ADVISORY COMMITTEE
ON
CRIMINAL RULES

Washington, D.C.
April 22-23, 1999

CRIMINAL RULES COMMITTEE MEETING

April 22-23, 1998
Washington, D.C.

I. PRELIMINARY MATTERS

A. Remarks and Administrative Announcements by the Chair

B. Approval of Minutes of October 1998, Meeting at Cape Elizabeth, Maine

C. Minutes of Standing Committee Meeting, January 1999.

D. Criminal Rules Agenda Docketing.

II. CRIMINAL RULES UNDER CONSIDERATION

A. Rules Approved by Judicial Conference in Spring 1999 and Pending Before Supreme Court (No Memo).

1. Rule 32.2. Criminal Forfeitures.

B. Rules Pending Before Supreme Court (No Memo).

1. Rule 6. Grand Jury (Presence of Interpreters; Return of Indictment)..

2. Rule 11. Pleas (Acceptance of Pleas and Agreements, etc).

3. Rule 24(c). Alternate Jurors (Retention During Deliberations).

4. Rule 54. Application and Exception (Conforming Amendment).

C. Rules Approved by Congress; Effective December 1, 1998 (No Memo).

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.

D. Proposed Style Amendments to Rules of Criminal Procedure; Report of Subcommittee (Memos)

1. Rule 1. Scope.

2. Rule 2. Purpose and Construction.

3. Rule 3. The Complaint.

4. Rule 4. Arrest Warrant or Summons Upon Complaint.

5. Rule 5. Initial Appearance Before the Magistrate Judge.

6. Rule 5.1 Preliminary Examination.

7. Rule 6. The Grand Jury.

8. Rule 7. The Indictment or Information.

9. Rule 8. Joinder of Offenses and Defendants.

10. Rule 9. Warrant or Summons Upon Indictment or Information.

E. Proposed Amendments to Rules of Criminal Procedure

1. **Rule 10, Arraignment & Rule 43, Presence of Defendant.** Proposed Amendments to Permit Defendant to Waive Personal Appearance at Arraignment and Plea (Memo).

2. **Rule 12.2, Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition.** Proposed Amendment Re Notice and Ordering Of Mental Examination For Defendant. (Memo).

3. **Rule 26. Taking of Testimony.** Proposed Amendment to Permit Taking of Testimony from Remote Location. (Memo).

4. **Rule 35. Correction or Reduction of Sentence. (Memo)**

7. **Rule 43. Presence of Defendant.** Proposed Amendments re Teleconferencing for Initial Appearance and Arraignment (Memo).

8. **Rule 49. Service and Filing of Papers**. Use of Electronic Transmissions (Memo).

9. **Other Proposals for Discussion (Memo)**

F. Rules and Projects Pending Before Advisory Committees, Standing Committee and Judicial Conference

G. Status Report on Legislation Affecting Federal Rules of Criminal Procedure.

III. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

ADVISORY COMMITTEE ON CRIMINAL RULES

Chair:

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

Area Code 318
262-6664

FAX-318-262-6685

Members:

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

Area Code 334
223-7132

FAX-334-223-7676

Honorable David D. Dowd, Jr.
United States Senior District Judge
402 U.S. Courthouse & Federal Building
Two South Main Street
Akron, Ohio 44308

Area Code 330
375-5834

FAX-330-375-5628

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

Area Code 814
533-4514

FAX-814-533-4519

Honorable John M. Roll
United States District Judge
United States District Court
415 James A. Walsh Courthouse
44 East Broadway Boulevard
Tucson, Arizona 85701-1719

Area Code 520
620-7144

FAX-520-620-7147

Honorable Susan C. Bucklew
United States District Judge
United States District Court
109 United States Courthouse
611 North Florida Avenue
Tampa, Florida 33602

Area Code 813
301-5858

FAX-813-301-5757

ADVISORY COMMITTEE ON CRIMINAL RULES (CONTD.)

