapter 7, the court

1. The apparent conflict may not be important in this case, because when the district court first sentenced Forrester it departed downward and placed him on five years probation. In such a case where the court has departed downward at the initial sentencing, Chapter 7 authorizes an upward departure upon revocation of probation. U.S.S.G. § 7B1.4, comment. n. 4.

would not be bound by the 3–9 month range suggested by Defendant. Commentary note 4 to section 7B1.4 provides that, '[w]here the original sentence was the result of a downward departure (*e.g.*, is a reward for substantial assistance) ..., an upward departure may be warranted.'" District Court Order, Feb. 23, 1993, at 6.

Having considered the policy statements of Chapter 7, the court was free to reject the suggested sentence range of 3 to 9 months. It did so when it sentenced Forrester to 33 months, authorized by 18 U.S.C. § 3565(a)(2) (1988).

AFFIRMED.

SKOPIL, Circuit Judge, concurring:

I agree with the majority that U.S.S.G. Chapter 7 policy statements are not binding on the sentencing court, but must be considered prior to sentencing. *See United States v. Baclaan*, 948 F.2d 628, 631 (9th Cir.1991) (per curiam). I also agree that the district court adequately considered the policy statements before sentencing Forrester. Accordingly, I concur.

I write separately only to express my disagreement with the majority's statement that Chapter 7 apparently conflicts with the requirements of 18 U.S.C. § 3565(a)(2). I believe that any apparent conflict is resolved by the policy statement that provides:

> Where the minimum term of imprisonment required by statute, if any, is greater than the maximum of the applicable range, the minimum term of imprisonment required by statute shall be substituted for the applicable range.

U.S.S.G. § 7B1.4(b)(2).

The majority's holding that the policy statements are in apparent conflict with the statute rests on the difference between the sentence suggested by Chapter 7's "applicable range" (3 to 9 months) and the sentence "available under subchapter A at the time of the initial sentencing" (33 to 41 months). The very existence of such a conflict leads to the conclusion that this is a case where "the minimum term of imprisonment required by statute ... is greater than the maximum of the applicable range." and thus that the appropriate sentence under Chapter 7 is "the minimum term of imprisonment required by statute." U.S.S.G. § 7B1.4(b)(2). This is precisely the sentence that Forrester received.

In *Baclaan*, we remanded for resentencing because the district court failed to consider section 7B1.4(b)(2) when imposing a sentence longer than the minimum required by 18 U.S.C. § 3583(g) on revocation of supervised release for possession of a controlled substance. 948 F.2d at 630–31. I see no reason to treat probation revocations under section 3565(a)(2) differently. I believe that our holding in *Baclaan* requires the court to consider imposing the minimum sentence "available under subchapter A at the time of the initial sentencing," 18 U.S.C. § 3565(a)(2), before inposing a longer sentence in a probation revocation proceeding to which section 3565 applies. Because the court did impose the minimum available sentence in this case, it did not run afoul of *Baclaan*.

UNITED STATES of America, Plaintiff–Appellee,

v.

Brenda Lu SMITH, Defendant–Appellant.

No. 93–3307.

United States Court of Appeals, Tenth Circuit.

Feb. 22, 1994.

D. Kansas, D.C. No. 92–20011–01; John W. Lungstrum, District Judge.

Agenda Item IIC-1d

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Dave Schlueter, Reporter

RE: Rule 11(c); Proposed Amendment Re Waiver of Rights

DATE: September 3, 1996

Attached are materials from the Committee on Criminal Law which has proposed that Rule 11(c) be amended to require the trial judge to advise a defendant about any provision which requires the defendant to waive the right to appeal or collaterally attack the sentence.

The materials are self-explanatory. This matter, and several other matters affecting Rule 11, will be on the agenda for the October meeting in Oregon.

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

July 30, 1996

Honorable Maryanne Trump Barry
Chair, Committee on Criminal Law
United States Post Office and Courthouse
P.O. Box 999
Newark, New Jersey 07101-0999

Dear Judge Barry:

Thank you for your letter on behalf of the Committee on Criminal Law suggesting amendments to Rule 11 of the Federal Rules of Criminal Procedure. A copy of your letter will be sent to the chair and reporter of the Advisory Committee on Criminal Rules for their consideration. The advisory committee will hold its next meeting on October 7-8, 1996.

We welcome your Committee's suggestion and appreciate your interest in the rulemaking process.

Sincerely,

Peter G. McCabe
Secretary

cc: Honorable Alicemarie H. Stotler
Honorable D. Lowell Jensen
Professor David A. Schlueter
Professor Daniel R. Coquillette

96-CR-A

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July 15, 1996

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751 W. Santa Ana Blvd.
Santa Ana, CA 92701

Re: Proposed Change to Criminal Rule 11

Dear Judge Stotler:

I am writing on behalf of the Committee on Criminal Law, which voted unanimously on June 4, 1996, to request that the Rules Committee consider a proposed change to Rule 11, Federal Rules of Criminal Procedure.

The proposals for a change to Rule 11 and its commentary were initially submitted to the Criminal Law Committee in its agenda materials for the June, 1996, meeting, as part of a larger memorandum containing various proposals regarding sentencing appeals. The portion of that memorandum which discussed waivers of appeal in general and contained the proposal for the change to Rule 11 is enclosed with this letter.

The enclosure discussed some of the points that opponents and proponents make regarding waivers of appeal in general, and noted that waivers can vary greatly in scope. It also noted that the Department of Justice is increasingly using appeal waivers, in various forms. Further, waivers have consistently been upheld, so long as the defendant enters into the waiver (like any other waiver) knowingly and voluntarily.

Need for Specific Advice as to Waiver of Appeal

The Committee on Criminal Law agreed with the view expressed in the enclosure that, because of the importance of the appeal rights being waived, it is very important that the court at the Rule 11 proceeding specifically advise the defendant as to any appeal waiver provision which may be contained in the plea agreement. Indeed, while the case law is somewhat mixed, there have been reversals where the court failed to sufficiently advise the defendant on an appeal waiver provision, and where no advice had been given some courts have not enforced the waiver or have remanded for a determination of voluntariness. The following is a brief summary of some of the pertinent case law.

Some courts have upheld waivers solely on the basis of language in the plea agreements: U.S. v. Portillo, 18 F.3d 290 (5th Cir.), cert. denied, 115 S.Ct. 244 (1994); U.S. v. DeSantiago-Martinez, 980 F.2d 582, 583 (9th Cir. 1992), amended 38 F.2d 394 (1994), cert. denied, 115 S.Ct. 939 (1995); U.S. v. Wenger, 58 F.3d 280 (7th Cir.), cert. denied, 116 S.Ct. 349 (1995). On the other hand, other courts have permitted defendants to appeal, thereby rendering the waiver meaningless, where the district court did not question the defendant specifically about the waiver: U.S. v. Wessels, 936 F.2d 165 (4th Cir. 1991); U.S. v. Baty, 980 F.2d 977, 978-980 (5th Cir. 1992); U.S. v. Bushert, 997 F.2d 1343, 1351 (11th Cir. 1993), cert. denied, 115 S.Ct. 652 (1994). See also, U.S. v. Attar, 38 F.3d 727, 732 (4th Cir. 1994), cert. denied, 115 S.Ct. 1957 (1995) (requiring the court to draw defendant's attention to the waiver at the time of the plea); U.S. v. Davis, 954 F.2d 182, 186 n.1 (4th Cir. 1992) (suggesting the court would be "well-advised" to discuss waiver with defendant); and U.S. v. Agee, 83 F.3d 882 (7th Cir. 1996) (specific dialogue with court not necessary, but record must contain evidence demonstrating waiver is knowing and voluntary). Some courts have remanded, where there was no specific advice as to the waiver. U.S. v. Stevens, 66 F.3d 431 (2d Cir. 1995); Agee, supra (waiver was not part of plea agreement).

However, waivers are consistently found to be knowing and valid where the court specifically advised the defendant of the waiver during the Rule 11 hearing. U.S. v .Marin, 961 F.2d 493, 496 (4th Cir. 1992); U.S. v. Melancon, 972 F.2d 566, 567-8 (5th Cir. 1992). "When there is a direct and specific discussion between defense counsel and the trial court regarding the waiver, the court can make the inquiries necessary to be confident that the defendant understood the right he or she was waiving and willingly relinquished it." Agee, supra, 83 F.3d at 886.

The Committee on Criminal Law decided to submit an informational memorandum to courts on appeal waivers, as an immediate way of encouraging specific advice to the defendant of waivers of appeal in plea agreements. The memorandum will not take a position on waivers, per se. However, it will inform the courts that they will no doubt increasingly be seeing appeal waivers in plea agreements, note some of the types of waivers which might be encountered, and, particularly, will advise courts of the need to specifically

advise defendants at the Rule 11 hearing of any appeal waiver provision in the plea agreement.

Proposed Change to Rule 11

Primarily, however, the Committee on Criminal Law decided that a minor change to Rule 11 would be helpful to courts, as a permanent measure, to ensure proper advisement of any waiver of appellate rights in the plea agreement. Rule 11 dictates that before accepting a guilty plea, the trial court must discuss with the defendant a host of issues, including the waiver of certain constitutional rights, and must ensure that the plea is voluntary. The proposed change would simply add a requirement that the court also advise of any waiver of appeal. This addition would serve to focus the parties' and the court's attention on the waiver provision, thereby ensuring that the defendant is properly advised and that his or her consent to the waiver is knowing and voluntary. It would also largely eliminate reversals and minimize further litigation on the waiver.

The Committee on Criminal Law recommends that the Rules Committee propose a change to Rule 11, F.R.Cr.P., which would add a new subsection (6) under Rule 11(c):

> (c) **Advice to Defendant.** Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following: ....
>
> (6) the terms and consequences of any provision waiving the right to appeal or collaterally attack the sentence.

This provision, like the other subsections of the Rule, does not prescribe a particular procedure for giving such advice, but instead allows the court flexibility in the manner it chooses to advise the defendant.[1] This is, for example, the approach the current Rule 11 takes with regard to advice as to "the nature of the charge...[and] effect of any special parole or supervised release term."[2]

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[1] See, United States v. DeFusco, 949 F.2d 114, 116 (4th Cir. 1991), cert denied, 503 U.S. 997 (1992) ("In reviewing the adequacy of compliance with Rule 11, this Court should accord deference to the trial court's decision as to how best to conduct the mandated colloquy with the defendant.")

[2] Rule 11(c)(1). See advisory committee note for 1982 amendments to Rule 11(c)(1): "The amendment does not attempt to enumerate all of the characteristics of the special parole term which the judge ought to bring to the defendant's attention. Some flexibility in this respect must be preserved although it is well to note that the unique characteristics of this kind of parole are such that they may not be readily perceived by laymen."

Therefore, based on the above discussion and that contained in the enclosure, the Committee on Criminal Law of the Judicial Conference hereby requests that the Rules Committee of the Judicial Conference consider and propose a change to Criminal Rule 11.

Sincerely yours,

Maryanne Trump Barry
Chairman, Committee on Criminal Law

encl.
cc: Karen Siegel
John Rabiej

Enclosure

Waivers of Appeal
Agenda Materials (Attachment D)
Committee on Criminal Law
June, 1996

ATTACHMENT D

Waivers of Appeal and Advisement of the Right to Appeal

The Sentencing Reform Act provides for certain grounds for appeal from a sentence, and other grounds are not authorized. For example, appeals of within-range determinations of a sentence or of a court's decision not to depart are not authorized and would be denied, whether or not the defendant waived the right to appeal. However, virtually any other guideline adjustment (or non-adjustment) is appealable as a "misapplication of the guidelines," pursuant to 18 U.S.C. § 3742.

I. Waivers of Appeal

Without doubt, waivers could decrease the number of appeals and simplify resolution of some appeals. In view of the benefits waivers bring to the courts, the government, and to defendants (as a bargaining tool to achieve desired plea benefits), and in light of the large number of guideline sentencing appeals, it is reasonable to take a closer look at waivers of appeal. The practice is currently mixed, but waivers are increasing. Some districts have been using waivers of appeal for some time (e.g., E.D.Va. and S.D.Ca.), others are just beginning to do so, and still others have not begun (e.g., N.D.Ca.) or stopped using them (e.g., E.D.Mi.) because of defender disfavor.

The use of waivers has a direct impact on the number of appeals and the ease with which those appeals can be determined. The utility of extending waivers to collateral appeals is also obvious. If effective, such waivers could have a direct impact on the workload of not only appellate courts, but of district courts as well. Use of waivers of appeal will be increasing, partly because of a recent memorandum from the Department of Justice to all U.S. Attorneys advising on the use of waivers, which encourages, but does not require, that waivers be used. (The memorandum is attached hereto.)

The DOJ memorandum establishes the legality of waivers and urges prosecutors not to abuse or overuse broad waivers, which might allow sentences to be imposed in violation of the guidelines. It notes that courts can refuse to accept agreements which undermine the statutory purposes of sentencing, and suggests that all waivers include a waiver of post-conviction appeal, as well. It advises that U.S. Attorney's offices "should evaluate whether waivers of sentencing appeal rights and post-conviction rights would be a useful addition to plea agreements in their districts and, if so, the extent and scope of such waivers."

Waivers have been consistently upheld as legal, in the face of constitutional and other challenges.[36] Just as defendants can waive constitutional rights, they can clearly waive

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[36] See citations, for example, in the DOJ memorandum, attached, p. 1.

statutory rights - as long as the waiver is knowing and voluntary. There is every reason to believe that the Supreme Court would uphold them as well, especially given the recent case in which the Court upheld a plea agreement that contained a waiver of a right conferred under the Rules of Criminal Procedure.[37] The Court held that, absent an affirmative indication in a statute of Congress' intent to preclude waiver, the statute is presumed waivable by voluntary agreement of the parties.[38]

Waivers of collateral appeals have also been upheld,[39] but one circuit has held that such a waiver must be express, and will not be inferred from a waiver of direct appeal.[40] Such a waiver may have some general deterrence effect. However, it may not actually narrow the available scope of permissible collateral appeals, because sentencing issues are usually not now successful on collateral appeal due to the requirement that the defendant show cause why the issue was not raised on direct appeal. Moreover, it is doubtful that the right to effective assistance of counsel, perhaps the most common basis for collateral appeals, is waived in a waiver of sentencing appeals.

Notwithstanding waivers' legal validity, some critics raise public policy challenges to at least some waivers. Waivers vary tremendously along a continuum from narrow ones (which are less controversial) to very broad ones (which are more controversial).[41]

Narrow Waivers: It is arguably only logical and fair that a defendant would waive appeal if the defendant receives a sentence which was within the range both parties anticipated and agreed to. In fact, an appeal of such a sentence could be denied without an express waiver.[42] More frequently, a sentence is appealed which was not expressly agreed to, but which was foreseeable as a result of the plea agreement. For example, the defendant might have known at the plea that the government would ask the court to impose a certain adjustment, but the defendant agrees to plead anyway, knowing that the court could apply that adjustment. Is such a sentence "consistent" with the plea agreement? If so, the legislative history of § 3742 indicates that Congress intended there to be no appeals from

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[37] See, United States v. Mezzanatto, 115 S.Ct. 797 (1995). The court upheld the defendant's waiver of the right not to have plea-statements made in negotiations or discussions about plea agreements used against him (Rule 11(e)(6), F.R.Cr.P. and Rule 410, F.R.E.).

[38] Id. at 801. The Court also noted that it is in defendants' interest to be able to waive rights in return for sentencing concessions.

[39] See, e.g., United States v. Wilkes, 20 F.3d 651, 653 (5th Cir. 1994) (per curiam).

[40] United States v. Pruitt, 32 F.3d 431, 433 (9th Cir. 1994).

[41] See discussion of varying "scopes" of waivers in the DOJ memorandum, pp. 2-4.

[42] See, Calhoun, infra, n. 49, at p. 207.

such a sentence: "Of course, a sentence consistent with a plea agreement cannot be appealed."[43] An example of a waiver that covers this situation is that which is routinely used in the Southern District of California:

> *In exchange for the Government's concessions in this plea agreement, defendant waives, to the full extent of the law, any right to appeal or to collaterally attack the conviction and sentence, including any restitution order, unless the court imposes a custodial sentence greater than the high end of the offense level recommended by the Government pursuant to this agreement. If the custodial sentence is greater than the high end of that range, the defendant may appeal, but the Government will be free to support on appeal the sentence actually imposed. If defendant believes the Government's recommendation is not in accord with this agreement, defendant will object at the time of sentencing; otherwise the objection will be deemed waived.*

The appellate jurisprudence on federal guideline sentencing indicates that, without such a waiver, defendants routinely appeal nearly every court determination regarding potential adjustments (all non-beneficial guideline adjustments or non-adjustment), even if the plea agreement indicated the government would ask for the adjustment (or non-adjustment).[44]

Even critics of appeal waivers have conceded there are fewer public policy concerns where the defendant received what was a possible result of the plea agreement than there are with broader waivers.[45] Also, there are fewer public policy concerns about waivers under a guidelines system, where the discretion of the court is limited, a bargained plea is frequently made to a sentencing range, and the sentencing components and their potential weight are predictable.[46]

Broad waivers: Waivers that waive all appeal rights - even if the court departs -

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[43] S. Rep. at p. 153.

[44] This issue is revisited in **Attachment D.** in the context of a proposed statutory amendment which would narrow the right to appeal based on the "benefit of the bargain" concept. This same narrowing can be achieved with a waiver, an approach which is available without need of statutory amendment. One view might be to give waivers a chance to reduce appeals before seeking statutory reform, because waivers are voluntary and case-specific.

[45] See, Calhoun, "Waiver of the Right to Appeal," 23 Hastings Const. L.Q. 127, 208 (1996), admits that waivers involving "pleas where the defendant got precisely what he bargained for are the least troubling from a public policy standpoint."

[46] Calhoun, at p. 209.

generate particularly strong criticism on policy and fairness grounds.[47] Critics argue that waivers would deprive the system of appeals to check the application and development of the guidelines, and result from unequal bargaining positions of the parties.

An example of this kind of waiver is used in virtually all cases in the Eastern District of Virginia, where waivers have been used since near the beginning of the guidelines:

> *The defendant is aware that 18 U.S.C. § 3742(a) affords a convicted person the right to appeal the sentence imposed. Knowing this, and realizing the uncertainty in predicting what sentence he ultimately will receive, the defendant, in exchange for the concessions made by the United States in this agreement, waives the right to appeal his sentence or the manner in which it was determined on the grounds set forth in 18 U.S.C. § 3742(a), or on any ground whatever. The defendant also waives his right to challenge his sentence or the manner in which it was determined in any collateral attack, including but not limited to a motion brought under 28 U.S.C. § 2255.*

The first circuit case upholding waivers emanated from the Eastern District of Virginia.[48] Supporters of waivers contend that waivers are no different from any other provision of a plea agreement, for which each party gains something.[49] Also, the system benefits from appeals of evidentiary and trial issues, yet defendants can waive trials. They argue that there would always be enough appeals from trials or defendants who plea "straight up" to charges without a plea agreement, to provide a check of the system. (Moreover, given the huge numbers of sentencing appeals, as discussed in **Attachment B**, we are a long way from having too few appeals.) Finally, certain issues are never waived, such as sentences which are plainly illegal because they exceed the statutory maximum, or sentences based on a factor such as race, gender, or religion.[50]

A. Proposed Rule 11 Advisement on Waivers of Appeal

The courts' primary objective, regardless of the merits of waivers, is to ensure that

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[47] See Calhoun, supra.

[48] United States v. Wiggins, 905 F.2d 51 (4th Cir. 1990). More recently, the Circuit upheld a waiver even where the court imposed an upward departure that the government had not asked for. United States v. Marin, 961 F.2d 493 (4th Cir. 1992). A noteworthy aspect of this case is that it is written by Judge Wilkins, former Chair of the Sentencing Commission, who would be expected to protect the guideline sentencing system.

[49] See,e.g., Haines, "Waiver of the right to Appeal Under the Federal Sentencing Guidelines," 3 Federal Sentencing Reporter 227 (1991).

[50] See Calhoun, and citations therein, at p. 208.

the defendant is properly advised on any waiver that is part of the agreement. The DOJ memo advises prosecutors to be sure the record reflects that the defendant knowingly and voluntarily waived the right to appeal the sentence, and the memo recommends specific wording for the plea agreement in this regard. However, it notes that some courts have held it is not necessarily enough to rely on the written plea agreement, and some sentences have been reversed where the sentencing court failed to explicitly advise the defendant of the existence of an appeal waiver in the plea agreement.[51]

Clearly the best practice regarding appeal waivers would be for the court receiving a plea to specifically and orally advise the defendant of any waiver in the plea agreement during the plea colloquy. Such an advisement ensures mutual understanding between the parties of the scope of the waiver, and determines if the defendant knowingly and voluntarily consents to the waiver. This practice simultaneously protects the interests of both parties, provides adequate advisement to the defendant, and generates a thorough and complete record, which will withstand subsequent challenges. Misunderstandings and resulting appeals (or even reversals) result when the record is ambiguous or vague.

A change to Rule 11, Federal Rules of Criminal Procedure (F.R.Cr.P.), is needed in order to ensure careful advisement of waivers in all cases. Such a change would alert the court and the parties to the importance of the issue. It is therefore proposed that the Committee recommend that the Rules Committee propose a change to Rule 11, F.R.Cr.P., which would add a new subsection (6) under Rule 11(c):

> (c) **Advice to Defendant.** Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:
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> ....
>
> (6) the terms and consequences of any provision waiving the right to appeal or collaterally attack the sentence.

This provision, like the other subsections of the Rule, does not prescribe a particular procedure for giving such advice, but instead allows the court flexibility in the manner it chooses to advise the defendant.[52] This is, for example, the approach the current Rule 11

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[51] See, e.g., United States v. Attar, 38 F.3d 727, 732 (4th Cir. 1994), cert. denied, 115 S.Ct. 1957 (1995); United States v. Bushert, 997 F.2d 1343 (11th Cir. 1993), cert. denied, 115 S.Ct. 652 (1994); and discussion at p. 5 of DOJ memorandum.

[52] See, United States v. DeFusco, 949 F.2d 114, 116 (4th Cir. 1991), cert denied, 503 U.S. 997 (1992) ("In reviewing the adequacy of compliance with Rule 11, this Court should accord deference to the trial court's decision as to how best to conduct the mandated colloquy with the defendant.")

takes with regard to advisement on "the nature of the charge...[and] effect of any special parole or supervised release term."[53]

Another way to amend Rule 11(c) which has been suggested would be to require only that the court inquire whether the defendant has discussed any waiver provision with his attorney and understands its consequences.[54] Such an approach, while perhaps allowing more of a perfunctory inquiry, puts the responsibility of satisfactorily explaining a waiver on the attorney, thereby inviting ineffective assistance motions at a later time.

Directing the court to advise on the effect of a waiver of the right to appeal is logical and consistent with the other directions given the court in current Rule 11(c). Given the importance and prevalence of sentencing appeals, a waiver of such a right, where present, deserves the same kind of advisement that other rights waived by all pleas are accorded. This is particularly true in view of the varying kinds of waivers, as discussed above, about which there could reasonably fail to be a mutual understanding between the parties. The proposed Rule 11 change would alert courts and counsel alike to the importance of the issue, it would help to ensure that a complete record is made of the understanding of the parties of the kind of waiver involved and of the defendant's knowing consent to that waiver.

B. Suggested Limitations on Waivers

Lucien Campbell, the representative to the Committee on Criminal Law for the Federal Public Defenders, was invited to supply a position paper on the issue of waivers of appeal for inclusion in this memorandum. His letter is attached as an exhibit. Recognizing that waivers are controversial, and that practice varies greatly, Mr. Campbell proposes that steps be taken to establish a national policy governing sentencing-appeal waivers, which would, in effect, encourage a middle-ground practice regarding waivers. To this end he suggests three limitations on the use of appeal waivers. They are:

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[53] Rule 11(c)(1). See advisory committee note for 1982 amendments to Rule 11(c)(1): "The amendment does not attempt to enumerate all of the characteristics of the special parole term which the judge ought to bring to the defendant's attention. Some flexibility in this respect must be preserved although it is well to note that the unique characteristics of this kind of parole are such that they may not be readily perceived by laymen."

[54] Such an amendment to Rule 11(c) was proposed in a memorandum by Sixth Circuit counsel to Chief Judge Merritt in September, 1995: "(6) if a written plea agreement includes a provision whereby the defendant waives the right to directly appeal and/or collaterally attack his sentence, that the defendant has discussed this provision with his attorney and understands its consequences." This is similar to the Rule 32 provision where the court must inquire whether the defendant and counsel have read and discussed the presentence report.

1. *Include in all waivers a provision making clear that the defendant does not waive his right to raise issues of prosecutorial misconduct or ineffective assistance of counsel;*

2. *Make waivers inapplicable when the district court refuses to adopt the stipulations of the parties regarding the offense level, applicable adjustments, or criminal history category; and*

3. *Make waivers inapplicable to departures unless the parties have agreed [to the departure].*

If the Committee decides that encouragement of such limitations as these would be helpful in establishing a middle-ground practice in the use of waivers, to avoid unnecessary litigation and controversy, to contribute to sentencing fairness, and to avoid disparities in practice, there are at least three options available for the Committee to pursue. The Committee could issue an informational memorandum to the courts suggesting that they consider seeking such limitations within their districts. Also, the Committee could ask the Sentencing Commission to either publish the issue for comment, or simply ask the Commission to adopt such commentary. Finally, the Committee could ask that the Judicial Conference request that the Attorney General include these limitations in the waivers used by prosecutors.

These suggestions are not proposed in lieu of the proposed Rule 11 change, but only as a possible corollary to the rule change. That is, it is important that there be a reasonable practice in the use of waivers, and at the same time it is important that defendants be properly advised on any waivers that are used. These suggested limitations merely provide an additional means to encourage a consensus on the reasonable use of waivers.

II. Advisement of the Right to Appeal

A. Rule 32 Advisement of Right to Appeal

The proposed change to Rule 11 would also be consistent with the recently amended Rule 32, F.R.Cr.P., which appears to contemplate the fact that some appeal rights might be waived at a plea. Rule 32(c)(5) reads:

> (5) **Notification of Right to Appeal.** After imposing sentence in a case which has gone to trial on a plea of not guilty, the court must advise the defendant of the right to appeal. After imposing sentence in any case, the court must advise the defendant of any right to appeal the sentence, and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. If the defendant so requests, the clerk of the court must immediately prepare and file a notice of

appeal on behalf of the defendant. (emphasis added)

B. Problems with Advisement of the Right to Appeal

It is common for courts to advise all defendants simply that he or she has a right to appeal the sentence. It is possible that this kind of routine, broad advisement may mislead some defendants into thinking there is more of a right to appeal than there may be in some cases, and may unnecessarily encourage frivolous appeals, even when there is substantially nothing to appeal (for example, when a defendant pleads to and receives a mandatory minimum sentence). In fact, one circuit has held that such an advisement can render unenforceable any waiver of appeal provision in the plea agreement (where the court did not specifically advise on the waiver).[55]

The proposed Rule 11 change, above, would help to alleviate the problems with advisement at sentencing of the right to appeal in two ways. First, it would probably save the waiver provision even if the court were to erroneously state at sentencing that the defendant had a right to appeal, because the record would be clear that the defendant definitely understood the waiver. Second, a clear record on any waiver assists the court in determining what, if any, appeal rights survive the plea on which the defendant would need to be advised at sentencing.

However, it is unrealistic and invites error for a court to have to determine in each case on which appeal rights the defendant should be advised. Therefore, while a waiver advisement at the plea helps the process, an overly broad advisement of the right to appeal at sentencing does not help, and may confuse the process.

C. Suggested Advisement and Commentary

A balanced approach, which seems to address all concerns, is to recommend that courts employ a more cautionary, informative advisement of the right to appeal at sentencing. Such an advisement creates a better record, better informs the defendant, does not mislead the defendant regarding his or her appeal rights, and does not risk making a waiver of appeal unenforceable.

Attached as an exhibit is a one-page Proposed Model Advice of Appellate Right, supplied by Lucien Campbell, which was drafted for the Fifth Circuit Court of Appeals' consideration. It was not formally adopted but has been used by some courts in that circuit. The advice is accompanied by some commentary on the right to appeal. Rather than a generic recital of the right to appeal a sentence, the suggested advisement makes a qualified

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[55] United States v. Buchanan, 59 F.3d 914 (9th Cir. 1995).

statement, indicating there "may" be a right to appeal, it suggests how the defendant might proceed to determine whether to appeal, and it describes the time frame:

> *Under the Sentencing Reform Act, a criminal defendant has a right to appeal a sentence in certain circumstances. [A defendant may, however, waive that right as part of a plea agreement.]* You should discuss carefully with your attorney whether you may be entitled to appeal your sentence. With few exceptions, any notice of appeal must be filed within 10 days after judgment in your case is entered. If you are entitled to appeal, your attorney will advise you of the deadline for filing notice of appeal in your case. If you so request, the clerk will prepare and file a notice of appeal on your behalf. [* May optionally be omitted when no basis for waiver exists.]*

This advisement (and its accompanying commentary) are similar to some of the commentary in the advisory notes to Rule 11(c)(1), 1982 amendment. Whereas the Rule simply says the court should advise the defendant of the effect of any special parole or supervised release term, the commentary suggests points which courts should consider advising defendants about special parole.

If the Committee believes that such an advisement would facilitate the sentencing process, it could, a) suggest that courts consider using the advisement in an informational memorandum to courts; b) propose that the advisement be included in the Bench Book Committee; and/or c) recommend that the Rules Committee propose the advisement and commentary be added to Rule 32 (in addition to the change to Rule 11, discussed above).

III. Summary of Proposals Regarding Waivers:

1. Recommend that the Rules Committee propose that Rule 11 F.R.Cr.P. be amended to require advisement of any provision waiving the right to appeal in a plea agreement.

2. Encourage middle-ground practice of waivers by encouraging certain limitations to them in an informational memo, proposing them for Commission commentary, and/or asking the Judicial Conference to propose them to the Attorney General.

3. Encourage a model advisement on the right to appeal in an informational memo, propose that the Bench Book Committee include the advisement in the Bench Book, and/or recommend that the Rules Committee propose the advisement and commentary be added to the commentary to Rule 32.