Honorable Tommy E. Miller United States Magistrate Judge 173 Walter E. Hoffman United States Courthouse 600 Granby Street Norfolk, Virginia 23510-1915	Area Code 757 222-7007 FAX-757-222-7027
Honorable Daniel E. Wathen Chief Justice, Maine Supreme Judicial Court 65 Stone Street Augusta, Maine 04330	Area Code 207 287-6950 FAX-207-287-4641
Professor Kate Stith Yale Law School Post Office Box 208215 New Haven, Connecticut 06520-8215	Area Code 203 432-4835 FAX-203-432-1148
Robert C. Josefsberg, Esquire Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A. City National Bank Building, Suite 800 25 West Flagler Street Miami, Florida 33130-1780	Area Code 305 358-2800 FAX-305-358-2382
Darryl W. Jackson, Esquire Arnold & Porter 555 Twelfth Street, N.W. Washington, D.C. 20004	Area Code 202 942-5000 FAX-202-942-5999
Henry A. Martin, Esquire Federal Public Defender 810 Broadway, Suite 200 Nashville, Tennessee 37203	Area Code 615 736-5047 FAX-615-736-5265
Assistant Attorney General Criminal Division (ex officio) Roger A. Pauley, Esquire Director, Office of Legislation, U.S. Department of Justice 601 D Street, N.E., Room 6637 Washington, D.C. 20530	Area Code 202 514-3202 FAX 202-514-4042

ADVISORY COMMITTEE ON CRIMINAL RULES (CONTD.)

Reporter:

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

Area Code 210
431-2212

FAX-210-436-3717

Liaison Member:

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

Area Code 501
324-6863

FAX-501-324-6869

Secretary:

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

Area Code 202
273-1820

FAX-202-273-1826

I-A&B

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

October 19-20, 1998
Cape Elizabeth, Maine

The Advisory Committee on the Federal Rules of Criminal Procedure met at Cape Elizabeth, Maine on October 19th and 20th, 1998. These minutes reflect the discussion and actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Davis, Chair of the Committee, called the meeting to order at 8:30 a.m. on Monday, October 19, 1998. The following persons were present for all or a part of the Committee's meeting:

Hon. W. Eugene Davis, Chair
Hon. George M. Marovich
Hon. David D. Dowd, Jr.
Hon. D. Brooks Smith
Hon. John M. Roll
Hon. Susan C. Bucklew
Hon. Tommy E. Miller
Hon. Daniel E. Wathen
Prof. Kate Stith
Mr. Robert C. Josefsberg, Esq.
Mr. Darryl W. Jackson, Esq.
Mr. Henry A. Martin, Esq.
Mr. Roger Pauley, Jr., designate of the Asst. Attorney General for the Criminal Division
Professor David A. Schlueter, Reporter

Also present at the meeting were: Hon. Anthony J. Scirica, Chair of the Standing Committee on Rules of Practice and Procedure; Hon. William Wilson, member of the Standing Committee and liaison to the Advisory Committee; Professor Daniel Coquillette, Reporter to the Standing Committee; Mr. John Rabiej and Mr. Mark Shapiro from the Rules Committee Support Office of the Administrative Office of the United States Courts; Mr. Daniel Cunningham of the Legislative Affairs Office of the Administrative Office; Ms. Laurel Hooper from the Federal Judicial Center; Ms. Nancy Miller, Judicial Fellow at the Administrative Office; and Ms. Mary Harkenrider and Stephan Cassella from the Department of Justice. Judge Davis, the Chair, welcomed the attendees and thanked

Judge Marovich for his years of service to the Committee. He also welcomed the new member, Judge Bucklew. Later in the meeting, Judge Davis presented a certificate of appreciation to Judge Marovich.

II. APPROVAL OF MINUTES OF OCTOBER 1997 MEETING*

Mr. Josefsberg moved that the Minutes of the Committee's April 1998 meeting in Washington, D.C., be approved. Following a second by Judge Miller, the motion carried by a unanimous vote.

III. RULES APPROVED BY SUPREME COURT AND PENDING BEFORE CONGRESS

The Reporter informed the Committee that the Supreme Court had approved the following amendments and that absent any action from Congress, they would become effective on December 1, 1998:

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 Jurors);
4. Rule 33 (New Trial; Time for Filing Motion);
5. Rule 35(b) (Correction or Reduction of Sentence; Changed Circumstances); and
6. Rule 43 (Presence of Defendant; Presence at Reduction or Correction of Sentence).

IV. RULES APPROVED BY STANDING COMMITTEE AND JUDICIAL CONFERENCE AND PENDING BEFORE THE SUPREME COURT

The Reporter informed the Committee that both the Standing Committee and Judicial Conference had approved and forwarded to the Supreme Court the amendments to the following rules:

1. Rule 6. Grand Jury (Presence of Interpreters; Return of Indictment);
2. Rule 11. Pleas (Acceptance of Pleas and Agreements, etc.);
3. Rule 24(c). Alternate Jurors (Retention During Deliberations);
4. Rule 30. Instructions (Submission of Requests for Instructions);
5. Rule 54. Application and Exception.

The Standing Committee, however, rejected proposed Rule 32.2, Criminal Forfeitures. As a result, Judge Davis had withdrawn the following proposed amendments that would have been conforming changes required by Rule 32.2: Rule 7. The Indictment and Information (Conforming Amendment); Rule 31. Verdict (Conforming Amendment); Rule 32. Sentence and Judgment (Conforming Amendment); and Rule 38. Stay of Execution (Conforming Amendment).

V. CRIMINAL RULES CURRENTLY UNDER CONSIDERATION BY ADVISORY COMMITTEE*

A. Rule 10. Arraignment & Rule 43. Presence of Defendant.

Judge Miller briefly explained the background of proposed changes to Rules 10 and 43 that would permit the defendant to waive his or her appearance at the arraignment. He noted that he and Mr. Martin had agreed on some proposed language in a new (c)(i) that would make it clear that the defendant's ability to waive an appearance is available only where he or she is entering a plea of not guilty and that a waiver may not be used where the defendant, under Rule 7(b), must appear in open court to waive an indictment where he has been charged with a criminal information in a felony case.

There was general agreement among the Committee members to the proposed changes. The Reporter was asked to draft up the proposed language and conforming amendments for the Committee's April 1999 meeting.

B. Rule 12.2. Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition.

The Reporter provided a brief background on the proposed changes to Rule 12.2, which would make three changes. First, the amendment would require the defendant to provide notice of an intent to introduce expert testimony in a capital case sentencing proceeding. Second, the amendment would authorize the defendant, who had provided such notice, to undergo a mental examination. And third, the proposed change would place some limits on the ability of the government to see the results of that examination before the penalty phase had begun. The Reporter noted that as a result of the Committee's discussion at the October 1997 meeting, he had conducted some additional research into the questions of the impact of the Rule on the defendant's privilege against self-incrimination and whether early disclosure should be permitted.

---

* The material is presented here in the order it appeared on the Committee's agenda and not necessarily in the order it was discussed at the meeting.

With regard to the self-incrimination issue, the Reporter indicated that the law seems clear that requiring the defendant to provide notice of an intent to present evidence of his mental condition does not amount to a waiver of the privilege. And, requiring a defendant to undergo mental testing as a condition for introducing such evidence does not violate the privilege. Regarding the issue of disclosure of the report to the government, the Reporter informed the Committee that the routine practice seems to be that the trial court will seal the results of the compelled examination until the penalty phase of the trial. He observed, however, that there was support for the position that sealing was not constitutionally required. Finally, there is support for the proposition that the court need not wait until the defendant actually introduces evidence of his mental condition before disclosing the results of the examination to the government.

Judge Davis commented that in framing the issues, it should be noted that if the trial judge orders early disclosure, time will be taken for the government to show that no taint has resulted from that early disclosure. On the other hand, he noted, if the government must wait until sentencing to see the report for the first time, there will be delays while the defense and government review the report.