COMMITTEE ON CRIMINAL LAW
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July 30, 1996

MEMORANDUM TO ALL: UNITED STATES DISTRICT COURT JUDGES
CHIEF UNITED STATES PROBATION OFFICERS

FROM: Judge Maryanne Trump Barry, Chair, Committee on Criminal Law

SUBJECTS: Recommendation for Specific Advice to a Defendant Concerning Waivers of Appeal and Waivers of Collateral Review, Suggested Advice to a Defendant Concerning the Right to Appeal, and Notification of Increased Flexibility in the Imposition of Supervised Release

I write on behalf of the Committee on Criminal Law of the Judicial Conference of the United States to provide information which will help to ensure that a defendant receive certain necessary advice at a guilty plea and more qualified advice than is now being given concerning his or her right to appeal at sentencing. Additionally, I write to advise you of certain changes in the supervised release guidelines which provide additional flexibility in determining whether supervised release is appropriate.

I. Waivers of Appeal and Waivers of Collateral Review

The Sentencing Reform Act created a statutory right to appeal a sentence on certain specifically articulated grounds, namely, if the sentence was illegally imposed, imposed as a result of a "misapplication of the guidelines," imposed outside the guideline range, or imposed for an offense for which there is no guideline and the sentence was unreasonable. 18 U.S.C. § 3742. Appeals based on grounds not specifically set forth are without authorization and can be dismissed summarily. However, the proliferating and unrelenting numbers of guideline sentencing appeals demonstrates that "misapplication of the guidelines" is a broad enough basis to support,

jurisdictionally, an appeal of virtually every decision made by the sentencing court in computing the sentence.[1]

The sheer number of direct guideline appeals in appellate courts, as well as petitions for collateral review in district courts and the concomitant appeals, is leading to an increased use of provisions in plea agreements which purport to waive certain or all rights to challenge the sentence. The practice is currently mixed, with the government using various forms of waiver provisions in varying degrees across districts.

A. DOJ Memorandum

The use of waiver provisions will no doubt be increasing in the near future, partly due to the fact that all circuits have upheld the practice against legal challenge, and partly due to the fact that the Department of Justice sent an informational memorandum to its prosecutors in September, 1995 cautiously endorsing the use of waivers. The DOJ memorandum explained that waivers are legal, but urged prosecutors not to abuse or overuse broad waivers which might allow sentences to be imposed in violation of the guidelines. It noted that courts can refuse to accept agreements which undermine the statutory purposes of sentencing and suggested that all waivers include not only a waiver of direct appeal but a waiver of collateral review as well. U.S. Attorneys were advised to "evaluate whether waivers of sentencing appeal rights and post-conviction rights would be a useful addition to plea agreements in their districts and, if so, the extent and scope of such waivers." The memo discussed the fact that waivers vary significantly in their scope and urged prosecutors to ensure that the plea agreement and sentencing record reflect a knowing and voluntary consent on the part of the defendant to the waiver provision.

B. Legality of Waivers

Waivers have been consistently upheld as legal in the face of constitutional and other challenges. Just as constitutional rights can be waived, so can statutory rights - as long as the waiver is knowing and voluntary. There is every reason to believe that the Supreme Court would uphold waivers of direct appeal, given the case law upholding plea bargaining. Indeed, the Supreme Court recently held that, absent an affirmative indication in a statute of Congress' intent to preclude waiver, the statute is presumed waivable by voluntary agreement of the parties.[2]

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[1] The Administrative Office of the U.S. Courts data indicates that, between 1987 and 1994, the numbers of criminal appeals filed doubled (from 5,260 to 10,674), whereas overall appeals increased by only approximately 30%. Judicial Business of the U.S. Courts, Report of the Director (hereinafter Director's Report) for 1987 and 1994. There were even more appeals terminated in FY 1994 than were filed (11,704). Id. The AO data also shows that motions to vacate a sentence by federal prisoners have increased at an even greater rate, totaling 5,988 in district courts and 2,215 in appellate courts in FY 1995. Director's Report for 1995.

[2] See, United States v. Mezzanatto, 115 S.Ct. 797, 801 (1995). The court upheld the defendant's waiver of the right not to have plea-statements made in negotiations or discussions about plea agreements used against him (Rule 11(e)(6), F.R.Cr.P. and Rule 410, F.R.E.). The Court also noted that it is in defendants' interest to be able to waive rights in return for sentencing concessions.

Waivers of collateral review have also been upheld,[3] but one circuit has held that such a waiver must be express, and will not be inferred from a waiver of direct appeal.[4] Finally, certain issues are never waived, such as sentences which are plainly illegal because they exceed the statutory maximum, or sentences based on a factor such as race, gender, or religion.[5]

C. Widely Varying Kinds of Waivers

Narrow Waivers

Waivers vary tremendously along a continuum from the narrow to the very broad,[6] and confusion can result where there is no common understanding of what is being waived. In the narrowest of waivers, a defendant might waive appeal if he or she receives a sentence which was within the range which both parties agree is appropriate. For example, if both parties agree that a gun enhancement is appropriate, and the court imposes the enhancement, under a narrow waiver the defendant would not then be able to appeal that enhancement.[7]

More commonly, however, a sentence which was not expressly agreed to is appealed even though that sentence was nonetheless foreseeable as a result of the plea agreement. For example, the defendant might have known at the plea that the government would ask for a gun enhancement, but the defendant appeals when he or she receives the enhancement. This is the source of many appeals.[8] The following is a common form of waiver which addresses this situation and which is used regularly in some districts. It waives the direct appeal and collateral attack of sentences within the range that the plea agreement allows the government to recommend at sentencing:

> *In exchange for the Government's concessions in this plea agreement, defendant waives, to the full extent of the law, any right to appeal or to collaterally attack the conviction and sentence, including any restitution order, unless the court imposes a custodial sentence greater than the high end of the offense level recommended by the Government pursuant to this agreement. If the custodial sentence is greater than the high end of that range, the defendant may appeal, but the Government will be free to support on appeal the sentence actually imposed. If defendant believes the Government's recommendation is not in accord with this agreement, defendant will object at the time of sentencing; otherwise the objection will be deemed waived.*

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[3] See, e.g., United States v. Wilkes, 20 F.3d 651, 653 (5th Cir. 1994) (per curiam).

[4] United States v. Pruitt, 32 F.3d 431, 433 (9th Cir. 1994).

[5] See Calhoun, infra, and citations therein, at p. 208.

[6] See discussion of varying "scopes" of waivers in the DOJ memorandum, pp. 2-4.

[7] An appeal of such a sentence can, in theory, be denied without an express waiver. See, Calhoun, supra, n. 49, at p. 207.

[8] This type of appeal may or may not have been anticipated by Congress, given the fact that the legislative history of 18 U.S.C. § 3742 indicates, "Of course, a sentence consistent with a plea agreement cannot be appealed." S. Rep. No. 225, 98th Cong. 1st Sess. p. 153 (1983).

Broad Waivers

Some districts regularly use waiver provisions that waive all direct appeal and collateral attack rights - even if the court upward departs. The following is an example of this kind of waiver:

> *The defendant is aware that 18 U.S.C. § 3742(a) affords a convicted person the right to appeal the sentence imposed. Knowing this, and realizing the uncertainty in predicting what sentence he ultimately will receive, the defendant, in exchange for the concessions made by the United States in this agreement, waives the right to appeal his sentence or the manner in which it was determined on the grounds set forth in 18 U.S.C. § 3742(a), or on any ground whatever. The defendant also waives his right to challenge his sentence or the manner in which it was determined in any collateral attack, including but not limited to a motion brought under 28 U.S.C. § 2255.*

D. Recommendation of Specific Advice as to Waivers of Appeal and Waivers of Collateral Review

The courts' primary objective, regardless of the merits of waivers, is to ensure that the defendant is properly advised as to any waiver that is part of a plea agreement. The DOJ memo instructs prosecutors to be certain that the record reflects that the defendant knowingly and voluntarily waived the right to appeal the sentence, and the memo recommends specific wording in the plea agreement in this regard. While some circuit courts find this adequate,[9] other courts have expressed a preference for specific, oral advice in addition to the plea agreement,[10] and where there is specific advice given, the waiver will be upheld.[11] At least one circuit court has remanded for a determination as to whether a waiver was voluntary and knowing where the sentencing court failed to explicitly advise the defendant of the existence of the waiver in a stipulation concerning sentencing issues entered into following trial.[12]

Clearly, the best practice regarding waivers would be for the court taking a plea to specifically and orally advise the defendant during the plea colloquy of any waiver in the plea agreement. Specific advice would alert courts as well as counsel to the importance of the issue and help ensure that a complete record is made regarding the waiver. It ensures mutual understanding between the parties of the scope of the waiver, and ensures that the waiver is knowing and voluntary.

The Committee on Criminal Law has asked the Rules Committee to consider the feasibility of a change to Rule 11, Federal Rules of Criminal Procedure (F.R.Cr.P.), in order to ensure

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[9] See, e.g., United States v. Attar, 38 F.3d 727, 732 (4th Cir. 1994), cert. denied, 115 S.Ct. 1957 (1995); United States v. Bushert, 997 F.2d 1343 (11th Cir. 1993), cert. denied, 115 S.Ct. 652 (1994); and discussion at p. 5 of DOJ memorandum.

[10] See, e.g., United States v. Marin, 961 F.2d 493 (4th Cir. 1992).

[11] See, e.g., United States v. Melancon, 972 F.2d 566 (5th Cir. 1992).

[12] United States v. Stevens, 66 F.3d 431 (2d Cir. 1995).

careful advice of waivers in all cases. In the meantime, however, courts are encouraged to provide specific advice to defendants of any waiver provisions in plea agreements.

II. Advice Concerning the Right to Appeal

While it is true that specific advice at the time of plea as to waivers of appeal and collateral review is necessary, it is also true that overly inclusive advice at sentencing concerning the right to appeal can be problematic.

A. Rule 32 Advice Requirement

The recently amended Rule 32(c)(5), F.R.Cr.P. reads:

> (5) **Notification of Right to Appeal.** After imposing sentence in a case which has gone to **trial** on a plea of not guilty, the court must advise the defendant of **the** right to appeal. After imposing sentence in **any case**, the court must advise the defendant of **any** right to appeal the sentence, and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. If the defendant so requests, the clerk of the court must immediately prepare and file a notice of appeal on behalf of the defendant. (emphasis added).

In practice, it is common for sentencing courts to advise a defendant simply that he or she has "a right to appeal the sentence." It is probable that this kind of generic advice will be overly broad in many cases and may mislead or falsely encourage some or more defendants regarding their appeal rights. This is particularly true where there is a waiver of appeal.[13]

Therefore, the requirement to advise the defendant of "any" right to appeal at sentencing presents a dilemma for the court. To carefully analyze and explain exactly what appeal rights exist in each case would be tedious and fraught with potential error. On the other hand, to recite a generic, declarative statement which seems to indicate an absolute right to appeal any sentence might mislead or misinform the defendant and encourage frivolous appeals.

B. Suggested Language to Advise a Defendant of the Right to Appeal

Courts are encouraged to consider giving more qualified, yet informative, advice at sentencing of the right to appeal whether or not there has been a waiver of appeal provision in the plea agreement. Such advice would better inform the defendant, would not overstate any appellate rights that the defendant may have, and will help to minimize frivolous appeals.

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[13] In United States v. Buchanan, 59 F.3d 914 (9th Cir. 1995), the fact that the court did not specifically advise the defendant at the plea of the waiver provision in the plea agreement was a factor in the appellate court's holding that that provision was unenforceable, given the subsequent general advice of the right to appeal at sentencing.
Cf., Melancon, supra, where an appeal waiver, upon which the defendant was specifically advised, was upheld despite the defendant's claim of confusion created by the court's general advice of the right to appeal at sentencing. 972 F.2d at 568.

An example of such advice is set out below. It offers some information about appeal rights, couched in qualified terms, yet is general enough to be used for most cases. The option in brackets is for use where there is a waiver provision in the plea agreement.

> *You can appeal your conviction if you believe that your guilty plea was somehow unlawful or involuntary, or if there is some other fundamental defect in the proceedings that was not waived by your guilty plea. You also have a statutory right to appeal your sentence under certain circumstances, particularly if you think the sentence is contrary to law. [However, a defendant may waive those rights as part of a plea agreement, and you have entered into a plea agreement which waives some or all of your rights to appeal the sentence itself. Such waivers are generally enforceable, but if you believe the waiver is unenforceable, you can present that theory to the appellate court.]* With few exceptions, any notice of appeal must be filed within 10 days of judgment being entered in your case.*
>
> **To be omitted if there is no waiver of appeal in the plea agreement.*

Any such advice should also contain the substance of the following, as required by Rule 32(c):

> *If you are unable to pay the cost of an appeal, you may apply for leave to appeal in forma pauperis. If you so request, the clerk of the court will prepare and file a notice of appeal on your behalf.*

The Committee on Criminal Law recommends that sentencing courts consider giving qualified yet informative advice concerning the right to appeal, such as that set out above, in order to more fully and accurately advise a defendant of any right he or she may have without overstating that right or creating confusion in the record - particularly where there has been a waiver of appeal provision in the plea agreement.

III. Increased Flexibility in the Imposition of Supervised Release

Effective November 1, 1995, partly as a result of proposals by our Committee for greater flexibility in imposing supervised release, the United States Sentencing Commission provided a slightly greater measure of discretion in the imposition of supervised release and whether it need be imposed at all by amending §5D1.2 and the application notes to §5D1.1. The purpose of the amendments was to explain with "greater specificity the circumstances under which the court may depart from the requirements of §5D1.1 (Imposition of a Term of Supervised Release) and impose no term of supervised release." See amendment 529, 1995 Guidelines Manual, Appendix C.

The changes to the supervised release guidelines are subtle and some courts may not have noticed them. I write to call those changes to the courts' attention. The additional flexibility in determining whether supervised release is appropriate for any particular case enables courts to better focus institutional resources on those defendants most in need of supervision, particularly important in this era of strained resources (e.g., probation needs are currently funded only at 84% of what is required).

A. Background

Some background explanation of what prompted the Committee's concerns may be helpful. The court system and, most particularly, the probation system are heavily burdened by the rapidly growing numbers of supervised release cases. For example, in 1989 there were 1,673 offenders on supervised release and 53,589 on probation, with a total of 77, 284 on supervision (including parole, mandatory release, and military parole). In 1996 there were approximately 49,100 offenders on supervised release and 34,800 on probation, with a total of 92,100 on supervision.[14]

At the same time as the numbers of offenders on supervised release are escalating, however, budgets are shrinking and resources are being stretched thin. It is clear that not all defendants need supervision, and that among those that do, not all need the same term of supervision. While some period of supervision may be helpful for most defendants, extensive periods of supervised release for all defendants are not needed to meet the goals of the criminal justice system. Indeed, there is evidence that shorter periods of supervised release serve the purpose of rehabilitation and permit a determination to be made as to whether the offender is likely to recidivate or not. A 1994 study by the Bureau of Prisons indicates that most offenders who are going to recidivate do so within the first year after release.

The Sentencing Reform Act allows for court discretion in imposing supervised release.[15] The Commission was authorized to create guidelines to assist courts in determining whether to impose a term of supervised release after imprisonment or not, and if so, for how long.[16] The pertinent resulting guidelines indicated that a term of supervised release should follow imprisonment for any sentence of more than one year (§5D1.1), and that a minimum term of three years should be imposed when supervised release was required by statute (§5D1.2). Appellate courts have found these provisions to be consistent with the statutory discretion of the courts because the courts could depart from the terms of supervised release set out in the guidelines.[17] Nonetheless, the guidelines recognized but discouraged departures from these terms of release, stating that departures should be the exception.[18] Many courts may have been reluctant to depart, given the "exception" admonition and given the lack of guidance as to what would constitute "aggravating or mitigating" circumstances "of a kind, or to a degree, not adequately taken into

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[14] The numbers of offenders on supervised release are rising far faster than the numbers of those on probation and parole are falling. The consecutive years between 1989 and 1996 show the following figures for supervised release: 6,138 (in 1990), 11,949 (in 1991), 19,362 (in 1992), 26,384 (in 1993), 33,900 (in 1994), and 42,600 (in 1995).

[15] Title 18 U.S.C. § 3583(a) reads: "The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, [but shall do so if a statute requires it]." (emphasis added).

[16] Title 28 U.S.C. § 994(a)(1)(C).

[17] See, e.g., U.S. v. Chinske, 978 F.2d 557, 558-9 (9th Cir. 1992); U.S. v. West, 989 F.2d 1493, 1503 (11th Cir. 1990).

[18] Note 1 to §5D1.1.

consideration by the Sentencing Commission" that would justify departure (pursuant to §5K2.0) from the guideline-determined terms of release.

B. 1995 Amendments

While the Commission did not adopt the Committee's specific proposed amendments, it did agree to move in the direction of allowing somewhat more discretion to sentencing courts in deciding whether to depart from imposing the terms of release required by the guidelines. Effective November 1, 1995, it amended the notes to §5D1.1 by removing the "exception" admonition, and by more fully articulating the factors upon which a departure should be based. Note 1 to §5D1.1 now reads:

> *Under subsection (a), the court is required to impose a term of supervised release to follow imprisonment if a sentence of imprisonment of more than one year is imposed or if a term of supervised release is required by a specific statute. The court may depart from this guideline and not impose a term of supervised release if it determines that supervised release is neither required by statute nor required for any of the following reasons: (1) to protect the public welfare; (2) to enforce a financial condition; (3) to provide drug or alcohol treatment or testing; (4) to assist the reintegration of the defendant into the community; or (5) to accomplish any other sentencing purpose authorized by statute.*

In addition, the Commission amended §5D1.2 by omitting the provision requiring that when the defendant is convicted under a statute that requires a term of supervised release, the term shall be at least three years. The remainder of §5D1.2, indicating certain terms of release to be imposed according to the class of the offense, remains the same.

Therefore, a court must still depart if it decides not to impose the guideline-determined terms of supervised release, but there is much more guidance provided to the court in making that decision. The Committee believes that these changes will assist courts in more accurately determining whether a term of supervised release should be imposed or not, where not otherwise determined by statute, and should result in a more efficient and rational allocation of judicial resources while serving the purposes for which Congress intended supervised release.

In addition, in order to further focus resources to the maximum extent on those offenders most in need of supervision, the Committee encourages courts and probation officers to bear in mind the statutory provision which allows termination of a term of supervised release anytime after one year if the court " ... is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice." 18 U.S.C. § 3583(e)(1). In determining whether early termination of a defendant's term of supervised release is "warranted," it would seem relevant and helpful for a court to consider, in addition to the conduct of the defendant and the interest of justice, the factors listed in the new Note 1 to §5D1.1, which are relevant to the consideration of whether a term of supervised release should be imposed in the first place.

IV. Conclusion

The Committee hopes that sentencing courts will find the above suggestions useful in advising defendants of waiver provisions in the plea agreement, and in advising defendants of the right to appeal at sentencing. In addition, it hopes that the amended guidelines regarding

supervised release will be helpful to courts and probation officers alike in determining whether supervised release should be imposed and for how long, and, in appropriate cases, whether the term should be terminated after one year.

Agenda Item II C-2

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Rule 24(c); Possible Amendment to Permit Retention of Alternate During Jury Deliberations**

DATE: **September 5, 1996**

Judge Jensen has forwarded a letter he received from Judge Selya of the Court of Appeals for the First Circuit in which the judge suggests that it might be appropriate to consider an amendment to Rule 24(c). That rule now provides that alternate jurors (who do not replace other jurors) are to be discharged after the jury retires to deliberate.

A panel of the First Circuit decision in *United States v. Houlihan*, et al (not yet reported) concluded that the trial court committed harmless error in not discharging the alternate jurors after deliberations began. Judge Selya suggests that perhaps some change in Rule 24 would be appropriate which permits alternate jurors to be retained during deliberations.

A copy of the pertinent pages from the *Houlihan* case are also attached. This matter is on the agenda for the Committee's October meeting.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT
311 FEDERAL COURTHOUSE
ONE EXCHANGE TERRACE
PROVIDENCE, RHODE ISLAND 02903-1755

BRUCE M. SELYA
CIRCUIT JUDGE

August 23, 1996

Hon. D. Lowell Jensen
Federal Bldg. and U.S. Cthse
Suite 400 South
1301 Clay Street
Oakland, CA 94612-5212

Re: United States v. Houlihan, et al.
Nos. 95-1614, 1615, 1675

Dear Lowell:

I am rewriting to you in your capacity as chair of the Judicial Conference's Advisory Committee on Criminal Rules, and sending a copy of my letter to Maryanne Barry (who, as you know, chairs the Committee on Criminal Law). My letter is on behalf of myself and Judges Campbell and Boudin. The three of us comprised the panel in the above-entitled matter, and it is an issue in that matter (see enclosed opinion, Part III) which prompts us to write.

As you will note, the opinion discusses at pages 23-32 the mandatory language in Fed. R. Crim. P. 24(c) to the effect that: "An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict." In the opinion, we pointedly questioned the wisdom of this provision (see footnote 11), and wish to call it to your committee's attention. It strikes the three of us that, in an era marked by longer, more complicated trials and ever-lengthening periods of deliberation (lasting sometimes for weeks), it might be well to redraft the rule to permit retention of alternate jurors during deliberations while at the same time requiring that the retained alternates be strictly segregated from the deliberating jurors.

Let me take the liberty of thanking you in advance for looking at this small but potentially important issue. If I can provide any further information or can assist your committee in any way, please don't hesitate to call upon me.

As always, my best regards.

Cordially,

Bruce M. Selya
United States Circuit Judge

BMS/ca

cc: Hon. Maryanne Trump Barry
Hon. Levin H. Campbell (fax)
Hon. Michael Boudin (fax)

emotions in one case may be routine evidence in another case. The material distilled from Sargent's statements – which would have stood out like a sore thumb in a prosecution rooted in the relative gentility of white-collar crime – does not seem especially sensational when evaluated in light of the other, plainly admissible evidence that permeated this seventy-day saga of nonstop violence. Moreover, the district court instructed the jurors on the spot that they were not to consider Sargent's statements in deciding Fitzgerald's fate. To complement that directive, the court redacted all references to Fitzgerald from the portions of those statements that the jury heard, and it repeated its prophylactic instruction on several occasions. Under these circumstances, the presumption that jurors follow the court's instructions is intact. Ergo, Fitzgerald suffered no unfair prejudice.

III. ALTERNATE JURORS

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

The imperative of Rule 24(c) is clear and categorical: "An alternate juror who does not replace a regular juror shall be

discharged after the jury retires to consider its verdict." Fed. R. Crim. P. 24(c). The rule reflects the abiding concern that, once a criminal case has been submitted, the jury's deliberations shall remain private and inviolate.[11] See United States v. Virginia Erection Corp., 335 F.2d 868, 872 (4th Cir. 1964).

Here, the appellants' claim of error is well founded. Rule 24(c) brooks no exceptions, and the district court transgressed its letter by retaining the alternate jurors throughout the deliberative period. The lingering question, however, is whether the infraction requires us to invalidate the convictions. The appellants say that it does. In their view, a violation of Rule 24(c) automatically necessitates a new trial where, as here, the defendants preserved their claim of error, or, at least, the continued contact between regular and alternate jurors that transpired in this case demands that result. The government endeavors to parry this thrust by classifying the error as benign. We find that the Rule 24(c) violation caused no cognizable harm, and we deny relief on that basis.

The watershed case in this recondite corner of the law is United States v. Olano, 507 U.S. 725 (1993). There the trial court permitted alternate jurors, while under instructions to refrain from engaging personally in the deliberative process, to remain in

[11]Notwithstanding that Criminal Rule 23(b) permits the remaining eleven jurors to return a valid verdict if a deliberating juror is excused for cause, the wisdom of Rule 24(c) remains debatable. We can understand a district judge's reluctance, following a long, complicated, and hotly contested trial, to release alternate jurors before a verdict is obtained. But courts, above all other institutions, must obey the rules.

the jury room and audit the regular jurors' deliberations. See id. at 727-29. The jury found the defendants guilty. The court of appeals, terming the presence of alternate jurors in the jury room during deliberations "inherently prejudicial," granted them new trials although they had not lodged contemporaneous objections. United States v. Olano, 934 F.2d 1425, 1428 (9th Cir. 1991). The Supreme Court demurred. It noted that unless an unpreserved error affects defendants' "substantial rights," Fed. R. Crim. P. 52(b), the error cannot serve as a fulcrum for overturning their convictions. 507 U.S. at 737. The Court then declared that the mere "presence of alternate jurors during jury deliberations is not the kind of error that 'affect[s] substantial rights' independent of its prejudicial impact." Id. Instead, the critical inquiry is whether the presence of the alternates in the jury room during deliberations actually prejudiced the defendants. See id. at 739.

The Justices conceded that, as a theoretical matter, the presence of any outsider, including an alternate juror, may cause prejudice if he or she actually participates in the deliberations either "verbally" or through "body language," or if his or her attendance were somehow to chill the jurors' deliberations. Id. The Court recognized, however, that a judge's cautionary instructions to alternates (e.g., to refrain from injecting themselves into the deliberations) can operate to lessen or eliminate these risks. See id. at 740 (remarking "the almost invariable assumption of the law that jurors follow their instructions") (quoting Richardson v. Marsh, 481 U.S. 200, 206

(1987)). Thus, absent a "specific showing" that the alternates in fact participated in, or otherwise chilled, deliberations, the trial court's instructions to the alternates not to intervene in the jury's deliberations precluded a finding of plain error. Id. at 741.

This case presents a variation on the Olano theme. Here, unlike in Olano, the appellants contemporaneously objected to the district court's retention of the alternate jurors, thus relegating plain error analysis to the scrap heap. This circumstance denotes two things. First, here, unlike in Olano, the government, not the defendants, bears the devoir of persuasion with regard to the existence vel non of prejudice. Second, we must today answer the precise question that the Olano Court reserved for later decision. See id. Withal, the framework of the inquiry in all other respects remains the same. See id. at 734 (noting that, apart from the allocation of the burden of proof, a claim of error under Fed. R. Crim. P. 52(b) ordinarily requires the same type of prejudice-determining inquiry as does a preserved error). We do not discount the significance of this solitary difference, see, e.g., id. at 742 (Kennedy, J., concurring) (commenting that it is "most difficult for the Government to show the absence of prejudice"), but "difficult" does not mean "impossible." Since Olano teaches that a violation of Rule 24(c) is not reversible error per se,[12] see id. at 737, we must undertake a particularized inquiry directed at

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

whether the instant violation, in the circumstances of this case, "prejudiced [the defendants], either specifically or presumptively." Id. at 739.

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

The operative facts are as follows. Although the district court retained the alternates, subsequent physical contact between them and the regular jurors occurred only sporadically — confined mostly to the beginning of each day (when all the jurors assembled prior to the commencement of daily deliberations) and

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

lunch time (when court security officers were invariably present).[14] Judge Young at no time allowed the alternates to come within earshot of the deliberating jurors.

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

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[14]On one occasion when the regular jurors were on a mid-morning break, an alternate juror retrieved a plate of delicacies from the jury room. Defense counsel brought this interlude to Judge Young's attention, and the judge immediately agreed to instruct the alternates to stay out of the jury room during breaks (except for retrieving snacks from the jury room when court security officers confirmed that a break in deliberations had occurred).

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

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

On this record, we believe that the regular jurors were well insulated from the risks posed by the retention of the alternates. The judge repeatedly instructed the jurors – in far greater detail than in Olano – and those instructions were delicately phrased and admirably specific. Appropriate prophylactic instructions are a means of preventing the potential harm that hovers when a trial court fails to dismiss alternate jurors on schedule. See Olano, 507 U.S. at 740-41; United States v. Sobamowo, 892 F.2d 90, 97 (D.C. Cir. 1989) (Ginsburg, J.) (attaching great importance to trial court's prophylactic instructions in holding failure to discharge alternate jurors harmless); cf. United States v. Ottersburg, 73 F.3d 137, 139 (7th Cir. 1996) (setting aside verdict and emphasizing trial court's

[15]On the third day a regular juror had to be excused. With counsels' consent, Judge Young replaced the lost juror with an alternate and instructed the jurors to begin deliberations anew. On appeal, neither side contests the propriety of this substitution.

failure to provide such instructions). Courts must presume "that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case," Francis v. Franklin, 471 U.S. 307, 324 n.9 (1985), and that they follow those instructions.

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

One last observation is telling. Over and above the plenitude of instructions, there is another salient difference between this case and Ottersburg (the only reported criminal case in which a federal appellate court invalidated a verdict due to the trial court's failure to discharge alternate jurors). Here, unlike in Ottersburg, 76 F.3d at 139, the judge at no time permitted the alternates to sit in on, or listen to, the jury's deliberations (even as mute observers). Hence, the alternates had no opportunity to participate in the deliberations, and nothing in the record plausibly suggests that they otherwise influenced the jury's

actions. If the mere presence of silent alternates in the jury room during ongoing deliberations cannot in and of itself be deemed to chill discourse or establish prejudice, see Olano, 507 U.S. at 740-41, it is surpassingly difficult to imagine how absent (though undischarged) alternates, properly instructed, could have a toxic effect on the deliberative process.[16]

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

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[16]In Cabral v. Sullivan, 961 F.2d 998 (1st Cir. 1992), a case that antedated Olano, we considered a civil analog to Criminal Rule 24(c) and stated that "[w]hen a trial court allows an . . . alternate juror[] to deliberate with the regular jurors . . . an inherently prejudicial error is committed, and the substantial rights of the parties are violated." Id. at 1002. In the instant case, unlike in Cabral, there is neither proof nor reason to suspect that the undischarged alternates participated in the regular jurors' deliberations.

consequence of the court's bevue, they are not entitled to return to square one.

IV. DISCOVERY DISPUTES

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

A. Scope of the Jencks Act.

The Jencks Act provides criminal defendants, for purposes of cross-examination, with a limited right to obtain certain witness statements that are in the government's possession. That right is subject to a temporal condition: it does not vest until the witness takes the stand in the government's case and completes his direct testimony. Id. § 3500(a). It is also subject to categorical, content-based restrictions delineated in the statute: a statement is not open to production under the Jencks Act unless it (i) relates to the same subject matter as the witness's direct testimony, id. § 3500(b), and (ii) either comprises grand jury testimony, id. § 3500(e)(3), or falls within one of two general classes of statements, namely,

> (1) a written statement made by [the] witness and signed or otherwise adopted or approved by him;
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement . . . .

18 U.S.C. § 3500(e)(1)-(2).

Agenda Item II C-3
~~Agenda~~

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Rule 31(e), et al; Forfeiture Proceedings; DOJ Proposed Amendments**

DATE: **September 5, 1996**

At the Committee's April 1996, meeting the Department of Justice offered proposed amendments which would modify forfeiture procedures. Following discussion of the item, the matter was deferred until the Fall meeting to consider whether any amendments should be made to other rules.

Attached is material explaining the Department's proposed changes. This matter is on the agenda for the October meeting.

U. S. Department of Justice

Criminal Division

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

September 6, 1996

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

Dear Judge Jensen:

At the last meeting of the Advisory Committee on Criminal Rules, the Committee considered a proposal of the Department of Justice to amend Rule 31(e) to reduce the role of the petit jury in criminal forfeiture proceedings in the wake of Libretti v. United States, 116 S. Ct. 356 (1995). After considerable discussion, the Committee invited the Department to rethink and redraft its proposal in a more comprehensive fashion, and to present it at the upcoming meeting in October.

Attached is the product of our reconsideration, consisting of a proposed new rule and an explanation which is designed to serve as the basis for a Committee Note should the proposal be adopted. As you will see, upon further study, we have concluded that, since forfeiture is an aspect of sentencing under the holding in Libretti, the court should make criminal forfeiture determinations, just as it is entrusted with all other non-capital sentencing matters including the determination of such economic sanctions as fines and restitution.

We have also sought to resolve the difficulty and confusion that occur as a result of the overlap between Rule 31(e)'s requirement that the "extent" of the defendant's interest in the property be determined as part of the criminal trial, and the statutory requirement that that issue be resolved in the ancillary proceeding that follows the conclusion of the trial.

Finally, as the Committee suggested, we have attempted to consolidate in a single new rule the four current rules addressing various aspects of criminal forfeiture procedure.

Your and the other Committee members' consideration of this proposal is greatly appreciated.

Sincerely,

John C. Keeney
Acting Assistant Attorney General

Enclosure

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

32.2 Criminal Forfeiture

(a) Indictment and Information. No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information shall allege that the defendant or defendants have an interest in property that is subject to forfeiture in accordance with the applicable statute.

(b) Hearing and entry of preliminary order of forfeiture after verdict. Within 10 days of the entry of a verdict of guilty or the acceptance of a plea of guilty or nolo contendere as to any count in the indictment or information for which criminal forfeiture is alleged, the court shall conduct a hearing solely to determine what property is subject to forfeiture under any applicable statute because of its relationship to the offense. Upon finding that property is thus subject to forfeiture, the court shall enter a preliminary order directing the forfeiture of whatever interest each defendant may have in the property, without determining what that interest may be. A determination of the extent of each defendant's interest in the property shall be deferred until any third party claiming an interest in the property has petitioned the court pursuant to statute for consideration of the claim. If no such petition is timely filed, the property shall be forfeited in its entirety.

(c) Preliminary Order of Forfeiture. The entry of a

preliminary order of forfeiture shall authorize the Attorney General to seize the property subject to forfeiture, to conduct such discovery as the court may deem proper to facilitate the identification, location or disposition of the property, and to commence proceedings consistent with any statutory requirements pertaining to ancillary hearings and the rights of third parties. At the time of sentencing, the order of forfeiture shall become final as to the defendant, and shall be made a part of the sentence and included in the judgment. The court may include in the order of forfeiture such conditions as may reasonably be necessary to preserve the value of the property pending any appeal.

(d) Ancillary proceedings. (1) If, in accordance with the applicable statute, any third party files a petition asserting an interest in the forfeited property, the court shall conduct an ancillary proceeding. In such proceeding, the court may entertain a motion to dismiss the petition for lack of standing, for failure to state a claim upon which relief could be granted under this section, or for any other ground. For the purposes of such motion, all facts set forth in the petition shall be assumed to be true.

(2) If a motion referred to in paragraph (1) is denied, or if no such motion is made, the court may, in its discretion, permit the parties to conduct discovery in accordance with the Federal Rules of Civil Procedure to the extent that the court determines such discovery to be necessary or desirable to resolve

factual issues before conducting an evidentiary hearing. At the conclusion of such discovery, either party may seek to have the court dispose of the petition on a motion for summary judgment in the manner described in Rule 56 of the Federal Rules of Civil Procedure.

(3) At the conclusion of the ancillary proceeding, the court shall enter a final order of forfeiture amending the preliminary order as necessary if any third-party petition is granted.

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

(e) Stay of forfeiture pending appeal. If an appeal of the conviction or order of forfeiture is taken by the defendant, the court may stay the order of forfeiture upon such terms as the court finds appropriate in order to ensure that the property remains available in the event the conviction or order of forfeiture is vacated. Such stay, however, shall not delay the conduct of the ancillary proceeding or the determination of the rights or interests of any third party. If the defendant's appeal is still pending at the time the court determines that the order of forfeiture must be amended to recognize the interest of a third party in the property, the court shall amend the order of forfeiture but shall refrain from directing the transfer of any

property or interest to the third party until the defendant's appeal is final, unless the defendant, in writing, consents to the transfer of the property or interest to the third party.

(f) Substitute property. If the applicable forfeiture statute authorizes the forfeiture of substitute property, the court may at any time entertain a motion by the government to forfeit substitute property, and upon the requisite showing, shall enter an order forfeiting such property, or shall amend an existing preliminary or final order to include such property.

EXPLANATION OF RULE 32.2

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

Subsection (a) is derived from Rule 7(c)(2) which provides that notwithstanding statutory authority for the forfeiture of property following a criminal conviction, no forfeiture order may be entered unless the defendant was given notice of the forfeiture in the indictment or information. As courts have held, subsection (a) is not intended to require that an itemized list of the property to be forfeited appear in the indictment or information itself; instead, such an itemization may be set forth in one or more bills of particulars. See United States v. Moffitt, Zwerling & Kemler, P.C., 83 F.3d 660, 665 (4th Cir. 1996), aff'g 846 F. Supp. 463 (E.D. Va. 1994) (Moffitt I) (indictment need not list each asset subject to forfeiture; under Rule 7(c), this can be done with bill of particulars). The same applies with respect to property to be forfeited only as "substitute assets." See United States v. Voight, ___ F.3d ___, 1996 WL 380609 (3rd Cir. Jul. 9, 1996) (court may amend order of forfeiture at any time to include substitute assets).

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

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

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

cases); United States v. Voight, ___ F.3d ___, 1996 WL 380609 (3rd Cir. Jul. 9, 1996) (following Myers); United States v. Smith, 966 F.2d 1045, 1050-53 (6th Cir. 1992) (same for drug cases); United States v. Bieri, 21 F.3d 819 (8th Cir. 1994) (same).

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

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

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

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

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

interest. Accordingly, Rule 31(e) was drafted to make a determination of the "extent" of the defendant's interest part of the verdict.

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

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

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

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

forfeit "whatever interest the defendant may have," and then to conduct a proceeding in which all parties can participate that ensures that the property forfeited actually belongs to the defendant.

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

A more sensible procedure would be for the court, once it determines that property was involved in the criminal offense for which the defendant has been convicted, to order the forfeiture of whatever interest a defendant may have in the property without having to determine exactly what that interest is. If third parties assert that they have an interest in all or part of the property, those interests can be adjudicated at one time in the ancillary proceeding. And if no third party files a claim, the property can be forfeited in its entirety.

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

the other co-defendant's interest).

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

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

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

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

available under the Federal Rules of Civil Procedure should be available to the court and the parties to aid in the efficient resolution of the claims.

Because an ancillary hearing is part of a criminal case, it would not be appropriate to make the civil Rules applicable in all respects. The amendment, however, describes several fundamental areas in which procedures analogous to those in the civil Rules may be followed. These include the filing of a motion to dismiss a claim, the conduct of discovery, the disposition of a claim on a motion for summary judgment, and the taking of an appeal from final disposition of a claim. Where applicable, the amendment follows the prevailing case law on the issue. See, e.g., United States v. Lavin, 942 F.2d 177 (3rd Cir. 1991) (ancillary proceeding treated as civil case for purposes of applying Rules of Appellate Procedure); United States v. BCCI Holdings (Luxembourg) S.A. (In re Petitions of General Creditors), 919 F. Supp. 31 (D.D.C. 1996) ("If a third party fails to allege in its petition all elements necessary for recovery, including those relating to standing, the court may dismiss the petition without providing a hearing"); United States v. BCCI (Holdings) Luxembourg S.A. (In re Petition of Department of Private Affairs), 1993 WL 760232 (D.D.C. 1993) (applying court's inherent powers to permit third party to obtain discovery from defendant in accordance with civil rules). The provision governing appeals in cases where there are multiple claims is derived from Fed.R.Civ.P. 54(b).

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

Finally, subsection (e) provides a rule to govern what happens if the court determines that a third-party claim should be granted but the defendant's appeal is still pending. The defendant, of course, is barred from filing a claim in the ancillary proceeding. See 18 U.S.C. § 1963(l)(2); 21 U.S.C. § 853(n)(2). Thus, the court's determination, in the ancillary proceeding, that a third party has an interest in the property superior to that of the defendant cannot be binding on the

defendant. So, in the event that the court finds in favor of the third party, that determination is final only with respect to the government's alleged interest. If the defendant prevails on appeal, he recovers the property as if no conviction or forfeiture ever took place. But if the order of forfeiture is affirmed, the amendment to the order of forfeiture in favor of the third party becomes effective.

Subsection (f) makes clear, as courts have found, that the court retains jurisdiction to amend the order of forfeiture to include substitute assets at any time. See United States v. Hurley, 63 F.3d 1 (1st Cir. 1995) (court retains authority to order forfeiture of substitute assets after appeal is filed); United States v. Voight, ___ F.3d ___, 1996 WL 380609 (3rd Cir. Jul. 9, 1996) (following Hurley). Third parties, of course, may contest the forfeiture of substitute assets in the ancillary proceeding. See United States v. Lester, 85 F.3d 1409 (9th Cir. 1996).

Agenda Item II C-4

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Rule 40(a). Appearances Before Nearest Available Magistrate Within District.**

DATE: **September 5, 1996**

In October 1994 the Committee considered a proposal from Magistrate Judge Robert Collings (Boston) to amend Rule 40(a) As written, Rule 40(a) requires that where a defendant is arrested in a district other than where the offense occurred, authorities are required to take the defendant to a magistrate judge in the district of arrest. Magistrate Judge Collings recommended that where a defendant is arrested in a district other than where the offense occurred, authorities may take the defendant to a magistrate judge in the latter district if the judge is located within 100 miles of the place of arrest.

The Committee deferred any action on the proposal pending input from the Department of Justice.

Attached is correspondance from Magistrate Judge Crigler and the Department of Justice which addresses the issue of whether Rule 40(a) should be amended to permit an appearance before the geographically nearest available magistrate, even if the magistrate is not in the district of arrest.

If the Committee is inclined to amend Rule 40, I will work on a redraft of all of Rule 40(a) for consideration at the Spring meeting.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
Room 328
255 WEST MAIN STREET
CHARLOTTESVILLE, VIRGINIA 22901

B. WAUGH CRIGLER
U.S. MAGISTRATE JUDGE

PHONE 804-296-7779

May 29, 1996

John K. Rabiej, Chief
Rules Committee Support Office
Administrative Office of the U. S. Courts
Washington, D.C. 20544

Re: Fed.R.Cr.P. 40

Dear John:

Enclosed are materials and a letter sent to me by Roger Pauley. I think that it may be time to have the Criminal Rules Advisory Committee address whether there is a need to revise Rule 40 and, if so, how.

Our minutes of a year or so ago should show we breezed by these matters without stopping or pausing. Today, however, there are a greater number of cases arising in remote areas of the country where the nearest court may be in a district adjoining the one of arrest. This is something that should pass the review of the Committee as a whole.

Sincerely,

B. Waugh Crigler
U. S. Magistrate Judge

BWC/jsp

cc: Hon. D. Lowell Jensen
Prof. David A. Schlueter

MAY 23 1996

Criminal Division
U. S. Department of Justice

Washington, D.C. 20530

May 20, 1996

The Honorable B. Waugh Crigler
United States Magistrate Judge
United States District Court
255 West Main Street, Room 328
Charlottesville, Virginia 22901

Dear Waugh:

A colleague in our General Litigation and Legal Advice (GLLA) Section recently acquainted me with an incident from Georgia in which a magistrate judge there refused to authorize an arrestee's being brought before him for a Rule 40 proceeding in which he was the geographically "nearest available" magistrate, because the arrest occurred in another district. Relying on the Magistrate's Manual, the Georgia magistrate advised the federal agents that Rule 40 required bringing a defendant before the nearest available magistrate in the district of arrest.

In 1992, GLLA looked into this question and determined that Rule 40 was properly read to require the bringing of an arrestee before the geographically "nearest available" magistrate, even if this meant crossing a district or State line.

With GLLA's permission, I am enclosing a copy of its 1992 memoranda. Although it is impossible to determine how often this issue arises, given the physical location of federal judges and magistrate judges, it is probable that it occurs with some frequency. I would appreciate your preliminary thoughts on (1) the legal question, i.e., the proper interpretation of "nearest available" under Rule 40, and (2) depending on the answer to (1), whether or not you think the Rule should be altered or clarified, or alternatively whether the Magistrate's Manual (or our interpretation) should be changed.

Hope it's cooler where you are.

Sincerely,

Roger A. Pauley

U. S. Department of Justice

Criminal Division

General Litigation and Legal Advice Section
1001 G Street, N.W., Suite 200
Washington, D.C. 20001
(202) 514-1026
(202) 514-6113 (FAX)

DATE: May 17, 1996

FROM: Ezra H. Friedman EHF

TO: Roger Pauley FAX NO. 4-4042

PAGES INCLUDING THIS PAGE: 10

SUBJECT: Rule 40

Although the USMS raised the question in '92, this Georgia matter is a DEA case. I'm sure the FBI must also make a lot of arrests in which this can be an issue. I'm not sure how we can go about getting a handle on the numbers. I can call USMS general counsel and see ... I'd also like to know what the FBI mandua says on this subject. I think I have a contact there.

GLLLAS material and Magistrates Manual

FOR VERIFICATION, CALL: EHF TELEPHONE: (202) 514-1026

U. S. Department of Justice

United States Attorney
Southern District of Georgia

Post Office Box 8999
Savannah, Georgia 31412
(912) 652-4422 FAX 652-4388

100 Bull Street
Savannah Georgia 31401

DATE: 5/17/96

TO: Ezra Friedman FAX: (202) 514-6113

FROM: Charlie Bourne

NUMBER OF PAGES: 3
(INCLUDING THIS PAGE)

CONTENTS: Thanks for the material you sent to me. I discussed this with our judge who provided me with the attached copies which contradict our opinion. These copies are taken from the "Legal Manual for Magistrate Judges."

IF YOU DO NOT RECEIVE THE CORRECT NUMBER OF PAGES, PLEASE CALL THE TELEPHONE NUMBER ABOVE.

§ 8.01. In General

Article III of the Constitution provides that all criminal trials "shall be held in the State where the said Crimes shall have been committed...."[1] The Sixth Amendment states that in criminal cases "the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed...." The place where the offense is charged to have been committed thus determines the place of trial.[2]

Although an individual defendant has the constitutional right to be tried in the district in which the alleged crime has been committed, he or she may be arrested outside the boundaries of that district.[3] The Constitution does not specify a method to return a defendant to the district in which the prosecution is pending, nor does it provide a constitutional right to a removal hearing.[4] Rather, the procedures governing the return of the defendant were created by Congress and are found in the Federal Rules of Criminal Procedure.[5] Rule 40 gives the accused the right to appear before a federal magistrate in the district where he or she has been arrested, and extends certain procedural safeguards before the defendant can be ordered back - "committed" or "removed" - to the district of prosecution to face criminal charges.[6]

Commitment is the procedure for removing an accused person from one federal court to another. It is designed "to return federal fugitives to federal custody pursuant to federal warrants based on an underlying offense with a view toward federal prosecution in the district where the prosecution is pending."[7]

The procedures governing the transfer of an accused to another district are designed to strike an appropriate balance between the

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1. U.S. Const. art. III, § 2, cl. 3.

2. *Beavers v. Henkel*, 194 U.S. 73, 83 (1904); Fed. R. Crim. P. 18.

3. A federal arrest warrant runs throughout the United States. Fed. R. Crim. P. 4(d)(2).

4. *U.S. ex rel. Hughes v. Gault*, 271 U.S. 142, 149 (1926) (constitution is satisfied by defendant's right to contest charges in court where prosecution is pending).

5. "But, as otherwise hardship and injustice might result, [Congress] has given a right to examination and hearing." *United States v. Mulligan*, 295 U.S. 396, 400 (1935).

6. The traditional term "removal" was deleted from the federal rules in 1979.

7. *United States v. Love*, 425 F. Supp. 1248, 1249 (S.D.N.Y. 1977). Rule 40 applies to warrants issued for service based on violations of the District of Columbia Code, despite the fact that the United States District Court of the District of Columbia was stripped of jurisdiction over the D.C. Code. *See United States v. Ford*, 627 F.2d 807 (7th Cir. 1980).

defendant's interest in not being held or transported to answer charges having an insufficient basis against the more general interest in providing for the efficient and expeditious administration of criminal justice. The advisory committee note to the original 1946 rule stated:

> The purpose of removal proceedings is to accord safeguards to a defendant against an improvident removal to a distant point for trial. On the other hand, experience has shown that removal proceedings have at times been used by defendants for dilatory purposes and in attempting to frustrate prosecution by preventing or postponing transportation even as between adjoining districts and between places a few miles apart. The object of the rule is adequately to meet each of these two situations.

§ 8.02. Special Requirements of Rule 40

A magistrate judge should be particularly aware of the following specific provisions of Rule 40 and their application in commitment proceedings:

a. Federal Magistrate

Rule 40(a) provides that a person arrested in a district other than the one where the prosecution is pending "shall be taken without unnecessary delay before the nearest available federal magistrate." The authority to conduct commitment proceedings is therefore limited to a United States magistrate judge or a judge or justice of the United States; state judicial officers are barred from exercising jurisdiction.[8]

although, this is an exception

One case has found that a defendant was not prejudiced by the arresting officers' good faith determination to cross a district line to comply literally with the "nearest available" federal magistrate requirement.[9] The Fourth Circuit and the United States Supreme Court have declared violations of other requirements relating to commitment to be "technical and nonprejudicial".[10]

8. FED. R. CRIM. P. 54(c). *See also* FED. R. CRIM. P. 54(b) advisory committee's note.

9. *United States v. Bradford*, 122 F. Supp. 915 (S.D.N.Y. 1954).

10. *United States v. Neiswender*, 590 F.2d 1269 (4th Cir. 1979) (no mistrial for transportation of defendant 107 miles across district lines without removal hearing, interpreting provision of prior version of Rule 40). *United States v. Montalvo-Murillo*, 110 S. Ct. 2072 (1990) (failure to comply with "first appearance" requirement of Bail Reform Act does not defeat government's authority to seek pretrial detention). *Montalvo-Murillo* is discussed at § 8.03, *infra*.

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U. S. Department of Justice

Washington, D.C. 20530

AUG 24 1992

Mr. Larry Lee Gregg
General Counsel
United States Marshals Service
600 Army Navy Drive
Arlington, Virginia 22202-4210

Dear Mr. Gregg:

This letter is in response to your letter of April 27, 1992 to the Criminal Division's General Litigation and Legal Advice Section requesting our legal opinion of your reading of Fed. R. Crim. P. 40(a). Your reading would allow a Deputy United States Marshal to obtain custody of an arrestee in one district, and then take the arrestee before a federal magistrate in a nearby district. For the reasons stated in our memorandum, a copy of which is enclosed, we believe the United States Marshals Service proposal is in keeping with the language, purpose, and spirit of Rule 40(a), and we see no legal reason why, in circumstances such as you describe, it should not be implemented.

It is possible, however, that implementation of the proposed policy might cause administrative problems for the affected federal magistrates and United States Attorney offices. Given this possibility it would be prudent to fully discuss the proposal with all affected parties before implementing it.

Should you have any questions pertaining to our memorandum John T. Bannon, Jr., a General Litigation and Legal Advice Section attorney, may be reached at (202) 514-1038.

Sincerely,

Mary C. Spearing, Chief
General Litigation and
Legal Advice Section
Criminal Division

Enclosure

cc: Thomas Thalkan
Ted McBride

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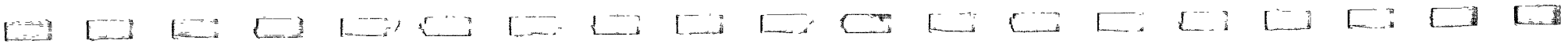

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U. S. Department of Justice

Washington, D.C. 20530

AUG 24 1992

MEMORANDUM

TO: Mary C. Spearing, Chief
General Litigation and
Legal Advice Section

FROM: John T. Bannon, Jr.
Attorney
General Litigation and
Legal Advice Section

SUBJECT: The Interpretation of Fed. R. Crim. P. 40(a) by the United States Marshals Service

We have received a letter dated April 27, 1992 from Mr. Larry Lee Gregg, the General Counsel of the United States Marshals Service (USMS), asking our views on an interpretation of Fed. R. Crim. P. 40 (a). The Rule provides in pertinent part:

> If a person is arrested in a district other than that in which the offense is alleged to have been committed, that person shall be taken without unnecessary delay before the nearest available federal magistrate. Preliminary proceedings concerning the defendant shall be conducted in accordance with rules 5 and 5.1 * * *.

The USMS asks whether a person arrested pursuant to a federal arrest warrant in a district other than that in which the offense is alleged to have been committed must be taken before the nearest federal magistrate within the district of arrest, or whether, in the alternative, the arrestee may be taken before the nearest federal magistrate, even if outside the district of arrest. The USMS notes that while the United States District court for the District of Nebraska encompasses the whole State, the District Court only sits in Omaha and Lincoln in the eastern part of the State. Moreover, both the United States Attorney and the United States Marshal have their offices in Omaha and Lincoln. Thus, sparsely settled northwestern Nebraska has virtually no federal judicial or federal law enforcement presence. This lack of federal presence creates a recurring problem for the USMS.

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According to their letter the USMS has had to arrest numerous persons in northwestern Nebraska in the last few years, persons who were the subjects of outstanding federal arrest warrants issued in other districts. When such a person has been arrested the United States Marshal has sent a deputy to northwestern Nebraska to obtain custody of the arrestee, and then has taken the arrestee to Omaha or Lincoln for his required appearance before a federal magistrate. Generally, each round-trip exceeds 800 miles, and, because of the time and distance involved, there is sometimes a delay in bringing the arrestee before a federal magistrate in Omaha or Lincoln.

Rereading Fed. R. Crim P. 40(a) the USMS believes it has found a way to resolve this recurring problem. The USMS proposes having a Deputy United States Marshal for the District of South Dakota or Wyoming obtain custody of the arrestee, and then take the arrestee to a federal magistrate sitting in Rapid City, South Dakota, or Casper or Cheyenne, Wyoming. Each of these cities is closer to northwestern Nebraska than Omaha or Lincoln. For the reasons set forth below we believe the USMS proposal fully complies with the language, purpose, and spirit of Fed. R. Crim. P. 40(a).

FED. R. CRIM. P. 40(a) AND THE USMS PROPOSAL

As previously noted Fed. R. Crim. P. 40(a) states, in pertinent part, that "a person arrested in a district other than that in which the offence is alleged to have been committed * * * shall be taken without unnecessary delay before the nearest available federal magistrate."[1]

In interpreting a statute, regulation or rule, the starting point is the language of the statute, regulation, or rule. See e.g., Garcia v. United States, 469 U.S. 70 (1984); Dickerson v. New Banner Institute, Inc., 460 U.S 103 (1983); Lewis v. United States, 455 U.S. 55 (1980). Indeed, when such language has a plain and unambiguous meaning resort to legislative history and comparable material, such as advisory notes, is all but superfluous; "[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete * * *."Garcia, 469 U.S. at 75. Moreover, in interpreting a statute, regulation, or rule, the emphasis is properly on the most "natural" and "non-technical" reading of the language. United States v. Rodgers, 446 U.S. 475, 479 (1984).

The language of Fed. R. Crim. P. 40(a) is consistent with the USMS proposal. The Rule emphatically states that a person

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[1]The Rule also states that "[p]reliminary proceedings concerning the defendant shall be conducted in accordance with Rules 5 and 5.1 * * *." Fed. R. Crim. P. 5 pertains to the arrrestee's initial appearance before a magistrate, and Fed. R. Crim. P. 5.1 pertains to the arrestee's preliminary examination.

"arrested in a district other than that in which the offense is alleged to have been committed * * * shall be taken without unnecessary delay before the nearest available federal magistrate." The Rule does not say that the arrested person shall be taken before the nearest available federal magistrate in the district. Under the USMS proposal a person arrested in northwestern Nebraska could be taken into custody by a Deputy United States Marshall from Rapid City, South Dakota, or Casper or Cheyenne, Wyoming, and be taken before a federal magistrate sitting in one of those cities. In short, when a person is arrested in northwestern Nebraska the "nearest available federal magistrate" is one of the federal magistrates sitting in Rapid City, South Dakota or Casper or Cheyenne, Wyoming, not a federal magistrate sitting in Omaha or Lincoln, Nebraska. The implementation of the proposal by the USMS would do no violence to the language of Rule 40(a); indeed, it would constitute literal compliance with the Rule's language. Moreover, implementation of the proposal is compatible with the purpose of Rule 40(a).

The purpose of Rule 40(a) is to safeguard the defendant against removal to a distant point for trial. United States v. McCord, 695 F.2d 825 (5th Cir.), cert. denied, 460 U.S. 1073 (1983); United States v. Green, 499 F.2d 538 (D.C. Cir. 1974). As one court noted more than a century ago: "In a country of such vast extent as ours, it is no light matter to arrest a supposed offender, and on the mere order of a magistrate, remove him hundreds, it may be thousands, of miles for trial." In re Buell, 4 F. Cas. 587, 588 (C.C.D. Mo. 1875) (No. 2,102). Under the USMS proposal the person who is taken into custody in northwestern Nebraska, and who is taken before a federal magistrate in South Dakota or Wyoming, receives the very same protection as the person who is taken into custody in northwestern Nebraska, and who is taken before a federal magistrate in Omaha or Lincoln, Nebraska. The function of the federal magistrate, whether the magistrate sits in Nebraska, South Dakota or Wyoming, is the same, that is, to inform the defendant of his panoply of rights so that he may intelligently defend himself against any pending federal criminal charges. Because a federal magistrate is a federal magistrate, the proposal of the USMS does not contravene the purpose of Rule 40(a).[2]

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[2]If, for example, a person were arrested in northwestern Nebraska on a federal arrest warrant issued in South Dakota, and then was taken to South Dakota because that was where the nearest federal magistrate was sitting, an argument could be made that the arrestee had been moved to the district charging him with a federal crime without a removal hearing. This argument, however, ignores the purpose of Rule 40(a) which is to protect the arrestee from distant removal. In the above hypothetical there would be no distant removal, and thus no violation of Rule 40(a).

It is worth noting that Fed. R. Crim. P. 2 states that the Federal Rules of Criminal Procedure "shall be construed to serve simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay." We believe the proposal of the USMS respects the language, purpose, and spirit of Rule 40(a), and we see no legal reason why it should not be implemented.

If you agree with this analysis, a copy of this memorandum should be sent to the General Counsel of the USMS. Attached for your signature is a proposed letter to the General Counsel.

Rule 40ME.MO

MEMORANDUM 8/21/92

TO: RBC

FROM: EHF

SUBJECT: Rule 40 Removal Hearings

As I found John's memo unconvincing I did some research of my own into the development of the current rule. On that basis I am satisfied that his conclusion is correct and have initialed his memo.

Briefly, prior to promulgation of the Federal Rules in 1946, a warrant could be executed only in the district of issuance. Even when it was known that the defendant was located in another district, the process required the return of the warrant unexecuted by the marshal before it could be sent to the district where the defendant had been, or was expected to be, located. The court in that district then issued its warrant. When the defendant was arrested, if he was not bailed to appear in the offense district at his initial appearance, he was given a removal hearing. Thus, all removal hearings were necessarily held in the district of arrest.

The right to a removal hearing is purely statutory and is accorded in recognition of the injury an "improvident removal" could cause. Therefor, when the Rules were promulgated, and Rule 4 authorized the execution of warrants throughout the United States, Rule 40 provided removal hearings only when the arrest occurred in a "distant district." The Rule authorized removal without hearing from districts within the same state or from a point in another state less than 100 miles away from the trial court. The Advisory Committee Notes explain that requiring hearings in a "nearby district" would only delay bringing the defendant to trial without corresponding benefit to him or the government. Nothing in the Advisory Committee Notes to the 1972 amendment abolishing the distinction between "nearby" and "distant" districts suggests an intent to make the process less expeditious. Moreover, removal statutes are to be read favorably to the government.

Finally, defendants, too, will profit from the suggested interpretation. The current thrust of the Rules is to effect the initial appearance, and, perhaps, the probable cause hearing, "without unnecessary delay." Interpreting "the nearest available magistrate" in the literal geographical sense is in harmony with this objective. Requiring a hearing within the district regardless of distance and delay would be counterproductive. It is neither compelled by the plain language of the Rule nor consistent with the Rule's historical development.

E. Rule 35(c); Correction of Sentence.

Judge Jensen informed the Committee that a recent case from the Ninth Circuit, *United States v. Navarro-Espinosa*, 30 F.3d 1169 (9th Cir. 1994) had addressed the applicability of Rule 35(c). In dicta the court addressed the question of whether the time for correcting a sentence runs from the oral announcement of the sentence or from the date the formal entry of judgment is entered. Noting that the language in the rule itself refers to imposition of the sentence, i.e. oral announcement, but the Advisory Committee Note seems to indicate that the time runs from formal entry of the judgment. The court expressed the hope that the Advisory Committee would clarify the point.

Following brief discussion by the Committee it was determined that the Reporter would look into the matter and place the item on the agenda for the Committee's Spring 1995 meeting.

F. Rule 40(a). Commitment to Another District; Exception for Transporting UFAP Defendants Across State Lines.

Magistrate Judge Robert Collings recommended in a letter to the Committee that Rule 40(a) be amended. As written, the rule requires that a defendant who is arrested in a district other than the district where the offense was committed is to be taken to the nearest available magistrate in the district of the arrest. Judge Collings suggested that an exception to that rule should be permitted where the nearest available magistrate happens to be in the district where the offense took place. Magistrate Judge Crigler indicated that the legislative history of Rule 40 indicates that in the 1960's the rule was amended specifically to require an appearance in the district of arrest.. Mr. Pauley added that there is little caselaw on the issue and that if the rule is properly applied there should not be any real problems. Noting that the Department of Justice has no current position on the proposed amendment he added that even if the defendant is taken to the wrong district, there appears to be no sanction.

Judge Jensen deferred any further discussion on the proposal until the next meeting, pending input from the Department of Justice.

Agenda Item II D #1

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

FROM: **Dave Schlueter, Reporter**

RE: **Proposed Bankruptcy Rules Amendments; Electronic Service of Motions**

DATE: **September 4, 1996**

As noted in the attached materials, the Bankruptcy Committee is considering amendments to the Bankruptcy Rules which would permit motions to be served on opposing counsel by electronic means.

In the event the amendment goes forward for approval, the Criminal Rules Committee may be asked to provide its views on whether a similar procedure could, or should, be implemented for criminal cases. As noted in John Rabiej's cover letter, service of papers by facsimilie transmission was rejected by the Civil and Appellate Rules Committees in 1990 and 1994, respectively. Under Criminal Rule 49(b), the method of service is determined by the civil rules.

This matter is on the agenda for the October meeting.

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

August 26, 1996

MEMORANDUM TO JUDGE ALICEMARIE H. STOTLER

SUBJECT: *Service of Papers by Electronic Means Proposed by Bankruptcy Subcommittee*

The Bankruptcy Rules Subcommittee on Litigation is recommending that Rules 9013 and 9014, which deal with motion practices, be amended. Both rules would be amended to permit service of motions on the other party "by electronic means, provided such means are consistent with technical standards, if any, established by the Judicial Conference of the United States." Motions under Rule 9013 are time-sensitive, but Rule 9014 motions are not.

Service of papers on other parties by facsimile transmission means was considered and rejected by the Civil Rules Committee in 1990 and the same proposal was not accepted by Appellate Rules Committee in 1994.

Two issues arise. First, what type of coordination needs or should be pursued on this issue among the rules committees? Second, when should we advise the Committee on Automation and Technology that such a proposal is being considered? That committee has already prepared standards on the electronic filing of papers with the court.

If approved by the full Bankruptcy Rules Committee the amendments would be published no earlier than August of next year, which gives us a little time. This is the type of issue that a Standing Committee subcommittee on technology could address. At the June Standing Committee meeting, volunteers were requested. We should now consider requesting each rules committee chair to appoint a member along with its reporter to serve on a Technology Subcommittee.

John K. Rabiej

cc: Professor Daniel R. Coquillette

Rule 9014. General Motions

(a) General Motion Practice. This rule governs any request for an order, other than a request for relief of the type described in Rule 7001 or 9013(a) or a motion made in an adversary proceeding.

(b) Motion Papers. Every motion shall:

(1) be filed, unless made orally at a status conference pursuant to § 105(d), or at a hearing, at which all parties entitled to notice of the motion are present;

(2) state with particularity the relief or order sought and the grounds therefor;

(3) be accompanied by proof of service, unless the motion is made orally;

(4) be accompanied by a proposed order for the relief requested;

(5) unless the movant is an individual debtor whose debts are primarily consumer debts, be accompanied by:

(A) one or more supporting affidavits;

(B) a memorandum of law;

(C) a statement of the name and, if known, the address and telephone number of any person who is likely to be called as a witness by the movant if there is a hearing on the

motion, and a summary of the testimony that the person is likely to give; and

(D) if the value of property is at issue and a valuation report has been prepared, a copy of the valuation report, and the name, address, and telephone number of the person who prepared the valuation report, unless the valuation report will not be introduced as evidence at any hearing on the motion.

(c) Service of the Motion and Notice of Hearing.

(1) Except as provided in subdivision (i)(1), not less than 25 days before the hearing date, the movant shall serve a copy of the motion, a copy of any paper filed with the motion, and notice of the hearing on any entity against whom relief is sought, any entity that has a lien or other interest in property that is the subject of the motion, the debtor, the attorney for the debtor, the trustee, and any committee elected under § 705 or appointed under § 1102, or, if the case is a chapter 9 case or a chapter 11 case and no committee of unsecured creditors has been appointed, on the creditors included on the list filed pursuant to Rule 1007(d).

(2) Service shall be in accordance with Rule 7004, except that the court by local rule may permit

service by electronic means, provided such means are consistent with technical standards, if any, established by the Judicial Conference of the United States. The notice of the hearing shall include:

(a) the date, time and place of the hearing;

(b) the time for filing a response; and

(c) a statement that, unless a response opposing the motion is timely filed, the court may grant the motion without a hearing.

(d) Responsive Papers.

(1) Any entity may file a response to the motion not later than 10 days before the hearing date.

(2) Not later than the time when a response is filed, the responding party shall serve a copy of the response on the movant, any other entity against whom relief is sought, any entity that has a lien or other interest in property that is the subject of the motion, the debtor, the trustee, and any committee elected under § 705 or appointed under § 1102, or, if the case is a chapter 9 case or a chapter 11 case and no committee of unsecured creditors has been appointed, on the creditors included on the list filed pursuant to Rule 1007(d). Service of the response shall be in

accordance with Rule 7004, except that the court by local rule may permit service by electronic means, provided such means are consistent with technical standards, if any, established by the Judicial Conference of the United States.

(3) Every response shall be accompanied by proof of service and, unless the respondent is an individual debtor whose debts are primarily consumer debts, by:

(A) a proposed order for the relief requested;

(B) one or more supporting affidavits;

(C) a memorandum of law;

(D) a list of the name and, if known, the address and telephone number of any person who is likely to be called as a witness by the respondent if there is a hearing on the motion, and a summary of the testimony that the person is likely to give; and

(E) if the value of property is at issue, and a valuation report has been prepared and is likely to be introduced by the respondent at any hearing on the motion, a copy of the valuation report and the name, address, and telephone number of the appraiser or evaluator.

(e) Affidavits. Affidavits shall be made on personal

Agenda Item II D 2

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

FROM: **Professor D. Schlueter, Reporter**

RE: **Federal Rule of Evidence 103; Solicitation of Committee's Views**

DATE: **September 6, 1996**

The Evidence Advisory Committee has asked the Civil and Criminal Rules Committees to comment on a proposed amendment to Rule of Evidence 103, which would require a party to preserve a pretrial evidentiary ruling by renewing the objection at trial, unless the court indicated that its ruling was final or if the context of the ruling indicated that it was final. That proposed amendment was submitted for public comment but was withdrawn from further consideration when there was a lack of consensus in that committee. A final vote of the Evidence committee resulted in a 7-2 vote to defer action on the amendment and seek the advice of the criminal and civil rules committees.

The attached materials set out the proposed amendment and the various positions taken on the issue of whether a "default" rule should operate on pretrial evidentiary rulings.

This matter is on the agenda for the October meeting.

April 8, 1996

To: Members, Advisory Committee on the Federal Rules of Evidence

From: Margaret A. Berger, Reporter

Re: Comments on Proposed Amendments

This memorandum summarizes the comments that were received about possible amendments to the Federal Rules of Evidence. The discussion is organized as follows: Part I reviews responses to the amendments proposed by the Committee; Part II examines additional suggestions, unrelated to the Committee's proposals, for amending the rules discussed in Part I; Part III reports on recommendations for amending rules not presently under consideration by the Committee.

I Comments on the Proposed Amendments. The reaction to each proposed amendment is summarized, as are the principal arguments of the commentators. All suggestions for alternative language are set forth. The number in parentheses following the author's name is the identification number assigned the comment by the Rules Committee Support Office. (Comments EV19 and EV23 are identical comments submitted by different members of the Federal Magistrate Judges Association.)

Rule 103(e).

Summary. The Committee received 19 comments with regard to the proposed amendment, not counting comments from members of the Evidence Committee, comments from members of the Standing Committee, or comments made by Professor Friedman at the public hearing. The commentators agree that a uniform default rule ought to be codified, but disagree on how it should be formulated. Eight comments supported the Committee's formulation, and eleven supported an opposite default rule. Since there was no controversy about the need for a rule, I am only abstracting comments that relate to the substance of the rule.

Comments supporting the proposed rule.

The Commercial and Federal Litigation Section of the New York State Bar Association (EV24) found that the proposed amendment "makes sense."

> Where the court feels renewal at trial would serve no purpose, it retains the option to make clear that its pretrial ruling is final, thereby relieving the parties of any obligation to revisit the issue. By otherwise requiring the renewal of pretrial proffers or objections at the appropriate time during the trial, the proposed rule provides the trial judge a "last clear chance" to avoid error and to make evidentiary decisions in the context of all trial developments to that point.

The Section pointed out that its "last clear chance" concern is particularly relevant in districts in which the magistrate judge rules on pretrial motions so that the district judge has no occasion to consider evidentiary rulings prior to trial. Furthermore, it found the proposed rule consistent with current practice by careful trial attorneys.

The Federal Magistrate Judges Association (EV10, EV22) supported the proposed rule because it would provide trial judges an opportunity to correct pretrial error before it is subjected to scrutiny on appeal. The Association suggests that the Advisory Committee Note indicate the

provision is not intended to override or modify Fed.R.Civ.P. 72(a) or (b) or 28 U.S.C. §636 with respect to appeals and review of pretrial decisions by magistrate judges.

The proposed version of Rule 103(e) was also endorsed by the Seventh Circuit Bar Association (EV23) as it "clarifies existing procedure [and] adds certainty to the litigation process;" the Executive Committee of the Litigation Section of the State Bar of California (EV39); the Federal Legislation and Procedures Committee of the Arkansas Bar Association (EV21); the ABA Section of Intellectual Property Law (EV33) and Frank E. Tolbert, Esq. (EV3) of Logansport, Ind.

While the Federal Bar Association (EV34) recommended the Committee's version with limited reservations, because it "provides judges with a straightforward and easily applied uniform rule," the chair of one of its sections expressed a personal preference for the competing default rule.

Comments endorsing the reverse formulation.

Two federal judges criticized the Committee's formulation.

Judge Prentice H. Marshall (EV13) suggested the following amendment:

> "A.[sic] Pretrial objection to or proffer of evidence need not be renewed at trial unless the court states on the record that it must be."

Judge Marshall objected to the Committee's proposed amendment on a number of grounds: 1. it fails to encourage pretrial objections or proffers; 2. in-trial objections "are an anathema;" 3. the proposed amendment denigrates the mandatory in limine motion practice prescribed by Fed.R.Civ.P 26(a)(3) -- "why are trial counsel burdened with pretrial objections if they must renew them at trial?"

Judge Edward R. Becker (EV15) also questioned the proposed change: 1. it will make more work for trial judges; 2. the "escape hatch" in the proposed rule will lead to satellite legislation, and 3. the proposal contravenes Fed.R.Civ.P. 46 which provides that formal exceptions to a court's rulings are unnecessary.

A number of attorneys objected to the Committee's default formulation. J. Houston Gordon, Esq. of Covington, Tenn. (EV5) thought the rule change would prolong litigation.

Mike Milligan, Esq. of El Paso, Texas (EV7) argued that counsel lose face when they have to raise a losing issue before the jury, and that this formulation supports "the Judiciary's tendency to make preservation of error difficult." He added that he didn't "expect anybody but trial lawyers to be on my side of this issue."

Daniel A. Ruley of Steptoe & Johnson, Parkersburg, W.Va. (EV18) questioned whether the proposed rule is "another trap for an unwary lawyer."

The American Intellectual Property Law Association (EV25) used much the same language in expressing its opposition to the proposed rule. It also deemed the necessity of having to re-raise fully briefed and carefully decided issues a waste of time, and expressed fears that the "context clearly demonstrates" exception is an open invitation to secondary litigation.

The National Association of Railroad Trial Counsel's Executive Committee (EV28) commented that "the changes would complicate and disrupt existing in limine procedures because all rulings made prior to trial will have to be revisited at the trial itself. This does not appear to promote judicial economy or efficiency." The Tort & Insurance Practice Section of the American Bar Association (EV38) opposed the change because 1. the finality of pretrial rulings shortens trials, and 2. the proposed amendment does not clarify matters because of the provision

making a pretrial ruling final if "the context clearly demonstrates." The Kansas Association of Criminal Defense Lawyers (EV17) feared 1. that counsel might forget to renew an objection (leading to move ineffective assistance of counsel claims); 2. that if counsel has to make an objection, jurors will wonder why counsel is seeking to hide evidence; 3. that the rule will prove burdensome with regard to Fourth and Fifth Amendment objections, and 4. that the proposed rule is contrary to the spirit of Fed.R.Crim.Pro. 12(b).

The reverse formulation was also supported by the State Bar of Arizona (EV29), concerned that uncertainty about a ruling's finality will produce non-uniformity and appeals; the National Association of Criminal Defense Lawyers (NACDL) (EV36) and Professor Bruce Comely French (EV16).

Professor Myrna Raeder, writing on behalf of a group of evidence professors who favor the reverse formulation, (EV35) pointed out that judges have the option of telling lawyers that they must renew an objection at trial; that litigants can be warned that the ruling is final unless evidence introduced at trial substantially contradicts the in limine showing, and that a pro forma renewal creates an unnecessary technical hurdle to appellate review. She suggested the underlined changes in language:

> A pretrial objection to or proffer of evidence does not have to be renewed at trial, unless the court states on the record, or the context clearly demonstrates, that a ruling on the objection or proffer is not final.

Public hearing. Professor Richard Friedman expressed concern that the proposed rule would become a trap for lawyers who forget to mouth the right words, or that the "context" language would get a lot of use, in which case little will have been accomplished.

Rule 103. Rulings on Evidence

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(e) Effect of Pretrial Ruling. A pretrial objection to or proffer of evidence ~~must~~ need not be ~~timely~~ renewed at trial unless the court states on the record, or the ~~context~~ record clearly demonstrates, that ~~a~~ the ruling on the objection or proffer is ~~final~~ not.

COMMITTEE NOTE

Since the Federal Rules of Evidence became effective, litigants have increasingly relied on pretrial motions to raise issues about the admissibility of evidence. As enacted, Rule 103 did not specifically address whether a losing party had to renew its objection or offer of proof at trial in order to preserve an issue for appeal.

Subdivison (e) has been added in order to clarify differing approaches that spell uncertainty for litigants and create unnecessary work for the appellate courts. See, e.g., United States v. Vest, 842 F.2d 1319, 1325 (1st Cir.) (absence of objection at trial is "fatal"), cert. denied, 488 U.S. 965 (1988); Allison v. Ticor Title Ins. Co., 979 F.2d 1187, 1200 (7th Cir. 1992) ("the law in this circuit is that an unsuccessful motion in limine does preserve the issue for appeal"); American Home Assurance Co. v. Sunshine Supermarket, Inc., 753 F.2d 321, 324 (3d Cir. 1985) ("test is whether an objection at trial would have been more in the nature of a formal exception or in the nature of a timely objection calling the court's attention to a matter it need consider."); Palmerin v. City of Riverside, 794 F.2d 1409, 1411 (9th Cir. 1986) (circuit's position is "unclear").

Subdivision (e) states as a default rule that counsel for the losing party must renew any pretrial objection or proffer at trial. Renewal is not required if "the court states on the record, or the

context clearly demonstrates," the finality of the pretrial ruling. Counsel bears the responsibility for obtaining the requisite ruling or renewing the objection and bears the risk of waiving an appealable issue if these procedures are not followed. The Committee considered but rejected an alternative general rule that would not require renewal of a motion at trial.

Rule 103(e) does not excuse a litigant from having to satisfy the requirements of Luce v. United States, 469 U.S. 38 (1984) to the extent applicable. In Luce, the Supreme Court held that an accused must testify at trial in order to preserve for appeal any Rule 609 objection to a trial court's ruling on the admissibility of the accused's prior convictions for impeachment. Some circuits have extended the Luce rule beyond the Rule 609 context. See United States v. Weichert, 783 F.2d 23, 25 (2d Cir. 1986) (Rule 608(b)), cert. denied, 479 U.S. 831 (1986); United States v. Sanderson, 966 F.2d 184, 189-90 (6th Cir. 1992) (same); United States v. DiMatteo, 759 F.2d 831, 832-33 (11th Cir. 1985) (per curiam) (same), cert. denied, 474 U.S. 860 (1985); United States v. Griffin, 818 F.2d 97, 105 (1st Cir. 1987) (Rule 403), cert. denied, 484 U.S. 844 (1987).

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TO: Advisory Committee on the Federal Rules of Evidence

FROM: Margaret A. Berger, Reporter

DATE: September 30, 1994

Rule: Rule 103

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Suggested Redraft of Rule 103

Add after Rule 103(a)(1):

(a) The making of a motion in limine does not relieve the losing party from having to renew its objection when the evidence is offered at trial,

1) unless the court specifically states on the record at the hearing of the motion or at trial that its ruling is final, or

2) the evidence not excluded by the motion in limine is offered at trial by the losing party.

(b) Subdivision (a) does not preclude the court from reconsidering at trial any ruling made on a motion in limine.

[Add to Rule 103(a)(2):

An offer of proof made at a motion in limine does not have to be renewed at trial unless the court orders otherwise.

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Previous consideration by the Committee. After discussing Rule 103 at our May 1994 meeting, the Committee decided not to revise the Supreme Court's ruling in Luce v. United States, 469 U.S. 28 (1984) that requires a defendant to take the stand in order to preserve for appeal a trial court ruling admitting defendant's prior convictions for impeachment.[1] The Committee reserved decision on the more general question of amending Rule 103 in order to state whether, and in what circumstances, a party must renew an objection at trial in order to preserve for appeal the trial court's refusal to exclude evidence pursuant to a motion in limine. The rule is silent about the need for a contemporaneous objection when the issue was previously raised through a motion in limine.[2] We did not discuss at our prior meeting the need to cover in Rule 103 the related issue of whether a pretrial offer of proof has to be renewed at trial. The proposed amendment adds a provision dealing with this issue. Since it is considerably less controversial than the amendment to Rule 103(a)(1) it is discussed first.

Amending Rule 103(a)(2). The courts do not seem to have encountered difficulties in reconciling pretrial offers of proof

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[1] As indicated in the earlier memorandum on Rule 103, some courts have extended Luce beyond the Rule 609 context. This memorandum assumes that a disputed issue will not be preserved for appeal in the absence of testimony by the party who moved in limine or his witness whenever the circuit so requires. This memorandum is concerned solely with cases in which the movant testified at trial, or was not required to testify.

[2] Rule 103(a)(1) provides that rulings admitting evidence cannot be assigned as error on appeal unless "a timely objection or motion to strike appears of record."

with the motion in limine procedure. The only reason for amending Rule 103(a)(1) is to ensure that no erroneous conclusions will be drawn from the amendment to Rule 103(a)(1). Unlike the general rule proposed for overruled objections to evidence -- requiring a renewal of the objection at trial -- the amendment to Rule 103(a)(2) operates to relieve a party from having to renew an offer of proof at trial unless the court directs otherwise. The reasons for distinguishing between the two situations were well stated by the First Circuit in Fusco v. General Motors Corp., 11 F.3d 259, 262 (1st Cir. 1993):

> Where an objection to evidence has been overruled in limine, it makes sense to require that the objection be renewed at trial. However definite the denial of the motion to exclude prior to trial, it is child's play for the opponent of the evidence to renew the objection when the evidence is actually offered, and requiring this renewal gives the trial judge a change to reconsider the ruling with the concrete evidence presented in the actual context of the trial.
>
> On the other hand, where the motion in limine is granted, and the proponent of the evidence is told that the evidence will not be admitted, the situation is different. To require that the evidence be offered again at trial would certainly give the trial court a second chance, but doing so can hardly be described as easy: on the contrary, the proponent would have to engage in the wasteful and inconvenient task of summoning witnesses or organizing demonstrative evidence that the proponent has already been told not to offer. Indeed, in many cases the prior grant of the in limine motion would make it improper to call such witnesses without prior permission. All the proponent could do would be to line up the witnesses at trial and then ask permission.

Reasons for revising Rule 103(a)(1). After looking at numerous cases that discuss the interface between the contemporaneous objection rule and motions in limine, I believe

that we should amend Rule 103(a) as suggested above so as to deal explicitly with numerous problems that arise in connection with in limine motions. The proposed amendment seeks to strike a balance that recognizes that in most instances an evidentiary appeal should be based "on the actual form and timing of the attempt to introduce the evidence, rather than on an essentially hypothetical situation suggested by the pretrial motion in limine."[3] On the other hand, "[p]retrial motions are useful tools to resolve issues which would 'otherwise clutter up' the trial."[4] An amendment is needed for the following reasons, which are discussed in greater detail below:

1. One extremely important function of Rule 103 is to put attorneys on notice as to what they must do in order to preserve a right to appeal. In reading opinions that deal with Rule 103 and motions in limine it is often difficult to disentangle a circuit's statement of its general rule from its statement of the exceptions to the rule, and to separate holding from dictum.

For instance, the general rule in a majority of the circuits is that an objection must be renewed at trial in order to preserve an issue for appellate review. The Seventh Circuit, however, has declared on more than one occasion that "the law in this circuit is that an unsuccessful motion in limine does

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[3] Palmerin v. City of Riverside, 794 F.2d 1409, 1412 (9th Cir. 1986).

[4] Id.

preserve [an] issue for appeal."[5] In these cases the Seventh Circuit's conclusion is either dictum or is uttered in the context of facts that in other circuits give rise to an exception to the general rule. If the Seventh Circuit really means what it is saying about "the law in this circuit" then we should consider amending Rule 103 because there is a conflict in the circuits. If the Seventh Circuit would modify its language if presented with other fact patterns, then we ought to amend the rule because it fails to warn attorneys of forfeiting a right to appeal.

Furthermore, even though a good deal of inter-circuit consistency is visible with regard to the actual results in cases when all of the circuits' opinions are considered in conjunction with their underlying facts, there is considerably less consistency in how courts phrase various exceptions to the general, majority rule. The formulation is often phrased in terms of subjective elements that make it difficult for a litigant to predict what the outcome would be in a particular case. This uncertainty may cause difficulties in some cases because the attorney for the losing party may prefer not to repeat the objection before the jury. The existence of these exceptions suggests, however, that courts are willing to forgo an objection at trial when the objectives of the contemporaneous objection rule are satisfied. The proposed amendment seeks to achieve the

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[5] Allison v. Ticor Title Ins. Co., 979 F.2d 1187, 1200 (7th Cir. 1992) (D failed to preserve objection where it made no motion in limine but objected in trial brief). See other cases discussed below.

objectives sought by the exceptions while ensuring predictability.

2. The circuits disagree on whether a party who made an unsuccessful motion in limine waives its right to appeal when for tactical reasons it introduces at trial the evidence it unsuccessfully sought to exclude. See discussion, infra.

3. Adding to the confusion in present practice is the somewhat uncertain relationship between Rule 103 and Rules 46 of the Federal Rules of Civil Procedure and Rule 51 of the Federal Rules of Criminal Procedure. Courts sometimes rely on the language in these rules making [formal] exceptions unnecessary when they conclude that an objection at trial was unnecessary to preserve the error.[6]

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[6] See, e.g., American Home Assurance Co. v. Sunshine Supermarket, Inc., 753 F.2d 321, 324-325 (3d Cir. 1985) ("test is whether an objection at trial would have been more in the nature of a formal exception or in the nature of a timely objection calling the courts' attention to a matter it need consider."); Sprynczynatyk v. General Motors Corp., 711 F.2d 1112, 1119 (8th Cir. 1985) (under the circumstances an objection would have been in the nature of a formal exception unnecessary under Rule 46). Although both the civil and criminal rules were last amended in 1987, they are not completely identical. The criminal rule makes "exceptions" unnecessary while the civil rule makes only "formal exceptions" unnecessary.

Rule 51 provides:

> Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which that party desires the court to take or that party's objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice that party.

Rule 46 provides:

> Formal exceptions to rulings or orders of the court are

4. Revision is not inconsistent with the Committee's reluctance to disturb well-established practice under the Rules. Although minor improvements are not worth the confusion that may result if attorneys have to learn new ways of proceeding, there is no well-established practice set forth in the Rules with regard to the appealability of issues decided on motions in limine. Instead, a gap exists which an amended Rule 103 would now cover.

5. The need for a rule covering motions in limine is probably more pressing now than when the Rules of Evidence were enacted. More motions in limine are undoubtedly being made than in 1975 when the Rules became effective. Developments with regard to evidentiary doctrine such as hearsay and expert testimony have increased the need for preliminary motions, as has the growth of judicial management and greater dependence on pretrial conferences. Had motions in limine been as prevalent in the early 1970's as they are now, the original Advisory Committee might have mentioned them in Rule 103.

6. At our last meeting, some members stated that good lawyers always figure out a way in which to protect their right

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unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which the party desires the court to take or the party's objection to the action of the court and the grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party.

to appeal. This Committee may, however, owe some obligation to bad lawyers' clients. Careless lawyers who have never read the cases may be lulled into surrendering a client's right to appeal because Rule 103 does not alert them to the necessity of renewing an objection at trial. The creation of this Committee -- after close to twenty years in which no Evidence Committee existed -- indicates a felt need to reconsider whether evidentiary matters are being handled well. The problems listed above and discussed in more detail below suggest the desirability of clarifying when an objection must be renewed at trial.

Practice in the circuits a. The majority rule. The proposed amendment is in accord with the thrust of the rule voiced in a majority of the circuits -- an objection must ordinarily be renewed at trial in order to preserve an issue for appellate review. Most opinions in the First,[7] Third,[8] Fifth,[9] Sixth,[10]

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[7] See e.g., United States v. Vest, 842 F.2d 1319, 1325 (1st Cir.) (absence of objection at trial is fatal), cert. denied, 488 U.S. 965 (1988); United States v. Griffen, 818 F.2d 97, 104-05 (1st Cir.) (party must renew objection on Rule 403 grounds in context of trial), cert. denied, 484 U.S. 844 (1987); United States v. Reed, 977 F.2d 14, 16 (1st Cir. 1992)(dictum; appellant had not raised issue in question at in limine hearing)

[8] While the Third Circuit states as its rule a formula that other circuits characterize as an exception to the general rule, the result is in accordance with the majority since the court is concluding that the objection that would otherwise have to be made is excused under the particular circumstances. See American Home Assur. v. Sunshine Supermarket, 753 F.2d 321, 324-325 (3d Cir. 1988).

[9] The court states its general rule as requiring an objection at trial unless good cause is shown. See e.g., Marcel v. Placid Oil Co., 11 F.3d 563 (5th Cir. 1994); Rojas v. Richardson, 703 F.2d 186, 188 (5th Cir.) (appellant did not lodge an objection by making a motion in limine and failed to show good

Eighth,[11] Tenth,[12] and Eleventh[13] circuits state as the general rule that the losing party waives an error created by the in

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cause, but court found plain error), opinion set aside on other grounds at rehearing, 713 F.2d 116 (5th Cir. 1983); Petty v. Ideco, Division of Dresser Industries, Inc., 761 F.2d 1146, 1150 (5th Cir. 1985). The court finds that good cause exists when the losing party offers the testimony at trial in order to remove the sting. See, e.g., Reyes v. Missouri Pacific RR Co., 589 F.2d 791, 793, n.2 (5th Cir. 1979), infra.

[10] Dictum in cases in this circuit suggest adherence to the majority rule. See, e.g., Burger v. Western Kentucky Navigation Inc., 1992 WL 75219 (6th Cir. 1992) at **3 (although court rested its holding on failure of the district court to rule on the motion in limine, the court indicated that the motion would not have counted as an objection even if the court had ruled); Boyle v. Mannesmann Demag Corp., 1993 WL 113734 (6th Cir. 1993) at **1 (failure to object at trial generally results in waiver but in this instance court led party to believe that motion in limine sufficed to preserve record). See also Polk v. Yellow Freight System, Inc., 876 F.2d 527, 532 (6th Cir. 1989) (D failed to preserve objection when motion in limine was denied and D "did not appeal this denial;" no mention of Rule 103).

[11] See e.g., United States v. Neumann, 867 F.2d 1102 (8th Cir. 1989); United States v. Kandiel, 865 F.2d 967, 972 (8th Cir. 1989); Hale v. Firestone Tire & Rubber Co., 756 F.2d 1322, 1333-34 (8th Cir. 1985)(hearsay objection at trial did not preserve objection made at motion in limine to same evidence on Rule 401/403 grounds); Northwestern Flyers Inc. v. Olsen Bros. Mfgs., 679 F.2d 1264, 1275, n.27 (8th Cir. 1982). See also Stars v. J. Hacker Co., Inc., 688 F.2d 78 (8th Cir. 1982); United States v. Roenigk, 810 F.2d 809 (8th Cir. 1987) (dictum; defendant made objection at trial).

[12] The Tenth Circuit, albeit in dictum, has rejected the rule being advocated here. It would not excuse renewing an objection at trial even if the trial court's ruling on the motion in limine was "explicit and definitive." See McEwen v. City of Norman, Okla., 926 F.2d 1539, 1544 (10th Cir. 1991) (losing party failed to make motion in limine part of the record on appeal so that court concluded that it had nothing to review). See also United States v. Sides, 944 F.2d 1554, 1560 (10th Cir.), cert. denied, 112 S. Ct. 604 (1991).