Professor Stith observed that the defendant could always waive holding the report, and Judge Bucklew observed that timing is important in these issues, especially if a jury is involved. Chief Justice Wathen noted that there are really no good choices in this situation; the issues must be decided in a short time frame. Judge Roll commented that mental examination reports include all sorts of information and that the opportunity to investigate those matters is usually not available.

Mr. Martin stated that federal capital cases are usually high profile cases with a great deal of psychiatric testing. He noted, however, that during compelled examinations the defense counsel is not permitted to be present and that that can lead to abuse. He noted that in many cases the results of the examination are sealed because it is believed that there is no reason to disclose it earlier to the defense. He also observed that when the defense sees possible rebuttal evidence in the report, it may withdraw the mental health defense. Finally, he stated that early release to the government could pose dangers and that there is a risk that the government's knowledge of the results might be used against the defendant on the merits portion of the case.

Mr. Josefsberg observed the defendants are already suspicious of the government and the early release of the report simply fuels that belief and undermines trust in the system. He noted that in his experience in State courts, both sides get the results before sentencing begins and that it does take time to review the report. Ms. Harkenrider responded that the typical delay in a federal trial is five days. Other Committee members raised questions about the issue of delay and Judge Marovich urged the Committee to support changes that speeded up the discovery process. Judge Roll commented that he would be concerned about the impact of such delays on the jurors, especially in high profile cases.

The Committee ultimately voted 9 to 2 to amend the Rule to require the trial court to seal the results of the mental examination until the penalty phase.

On the issue of when the results should be disclosed earlier to the defense, Mr. Josefsberg observed that the report might be very beneficial to the defense and in that instance the defense might wish for the government to see it as well. Where the defendant is facing the death penalty, he observed, more time should be given to the defense. Judge Dowd questioned what the States have done on this issue and whether any States provide for earlier release. Following additional brief discussion the Committee voted 7 to 4 to amend the Rule to provide that if the trial court provides the report to the defense earlier than at the penalty phase, the government is entitled to disclosure as well.

C. Rule 26. Taking of Testimony.

The Reporter provided background information on the proposed changes to Rule 26, which had originally been proposed by Judge Stotler as a means of conforming the Rule to Civil Rule 43. The proposed amendment would permit the court to hear testimony being transmitted from a remote location. The Reporter indicated that in response to the Committee's questions at the last meeting, he had done some additional research on the question of whether such an amendment would implicate Confrontation Clause concerns. He noted that of the few cases dealing with the issue, it seemed clear that reception of testimony from a remote location does not per se violate the defendant's right to confrontation. In particular, he noted that a recent decision by Judge Weinstein in United States v. Gigante, 971 F.3d 755 (E.D.N.Y. 1997) had addressed the issue in some detail, and had cited Civil Rule 43 and the accompanying Committee Note.

He further explained that the most recent draft of the proposed amendment stated no preference for remote transmission over deposition testimony and that the requesting party must establish compelling reasons for that transmission.

The Committee approved the draft by a unanimous vote. The Reporter was asked to make style changes to the Rule.

D. Rule 30. Instructions.

Judge Davis provided background information on the proposed amendments to Rule 30. He noted that as published for public comment in 1997, the Rule only addressed the question of the timing of providing requested instructions. However, after the comment period ended, the Committee learned that the Civil Rules Committee was considering broader amendments to the Civil Rule counterpart, Rule 51. At the suggestion of the Committee, the Reporter had discussed with the Reporter for the Civil

Rules Committee the possibility of coordinating a common rule on the issue. Judge Dowd added that perhaps the Rule should include a specific provision authorizing or requiring that the instructions be given before arguments are made. Following additional brief discussion, the Committee decided to wait with any further amendments to Rule 30 pending action by the Civil Rules Committee.

E. Rule 32. Sentence and Judgment.

Judge Davis reminded the Committee of the request from the Criminal Law Committee that the Committee consider whether any provision should be made in either a national rule or local rules concerning release of presentence and related reports. He also indicated that he had appointed a subcommittee consisting of Judge Smith (Chair), Chief Justice Wathen, Mr. Pauley, Ms. Harkenrider, and Mr. Martin. Judge Smith reported that the subcommittee had conferred on the issue and had concluded that no rule changes should be made—either in a national or local rule. He added that they believed that the fact that individuals or organizations might seek access to the reports was not reason enough to make them readily available. He also noted that Judge Kazen, Chair of the Criminal Law Committee, tended to agree with that position. On the motion of Judge Dowd, seconded by Judge Miller, the Committee unanimously approved the Subcommittee's report that no amendments be made.