[13] See e.g., United States v. Khoury, 901 F.2d 948, 966 (11th Cir. 1990). See also Hendrix v. Raybestos-Manhattan Inc., 776 F.2d 1492, 1503-04 (11th Cir. 1985).

limine ruling unless it objects at trial when the evidence is introduced.

b. Other circuits. Numerous cases in the Seventh Circuit state that the circuit's rule is that once a motion in limine is made no further objection must be made at trial to preserve the error.[14]

The Ninth Circuit's position is "unclear."[15] In a number of cases the court has suggested that an in limine motion may suffice to preserve an objection.[16] Other cases are to the

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[14] See Thronson v. Meisels, 800 F.2d 136, 142 (7th Cir. 1986); Sherrod v. Berry, 827 F.2d 195, 203 (7th Cir. 1987) (objections relating to Rule 401/403 evidentiary issues were preserved for appellate review when they were raised in motions in limine, treated in the district judge's opinion overruling the new trial motion, and were argued on the first day of trial; "under the circumstances, it was unnecessary under [Fed. R. Civ. P. 46] for defendants to review their objection at the time the evidence was admitted); Harris v. Davis, 874 F.2d 461, 464, n.5 (7th Cir. 1989), cert. denied, 493 U.S. 1027 (1990). See also Allison v. Ticor Title Ins. Co., 979 F.2d 1187, 1200 (7th Cir. 1992) ("[w]hile the law in this circuit is that an unsuccessful motion in limine does preserve [an] issue for appeal," D failed to preserve its objection by objecting in a trial brief and failing to make a contemporaneous objection at trial). But see United States v. York, 933 F.2d 1343 (7th Cir.) (requires objection at trial; cites United States v. Roenigk, 810 F.2d 809, 815 (8th Cir. 1987) without discussion) cert. denied, 112 S. Ct. 321 (1991). York has been ignored in subsequent 7th Circuit cases. See e.g., Favala v. Cumberland Engineering Co., 17 F.3d 987 (7th Cir. 1994); Allison v. Ticor Title Ins. Co., 979 F.2d 1187, 1200 (7th Cir. 1992).

[15] Palmerin v. City of Riverside, 1794 F.2d 1409, 1411 (9th Cir. 1986).

[16] See, e.g., United States v. Khan, 993 F.2d 1368, 1377 (9th Cir. 1993) (court held that defendant's objection to testimony of a particular witness in motion on limine on which judge never ruled did not constitute a pending or continuing objection to all like evidence, but suggests that he could have availed himself of the benefit of a continuing objection if he had requested that his earlier objection apply to all other like

contrary.[17]

The District of Columbia and the Second and Fourth Circuits do not seem to have dealt with this issue.

b. Rationale supporting the general rule. The courts have advanced the following reasons for the majority rule that requires a contemporaneous objection to be made at trial in order to preserve an issue for appellate review:

1. objections are best assessed in the context of the actual trial;[18]

2. unnecessary appeals should be avoided in order to preserve judicial resources;[19] and

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evidence); Sheey v. South Pacific Transp. Co., 631 F.2d 649, 652-653 (9th Cir. 1980) (losing party made no objection when evidence was introduced at trial, but attorney had objected during pretrial arguments to the court's ruling and the court held that "under
these circumstances" the objection was adequate to preserve the issue on appeal).

[17] See United States v. Traylor, 656 F.2d 1326, 1333, n.6 (9th Cir. 1981) (in holding that a contemporaneous objection to hearsay statements was required, court cited to Collins v. Wayne Corp., 621 F.2d 777 (5th Cir. 1980) without discussion). See also Palmerin v. City of Riverside, 794 F.2d 1409 (9th Cir. 1986)(excusing objection under certain conditions; see discussion below).

[18] Collins v. Wayne Corp., 621 F.2d 777, 784 (5th Cir. 1980) contains a lengthy discussion of this rationale which courts cite to frequently).

[19] When a movant makes a contemporaneous objection at trial, it allows the court to either avoid the evidentiary violation or give an instruction to cure the harm. Collins v. Wayne Corp., 621 F.2d 777 (5th Cir. 1980). Furthermore. the rule "discourage counsel from refraining from making an objection at trial in order to reserve the opportunity to assert reversible error on appeal." U.S. v. Roenigk, 810 F.2d 809, 815 (8th Cir. 1987).

3. requiring a contemporaneous objection does not place any great burden on the movant.[20]

c. Exceptions to the general rule. The circuits have stated a number of different exceptions to the general majority rule. Just as with the statement of the rule itself, the statement of the exception often constitutes dictum in the setting of the particular case.[21] In formulating exceptions courts have singled out situations in which the evidentiary issue was handled at the motion in limine proceeding in a manner consistent with how it would be treated at trial. The conduct of the parties, the type of evidentiary issue, and the nature of the judge's ruling are all factors that courts have considered. Opinions in some of the circuits, like the amendment proposed above, excuse renewing the objection at trial when the judge has ruled definitively.[22] Other exceptions, however, also contain subjective elements, such

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[20] The rule requiring a contemporaneous objection at trial is justifiable because "[d]enial of a motion in limine rarely imposes a serious hardship on the requesting party since the affected party can make a subsequent objection if the evidence is ever offered at trial." Rojas v. Richardson, 703 F.2d 186, 188 (5th Cir. 1983), opinion set aside on other grounds at rehearing, 713 F.2d 116 (5th Cir. 1983). Another court referred to the burden of a contemporaneous objection as "child's play." See Fusco v. General Motors Corp., 11 F.3d 259, 262 (1st Cir. 1993).

[21] See, e.g., Freeman v. Package Machinery Co., 865 F.2d 1331, 1337 (1st Cir. 1988) ("[t]o be sure, there may be instances where a trial court's ruling on an in limine motion, taken in context, is definite enough to excuse omission of an objection on the point at trial.").

[22] Greger v. International Jensen, Inc., 820 F.2d 937, 941 (8th Cir. 1987) (objection at trial excused where trial judged had "ruled definitively).

as whether the issue was fully briefed,[23] or whether the trial court treated the motion in detail[24] that make predictability difficult.

Consequently, the proposed amendment proposes an objective standard. The losing party must obtain a definitive on-the-record ruling in order to avoid having to renew its objection at trial. By putting this requirement into Rule 103 courts will on notice of the consequences of making such a ruling. Courts are likely to rule finally only when they are satisfied that the parties have treated the matter adequately, and when the exclusion of evidence rests on an issue of law rather than on an exercise of discretion best made in the context of the trial.[25] For instance, Rule 403

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[23] American Home Assurance Co. v. Sunshine Supermarket Inc., 753 F.2d 321, 324 (3d Cir. 1985) (objection excused when motion in limine fully briefed and the trial court is able to make a definitive ruling); Spryczynatyk v. General Motors Corp., 771 F.2d 1112, 1118-19 (8th Cir. 1985) (trial court made a definite pre-trial ruling and thee "matter was fully briefed and argued"); Palmerin v. City of Riverside, 794 F.2d 1409, 1413 (9th Cir. 1986) ("where the substance of the objection has been thoroughly explored during the hearing on the motion in limine, and the trial court's ruling permitting introduction of evidence was explicit and definitive, no further action is required to preserve or appeal the issue of admissibility of that evidence.").

[24] United States v. Kerr, 770 F.2d 690, 698, n.8 (11th Cir. 1985) (dictum)

[25] Cf. United States v. Mejia-Alarcon, 995 F.2d 982 (10th Cir.) (holding that the motion in limine preserved the evidentiary issue for appeal because a three-part test was satisfied: 1) the issue was fairly presented to the district court at the time of the pre-trial hearing; 2) the issue could be finally determined at the hearing, a requirement that was met because a Rule 609(a)(2) question is essentially a question of law; and 3) the trial judge ruled unequivocally, cert. denied, 114 S. Ct. 334 (1992).

determinations are not going to be made definitively. Consequently, in practice, the proposed amendment would accommodate some of the more subjective factors that some of the circuits have included in their discussion of exceptions to the general rule. Even if the court makes a "final" ruling at the motion in limine, the last sentence of the proposed amendment recognizes that a court may always reconsider its ruling at trial.

The losing party offers the evidence the court refused to exclude. There is a definite split in the circuits as to whether the losing party waives its right to appellate review when it elicits the evidence at trial which it previously unsuccessfully sought to exclude at the motion in limine. In the Fifth[26] and Seventh[27] Circuits, the movant at the motion in limine does not forfeit its objection when it introduces the evidence for tactical reasons in order to lessen the sting. The Second Circuit has dealt with this issue only at the district court level.[28] The Tenth Circuit has not actually discussed this issue but has

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[26] Reyes v. Missouri Pacific RR Co., 589 F.2d 791, 793, n.2 (5th Cir. 1979) ("[a]fter the trial court refused to grant Reyes' motion in limine ..., he had no choice but to elicit the information on direct examination in an effort to ameliorate its prejudicial effect."); Petty v. Ideco, 761 F.2d 1146, 1152, n.3 (5th Cir. 1985).

[27] Cook v. Hoppin, 783 F.2d 684, 691, n.2 (7th Cir. 1986)(ruling on motion in limine is law of the case). Accord, Harris v. Davis, 874 F.2d 461, 464, n.5 (7th Cir. 1989).

[28] See United States v. Muscato, 534 F. Supp. 969, 973 (E.D.N.Y. 1982) (Weinstein, J.) (party did not waive a hearsay issue by introducing the evidence after the court denied his motion in limine to exclude).

allowed a losing party to raise an evidentiary issue on appeal after bringing out the evidence on direct.[29]

The Sixth,[30] Eighth,[31] and Ninth[32] Circuits have held that waiver of the evidentiary issue results when the movant introduces at trial the evidence which he previously sought to exclude.

The proposed draft would permit the losing party at the motion in limine to preserve the issue for appeal even though it introduces the disputed evidence at trial. Although this approach has been criticized for permitting a party to adopt a trial strategy that is in his best interest and then complaining about it, two considerations support such a rule. The first which pertains to objections made pursuant to Rule 609 in particular is

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[29] See U.S. v. Mejia-Alarcon, 995 F.2d 982 (10th Cir. 1992) (discussed supra at note 25).

[30] U.S. v. Leon, 1992 WL 133039 at **2 (6th Cir. 1992) ("[a] motion in limine is merely a request for guidance from the court on an evidentiary question which the parties can utilize to guide their trial strategy." Thus "the denial of the motion in limine does not insulate the defense from the adverse effects of its trial strategy ...").

[31] The Eighth Circuit has consistently held that a movant's trial tactic of introducing disputed evidence precludes review of the evidentiary issue on appeal. See United States v. Brown, 956 F.2d 782 (8th Cir. 1992); United States v. Brimberry, 779 F.2d 1339 (8th Cir. 1985); Nicholson v. Layton, 747 F.2d 1225 (8th Cir. 1984) United States v. Dahlin, 734 F.2d 393 (8th Cir. 1984); United States v. Cobb, 588 F.2d 607 (8th Cir. 1978), cert. denied, 440 U.S. 947 (1979).

[32] See Williams v. United States, 939 F.2d 721, 723-25 (9th Cir. 1991) ("by not making an objection to the admission of past crimes evidence at trial, defendant waived his right to appeal the district court's in limine ruling that the evidence was admissible under Rule 608(a)(1).").

that the 1990 amendment to Rule 609 specifically

> remove[d] from the rule the limitation that the conviction may only be elicited during cross-examination, a limitation that virtually every circuit has found to be inapplicable. It is common for witnesses to reveal on direct examination their convictions to "remove the sting" of the impeachment.

Advisory Committee Note to 1990 Amendment.

It seems unfair to suggest that defendant's right to introduce evidence of the conviction on direct has been recognized without warning defendant that he will forfeit appellate review of the district court's pretrial ruling, especially since the rule in Luce, which is not being changed, will force him to testify in order to preserve an error.

More generally, a rule that conditions appellate review on not putting one's best foot forward with the jury seems harsh. Courts have expressed concerns that a rule such as the one here proposed encourages the losing party to proffer the evidence, thereby precluding the trial court from changing its in limine ruling.[33] However, the losing party is unlikely to offer the evidence if it believes that there is a realistic chance that the court will reverse itself and exclude the evidence at trial.

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[33] Williams v. United States, 939 F.2d 721, 724 (9th Cir. 1991) ("even if the court rules that the disputed evidence is admissible, it can later change its mind based on D's testimony or it my appear, as the trial proceeds that there is less of a need to impeach than previously thought ....").

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FROM: Margaret A. Berger, Reporter MAB

DATE: April 26, 1994

RE: Amending Rule 103

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1. Prior Committee action. At its fall meeting, the Committee expressed interest in further exploration of problems posed by the Supreme Court's opinion in Luce v. United States, 469 U.S. 38 (1984). Luce prohibits a defendant from raising on appeal a claim pursuant to Rule 609 unless the defendant testified and raised the objection at trial. Luce means that a defendant who is unsuccessful in having a prior conviction excluded through a motion in limine cannot have that determination reviewed on appeal unless he takes the stand. The Committee agreed that any modification of Luce's policy should be accomplished via Rule 103 rather than Rule 609 because opening Rule 609 to Congressional review might well be counter-productive.

Rule 103 does not presently contain any provision dealing with in limine motions. Drafting such a section requires the resolution of a number of issues that lie beyond the scope of the

Luce opinion itself. Accordingly, this memorandum first discusses Luce and the Supreme Court's rationale. It then considers the extent to which Luce has been applied outside the Rule 609 context, the contemporaneous objection rule, and possible changes to Rule 103.

2. Luce. In Luce v. United States, 469 U.S. 38, 43 (1984), the Court held "that to raise and preserve for review the claim of improper impeachment with a prior conviction, a defendant must testify." The Court justified its holding by stressing the difficulty a reviewing court encounters in ruling "on subtle evidentiary questions outside a factual context." Id. at 41. This is particularly a problem in view of the balancing test the court must apply pursuant to Rule 609(a)(1) to determine the admissibility of a prior conviction. The court needs to know the precise nature of the defendant's testimony which is, however, unknowable at the motion in limine stage before the defendant testifies. The Court found speculative any possible harm flowing from a district court ruling allowing impeachment and voiced concern that appellate review without requiring the accused's testimony would encourage defendants to make in limine motions "to 'plant' reversible error in the event of conviction." Furthermore, the Court expressed concern that allowing appeals from adverse rulings on motions in limine would promote a windfall of automatic reversals, since error which presumptively kept the defendant from testifying could not logically be called harmless.

Critics of Luce have pointed primarily to the decision's effect in keeping defendants off the stand for fear that they will be convicted once the jury hears of their prior convictions. That fear, coupled with the appellate courts' extensive reliance on harmless error, means that a defendant may conclude that the lesser danger is to forgo testifying in his own behalf. Consequently, if the trial court was wrong in its in limine determination, or refuses to make one, the defendant forfeits the protection of Rule 609(a) which was specifically drafted to protect defendant against the danger that prior crime evidence offered to impeach will be misused on a propensity inference. See Advisory Committee Note to 1990 Amendment ("the rule recognizes that, in virtually every case in which prior convictions are used to impeach the testifying defendant, the defendant faces a unique risk of prejudice").

Critics have also argued that appellate courts can take into account the fact that defendant's proffer may be self-serving and can still apply a harmless error test even if they assume that the erroneous ruling caused defendant not to take the stand. Furthermore, exclusion of a conviction may be conditioned on defendant's trial testimony being consonant with the terms of a proffer made at the in limine hearing.

The states are split on adopting the Luce approach. See Annot., 88 A.L.R. 4th 1028. Some states that do not follow Luce have added special provisions to their rules of evidence (see below); others have reached this result via court decisions. The

opinions indicate some disagreement about the record that defendant must make at the in limine hearing.

3. Extensions of Luce. Justice Brennan's concurring opinion in Luce stated: "I do not understand the Court to be deciding broader questions of appealability vel non of in limine rulings that do not involve Rule 609(a)." The Second, Sixth and Eleventh Circuits have, however, extended Luce to impeachment pursuant to Rule 608(b). See United States v. Weichert, 783 F.2d 23, 25 (2d Cir. 1986) (per curiam) (defendant failed to testify), cert. denied, 479 U.S. 831 (1986); United States v. Sanderson, 966 F.2d 184, 189-90 (6th Cir. 1992); United States v. DiMatteo, 759 F.2d 831, 832-33 (11th Cir. 1985) (per curiam) (witness failed to testify), cert. denied, 474 U.S. 860 (1985). The First Circuit has refused to review a Rule 403 determination in the absence of testimony by the accused (United States v. Griffin, 818 F.2d 97, 105 (1st Cir. 1987), cert. denied, 484 U.S. 844 (1987). And the Eighth Circuit has stated that Luce applies to a Rule 404(b) determination, and refused to review a claimed error pursuant to that rule when defendant failed to testify. See United States v. Johnson, 767 F.2d 1259 (8th Cir. 1985) (court ruled that evidence would be usable for rebuttal and cross-examination).

4. The contemporaneous objection rule. Rule 103(a)(1) provides that rulings admitting evidence cannot be assigned as error on appeal unless "a timely objection or motion to strike appears of record." Does this rule require a party to renew its objection at trial when the evidence is offered if the court

previously denied the party's motion in limine to exclude the evidence? See Catherine Young, Should a Motion in Limine or Similar Preliminary Motion Made in the Federal Court System Preserve Error on Appeal Without a Contemporaneous Objection? 74 Ky. L. J. 177 (1990) (reporting a split among the circuits).

In the case of prior conviction evidence, the contemporaneous exception rule intersects with the Luce rule and may cause additional problems for the defendant. If the defendant testifies at trial, thereby satisfying Luce, a rigid view of Rule 103(a) precludes appellate review if the defendant brings out the conviction on direct, as permitted by Rule 609, in order to remove its sting. See Williams v. United States, 939 F.2d 721, 723-25 (9th Cir. 1991).

5. Possible amendments to Rule 103.

a. Should a motion in limine provision be added with an exception to the contemporaneous objection rule? A number of different solutions are possible.

1) Do not add a motion in limine provision. This resolution does not mean that a failure to renew an objection at trial after an adverse in limine determination will always be fatal to appellate review. Some of the circuits have carved out limited exceptions. See, e.g., United States v. Mejia-Alarcon, 996 F.2d 982 (10th Cir. 1992) (defendant brought out conviction on direct after judge found at in limine hearing that defendant's prior conviction for the unauthorized acquisition and possession of food stamps involved dishonesty or false statement and was

therefore automatically admissible pursuant to Rule 609(a)(2); appellate court found that under these circumstances the motion in limine preserved the objection because it satisfied a three-part test: 1. the issue was fairly presented to the district court at the time of the pre-trial hearing; 2. the issue could be finally determined at the hearing, a requirement which was met because a Rule 609(a)(2) question is essentially a question of law; and 3. the judge ruled unequivocally).[1] Courts have also sometimes excused the need for a contemporaneous objection when it obviously would have been useless. See United States v. Lui, 941 F.2d 844 (9th Cir. 1991) (court threatened defendant with sanctions for moving in limine to exclude drug courier profile evidence).

The disadvantage with this approach is that the party who fails to object can never be sure that the circuits' various exceptions will apply in a particular case. Consequently, a number of suggestions have been made for codifying the circumstances in which a prior motion in limine will excuse further objection at trial.

2) Amend the rule to require the judge to specify at the in limine motion whether a further objection must be made at trial. One possible version of such an addition to Rule 103 was proposed by the ABA Criminal Justice Section, Committee on

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[1] For other cases in which courts applied a similar test see Cook v. Hoppin, 783 F.2d 684 (7th Cir. 1986); Greger v. International Jensen, Inc, 820 F.2d 937 (8th Cir. 1987); Palmerin v. City of Riverside, 794 F.2d 1409 (9th Cir. 1986) (thoroughly explored and definitive ruling).

Rules of Criminal Procedure and Evidence, Federal Rules of Evidence: A Fresh Review and Evaluation, 120 F.R.D. 299 (1987). It suggested adding to Rule 103(a)(1):

> (a) A ruling on a motion in limine that evidence subject to the motion is admissible shall be sufficient to preserve the issue for appeal without any further objection by the losing party during trial, unless the court specifically notifies the parties that its ruling is tentative and the motion should be renewed at trial.
>
> (b) During trial, the court can change any in limine ruling for good cause shown.

It would of course also be possible to draft such a rule in the reverse, eliminating the need to make an objection at trial if the court advises the losing party that it need not renew the objection. The advantage of either approach is that the losing party will know when to renew the objection at trial. It will not, however, always allow a defendant to preserve his right to raise the issue on appeal when he introduces evidence on direct of a conviction which the court admitted pursuant to Rule 609(a)(1).

3) Amend the rule to eliminate the need for an objection at trial if the issue was explored fully at the in limine hearing. Kentucky added a subdivision (d) to its version of Rule 103 that not only makes contemporaneous objections unnecessary under some circumstances but also simultaneously overcomes Luce when the provision applies:

> (d) Motions in limine. A party may move the court for a ruling in advance of trial on the admission or exclusion of evidence. the court may rule on such a motion in advance of trial or may defer a decision on admissibility until the evidence is offered at trial. A

> motion in limine resolved by order of record is sufficient to preserve error for appellate review. Nothing in this rule precludes the court from reconsidering at trial any ruling made on a motion in limine.

The Commentary to the provision first explains the value of motions in limine and expresses the hope that the provision will encourage more widespread use of the device. The Commentary then discusses the second and last sentence of subdivision (d):

> The second sentence is intended to recognize that such motions might frame issues which can only be resolved properly in the context of developments at trial and that the trial judge must be given great latitude to make or refuse to make advance rulings on admissibility.
>
> In some jurisdictions the case law leaves doubt about the extent to which motions in limine may be used to preserve errors for review. . . Subdivision (d) eliminates this doubt by providing that motions in limine resolved by order of record are sufficient to preserve error for appellate review. By requiring that such motions be resolved by "order of record," an adequate record for the appeals court should be assured. it should be noted that a motion in limine would not be sufficient to preserve errors for appellate review unless it provided the trial court with the type of information which would be required to preserve errors raised at trial (i.e. information sufficient to satisfy the requirements of subdivision (a) --the specific ground for any objection being made and the substance of any evidence being offered).
>
> The last sentence of the provision merely recognizes aa right in the trial court to reconsider advance rulings on evidence issues in the light of developments at trial. the provision does not attempt to define the circumstances under which reconsideration would be appropriate. But it could be expected that reconsideration would only be necessary in unusual situations, for a trial judge should not provide advance rulings on admissibility in situations which might call for reconsideration at trial.

Kentucky's formulation leaves somewhat uncertain when defendant can risk not making an objection at trial. See

discussion of United States v. Mejia-Alarcon, supra. The rule does not indicate when the record will be adequate to overcome the timely objection requirement and the Luce ruling. Must the defendant proffer his testimony at the in limine hearing?

4) Other formulations. The ABA Criminal Justice Section's Committee suggested a number of additions to Rule 103 specifically responsive to the Luce opinion. See discussion infra. The proposal also preserves the right to an appeal if the defendant brings out the evidence of his prior conviction on direct provided certain conditions are met. Such a provision could be drafted independently of provisions aimed at overruling Luce.

One might also seek to codify the test in Mejia-Alarcon. The result would be a provision stressing both an explicit ruling by the trial court and an adequate exploration of the issue at the limine hearing, i.e. somewhat of a cross between the ABA Criminal Section's proposed subdivision(a)(1) and Kentucky's subdivision (d).

b. Overruling Luce. Instead of, or in addition to, dealing with motions in limine in general, the Committee might wish to address the issues posed by the Court's holding in Luce. State judicial decisions which have declined to follow Luce can be divided into two broad categories: 1. defendant need not testify at trial in order to preserve for appeal an adverse ruling that admits a prior criminal conviction for impeachment; 2. defendant's failure to testify at trial preserves for appeal

an adverse ruling concerning the admissibility of prior convictions only if the defendant created an adequate record to permit appellate review. Compare State v. Whitehead, 517 A.2d 373 (N.J. 1986) (found that appellate court could review the trial court's decision without requiring a proffer from defendant and that requiring a proffer exposes the defendant to the tactical disadvantage of prematurely disclosing his testimony) with State v. McClure, 692 P.2d 579 (Ore. 1984) (in order to preserve issue for appeal defendant must establish on record that he will in fact take the stand and testify if convictions are excluded, and must outline sufficiently the nature of his testimony so that appellate court can effectively balance). These solutions and others are discussed below.

1) Restricting Luce's impact to the facts of the case. Courts have gone beyond the specific holding of Luce: 1. by extending the ruling to rules of evidence other than rule 609; 2. by foreclosing the non-testifying defendant from raising the propriety of the trial judge's ruling with regard to the admissibility of prior convictions even when the court finds the conviction automatically admissible pursuant to Rule 609(a)(2) so that it does not have to engage in any balancing; 3. in Luce, the defendant had made no proffer as to what his testimony would be 469 U.S. at 462. A provision could be drafted requiring defendant to testify in order to raise a Rule 609(a)(1) issue on appeal unless he made an adequate proffer at the motion in limine, and providing that other situations would be handled by some version

of a motion in limine rule as suggested above.

2) Requiring defendant to make an adequate proffer of evidence at the motion in limine in order to preserve the right to appellate review. A provision that relieves defendant from testifying at trial but conditions appellate review on the adequacy of defendant's proffer is consistent with the Luce opinion's basic premise that appellate courts cannot review the trial court's balancing in the absence of an adequate record. The Kentucky provision quoted above is one example of a rule that would require defendant to offer some information, although it is very vague as to what is required.

A more detailed provision was suggested by the ABA Criminal Justice Section's Committee. It proposed that the following two sections be added to Rule 103 (in addition to the general provision on motions in limine set forth above):

> (2)(a) If the in limine motion concerns impeachment of the criminal defendant, the court shall rule (and the ruling shall be made subject to later evidentiary considerations) as early as practicable, and no later than when the defendant is called as a witness. (b) Any ruling made at the time the defendant is called as a witness shall be subject to change only if he or she testifies in a manner so differently from that indicated to the court at the time of the ruling that it would have affected the ruling.
>
> (3) if the ruling in limine admits impeachment concerning a criminal defendant's wrongdoing or conviction of crime, the merits of the evidentiary issue shall be preserved for appeal even if the witness-defendant personally testifies to the impeaching facts on direct examination, or does not testify at all, as a result of the ruling, if he or she:
>
> (a) indicated to the court an intention to testify at trial; and
> (b) made known the substance of his or her

proposed testimony on the record before the court ruled on the admissibility of the impeachment.

c. Relieving defendant of any obligation to testify at trial or to make a proffer in order to preserve for appellate review a ruling that admits evidence of a prior conviction. As indicated above, some state courts have rejected the Luce rationale that an appellate court cannot properly review the trial court's decision absent testimony or a proffer of testimony by the accused. See also Commonwealth v. Richardson, 500 A.2d 1200 (Pa. 1985); State v. Ford, 381 N.W.2d 534 (Minn. 1986). This had been the rule in some federal circuits prior to Luce.

Tennessee has incorporated this approach into its version of Rule 609:

> (a)(3) If the witness to be impeached is the accused in a criminal prosecution, the State must give the accused reasonable written notice of the impeaching conviction before trial, and the court upon request must determine that the conviction's probative value on credibility outweighs its unfair prejudicial effect on the substantive issues. The court may rule on the admissibility of such proof prior to the trial but in any event shall rule prior to the testimony of the accused. if the court makes a final determination that such proof is admissible for impeachment purposes, the accused need not actually testify at the trial to later challenge the propriety of the determination.

See also Kentucky's Rule 103(d) discussed at 5.a.(3), supra.

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

October 4, 1996
Via Facsimile

MEMORANDUM TO ADVISORY COMMITTEE ON CRIMINAL RULES

SUBJECT: *Additional Materials for the Committee Meeting*

I have attached some more materials for the next Monday's committee meeting. They include the following:

1. The full Standing Committee's Style Subcommitte reviewed the suggested edits made by Bryan Garner to Rule 32.2, 11(c)(6), and 40, which were sent to you earlier. The attached version builds on Bryan's changes and represents the full subcommittee's views.

2. A letter from Judge W. Eugene Davis attaching a request from Judge George Kazen to examine problems with Rule 25(b).

3. A letter from Judge Paul D. Borman commenting on the proposed amendments to Rule 11(c) and the waiver of appeal rights.

4. A memorandum from Magistrate Judge Robert B. Collings to Magistrate Judge B. Waugh Crigler expanding on the proposed amendments to Rule 40.

Copies of these late materials will be available at the meeting.

John K. Rabiej

Attachments

cc: Honorable Alicemarie H. Stotler
Honorable James A. Parker
Professor Daniel R. Coquillette

Rule 32.2 Criminal Forfeiture

(a) Indictment and Information. No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information ~~shall~~ alleges that ~~the~~ a defendant ~~or defendants have~~ has an interest in property that is subject to statutory forfeiture ~~in accordance with the applicable statute~~.

(b) Hearing ~~and entry of preliminary order of forfeiture~~ After Verdict and Third-Party Claim. Within 10 days of ~~the entry of~~ entering a verdict of guilty or ~~the acceptance of~~ accepting a plea of guilty or nolo contendere ~~as to~~ on any count in the indictment or the information ~~for~~ which alleges ~~criminal~~ statutory forfeiture ~~is alleged~~, the court ~~shall~~ must conduct a hearing solely to determine what property is subject to forfeiture. ~~under any applicable statute because of its relationship to the offense. Upon finding~~ If the court finds that property is ~~thus~~ subject to forfeiture, ~~the court shall~~ it must enter a preliminary order directing the forfeiture of whatever interest ~~each~~ a defendant may have in the property, without determining what that interest may be. A determination of the extent of each defendant's interest in the property ~~shall~~ is to be deferred until any third party claiming an interest in the property has petitioned the court ~~pursuant to statute for consideration of~~ to consider the claim. If no

There is no linkage to the D here.

such petition is timely filed, the property ~~shall be~~ is forfeited in its entirety.

(c) **Preliminary Order of Forfeiture.** ~~The entry of~~ If the court enters a preliminary order of forfeiture, ~~shall~~ the order must authorize the Attorney General to seize the property subject to forfeiture, ~~to~~ conduct ~~such~~ whatever discovery ~~and~~ the court ~~may deem~~ considers helpful in identifying or locating ~~proper to facilitate the identification, location or disposition of~~ the property, and ~~to~~ commence proceedings consistent with any statutory requirements pertaining to ancillary hearings and ~~the~~ third party rights ~~of third parties~~. At ~~the time of~~ sentencing, the order of forfeiture ~~shall~~ becomes final as to the defendant~~;~~ and ~~shall~~ must be made ~~a~~ part of the sentence and included in the judgment. The court may include in the order of forfeiture ~~such~~ whatever conditions ~~as may~~ are reasonably ~~be~~ necessary to preserve the property's value ~~of the property~~ pending any appeal.

(d) **Ancillary Proceedings.** (1) If, ~~in accordance with the applicable~~ as prescribed by statute, ~~and~~ a third party files a petition asserting an interest in ~~the forfeited~~ property subject to forfeiture, the court ~~shall~~ must conduct an ancillary proceeding. In ~~such~~ that proceeding, the court may, ~~entertain a~~ on motion, ~~to~~ dismiss the petition for lack of standing, for failure to state a claim upon which relief could be granted

~~under this section~~, or for any other ~~ground~~ reason. ~~For the purposes of such motion, all facts set forth in the petition shall be assumed to be true.~~ In ruling on the motion, the court must assume as true all facts stated in the petition.

(2) If a motion ~~referred to in paragraph~~ made under Rule 32.2 (d)(1) is denied, or if no ~~such~~ motion is made, the court may~~, in its discretion,~~ permit the parties to conduct discovery, in accordance with the Federal Rules of Civil Procedure, ~~to the extent~~ that the court determines ~~such discovery to be~~ is necessary or desirable to resolve factual issues before ~~conducting~~ holding an evidentiary hearing. At the conclusion of ~~such~~ discovery, either party may ~~seek to have the court dispose of the petition on a motion~~ move for summary judgment on the petition in the manner ~~described in~~ prescribed by Rule 56 of the Federal Rules of Civil Procedure.

(3) At the conclusion of the ancillary proceeding, the court ~~shall~~ must enter a final order of forfeiture amending the preliminary order as necessary if any third-party petition is granted.

(4) ~~Where~~ If multiple petitions are filed in the same case, an order dismissing or granting fewer than all of the petitions ~~shall~~ is not ~~be~~ appealable until all petitions are resolved, unless the court determines that

there is no just reason for delay and directs the entry of final judgment with respect to one or more but fewer than all of the petitions.

(e) Stay ~~of forfeiture~~ Pending Appeal. If ~~an appeal of~~ the defendant appeals from the conviction or order of forfeiture, ~~is taken by the defendant~~ the court may stay the order of forfeiture upon ~~such~~ terms ~~as~~ that ~~the court finds appropriate in order to~~ will ensure that the property remains available ~~in the event~~ in case the conviction or order of forfeiture is vacated. ~~Such~~ But the stay~~, however, shall~~ must not delay the ~~conduct of the~~ ancillary proceeding or the determination of the rights or interests of any third party. If, while the defendant's appeal is still pending, ~~at the time~~ the court determines that the order of forfeiture must ~~be amended to~~ recognize ~~the~~ a third party's interest ~~of a third party~~ in the property, the court ~~shall~~ must amend the order of forfeiture but must ~~shall refrain from directing~~ not, without the defendant's written consent, direct the transfer of any property or interest to the third party until the defendant's appeal is final~~, unless the defendant, in writing, consents to the transfer of the property or interest to the third party~~.

(f) Substitute Property. If the applicable forfeiture statute authorizes the forfeiture of substitute property, the court may at any time ~~entertain a~~ on the government's motion ~~by the government to~~ order

forfeiture of substitute property. ~~and upon the~~ If the government makes the requisite showing, ~~shall~~ the court must enter an order forfeiting ~~such~~ the substituted property~~,~~ or ~~shall~~ must amend an existing preliminary or final order to include ~~such~~ that property.

Rule 11(c) Advice to Defendant.

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(6) the terms and consequences of any provision waiving the right to appeal or to ~~collaterally~~ attack the sentence collaterally.

Rule 40. Commitment to Another District

(a) Appearance Before a Federal Magistrate Judge.

(1) A person arrested in a district other than the district in which the offense was allegedly committed must be taken without unnecessary delay before the nearest federal magistrate judge who is either in the district of arrest or in an adjacent district.

(2) The federal magistrate judge must conduct a Rule 5 proceeding and must also conduct a Rule 5.1 preliminary examination to determine probable cause, unless an indictment has been returned or an information has been filed, or the person arrested elects to have a Rule 5.1 preliminary examination held in the district where the prosecution is pending.

(3) Upon finding that the person arrested is the same person named in the indictment, information, or warrant the federal magistrate judge must hold that person to answer in the district where the prosecution is pending. If the person was arrested without a warrant, the federal magistrate judge may await the arrival of a warrant or certified copy of it, which may be received by facsimile transmission.

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

W. EUGENE DAVIS
CIRCUIT JUDGE

October 3, 1996

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

In re: Rule 25(b), Fed. R. Crim. P.

Dear Lowell:

I received a letter today from Judge George Kazen about a significant problem Rule 25(b) creates for him. I am bringing copies of Judge Kazen's attached self-explanatory letter with me to the meeting next week in the event we have time to discuss the problem he raises and you decide we should discuss it despite the inadequate notice.

I look forward to seeing you in Oregon next week.

Sincerely,

W. Eugene Davis

cc: Professor David A. Schlueter
Mr. John K. Rabiej

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) 726-2349

October 1, 1996

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

Re: Rule 25, Fed. R. Crim. P.

Dear Gene:

This is my very belated follow-up to our earlier conversations about Rule 25. My concern is based on my own experiences, confirmed by discussions with several of my colleagues.

Rule 25(a) deals only with a change of judge during a trial. Rule 25(b) applies after a verdict or "finding of guilt." It is unclear whether the quoted phrase applies to a guilty plea or is limited to a non-jury trial, because of following language about whether the successor judge is satisfied that "a judge who did not preside at the trial" cannot perform the duties.

At least for those of us who sit on the Mexican border, it is normal to process at least 20 to 30 criminal cases a month. From time to time, visiting judges have come for a week or so to help us. Sometimes they will preside over a trial, but often the need is to help take guilty pleas or rule on pretrial motions, particularly motions to suppress requiring an evidentiary hearing. After the period of visitation, the judge leaves and the question is whether I or another visitor can sentence a defendant who earlier pled guilty before the first judge. Also, is there any potential problem with different judges handling different parts of a file, such as pretrial motions? Also, there have been times when I have had literally dozens of sentences pending and a visiting judge offers to assist with the sentencings. Is this permissible? I see no clear support for it in Rule 25 and I have not wanted to create unnecessary problems, but often the help would be most welcome.

This situation will become chronic for me when I become Chief Judge in December. At least for the time being, the arrangement my Court has made to help with my docket is that one of our judges will come to Laredo for two weeks every two months to help me with the docket. Again, sometimes that will mean trying a case but his value would be increased enormously if he could help with whatever is pending without committing error.

As you know, the judiciary is facing constant pressure about budget reduction, downsizing, courtroom sharing, etc. At the same time, Congress does not appear to be retreating from the push to keep increasing the federalization of crimes. We are consistently being urged to increase our efficiency but I do not want to do so at the risk of reversible error. My concern is with an argument that whatever substitution of judges is not expressly allowed by Rule 25 is impermissible. I have not attempted to draft a proposal, but I wanted to put the issue on the table to see if there is any support for a clarification and expansion of the Rule.

Thank you for your interest in this matter.

Sincerely yours,

George P. Kazen

George P. Kazen

GPK/gsh

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
U. S. COURTHOUSE
231 WEST LAFAYETTE BLVD.
DETROIT, MICHIGAN 48226

CHAMBERS OF
PAUL D. BORMAN
UNITED STATES DISTRICT JUDGE

313 234-5120

October 3, 1996

Judge D. Lowell Jensen, Chair
Committee on Criminal Rules
U.S. Courthouse
1301 Clay Street, 4th Floor
Oakland, CA 94612

Dear Judge Jensen:

I write concerning a matter on the agenda of the Criminal Rules Committee meeting on October 7-8, 1996: Proposed Amendment to Rule 11(c) Re Waiver of Appeal Rights. The proposed amendment would require the judge to establish on the record that the defendant understands "the terms and consequences of any provision waiving the right to appeal or collaterally attack the sentence." In essence, the Judge will be placing on the record of the plea proceeding, language of the parties' Rule 11 waiver provision, and then verifying that the defendant understands it and accepts this waiver. In doing this, the Judge will be implicitly vouching for the legality of this Rule 11 language, and informing the defendant that he or she has lost the right to appeal or collaterally attack the sentence.

I proffer the following issues as matters deserving Committee consideration prior to adoption of this proposed amendment.

A Judge's expression of the terms of an appeal waiver, without more, leaves unresolved several significant issues:

I. Does the fact that the defendant and the U.S. Attorney have agreed to insert waiver language in the Rule 11 agreement validate the legal correctness of such language?

Can a defendant waive future sentencing error prior to that error manifesting itself at the sentencing proceeding?

Can the defendant waive his right to challenge his sentence if he was denied ineffective assistance of counsel, or if his plea was not entered voluntarily?

Is there is a serious question whether the Judge, in reading the waiver into the record, indeed affirming it on the record, is acting appropriately?

II. Does Supreme Court precedent establish that the defendant must have an avenue for appealing from an unconstitutional plea and/or sentencing? The recent Supreme Court decision, U.S. v. Mezzanatto, 115 S.Ct. 797, 806 (1995), while enforcing a plea agreement, pointed out:

> Thus, although some waiver agreements "may not be the product of an informed and voluntary decision," this possibility "does not justify invalidating all such agreements." Newton [v. Rumery] 480 U.S. at 393. Indeed, the appropriate response to respondent's predictions of abuse is to permit case-by-case inquiries into whether waiver agreements are the product of fraud or coercion."

Should this Committee act to foreclose appeals in all cases of "waiver"? The proposed 11(c) amendment does not inform the defendant of the right to a case-by-case appellate inquiry into whether the agreement has been entered into knowingly or voluntarily.

III. Will adoption of Rule 11(c)(6) create a tension between Rule 11 and Rule 32(c)(5)? Should the Committee act, in advance, to conform Rule 32(c)(5) to provide for notice of appeal at sentencing where the defendant's plea and/or sentence was constitutionally infirm, e.g. involuntary or coerced? Rule 32(c)(5) requires the court, after imposing sentence, to "advise the defendant of any right to appeal the sentence." If there is a right to appeal the sentence based on an involuntary or unknowing plea, as noted in Justice Thomas' majority opinion in Mezzanatto, then should the Judge, in applying Rule 32(c)(5), be required to inform the defendant of that avenue of appeal?

The July 30, 1996 memorandum (page 6) from Judge Maryanne Trump Barry, Chair of the Committee in Criminal Law, to all U.S. District Court Judges, contained the following example of advice that might protect the defendant's right to appeal:

> *You can appeal your conviction if you believe that your guilty plea was somehow unlawful or involuntary, or if there is some other fundamental defect in the proceedings that was not waived by your guilty plea. You also have a statutory right to appeal your sentence under certain circumstances, particularly if you think the sentence is contrary to law. [However, a defendant may waive those rights as part of a plea agreement, and you have entered into a plea agreement which waives some or all of your rights to appeal the sentence itself. Such waivers are generally enforceable, but if you believe the waiver is unenforceable, you can present that theory to the appellate court.]* With few exceptions, any notice of appeal must be filed within 10 days of judgment being entered in your case.*
>
> ** To be omitted if there is no waiver of appeal in the plea agreement.*

Should this language or similar language be added to Rule 32(c)(5) in conjunction with the

proposed amendment to Rule 11(c)?

IV. Under Rule 32(c)(5) the Judge is required to notify the defendant of any right to appeal the sentence. If the Judge fails to provide this advice, the defendant is merely not advised, but not affirmatively misled into believing that there is no right to appeal or collaterally attack his/her sentence.

Under the proposed amendment to Rule 11(c), the Judge will be acting affirmatively to "validate" a defendant's waiver of the right to appeal or collaterally attack the sentence, by putting the waiver provision on the record and then questioning the defendant to assure for the record that he understands the waiver. Thus, the Judge will be transformed from the neutral actor in Rule 32 to an affirmative actor in Rule 11 with regard to informing the defendant in that he is giving up any right to appeal or collaterally attack his sentence. This is a dramatic role change. Is this a legally appropriate role for the Judge?

V. I am sure that the Committee is aware of the multitude of decisions by the U.S. Courts of Appeals reversing district court sentences because of improper application of the Sentencing Guidelines. The proposed waiver provision will reduce the number of appeals from incorrect guideline sentences, thereby shielding sentencing errors, and condoning disparate sentencing. This will significantly undercut the Congressional purpose in enacting the Federal Sentencing Guidelines, and significantly impede the Sentencing Commission's duty to collect and study sentencing decisions to enable the Committee to monitor, revise, and correct the Guidelines.

For all the above reasons, I urge that the Committee provide for further study of this proposed Rule 11(c) amendment, its relationship to Rule 32, its constitutional validity, and its impact on the federal Sentencing Guideline system.

Sincerely,

Paul D. Borman
United States District Judge

cc: John Rabiej, Chief of Rules Committee Office

October 3, 1996

MEMORANDUM

To: Honorable B. Waugh Crigler

From: Honorable Robert B. Collings

Subj: Proposed Revision -
Rule 40(a), Fed.R.Crim.P.

Referencing our discussion this date, I certainly think it is a good idea to amend Rule 40(a), Fed.R.Crim.P., to require that a person arrested in a district other than the district of offense be brought before the nearest available magistrate judge if the nearest available magistrate judge is in an adjacent district.

As I indicated, my proposal deals with a slightly different problem - that is, when the district of offense is an adjacent district but the nearest available magistrate judge is in the district of arrest.

For example, suppose the district of offense is Eastern Pennsylvania at Philadelphia and the arrest occurs in the District of New Jersey at Camden - right across the bridge from Philadelphia. The nearest available magistrate judge is in Camden, but it would be far more efficient to bring the defendant directly before the magistrate judge in Philadelphia

where the charge is pending. Under the current version of the rule, or under an amendment which would allow the defendant to be taken before the nearest available magistrate judge if that nearest available magistrate judge is in an adjacent district, the defendant could not be brought before the nearest available magistrate judge because that magistrate judge is in Camden.

There are many other geographical sites which are very close yet this problem arises. Examples would be (1) arrests in the District of Columbia where the charge originates in Alexandria, Virginia; (2) arrests in Manhattan where the charge originates in Newark; (3) arrests in Manhattan (S.D.N.Y.) where the charge originates in Brooklyn (E.D.N.Y.); (4) arrests in East St. Louis (S.D. Ill.) where charge originates across the river in St. Louis (E.D. Mo.); (5) arrests in Council Bluffs (S.D. Iowa) where the charge originates across the river in Omaha (D. Neb.). I daresay that it would be almost just as quick in these instances to take the defendant directly to the district of offense.

My proposal would go a bit further and allow the defendant to be brought before a magistrate judge in the district of offense if the nearest magistrate judge in the district of offense is within 100 miles of the place of arrest. But I am not wed to the 100 mile figure. Maybe 50 miles or 30 miles would be better. It just seems to me that there comes a point in which the nearest available magistrate judge in the district of offense is <u>so</u> <u>close</u> that it makes eminent sense to take the defendant before that magistrate judge rather than to one

slightly nearer in the district of arrest. Where to draw the line is a matter of judgment, but I think that the Rules Committee should at least recognize that in certain instances, the nearest available magistrate judge in the district of arrest can be bypassed when the nearest available magistrate judge in the district of offense is close by.

My proposal is that Rule 40(a) be amended to make the current Rule 40(a), with a minor addition, Rule 40(a)(1) and that a subsection (2) be added as follows:

> (a)(1) Appearance Before a Federal Magistrate ***Judge in the District of Arrest or an Adjacent District***. If a person is arrested in a district other than that in which the offense is alleged to have been committed, that person shall be taken before the nearest available federal magistrate ***judge in the district of arrest or an adjacent district.*** [Rule then continues as currently stated]
>
> (a)(2) ***Alternative Procedure when the Place of Arrest is Miles or Less from the Nearest Federal Magistrate Judge in the District in which the Crime is Alleged to have been Committed. Except for an arrest upon a warrant issued upon a complaint charging a***

violation of 18

> ***U.S.C. § 1073, if a person is arrested in a district other than that in which the offense is alleged to have been committed and the place of arrest is miles or less from the nearest federal magistrate judge in the district in which the crime is alleged to have been committed and an appearance before the federal magistrate judge in the district in which the crime is alleged to have been committed is able to be scheduled on the day on which the arrest took place or on the day after the arrest took place if the arrest is made after normal business hours, the person may be transported to the district in which the crime is alleged to have been committed for an appearance before the nearest federal magistrate judge in that district without the necessity of an appearance before a federal magistrate judge in the district of arrest or an adjacent district. Thereafter, the federal magistrate judge in the district in which the crime is alleged to have been committed shall proceed in accordance with Rules 5 and 5.1.***

The Committee could decide the number of miles and fill

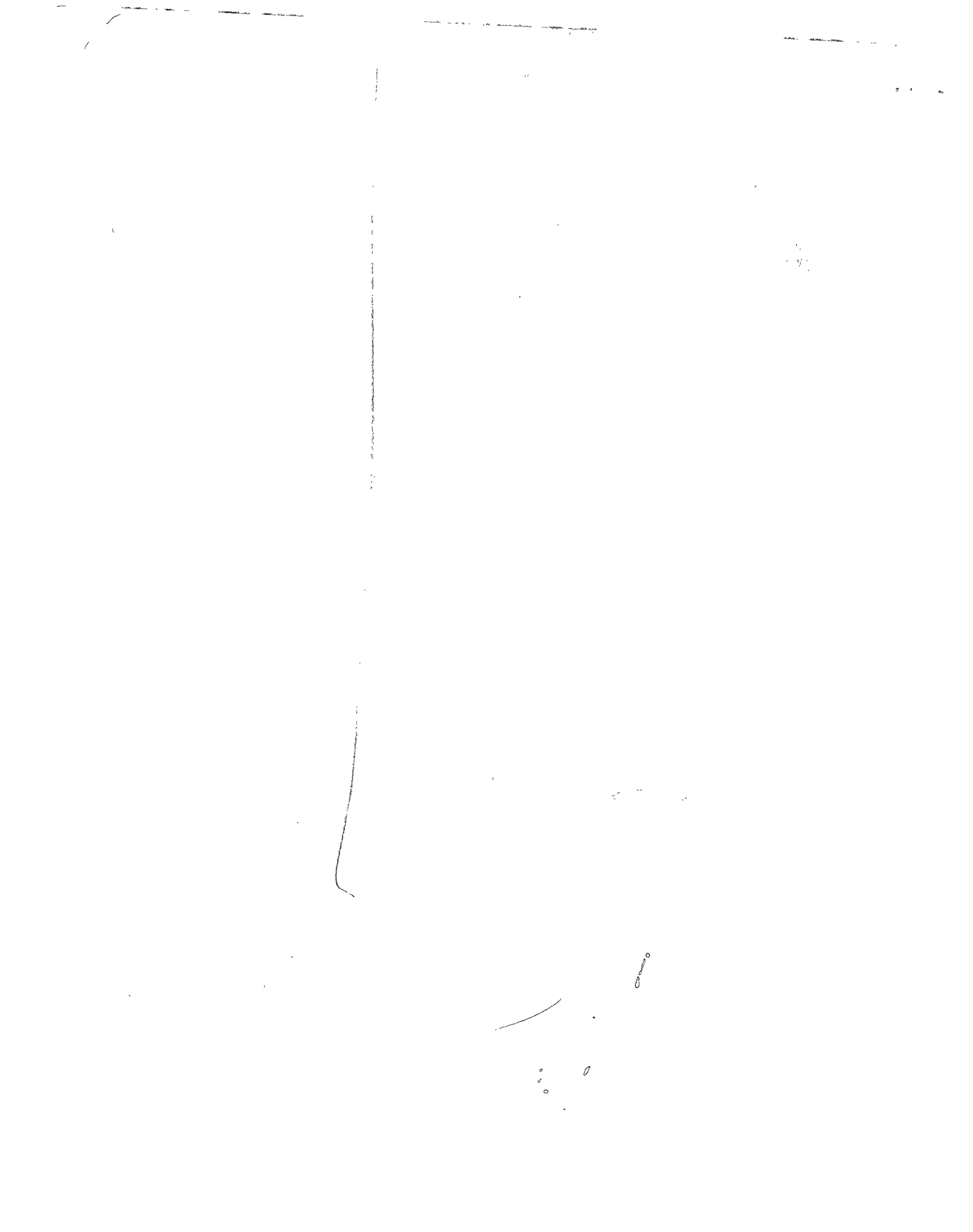
in the blanks.

As I say, I think that such a rule would save considerable judicial time and expense as well as expenses to the federal law enforcement agents and the defenders. It would also work to the advantage of the defendant whose roots are more often in the district in which the crime is alleged to have been committed than in the district of arrest. In my experience, more often than not, the delay attributable to removal proceedings works to the defendant's disadvantage.

The provision about not permitting the alternate procedure to be used if the defendant cannot be seen by the federal magistrate judge on the day of arrest or the day after arrest if the arrest occurs after normal business hours is to ensure that the defendant will appear before the federal magistrate judge in the district of origin within relatively the same time he would appear before a federal magistrate judge in the district of arrest.

I hope this is helpful. Please call (617-223-9228) if you have any questions. Good luck, and enjoy your meeting. Hope it's in a nice place.

Copy to:
Peter G. McCabe, Esquire
Bret Saxe, Esquire



#3272

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

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Additional Materials for October Meeting**

DATE: **10-1-96**

Attached are additional materials which may assist you in preparing for the upcoming meeting in Oregon:

1. Judge Jensen's suggested changes to Rule 11 (3 pages)

2. Letter (9-16-96) from Judge Marovich w/attached letters re proposed changes to Rule 11 (6 pages)

3. Letter (9-30-96) from Judge Dowd re sample pretrial agreements. I will make 4 or 5 copies of this material (approximately 75 pages) and have it available at meeting. (1 page).

4. Letter (9-12-96) from Judge Dowd re *Hyde* decision and *Leake* decision re possible problem with motions to suppress vis a vis disclosure of government witnesses. (2 pages).

5. Memo (9-30-96) from John Rabiej re possible amendment to Rule 26 to conform to Civil Rule 43. (1 page)

6. Revised Draft of Proposed Rule 32.2, incorporating suggested style changes submitted by Bryan Garner, infra. (3 pages)

7. Bryan Garner's suggested style changes to Proposed Rule 32.2. (6 pages).

(1)

Add

(11)(C)(6) the terms and consequences of any provision waiving the right to appeal or collaterally attack the sentence.

Amend

11(E)(1)(B) to read

Make a recommendation, or agree not to oppose the defendant's request, for a particular sentence or sentencing range, or that a particular sentencing guideline, sentencing offense characteristic, sentencing departure, or policy statement is applicable to the case, with the understanding that such recommendation or request is not binding on the court; or

11(E)(1)(C) to read

agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular sentencing guideline, sentencing offense characteristic, sentencing departure, or policy statement is applicable to the case, with the understanding thast the plea agreement shall be binding on the Court if it is accepted by the Court.

(2)

Amend

11(E)(2) to read

(2) Notice of such agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera at the time the plea is offered.

(a) If the agreement is of the type specified in subdivision (E)(1)(A) or (E)(1)(C), the court may reject the agreement, or may accept the plea of the defendant and defer acceptance of the disposition provided for in the plea agreement until after it has considered the presentence report. The court shall advise the defendant that if the court accepts the plea agreement the defendant has no right to withdraw the plea.

(b) same language as 11(E)(1)(B)

Amend 11(E)(3) to read

(3) Acceptance of a plea agreement. If the court accepts the disposition provided for under a plea agreement of the type specified in subdivision 11(E)(1)(A) or 11(E)(1)(C), the court shall inform .....

(3)

Amend 11(E)(4) to read

(4) Rejection of a plea agreement. If the court does not accept the disposition provided for under a plea agreement of the type specified in subdivision 11(E)(1)(A) or 11(E)(1)(C), the court shall, on the record, inform the parties .....

Another possibility

Amend subdivision 11(E)(2)(a)

(2) If the agreement is of the type specified in subdivision 11(C)(1)(A) or 11(E)(1)(C) the court may reject the agreement, or, if the court is satisfied that (i) the agreed sentence is within the applicable guideline range, or, (ii) that the agreed sentence departs from the applicable guideline range for justifiable reasons, the court may accept the plea and defer acceptance of the disposition .....

United States District Court
Northern District of Illinois
219 South Dearborn Street
Chicago, Illinois 60604

Chambers of
George M. Marovich
Judge

September 16, 1996

By Facsimile

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

Dear David:

Upon my return from a Prisoner Rights Seminar in St. Louis, I found final responses from Roger, Henry, and Kate. I know your Agenda Book has been printed since I have a copy, but I thought I would forward the responses to you anyway with copies to Judge Jensen.

I guess my conclusion would be that the subcommittee recommends changes to Rule 11(e)(1)(B) and (e)(1)(C) as suggested by Roger Pauley and Mary Harkenrider. This should cure the U.S. v. Harris problem.

Kate, Henry, and I agree that the Committee should consider in depth whether any further changes should be made given the realities of plea bargaining under the Guidelines. I agree with Henry that we should look to a goal that can increase a lawyer's ability to more reliably predict the consequences of a guilty plea. Roger finds some discomfort in a more comprehensive examination of Rule 11. These are points of view for the Committee, as a whole, to consider.

I look forward to seeing you all in Oregon.

Best regards,

George M. Marovich
United States District Judge

mm

c\Pauley
Martin
Stith

Office of the Federal Public Defender
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, Tennessee 37203-3805

Tele. No. 615-736-5047
FAX 615-736-5265

Henry A. Martin
Federal Public Defender
Marietta A. Wesley
Deputy Federal Public Defender
C. Douglas Thornton
Senior Litigation Counsel
Sandra L. Camp
Thomas H. Watson
Judy T. Lanchart
Caryll E. Alpert
Paul R. Bottei
Assistant Federal Public Defenders

September 5, 1996

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

RE: Rule 11, Etc., Subcommittee

Dear Judge Marovich:

Since my last letter to you on this topic, I solicited input from other defenders and have gotten considerable feedback. While I have not yet had the time to go through the responses carefully either to articulate a defender position or to formulate any specific proposals, I can say that there is a high degree of frustration among federal defenders about their inability to give reliable and specific advice to a defendant about the consequences of a guilty plea vis-a-vis a trial. This frustration is increased because of the severity of punishment that is usually involved and because a sentencing guideline system ought to offer a higher degree of predictability than is seen in a large number of districts around the country.

We can all articulate a number of factors contributing to a defense lawyer's inability to provide reliable information to a defendant in deciding whether or not to plead guilty. Many of these factors are beyond the jurisdiction of a rules committee. However, if some modification of the existing rules can increase a lawyer's ability to provide reliable predictions to a client about the consequences of a guilty plea, it seems like a worthwhile goal.

I will make every effort to synthesize the comments I got from the other defenders into some meaningful presentation that can be distributed to the other members of our Subcommittee or to the entire Committee in advance of the October meeting. I would like to see our Subcommittee or some other subcommittee or the Committee as a whole

continue to look at these issues which I think means that I concur with what you proposed to report to the Committee as a whole.

Sincerely yours,

Henry A. Martin

HAM:drh
Via Fax
cc: Roger A. Pauley, Esq.
Professor Kate Stith

Yale Law School

KATE STITH
Professor of Law

BY FAX

September 6, 1996

Hon. George M. Marovich
United States District Court
219 South Dearborn Street
Chicago, IL 60604

Dear Judge Marovich:

I join with Roger and Mary Frances in hoping that our subcommittee report will support the proposed changes to Rule 11(e)(1)(B) and (e)(1)(C). These changes (including the change proposed in the letter from Roger and Mary Frances dated September 5) do avoid the ambiguity that led to *United States v. Harris*, 70 F.3d 1001 (8th Cir. 1995).

I also agree with Henry that we (or another subcommittee) should consider in some depth whether the Rules should be further amended to take account of the changed nature of plea-bargaining and sentencing in the Guidelines era.

Sincerely,

cc: Henry A. Martin, Esq.
Federal Public Defender

Mary Frances Harkenrider, Esq.
Roger Pauley, Esq.
U.S. Department of Justice

P.O. BOX 208215, NEW HAVEN, CONNECTICUT 06520-8215 · TELEPHONE 203 432-4835 · FACSIMILE 203 432-1148
COURIER ADDRESS 127 WALL STREET, NEW HAVEN, CONNECTICUT 06511

Criminal Division

U. S. Department of Justice

Washington, D.C. 20530

September 5, 1996

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

Dear Judge Marovich:

In response to your letter of September 4, 1996, we also would hope that the Subcommittee report would express support for the Rule 11(e)(1)(C) amendment we suggested (and in that regard, we have no objection to the conforming amendment to Rule 11(e)(1)(B) suggested by Professor Stith). To further embellish our original proposal, we recommend -- for purposes of parallelism and to underscore the difference between an (e)(1)(B) agreement and an (e)(1)(C) agreement -- that (e)(1)(C) should end with the clause "with the understanding that the agreement shall be binding on the court if the plea is accepted" (in contradistinction to (e)(1)(B) which ends with a similar clause save for the inclusion of "not" after "shall". Thus, Rule 11(e)(1)(C) would read:

> "(C) agree that a specific or sentencing range is the appropriate disposition of the case, or that a particular sentencing guideline, sentencing factor, or policy statement is applicable to the case, with the understanding that the agreement shall be binding on the court if the plea is accepted. (Proposed new matter underlined).

As Professor Stith noted in her letter, this amendment would not confer any additional power on the parties as compared to the court, since judges remain free to reject an (e)(1)(C) agreement for any reason, or even without stating a reason.

As to the notion of a more comprehensive examination of Rule 11, we are somewhat uneasy about what this might entail. We certainly have no problem with looking at any other amendments to address the issues raised by United States v. Harris, 70 F.3d 1001 (8th Cir. 1995) (the amendment we have proposed, however,

indirectly addresses Harris by implying that only an (e)(1)(C) agreement is binding on the court), but would not want to sign on to the concept of an overall review of Rule 11 without some further idea of perceived specific problem areas. To the extent the Subcommittee, and the Committee, can identify and provide sound solutions for recurring and important problems that have arisen under Rule 11, we would prefer that such amendments move forward promptly, without awaiting the results of a more generalized and amorphous examination of the Rule.

Sincerely,

Roger A. Pauley

Mary Frances Harkenrider

cc: Henry Martin, Esq.
Professor Kate Smith

United States District Court
Northern District of Ohio
United States Courthouse
2 South Main St.
Akron, Ohio 44308

David D. Dowd, Jr.
Judge

September 30, 1996

Professor David A. Schlueter
St. Mary's University
School of Law
The Raba Law Faculty Building
San Antonio, Texas 78228-8603

Dear Professor,

Consistent with our phone conversation of this morning, I am sending you by Federal Express a copy with the attachments of the letter I sent to Judge Davis on September 27 which sets forth numerous guilty plea agreements that had been presented to me.

Possibly this data will be of some assistance as the committee discusses Criminal Rule 11(e) and, in particular, the proposed amendment suggested by the Department of Justice in its July 29, 1996 letter to Judge Marovich and as supplemented by the September 5, 1996 letter from the Justice Department.

I look forward to seeing you in Oregon.

Yours very truly,

David D. Dowd, Jr.
U.S. District Judge

DDD:gh
Enc.
cc: Judge D. Lowell Jensen

United States District Court
Northern District of Ohio
United States Courthouse
2 South Main St.
Akron, Ohio 44308

David D. Dowd, Jr.
Judge

September 12, 1996

Previously sent by FAX
Professor David A. Schlueter
Professor of Law
St. Mary's University School of Law
San Antonio, Texas 78228-8603

In Re: United States v. Leake
1996 WL 506434
___ F.3d ___

Dear Professor:

Attached is the full text of the opinion in the above described case released on September 9, 1996. This case deals with procedural issues relating to defense motions based upon "fruit of the poisonous tree" issues.

At page 21 of the attached text of the opinion, there begins a discussion of "disposition upon remand." In that discussion the decision points out, as indicated in footnote 23, that the Federal Rules of Criminal Procedure fail to provide a clear roadmap for resolutions of motions to suppress evidence when challenged as "fruit of the poisonous tree" where the government refuses to disclose, prior to trial, the identity of its witnesses.

You will see that our court punted on that issue other than to instruct the district court that it was not to entertain a subsequent hearing pretrial on "fruit of the poisonous tree" issues.

I suspect that the issue that arose in the Leake case is rare. However, it may be a proper subject for our committee to examine.

Additionally, I recently stumbled on to the decision of the Ninth Circuit in United States v. Hyde, 82 F.3d 319 (9th Cir. 1996) that gives me some concern. The Hyde opinion was amended on July 29, 1996 by modifying the second footnote. See 1996 WL 457179. Subsequently, a district court in California in United States of America v. Lopez-Reyes, 1996 WL 420111 (S.D. Cal.) held that the Hyde decision was limited to guilty pleas taken under the

provisions of Fed. R.Crim. P. 11(e)(1)(A) or (C) and did not apply to a plea agreement with a non-binding recommendation under Rule 11(e)(1)(B). The Hyde decision declares that a defendant may withdraw a guilty plea for any reason prior to the district court accepting the written plea agreement. Normally it has been my observation that district court judges delay a formal acceptance of the written plea agreement until the time of sentencing. Under the teachings of Hyde, if it is to have univeral application, the taking of guilty pleas has entered a new and somewhat uncertain area.

It may be that the agenda is already set for the October meeting. If not, you may wish to at least bring the Leake opinion and the Hyde opinion to the attention of the committee.

Yours very truly,

David D. Dowd, Jr.
United States District Judge

DDD:sme
Enc.
cc w/enc.: Judge D. Lowell Jensen, N.D. California

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

September 30, 1996

MEMORANDUM TO JUDGE D. LOWELL JENSEN

SUBJECT: *Proposed Change to Criminal Rule 26*

Amendments to Civil Rule 43 take effect on December 1, 1996, which delete the requirement for testimony to be taken "orally" in open court. The amendments are intended to allow testimony to be given in open court by other means if the witness is unable to communicate orally. Writing or sign language are common examples. A provision has also been added to allow for the presentation of testimony by contemporaneousness transmission from a different location in compelling circumstances.

While reviewing the amendments, Judge Stotler noticed that Criminal Rule 26 has a similar provision that requires testimony to be "taken orally in open court." It may be that "oral" testimony is necessary in criminal cases, but either way, she requests that your committee consider amending Rule 26 consistent with the amendments to Civil Rule 43.

Thank you for your consideration.

John K. Rabiej

cc: Honorable Alicemarie H. Stotler
Professor David A. Schlueter

32.2 Criminal Forfeiture

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

(b) HEARING AND ENTRY OF PRELIMINARY ORDER OF FORFEITURE AFTER VERDICT. Within 10 days of entering a verdict of guilty or accepting a plea of guilty or nolo contendere on any count in the indictment or information for which criminal forfeiture is alleged, the court must conduct a hearing solely to determine what property is subject to forfeiture. If the court finds that property is subject to forfeiture, it must enter a preliminary order directing the forfeiture of whatever interest each defendant may have in the property, without determining what that interest may be. A determination of the extent of each defendant's interest in the property [will be] [is] deferred until any third party claiming an interest in the property has petitioned the court [pursuant to statute] for consideration of the claim. If no such petition is timely filed, the property is forfeited in its entirety.

(c) PRELIMINARY ORDER OF FORFEITURE. If the court orders a preliminary order of forfeiture, the order must authorize the Attorney General to seize the property subject to forfeiture, to conduct whatever discovery the court considers helpful in identifying , locating and disposing of the property, and to commence proceedings consistent with any statutory requirements and third parties' rights. At the time of sentencing, the order of forfeiture becomef final as to the defendant and must be made a part of the sentence and included in the

judgment. The court may include in the order of forfeiture whatever conditions are reasonably necessary to preserve the property value pending any appeal.

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

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

(3) At the conclusion of the ancillary proceeding, the court must enter a final order of forfeiture amending the preliminary order as necessary if any third-party petition is granted.

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

(e) STAY OF FORFEITURE PENDING APPEAL. If the defendant appeals from the conviction or order of forfeiture, the court may stay the order of forfeiture upon terms that the court finds appropriate to ensure that the property remains available in case the conviction or order of forfeiture is vacated. But the stay must not delay the conduct of the ancillary proceeding or the determination of the rights or interests of any third party. If the defendant's appeal is still pending when the court determines that the order of forfeiture must be amended to recognize a third party's interest in the property, the court must amend the order of forfeiture but must refrain from directing the transfer of any property or interest to the third party until the defendant's appeal is final, unless the defendant, in writing, consents to the transfer of the property or interest to the third party.

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

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

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

September 16, 1996
Via Facsimile

To John Rabiej
202-273-1826
From Bryan Garner

MEMORANDUM TO STYLE SUBCOMMITTEE

SUBJECT: *Proposed Amendments to Criminal Rules*

For your review, I have attached proposed new Rule 11(c)(6), and Rule 32.2 that replaces present Rules 7(c)(2), 31(e), and 32(d)(2). The proposed new rule 32.2 was prepared by the Department of Justice. The proposals are on the agenda of the meeting of the Advisory Committee on Criminal Rules.

The Criminal Rules Committee meets on October 7, 1996. In accordance with our prior practice, please submit your suggestions directly to Judge Parker by Friday, September 27, 1996.

John K. Rabiej

John K. Rabiej

Attachments

cc: Honorable Alicemarie H. Stotler (w/o attach.)
Honorable D. Lowell Jensen (w/o attach.)
Professor Dave A. Schlueter (w/o attach.)

the defendant is properly advised on any waiver that is part of the agreement. The DOJ memo advises prosecutors to be sure the record reflects that the defendant knowingly and voluntarily waived the right to appeal the sentence, and the memo recommends specific wording for the plea agreement in this regard. However, it notes that some courts have held it is not necessarily enough to rely on the written plea agreement, and some sentences have been reversed where the sentencing court failed to explicitly advise the defendant of the existence of an appeal waiver in the plea agreement.[51]

Clearly the best practice regarding appeal waivers would be for the court receiving a plea to specifically and orally advise the defendant of any waiver in the plea agreement during the plea colloquy. Such an advisement ensures mutual understanding between the parties of the scope of the waiver, and determines if the defendant knowingly and voluntarily consents to the waiver. This practice simultaneously protects the interests of both parties, provides adequate advisement to the defendant, and generates a thorough and complete record, which will withstand subsequent challenges. Misunderstandings and resulting appeals (or even reversals) result when the record is ambiguous or vague.

A change to Rule 11, Federal Rules of Criminal Procedure (F.R.Cr.P.), is needed in order to ensure careful advisement of waivers in all cases. Such a change would alert the court and the parties to the importance of the issue. It is therefore proposed that the Committee recommend that the Rules Committee propose a change to Rule 11, F.R.Cr.P., which would add a new subsection (6) under Rule 11(c):

> (c) **Advice to Defendant.** Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:
>
> ....
>
> (6) the terms and consequences of any provision waiving the right to appeal or collaterally attack the sentence;

This provision, like the other subsections of the Rule, does not prescribe a particular procedure for giving such advice, but instead allows the court flexibility in the manner it chooses to advise the defendant.[52] This is, for example, the approach the current Rule 11

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[51] See, e.g., United States v. Attar, 38 F.3d 727, 732 (4th Cir. 1994), cert. denied, 115 S.Ct. 1957 (1995); United States v. Bushert, 997 F.2d 1343 (11th Cir. 1993), cert. denied, 115 S.Ct. 652 (1994); and discussion at p. 5 of DOJ memorandum.

[52] See, United States v. DeFusco, 949 F.2d 114, 116 (4th Cir. 1991), cert denied, 503 U.S. 997 (1992) ("In reviewing the adequacy of compliance with Rule 11, this Court should accord deference to the trial court's decision as to how best to conduct the mandated colloquy with the defendant.")

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

32.2 Criminal Forfeiture

(a) Indictment and Information. No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information ~~shall~~ allege that the defendant or defendants have an interest in property that is subject to statutory forfeiture ~~in accordance with~~ under the applicable statute.

(b) Hearing and entry of preliminary order of forfeiture after verdict. Within 10 days of ~~the entry of~~ entering a verdict of guilty or ~~the acceptance of~~ accepting a plea of guilty or nolo contendere ~~as to~~ on any count in the indictment or information for which criminal forfeiture is alleged, the court ~~shall~~ must conduct a hearing solely to determine what property is subject to forfeiture ~~under any applicable statute because of its relationship to the offense.~~ Upon finding if the court finds that property is ~~thus~~ subject to forfeiture, ~~the court shall~~ it must enter a preliminary order directing the forfeiture of whatever interest each defendant may have in the property, without determining what that interest may be. A determination of the extent of each defendant's interest in the property ~~shall~~ is be deferred until any third party claiming an interest in the property has petitioned the court ~~pursuant to statute~~ for consideration of the claim. If no such petition is timely filed, the property ~~shall be~~ is forfeited in its entirety.

(c) Preliminary Order of Forfeiture. ~~The entry of a~~ If the court enters a

The statutory basis ought to stand on its own, no?

Without this cut, the word "it" becomes ambiguous in the following phrase.

or "will be"

Necessary? If so, we need to reword to clarify

preliminary order of forfeiture ~~shall~~ authorize the Attorney General to seize the property subject to forfeiture, to conduct ~~such~~ discovery ~~as~~ the court ~~may deem~~ proper ~~to facilitate the identification, location or disposition of~~ the property, and to commence proceedings consistent with any statutory requirements pertaining to ancillary hearings and ~~the~~ rights ~~of third parties~~. At the time of sentencing, the order of forfeiture ~~shall~~ become final as to the defendant and ~~shall~~ be made part of the sentence and included in the judgment. The court may include in the order of forfeiture ~~such~~ conditions ~~as may~~ reasonably ~~be~~ necessary to preserve the value ~~of the property~~ pending any appeal.

(d) **Ancillary proceedings.** (1) If, ~~in accordance with the applicable~~ statute, ~~any~~ third party files a petition asserting an interest in the forfeited property, the court ~~shall~~ conduct an ancillary proceeding. In ~~such~~ proceeding, the court may entertain a motion to dismiss the petition for lack of standing, for failure to state a claim upon which relief could be granted under this section, or for any other ground. For ~~the~~ purposes of ~~such~~ motion, all facts set forth in the petition ~~shall~~ be assumed to be true.

(2) If a motion referred to in paragraph (1) is denied, or if no such motion is made, the court may, ~~in its discretion,~~ permit the parties to conduct discovery in accordance with the Federal Rules of Civil Procedure to the extent that the court determines ~~such~~ discovery to be necessary or desirable to resolve

factual issues before conducting an evidentiary hearing. At the conclusion of ~~such~~ this discovery, either party may seek to have the court dispose of the petition on a motion for summary judgment in the manner described in Rule 56 of the Federal Rules of Civil Procedure.

(3) At the conclusion of the ancillary proceeding, the court ~~shall~~ must enter a final order of forfeiture amending the preliminary order as necessary if any third-party petition is granted.

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

(e) Stay of forfeiture pending appeal. If ~~an appeal of~~ the defendant appeals from the conviction or order of forfeiture ~~is taken by the defendant,~~ the court may stay the order of forfeiture upon ~~such~~ terms that ~~as~~ the court finds appropriate in ~~order to~~ ensure that the property remains available ~~in the event~~ in case the conviction or order of forfeiture is vacated. ~~Such~~ But the stay, ~~however,~~ ~~shall~~ must not delay the conduct of the ancillary proceeding or the determination of the rights or interests of any third party. If the defendant's appeal is still pending ~~at the time~~ when the court determines that the order of forfeiture must be amended to recognize ~~the~~ interest ~~of~~ a third party's ~~third party~~ in the property, the court ~~shall~~ must amend the order of forfeiture but ~~shall~~ must refrain from directing the transfer of any

property or interest to the third party until the defendant's appeal is final, unless the defendant, in writing, consents to the transfer of the property or interest to the third party.

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

October 3, 1996

MEMORANDUM

To: Honorable B. Waugh Crigler

From: Honorable Robert B. Collings

Subj: Proposed Revision -
Rule 40(a), Fed.R.Crim.P.

Referencing our discussion this date, I certainly think it is a good idea to amend Rule 40(a), Fed.R.Crim.P., to require that a person arrested in a district other than the district of offense be brought before the nearest available magistrate judge if the nearest available magistrate judge is in an adjacent district.

As I indicated, my proposal deals with a slightly different problem - that is, when the district of offense is an adjacent district but the nearest available magistrate judge is in the district of arrest.

For example, suppose the district of offense is Eastern Pennsylvania at Philadelphia and the arrest occurs in the District of New Jersey at Camden - right across the bridge from Philadelphia. The nearest available magistrate judge is in Camden, but it would be far more efficient to bring the defendant directly before the magistrate judge in Philadelphia

where the charge is pending. Under the current version of the rule, or under an amendment which would allow the defendant to be taken before the nearest available magistrate judge if that nearest available magistrate judge is in an adjacent district, the defendant could not be brought before the nearest available magistrate judge because that magistrate judge is in Camden.

There are many other geographical sites which are very close yet this problem arises. Examples would be (1) arrests in the District of Columbia where the charge originates in Alexandria, Virginia; (2) arrests in Manhattan where the charge originates in Newark; (3) arrests in Manhattan (S.D.N.Y.) where the charge originates in Brooklyn (E.D.N.Y.); (4) arrests in East St. Louis (S.D. Ill.) where charge originates across the river in St. Louis (E.D. Mo.); (5) arrests in Council Bluffs (S.D. Iowa) where the charge originates across the river in Omaha (D. Neb.). I daresay that it would be almost just as quick in these instances to take the defendant directly to the district of offense.

My proposal would go a bit further and allow the defendant to be brought before a magistrate judge in the district of offense if the nearest magistrate judge in the district of offense is within 100 miles of the place of arrest. But I am not wed to the 100 mile figure. Maybe 50 miles or 30 miles would be better. It just seems to me that there comes a point in which the nearest available magistrate judge in the district of offense is <u>so close</u> that it makes eminent sense to take the defendant before that magistrate judge rather than to one

slightly nearer in the district of arrest. Where to draw the line is a matter of judgment, but I think that the Rules Committee should at least recognize that in certain instances, the nearest available magistrate judge in the district of arrest can be bypassed when the nearest available magistrate judge in the district of offense is close by.

My proposal is that Rule 40(a) be amended to make the current Rule 40(a), with a minor addition, Rule 40(a)(1) and that a subsection (2) be added as follows:

> (a)(1) Appearance Before a Federal Magistrate ***Judge in the District of Arrest or an Adjacent District***. If a person is arrested in a district other than that in which the offense is alleged to have been committed, that person shall be taken before the nearest available federal magistrate ***judge in the district of arrest or an adjacent district.*** [Rule then continues as currently stated]
>
> (a)(2) ***Alternative Procedure when the Place of Arrest is Miles or Less from the Nearest Federal Magistrate Judge in the District in which the Crime is Alleged to have been Committed. Except for an arrest upon a warrant issued upon a complaint charging a***

> ***U.S.C. § 1073, if a person is arrested in a district other than that in which the offense is alleged to have been committed and the place of arrest is miles or less from the nearest federal magistrate judge in the district in which the crime is alleged to have been committed and an appearance before the federal magistrate judge in the district in which the crime is alleged to have been committed is able to be scheduled on the day on which the arrest took place or on the day after the arrest took place if the arrest is made after normal business hours, the person may be transported to the district in which the crime is alleged to have been committed for an appearance before the nearest federal magistrate judge in that district without the necessity of an appearance before a federal magistrate judge in the district of arrest or an adjacent district. Thereafter, the federal magistrate judge in the district in which the crime is alleged to have been committed shall proceed in accordance with Rules 5 and 5.1.***

The Committee could decide the number of miles and fill

in the blanks.

As I say, I think that such a rule would save considerable judicial time and expense as well as expenses to the federal law enforcement agents and the defenders. It would also work to the advantage of the defendant whose roots are more often in the district in which the crime is alleged to have been committed than in the district of arrest. In my experience, more often than not, the delay attributable to removal proceedings works to the defendant's disadvantage.

The provision about not permitting the alternate procedure to be used if the defendant cannot be seen by the federal magistrate judge on the day of arrest or the day after arrest if the arrest occurs after normal business hours is to ensure that the defendant will appear before the federal magistrate judge in the district of origin within relatively the same time he would appear before a federal magistrate judge in the district of arrest.

I hope this is helpful. Please call (617-223-9228) if you have any questions. Good luck, and enjoy your meeting. Hope it's in a nice place.

Copy to:
Peter G. McCabe, Esquire
Bret Saxe, Esquire

Rule 32.2 Criminal Forfeiture

(a) Indictment and Information. No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information ~~shall~~ alleges that ~~the~~ a defendant ~~or defendants have~~ has an interest in property that is subject to statutory forfeiture ~~in accordance with the applicable statute~~.

(b) Hearing ~~and entry of preliminary order of forfeiture~~ After Verdict and Third-Party Claim. Within 10 days of ~~the entry of~~ entering a verdict of guilty or ~~the acceptance of~~ accepting a plea of guilty or nolo contendere ~~as to~~ on any count in the indictment or the information ~~for~~ which alleges ~~criminal~~ statutory forfeiture ~~is alleged~~, the court ~~shall~~ must conduct a hearing solely to determine what property is subject to forfeiture. ~~under any applicable statute because of its relationship to the offense. Upon finding~~ If the court finds that property is ~~thus~~ subject to forfeiture, ~~the court shall~~ it must enter a preliminary order directing the forfeiture of whatever interest ~~each~~ a defendant may have in the property, without determining what that interest may be. A determination of the extent of each defendant's interest in the property ~~shall~~ is to be deferred until any third party claiming an interest in the property has petitioned the court ~~pursuant to statute for consideration of~~ to consider the claim. If no

such petition is timely filed, the property ~~shall be~~ is forfeited in its entirety.

(c) Preliminary Order of Forfeiture. ~~The entry of~~ If the court enters a preliminary order of forfeiture, ~~shall~~ the order must authorize the Attorney General to seize the property subject to forfeiture, ~~to~~ conduct ~~such~~ whatever discovery ~~and~~ the court ~~may deem~~ considers helpful in identifying or locating ~~proper to facilitate the identification, location or disposition of~~ the property, and ~~to~~ commence proceedings consistent with any statutory requirements pertaining to ancillary hearings and ~~the~~ third party rights ~~of third parties~~. At ~~the time of~~ sentencing, the order of forfeiture ~~shall~~ becomes final as to the defendant~~;~~ and ~~shall~~ must be made ~~a~~ part of the sentence and included in the judgment. The court may include in the order of forfeiture ~~such~~ whatever conditions ~~as may~~ are reasonably ~~be~~ necessary to preserve the property's value ~~of the property~~ pending any appeal.

(d) Ancillary Proceedings. (1) If, ~~in accordance with the applicable~~ as prescribed by statute, ~~and~~ a third party files a petition asserting an interest in ~~the forfeited~~ property subject to forfeiture, the court ~~shall~~ must conduct an ancillary proceeding. In ~~such~~ that proceeding, the court may, ~~entertain a~~ on motion, ~~to~~ dismiss the petition for lack of standing, for failure to state a claim upon which relief could be granted

~~under this section~~, or for any other ~~ground~~ reason. ~~For the purposes of such motion, all facts set forth in the petition shall be assumed to be true.~~ In ruling on the motion, the court must assume as true all facts stated in the petition.

(2) If a motion ~~referred to in paragraph~~ made under Rule 32.2 (d)(1) is denied, or if no ~~such~~ motion is made, the court may~~, in its discretion,~~ permit the parties to conduct discovery, in accordance with the Federal Rules of Civil Procedure, ~~to the extent~~ that the court determines ~~such discovery to be~~ is necessary or desirable to resolve factual issues before ~~conducting~~ holding an evidentiary hearing. At the conclusion of ~~such~~ discovery, either party may ~~seek to have the court dispose of the petition on a motion~~ move for summary judgment on the petition in the manner ~~described in~~ prescribed by Rule 56 of the Federal Rules of Civil Procedure.

(3) At the conclusion of the ancillary proceeding, the court ~~shall~~ must enter a final order of forfeiture amending the preliminary order as necessary if any third-party petition is granted.

(4) ~~Where~~ If multiple petitions are filed in the same case, an order dismissing or granting fewer than all of the petitions ~~shall~~ is not ~~be~~ appealable until all petitions are resolved, unless the court determines that

there is no just reason for delay and directs the entry of final judgment with respect to one or more but fewer than all of the petitions.

(e) Stay ~~of forfeiture~~ Pending Appeal. If ~~an appeal of~~ the defendant appeals from the conviction or order of forfeiture, ~~is taken by the defendant~~ the court may stay the order of forfeiture upon ~~such~~ terms ~~as~~ that ~~the court finds appropriate in order to~~ will ensure that the property remains available ~~in the event~~ in case the conviction or order of forfeiture is vacated. ~~Such~~ But the stay, ~~however, shall~~ must not delay the ~~conduct of the~~ ancillary proceeding or the determination of the rights or interests of any third party. If, while the defendant's appeal is still pending, ~~at the time~~ the court determines that the order of forfeiture must ~~be amended to~~ recognize ~~the~~ a third party's interest ~~of a third party~~ in the property, the court ~~shall~~ must amend the order of forfeiture but must ~~shall refrain from directing~~ not, without the defendant's written consent, direct the transfer of any property or interest to the third party until the defendant's appeal is final~~, unless the defendant, in writing, consents to the transfer of the property or interest to the third party~~.

(f) Substitute Property. If the applicable forfeiture statute authorizes the forfeiture of substitute property, the court may at any time ~~entertain a~~ on the government's motion ~~by the government to~~ order

forfeiture of substitute property. ~~and upon the~~ If the government makes the requisite showing, ~~shall~~ the court must enter an order forfeiting ~~such~~ the substituted property~~,~~ or ~~shall~~ must amend an existing preliminary or final order to include ~~such~~ that property.

Rule 11(c) Advice to Defendant.

****

(6) the terms and consequences of any provision waiving the right to appeal or to ~~collaterally~~ attack the sentence collaterally.

Rule 40. Commitment to Another District

(a) Appearance Before a Federal Magistrate Judge.

(1) A person arrested in a district other than the district in which the offense was allegedly committed must be taken without unnecessary delay before the nearest federal magistrate judge who is either in the district of arrest or in an adjacent district.

(2) The federal magistrate judge must conduct a Rule 5 proceeding and must also conduct a Rule 5.1 preliminary examination to determine probable cause, unless an indictment has been returned or an information has been filed, or the person arrested elects to have a Rule 5.1 preliminary examination held in the district where the prosecution is pending.

(3) Upon finding that the person arrested is the same person named in the indictment, information, or warrant the federal magistrate judge must hold that person to answer in the district where the prosecution is pending. If the person was arrested without a warrant, the federal magistrate judge may await the arrival of a warrant or certified copy of it, which may be received by facsimile transmission.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
U. S. COURTHOUSE
231 WEST LAFAYETTE BLVD.
DETROIT, MICHIGAN 48226

CHAMBERS OF
PAUL D. BORMAN
UNITED STATES DISTRICT JUDGE

313 234-5120

October 3, 1996

Judge D. Lowell Jensen, Chair
Committee on Criminal Rules
U.S. Courthouse
1301 Clay Street, 4th Floor
Oakland, CA 94612

Dear Judge Jensen:

I write concerning a matter on the agenda of the Criminal Rules Committee meeting on October 7-8, 1996: Proposed Amendment to Rule 11(c) Re Waiver of Appeal Rights. The proposed amendment would require the judge to establish on the record that the defendant understands "the terms and consequences of any provision waiving the right to appeal or collaterally attack the sentence." In essence, the Judge will be placing on the record of the plea proceeding, language of the parties' Rule 11 waiver provision, and then verifying that the defendant understands it and accepts this waiver. In doing this, the Judge will be implicitly vouching for the legality of this Rule 11 language, and informing the defendant that he or she has lost the right to appeal or collaterally attack the sentence.

I proffer the following issues as matters deserving Committee consideration prior to adoption of this proposed amendment.

A Judge's expression of the terms of an appeal waiver, without more, leaves unresolved several significant issues:

I. Does the fact that the defendant and the U.S. Attorney have agreed to insert waiver language in the Rule 11 agreement validate the legal correctness of such language?

Can a defendant waive future sentencing error prior to that error manifesting itself at the sentencing proceeding?

Can the defendant waive his right to challenge his sentence if he was denied ineffective assistance of counsel, or if his plea was not entered voluntarily?

Is there is a serious question whether the Judge, in reading the waiver into the record, indeed affirming it on the record, is acting appropriately?

II. Does Supreme Court precedent establish that the defendant must have an avenue for appealing from an unconstitutional plea and/or sentencing? The recent Supreme Court decision, U.S. v. Mezzanatto, 115 S.Ct. 797, 806 (1995), while enforcing a plea agreement, pointed out:

> Thus, although some waiver agreements "may not be the product of an informed and voluntary decision," this possibility "does not justify invalidating all such agreements." Newton [v. Rumery] 480 U.S. at 393. Indeed, the appropriate response to respondent's predictions of abuse is to permit case-by-case inquiries into whether waiver agreements are the product of fraud or coercion."

Should this Committee act to foreclose appeals in all cases of "waiver"? The proposed 11(c) amendment does not inform the defendant of the right to a case-by-case appellate inquiry into whether the agreement has been entered into knowingly or voluntarily.

III. Will adoption of Rule 11(c)(6) create a tension between Rule 11 and Rule 32(c)(5)? Should the Committee act, in advance, to conform Rule 32(c)(5) to provide for notice of appeal at sentencing where the defendant's plea and/or sentence was constitutionally infirm, e.g. involuntary or coerced? Rule 32(c)(5) requires the court, after imposing sentence, to "advise the defendant of any right to appeal the sentence." If there is a right to appeal the sentence based on an involuntary or unknowing plea, as noted in Justice Thomas' majority opinion in Mezzanatto, then should the Judge, in applying Rule 32(c)(5), be required to inform the defendant of that avenue of appeal?

The July 30, 1996 memorandum (page 6) from Judge Maryanne Trump Barry, Chair of the Committee in Criminal Law, to all U.S. District Court Judges, contained the following example of advice that might protect the defendant's right to appeal:

> *You can appeal your conviction if you believe that your guilty plea was somehow unlawful or involuntary, or if there is some other fundamental defect in the proceedings that was not waived by your guilty plea. You also have a statutory right to appeal your sentence under certain circumstances, particularly if you think the sentence is contrary to law. [However, a defendant may waive those rights as part of a plea agreement, and you have entered into a plea agreement which waives some or all of your rights to appeal the sentence itself. Such waivers are generally enforceable, but if you believe the waiver is unenforceable, you can present that theory to the appellate court.]* With few exceptions, any notice of appeal must be filed within 10 days of judgment being entered in your case.*
>
> ** To be omitted if there is no waiver of appeal in the plea agreement.*

Should this language or similar language be added to Rule 32(c)(5) in conjunction with the

proposed amendment to Rule 11(c)?

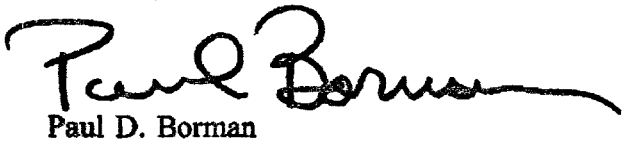
IV. Under Rule 32(c)(5) the Judge is required to notify the defendant of any right to appeal the sentence. If the Judge fails to provide this advice, the defendant is merely not advised, but not affirmatively misled into believing that there is no right to appeal or collaterally attack his/her sentence.

Under the proposed amendment to Rule 11(c), the Judge will be acting affirmatively to "validate" a defendant's waiver of the right to appeal or collaterally attack the sentence, by putting the waiver provision on the record and then questioning the defendant to assure for the record that he understands the waiver. Thus, the Judge will be transformed from the neutral actor in Rule 32 to an affirmative actor in Rule 11 with regard to informing the defendant in that he is giving up any right to appeal or collaterally attack his sentence. This is a dramatic role change. Is this a legally appropriate role for the Judge?

V. I am sure that the Committee is aware of the multitude of decisions by the U.S. Courts of Appeals reversing district court sentences because of improper application of the Sentencing Guidelines. The proposed waiver provision will reduce the number of appeals from incorrect guideline sentences, thereby shielding sentencing errors, and condoning disparate sentencing. This will significantly undercut the Congressional purpose in enacting the Federal Sentencing Guidelines, and significantly impede the Sentencing Commission's duty to collect and study sentencing decisions to enable the Committee to monitor, revise, and correct the Guidelines.

For all the above reasons, I urge that the Committee provide for further study of this proposed Rule 11(c) amendment, its relationship to Rule 32, its constitutional validity, and its impact on the federal Sentencing Guideline system.

Sincerely,



Paul D. Borman
United States District Judge

cc: John Rabiej, Chief of Rules Committee Office

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

W. EUGENE DAVIS
CIRCUIT JUDGE

October 3, 1996

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

In re: Rule 25(b), Fed. R. Crim. P.

Dear Lowell:

I received a letter today from Judge George Kazen about a significant problem Rule 25(b) creates for him. I am bringing copies of Judge Kazen's attached self-explanatory letter with me to the meeting next week in the event we have time to discuss the problem he raises and you decide we should discuss it despite the inadequate notice.

I look forward to seeing you in Oregon next week.

Sincerely,

W. Eugene Davis

cc: Professor David A. Schlueter
Mr. John K. Rabiej

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) 726-2349

October 1, 1996

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

Re: Rule 25, Fed. R. Crim. P.

Dear Gene:

This is my very belated follow-up to our earlier conversations about Rule 25. My concern is based on my own experiences, confirmed by discussions with several of my colleagues.

Rule 25(a) deals only with a change of judge during a trial. Rule 25(b) applies after a verdict or "finding of guilt." It is unclear whether the quoted phrase applies to a guilty plea or is limited to a non-jury trial, because of following language about whether the successor judge is satisfied that "a judge who did not preside at the trial" cannot perform the duties.

At least for those of us who sit on the Mexican border, it is normal to process at least 20 to 30 criminal cases a month. From time to time, visiting judges have come for a week or so to help us. Sometimes they will preside over a trial, but often the need is to help take guilty pleas or rule on pretrial motions, particularly motions to suppress requiring an evidentiary hearing. After the period of visitation, the judge leaves and the question is whether I or another visitor can sentence a defendant who earlier pled guilty before the first judge. Also, is there any potential problem with different judges handling different parts of a file, such as pretrial motions? Also, there have been times when I have had literally dozens of sentences pending and a visiting judge offers to assist with the sentencings. Is this permissible? I see no clear support for it in Rule 25 and I have not wanted to create unnecessary problems, but often the help would be most welcome.

This situation will become chronic for me when I become Chief Judge in December. At least for the time being, the arrangement my Court has made to help with my docket is that one of our judges will come to Laredo for two weeks every two months to help me with the docket. Again, sometimes that will mean trying a case but his value would be increased enormously if he could help with whatever is pending without committing error.

As you know, the judiciary is facing constant pressure about budget reduction, downsizing, courtroom sharing, etc. At the same time, Congress does not appear to be retreating from the push to keep increasing the federalization of crimes. We are consistently being urged to increase our efficiency but I do not want to do so at the risk of reversible error. My concern is with an argument that whatever substitution of judges is not expressly allowed by Rule 25 is impermissible. I have not attempted to draft a proposal, but I wanted to put the issue on the table to see if there is any support for a clarification and expansion of the Rule.

Thank you for your interest in this matter.

Sincerely yours,

George P. Kazen

George P. Kazen

GPK/gsh

(2)

Amend

11(E)(2) to read

(2) Notice of such agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera at the time the plea is offered.

(a) If the agreement is of the type specified in subdivision (E)(1)(A) or (E)(1)(C), the court may reject the agreement, or may accept the plea of the defendant and defer acceptance of the disposition provided for in the plea agreement until after it has considered the presentence report. The court shall advise the defendant that if the court accepts the plea agreement the defendant has no right to withdraw the plea.

(b) same language as 11(E)(1)(B)

Amend 11(E)(3) to read

(3) Acceptance of a plea agreement. If the court accepts the disposition provided for under a plea agreement of the type specified in subdivision 11(E)(1)(A) or 11(E)(1)(C), the court shall inform .....

(3)

Amend 11(E)(4) to read

(4) Rejection of a plea agreement. If the court does not accept the disposition provided for under a plea agreement of the type specified in subdivision 11(E)(1)(A) or 11(E)(1)(C), the court shall, on the record, inform the parties .....

Another possibility

Amend subdivision 11(E)(2)(a)

(2) If the agreement is of the type specified in subdivision 11(C)(1)(A) or 11(E)(1)(C) the court may reject the agreement, or, if the court is satisfied that (i) the agreed sentence is within the applicable guideline range, or, (ii) that the agreed sentence departs from the applicable guideline range for justifiable reasons, the court may accept the plea and defer acceptance of the disposition .....

United States District Court
Northern District of Illinois
219 South Dearborn Street
Chicago, Illinois 60604

Chambers of
George N. Marovich
Judge

September 16, 1996

By Facsimile

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

Dear David:

Upon my return from a Prisoner Rights Seminar in St. Louis, I found final responses from Roger, Henry, and Kate. I know your Agenda Book has been printed since I have a copy, but I thought I would forward the responses to you anyway with copies to Judge Jensen.

I guess my conclusion would be that the subcommittee recommends changes to Rule 11(e)(1)(B) and (e)(1)(C) as suggested by Roger Pauley and Mary Harkenrider. This should cure the U.S. v. Harris problem.

Kate, Henry, and I agree that the Committee should consider in depth whether any further changes should be made given the realities of plea bargaining under the Guidelines. I agree with Henry that we should look to a goal that can increase a lawyer's ability to more reliably predict the consequences of a guilty plea. Roger finds some discomfort in a more comprehensive examination of Rule 11. These are points of view for the Committee, as a whole, to consider.

I look forward to seeing you all in Oregon.

Best regards,

George N. Marovich
United States District Judge

mm

c\Pauley
Martin
Stith

Office of the Federal Public Defender
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, Tennessee 37203-3805

Tele. No. 615-736-5047
FAX 615-736-5265

Henry A. Martin
Federal Public Defender
Martick A. Weaver
Deputy Federal Public Defender
C. Douglas Thoreen
Senior Litigation Counsel
Sandra L. Camp
Thomas H. Warren
Judy T. Loudon
Caryll S. Alpert
Paul R. Bottei
Assistant Federal Public Defenders

September 5, 1996

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

RE: Rule 11, Etc., Subcommittee

Dear Judge Marovich:

Since my last letter to you on this topic, I solicited input from other defenders and have gotten considerable feedback. While I have not yet had the time to go through the responses carefully either to articulate a defender position or to formulate any specific proposals, I can say that there is a high degree of frustration among federal defenders about their inability to give reliable and specific advice to a defendant about the consequences of a guilty plea vis-a-vis a trial. This frustration is increased because of the severity of punishment that is usually involved and because a sentencing guideline system ought to offer a higher degree of predictability than is seen in a large number of districts around the country.

We can all articulate a number of factors contributing to a defense lawyer's inability to provide reliable information to a defendant in deciding whether or not to plead guilty. Many of these factors are beyond the jurisdiction of a rules committee. However, if some modification of the existing rules can increase a lawyer's ability to provide reliable predictions to a client about the consequences of a guilty plea, it seems like a worthwhile goal.

I will make every effort to synthesize the comments I got from the other defenders into some meaningful presentation that can be distributed to the other members of our Subcommittee or to the entire Committee in advance of the October meeting. I would like to see our Subcommittee or some other subcommittee or the Committee as a whole

continue to look at these issues which I think means that I concur with what you proposed to report to the Committee as a whole.

Sincerely yours,

Henry A. Martin

HAM:drh
Via Fax
cc: Roger A. Pauley, Esq.
Professor Kate Stith

Yale Law School

KATE STITH
Professor of Law

BY FAX

September 6, 1996

Hon. George M. Marovich
United States District Court
219 South Dearborn Street
Chicago, IL 60604

Dear Judge Marovich:

I join with Roger and Mary Frances in hoping that our subcommittee report will support the proposed changes to Rule 11(e)(1)(B) and (e)(1)(C). These changes (including the change proposed in the letter from Roger and Mary Frances dated September 5) do avoid the ambiguity that led to *United States v. Harris*, 70 F.3d 1001 (8th Cir. 1995).

I also agree with Henry that we (or another subcommittee) should consider in some depth whether the Rules should be further amended to take account of the changed nature of plea-bargaining and sentencing in the Guidelines era.

Sincerely,

cc: Henry A. Martin, Esq.
Federal Public Defender

Mary Frances Harkenrider, Esq.
Roger Pauley, Esq.
U.S. Department of Justice

P.O. BOX 208215, NEW HAVEN, CONNECTICUT 06520-8215 · TELEPHONE 203 432-4835 · FACSIMILE 203 432-1148
COURIER ADDRESS 127 WALL STREET, NEW HAVEN, CONNECTICUT 06511

Criminal Division

U. S. Department of Justice

Washington, D.C. 20530

September 5, 1996

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

Dear Judge Marovich:

In response to your letter of September 4, 1996, we also would hope that the Subcommittee report would express support for the Rule 11(e)(1)(C) amendment we suggested (and in that regard, we have no objection to the conforming amendment to Rule 11(e)(1)(B) suggested by Professor Stith). To further embellish our original proposal, we recommend -- for purposes of parallelism and to underscore the difference between an (e)(1)(B) agreement and an (e)(1)(C) agreement -- that (e)(1)(C) should end with the clause "with the understanding that the agreement shall be binding on the court if the plea is accepted" (in contradistinction to (e)(1)(B) which ends with a similar clause save for the inclusion of "not" after "shall". Thus, Rule 11(e)(1)(C) would read:

> "(C) agree that a specific or sentencing range is the appropriate disposition of the case, or that a particular sentencing guideline, sentencing factor, or policy statement is applicable to the case, with the understanding that the agreement shall be binding on the court if the plea is accepted. (Proposed new matter underlined).

As Professor Stith noted in her letter, this amendment would not confer any additional power on the parties as compared to the court, since judges remain free to reject an (e)(1)(C) agreement for any reason, or even without stating a reason.

As to the notion of a more comprehensive examination of Rule 11, we are somewhat uneasy about what this might entail. We certainly have no problem with looking at any other amendments to address the issues raised by United States v. Harris, 70 F.3d 1001 (8th Cir. 1995) (the amendment we have proposed, however,

indirectly addresses Harris by implying that only an (e)(1)(C) agreement is binding on the court), but would not want to sign on to the concept of an overall review of Rule 11 without some further idea of perceived specific problem areas. To the extent the Subcommittee, and the Committee, can identify and provide sound solutions for recurring and important problems that have arisen under Rule 11, we would prefer that such amendments move forward promptly, without awaiting the results of a more generalized and amorphous examination of the Rule.

Sincerely,

Roger A. Pauley

Mary Frances Harkenrider

cc: Henry Martin, Esq.
Professor Kate Smith

United States District Court
Northern District of Ohio
United States Courthouse
2 South Main St.
Akron, Ohio 44308

David D. Dowd, Jr.
Judge

September 30, 1996

Professor David A. Schlueter
St. Mary's University
School of Law
The Raba Law Faculty Building
San Antonio, Texas 78228-8603

Dear Professor,

Consistent with our phone conversation of this morning, I am sending you by Federal Express a copy with the attachments of the letter I sent to Judge Davis on September 27 which sets forth numerous guilty plea agreements that had been presented to me.

Possibly this data will be of some assistance as the committee discusses Criminal Rule 11(e) and, in particular, the proposed amendment suggested by the Department of Justice in its July 29, 1996 letter to Judge Marovich and as supplemented by the September 5, 1996 letter from the Justice Department.

I look forward to seeing you in Oregon.

Yours very truly,

David D. Dowd, Jr.
U.S. District Judge

DDD:gh
Enc.
cc: Judge D. Lowell Jensen

United States District Court
Northern District of Ohio
United States Courthouse
2 South Main St.
Akron, Ohio 44308

David D. Dowd, Jr.
Judge

September 12, 1996

Previously sent by FAX
Professor David A. Schlueter
Professor of Law
St. Mary's University School of Law
San Antonio, Texas 78228-8603

In Re: United States v. Leake
1996 WL 506434
___ F.3d ___

Dear Professor:

Attached is the full text of the opinion in the above described case released on September 9, 1996. This case deals with procedural issues relating to defense motions based upon "fruit of the poisonous tree" issues.

At page 21 of the attached text of the opinion, there begins a discussion of "disposition upon remand." In that discussion the decision points out, as indicated in footnote 23, that the Federal Rules of Criminal Procedure fail to provide a clear roadmap for resolutions of motions to suppress evidence when challenged as "fruit of the poisonous tree" where the government refuses to disclose, prior to trial, the identity of its witnesses.

You will see that our court punted on that issue other than to instruct the district court that it was not to entertain a subsequent hearing pretrial on "fruit of the poisonous tree" issues.

I suspect that the issue that arose in the Leake case is rare. However, it may be a proper subject for our committee to examine.

Additionally, I recently stumbled on to the decision of the Ninth Circuit in United States v. Hyde, 82 F.3d 319 (9th Cir. 1996) that gives me some concern. The Hyde opinion was amended on July 29, 1996 by modifying the second footnote. See 1996 WL 457179. Subsequently, a district court in California in United States of America v. Lopez-Reyes, 1996 WL 420111 (S.D. Cal.) held that the Hyde decision was limited to guilty pleas taken under the

provisions of Fed. R.Crim. P. 11(e)(1)(A) or (C) and did not apply to a plea agreement with a non-binding recommendation under Rule 11(e)(1)(B). The Hyde decision declares that a defendant may withdraw a guilty plea for any reason prior to the district court accepting the written plea agreement. Normally it has been my observation that district court judges delay a formal acceptance of the written plea agreement until the time of sentencing. Under the teachings of Hyde, if it is to have univeral application, the taking of guilty pleas has entered a new and somewhat uncertain area.

It may be that the agenda is already set for the October meeting. If not, you may wish to at least bring the Leake opinion and the Hyde opinion to the attention of the committee.

Yours very truly,

David D. Dowd, Jr.
United States District Judge

DDD:sme
Enc.
cc w/enc.: Judge D. Lowell Jensen, N.D. California

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

September 30, 1996

MEMORANDUM TO JUDGE D. LOWELL JENSEN

SUBJECT: *Proposed Change to Criminal Rule 26*

Amendments to Civil Rule 43 take effect on December 1, 1996, which delete the requirement for testimony to be taken "orally" in open court. The amendments are intended to allow testimony to be given in open court by other means if the witness is unable to communicate orally. Writing or sign language are common examples. A provision has also been added to allow for the presentation of testimony by contemporaneousness transmission from a different location in compelling circumstances.

While reviewing the amendments, Judge Stotler noticed that Criminal Rule 26 has a similar provision that requires testimony to be "taken orally in open court." It may be that "oral" testimony is necessary in criminal cases, but either way, she requests that your committee consider amending Rule 26 consistent with the amendments to Civil Rule 43.

Thank you for your consideration.

John K. Rabiej

cc: Honorable Alicemarie H. Stotler
Professor David A. Schlueter

U.S. Department of Justice
Office of Legislative Affairs

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

September 25, 1996

The Honorable Albert Gore, Jr.
President
United States Senate
Washington, D.C. 20510

Dear Mr. President:

Enclosed for consideration of the Congress is a draft legislative proposal intended to clarify the effective date provision of Rules 413 through 415 of the Federal Rules of Evidence. We would appreciate its referral to the appropriate committee and its speedy enactment. We are forwarding an identical proposal to the Speaker of the House of Representatives.

Rules 413-415 were enacted, with the support of the President, as part of the Violent Crime Control and Law Enforcement Act of 1994. The rules broaden the admissibility at trial of evidence that the defendant in a sexual offense case has committed offenses of the same type on other occasions. In the implementing legislation, Congress specified that the Rules 413-415 would apply to "proceedings commenced on or after" the effective date of the rules, which was July 10, 1995.

A number of district judges have interpreted this provision as making the rules applicable to all cases in which the relevant "proceeding" -- the trial -- begins on or after the effective date of July 10, 1995. A recent decision in the Tenth Circuit Court of Appeals, however, held that Rules 413-415 did not apply to cases in which the indictment was filed before July 10, 1995, even though the case was scheduled to go to trial after that date. United States v. Hollis Earl Roberts, 88 F.3d 872 (10th Cir. 1996).

The Roberts decision is binding precedent in the Tenth Circuit and increases the chance of an adverse decision on the same issue in other courts. The attached legislative proposal will resolve this problem by clarifying that Fed. R. Evid. 413-415 apply to all trials commenced on or after their effective date, regardless of when the indictment was filed. There is no *ex post facto* problem in the enactment of this proposal, as it affects only the application of rules of evidence (as opposed to the criminality of conduct or the penalty to be imposed.) See Collins v. Youngblood, 497 U.S. 37, 43 n. 3 (1990). Changes in

the rules of evidence are often applied to pending cases, as well as those in which the indictment was filed after their enactment.

In light of the effect that the Roberts decision could have on pending cases, it is essential that this legislation be enacted as soon as possible. We strongly urge your immediate action.

The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration's program to the presentation of this legislative proposal.

Sincerely,

Andrew Fois
Assistant Attorney General

Enclosure

U.S. Department of Justice

Office of Legislative Affairs

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

September 25, 1996

The Honorable Newt Gingrich
Speaker of the
House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

Enclosed for consideration of the Congress is a draft legislative proposal intended to clarify the effective date provision of Rules 413 through 415 of the Federal Rules of Evidence. We would appreciate its referral to the appropriate committee and its speedy enactment. We are forwarding an identical proposal to the Speaker of the House of Representatives.

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The Roberts decision is binding precedent in the Tenth Circuit and increases the chance of an adverse decision on the same issue in other courts. The attached legislative proposal will resolve this problem by clarifying that Fed. R. Evid. 413-415 apply to all trials commenced on or after their effective date, regardless of when the indictment was filed. There is no *ex post facto* problem in the enactment of this proposal, as it affects only the application of rules of evidence (as opposed to the criminality of conduct or the penalty to be imposed.) See Collins v. Youngblood, 497 U.S. 37, 43 n. 3 (1990). Changes in

the rules of evidence are often applied to pending cases, as well as those in which the indictment was filed after their enactment.

In light of the effect that the Roberts decision could have on pending cases, it is essential that this legislation be enacted as soon as possible. We strongly urge your immediate action.

The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration's program to the presentation of this legislative proposal.

Sincerely,

Andrew Fois
Assistant Attorney General

Enclosure

104th Congress
2d Session

H.R. ____
[S. ____]

M. ____ introduced the following bill; which was referred to the committee on _____

A BILL

To amend Section 320935 of the Violent Crime Control and Law Enforcement Act of 1994, to clarify the effective date of Federal Rules of Evidence 413-15

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

SEC.____ APPLICATION OF EVIDENCE RULES FOR SEXUAL OFFENSE CASES

Section 320935(e) of the Violent Crime Control and Law Enforcement Act of 1994 is amended by inserting ", including all trials commenced on or after the effective date of such amendments" after "such amendments".

Department of Justice Proposal
to Amend Federal Rules of Evidence 413-415

The 1994 Crime Act added Rules 413 through 415 to the Federal Rules of Evidence to broaden the admissibility of evidence of prior sexual crimes in sex offense cases. The rules generally allow admission of prior crimes of sexual assault to prove a defendant had the propensity to commit the crime, to counter the assertion that the defendant was the victim of mistaken identity, or for any other relevant purpose. See statement of Rep. Susan Molinari, Cong. Rec. H8991, (Aug. 21, 1994).

The implementing legislation provided that the rules would apply to all "proceedings commenced on or after" their effective date, which was July 10, 1995. A number of district judges have interpreted this provision as making the rules applicable to all cases in which the relevant "proceeding" -- the trial -- begins on or after the effective date of July 10, 1995. A recent decision in the Tenth Circuit Court of Appeals, however, held that Rules 413-415 did not apply to cases in which the indictment was filed before July 10, 1995, even though the case was scheduled to go to trial after that date. United States v. Hollis Earl Roberts, 88 F.3d 872 (10th Cir. 1996).

The Roberts decision is binding precedent in the Tenth Circuit and increases the chance of an adverse decision on the same issue in other courts. The Department's proposed legislation will resolve this problem by clarifying that Fed. R. Evid. 413-415 apply to all trials commenced on or after their effective date, regardless of when the indictment was filed. Rules 413-415 are rules of trial evidence; there are no other stages of a criminal case to which the rules could apply. To hold that the rules apply only to cases indicted after the effective date of the changes undermines the intent of Congress in enacting this legislation.

There is no *ex post facto* problem in the enactment of this proposal, as it affects only the application of rules of evidence (as opposed to the criminality of conduct or the penalty to be imposed.) See Collins v. Youngblood, 497 U.S. 37, 43 n. 3 (1990). Changes in the rules of evidence are often applied to pending cases, as well as those in which the indictment was filed after their enactment.

STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS (Senate - September 30, 1996)

[Page: S11999]

S.J. Res. 65

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid for all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

Section 1. Victims of crimes of violence and other crimes that Congress and the States may define by law pursuant to section 3, shall have the rights to notice of and not to be excluded from all public proceedings relating to the crime; to be heard if present and to submit a statement at a public pre-trial or trial proceeding to determine a release from custody, an acceptance of a negotiated plea, or a sentence; to these rights at a parole proceeding to the extent they are afforded to the convicted offender; to notice of a release pursuant to a public or parole proceeding or an escape; to a final disposition free from unreasonable delay; to an order of restitution from the convicted offender; to have the safety of the victim considered in determining a release from custody; and to notice of the rights established by this article.

Section 2. The victim shall have standing to assert the rights established by this article; however, nothing in this article shall provide grounds for the victim to challenge a charging decision or a conviction, obtain a stay of trial, or compel a new trial; nor shall anything in this article give rise to a claim of damages against the United States, a State, a political subdivision, or a public official; nor shall anything in this article provide grounds for the accused or convicted offender to obtain any form of relief.

Section 3. The Congress and the States shall have the power to enforce this article within their respective federal and state jurisdictions by appropriate legislation, including the power to enact exceptions when required for compelling reasons of public safety.

Section 4. The rights established by this article shall be applicable to all proceedings occurring after ratification of this article.

Section 5. The rights established by this article shall apply in all federal, state, military, and juvenile justice proceedings, and shall also apply to victims in the District of Columbia, and any commonwealth, territory, or possession of the United States.

Mrs. FEINSTEIN. Mr. President, I rise today along with my distinguished colleague from Arizona, Senator **Jon Kyl**, to introduce a revised and substantially improved version of the victims' rights amendment to the U.S. Constitution.

Since Senator **Kyl** and I originally introduced a victims' rights amendment in April, we have been working very diligently and intensively with the Department of Justice, law enforcement, the White House, major victims' rights groups, Senate Judiciary Committee Chairman **Hatch** and Ranking Member **Biden**, House Judiciary Committee Chairman **Hyde**, and a variety of distinguished scholars in the field of law enforcement, to more finely craft this amendment and resolve various concerns with its initial language. We have gone through 41 different drafts of the

amendment, so far, as the language has evolved, culminating in the resolution that we are introducing today.

We are introducing this most recent version so that interested people have an up to date draft to evaluate. Many of the people who have commented on the victims' rights amendment were commenting on an out of date draft, leading to erroneous and false conclusions by some, including legal scholars.

What really focused my attention on the need for greater protection of victims' rights was a particularly horrifying case, in 1974, in San Francisco, when a man named Angelo Pavageau broke into the house of the Carlson family in Portero Hill.

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STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS (Senate - September 30, 1996)

Pavageau tied Mr. Carlson to a chair, bludgeoning him to death with a hammer, a chopping block, and a ceramic vase. He then repeatedly raped Carlson's 24-year old wife, breaking several of her bones, He slit her wrist, tried to strangle her with a telephone cord, and then, before fleeing, set the Carlson's home on fire--cowardly retreating into the night, leaving this family to burn up in flames.

But Mrs. Carlson survived the fire. She courageously

lived to testify against her attacker. But she has been forced to change her name and continues to live in fear that her attacker may, one day, be released. When I was mayor of San Francisco, she called me several times to notify me that Pavageau was up for parole. Amazingly, it was up to Mrs. Carlson to find out when his parole hearings were.

Mr. President, I believe this case represents a travesty of justice--It just shouldn't have to be that way. I believe it should be the responsibility of the State to send a letter through the mail or make a phone call to let a victim know that her attacker is up for parole, and she should have the opportunity to testify at that hearing.

But today, in most States in this great Nation, victims still are not made aware of the accused's trial, many times are not allowed in the courtroom during the trial, and are not notified when convicted offender is released from prison.

I have vowed to do everything in my power to add a bit of balance to our Nation's justice system. This is why Senator **Kyl** and I have crafted the victim's rights amendment before us today.

The people of California were the first in the Nation to pass a crime victims' amendment to the State constitution in 1982--the initiative proposition 8--and I supported its passage. This measure gave victims the right to restitution, the right to testify at sentencing, probation and parole hearings established a right to safe and secure public school campuses, and made various changes in criminal law. California's proposition 8 represented a good start to ensure victims' rights.

Since the passage of proposition 8, 20 more States have passed constitutional amendments guaranteeing the rights of crime victims--and five others are expected to pass by the end of this year. In each case, these amendments have won with the overwhelming approval of the voters.

But citizens in other States lack these basic rights. The 20 different State constitutional amendments differ from each other, representing a patchwork quilt of rights that vary from State to State. And even in those States which have State amendments, criminals can assert rights grounded in the Federal constitution to try to trump those rights.

I stand before you today to appeal to my colleagues in this body--the highest legislative institution in the land--that the time is now to amend the U.S. Constitution in order to protect the rights of victims of serious crimes.

The U.S. Constitution guarantees numerous rights to the accused in our society, all of which were established by amendment to the Constitution. I steadfastly believe that this Nation must attempt to guarantee, at the very least, some basic rights to the millions victimized by crime each year.

For those accused of crimes in this country, the Constitution specifically protects: The right to a grand jury indictment for capital or infamous crimes; the prohibition against double jeopardy; the right to due process; the right to a speedy trial and the right to an impartial jury of one's peers; the right to be informed of the nature and cause of the criminal

accusation; the right to confront witnesses; the right to counsel; the right to subpoena witnesses--and so on.

I must say to my colleagues that I find it truly astonishing that no where in the text of the U.S. Constitution does there appear any guarantee of rights for crime victims.

To rectify this disparity, Senator **Kyl** and I introduce the victims' rights amendment in April. That amendment, like the one we introduced today, provides for certain basic rights for victims of crime: The right to be notified of public proceedings in their case; The right to be heard at any proceeding involving a release from custody or sentencing; The right to be informed of the offender's release or escape; The right to restitution from the convicted offender; and

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the right to be made of all of your rights as a victim.

Personally, I can say that the process of forging a constitutional amendment for victims' rights has been truly fascinating. The Constitution our forefathers scribed 200 years ago is a remarkable document that has withstood the test of time. Earlier this year, Senator **Kyl** and I embarked on a journey to include an amendment to this magnificent document that would ensure that the rights of the roughly 43 million people victimized by crime each year will be protected.

Our ongoing effort to include a victims' rights amendment in the Constitution has been at times frustrating, while at other times exhilarating. Each sentence, each word, and each comma has undergone hours of deliberation and questioning.

Having said that, I must tell this body and share with my colleagues that this latest resolution is still a work in progress--let me be perfectly clear, we anticipate modifications. Three principal issues remain unresolved:

First, whether there should be an effective remedy when crime victims are denied rights regarding sentences or pleas.

Second, whether to include nonviolent crimes (`other crimes'), and if these crimes are included, whether they should be defined by Congress or by Congress and the States.

Third, whether to have a right to a `final disposition free from unreasonable delay', whether to limit this right to trial proceedings, or whether to exclude this altogether.

Mr. President, Senator **Kyl** and I believe that the latest resolution before us is much better than the version than was previously introduced for a number of reasons. The language describing these rights has changed--and we continue to welcome suggestions to ensure that this amendment pass with the largest majority.

Unfortunately, there was precious little time to advance the amendment in this Congress, and once it became clear that the other Chamber would not proceed with the amendment this session, Senators **Kyl** and **Biden** and I decided not to press for Senate action in the last few weeks of the Congress, but, rather, to spend the next few months continuing to work to fine tune the amendment and build a consensus for its passage.

We implore Members of this body to examine this amendment, and to help to secure passage of this monumental piece of legislation. After 200 years, doesn't this Nation owe something to the millions of victims of crime? I believe that is our obligation and should be our highest priority--not only for the crime victims, but, for all Americans--to ensure passage of a victims' rights constitutional amendment.

I want to personally than Senator **Kyl** for his tireless efforts to accomplish this amendment, and to say that I look forward to continuing to work with him in the months to come.

I thank my colleagues and I yield the floor.

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

DUANE R. LEE
Office of Program Assessment

September 26, 1996

MEMORANDUM TO: **Noel J. Augustyn, Joseph J. Bobek, David L. Gellman, Peter G. McCabe, Myra Howze Shiplett, P. Gerald Thacker, and Pamela B. White**

SUBJECT: ***EASTERN AND WESTERN DISTRICTS OF ARKANSAS*** **-- Draft Reports on District and Bankruptcy Court Reviews**

(Action Requested - October 11, 1996)

The attached are draft reports on the recent reviews of the Eastern and Western Districts of Arkansas conducted by the Office of Program Assessment (OPA). Visits were made to the district and bankruptcy courts. Issues which came to light in the pre-review information provided by your offices as well as issues raised by the court were discussed by the review team, judges, and other court personnel. The reports summarize matters that may require further attention by various units within the Administrative Office.

Prior to my transmitting the final reports to the Director and the chief judges, I would appreciate your reviewing these reports and providing me with any comments or suggestions you may have for improving the reports.

Since these are drafts of reports intended for the consideration of the Director and the pertinent chief judges, who will receive the reports after your review of the drafts, I would appreciate your limiting distribution to your division chiefs and others necessary for preparing internal comments.

If you have any further questions or concerns about this effort, please contact me at 273-1220 or by e-mail. Thank you for your assistance.

Duane R. Lee
Program Assessment Officer

Attachments (3)