F. Rule 32.2. Criminal Forfeiture.

Judge Davis provided a brief overview of the questions that had been raised by the Standing Committee in rejecting the Committee's proposed Rule 32.2. He noted that one of the chief concerns focused on the proposed removal of the jury from any forfeiture decisions at trial. Another concern, he stated, was whether the defendant would be permitted to offer any evidence at the forfeiture hearing conducted by the judge. Beyond that, no member of the Standing Committee had voiced any strong concerns about the remainder of the Rule. Judge Wilson added brief comments which echoed Judge Davis' assessment.

Judge Dowd (Chair of Subcommittee on Rule 32.2) explained that since the Standing Committee's meeting in June, the Department of Justice had proposed a number of revisions to Rule 32.2, with a view toward possibly presenting it to the Standing Committee at its January meeting. He briefly noted the changes proposed by the Department and observed that although he personally favored removing the jury from the forfeiture decision, he recognized that there were important reasons for retaining that role.

Mr. Pauley offered reasons for adopting the revised Rule. First, he noted that it was important to recognize that the forfeiture issue was a sentencing matter and that the Rule reflected that point. Second, current procedures provide for redundant forfeiture

decisions and can be very time-consuming and may involve complicated decisions under property law. He noted that under the proposed Rule, the ancillary proceeding would become the primary locus for determining the rights of any third parties to the property to be forfeited.

Mr. Stephen Cassella, an Attorney with the Department of Justice, added to Mr. Pauley's comments and briefly reviewed the current procedures for deciding forfeiture issues. He noted that the ancillary proceeding is governed by statute and gave a brief historical overview of how that proceeding had developed. He added that the proposed Rule would bifurcate the forfeiture proceeding—the first proceeding following the verdict would determine whether any nexus existed between the property and the offense. In that proceeding, the parties would be entitled to request that a jury make that determination. If a third party asserts an interest in that property, the court would conduct an ancillary proceeding.

Mr. Pauley raised the question of whether the Rule should be republished and noted that the Standing Committee's concerns had caused the Department of Justice to rethink its proposal and address the concerns raised by that body. He added that the Department was still very interested in pursuing the adoption of a clear, single, Rule to address forfeiture procedures.

Judge Dowd moved that the Committee approve the Department's most recent draft of Rule 32.2. Mr. Pauley seconded the motion.

In the discussion which followed, Mr. Pauley explained the differences in the original (the one presented to the Standing Committee) and the revised draft of Rule 32.2 (dated October 13, 1998). He noted that one for the changes was in Subdivision (a) where the Department proposed that the language being changed to reflect current caselaw interpreting Rule 7(c) which does not require a substantive allegation that certain property is subject to forfeiture. The defendant need only receive notice that the government will be seeking forfeiture under the applicable statute.

He noted that (b)(1) had been revised to clarify that there are different kinds of forfeiture judgments: forfeiture of specific assets and money judgments. To the extent that the case involves forfeiture of specific assets, the court or jury must find a nexus between the property and the crime for which the defendant has been found guilty.

Under the revised (b)(2), the Rule makes it clear that what is deferred to the ancillary proceeding is the question of whether any third party has a superior interest in the property. Former language regarding what the court should do if no party files a claim has been moved to (c)(2).

Mr. Pauley noted that (b)(3) had been changed to make it clear that the Attorney General could designate someone outside the Department to seize the forfeited property.

The major change, he observed, rested in (b)(4) which retains the right of either the defendant or the government to request that the jury make the decision whether there is a nexus between the property and the crime. This provision, he noted, was designed specifically to address the concerns raised by some members of the Standing Committee.

Next, Mr. Pauley informed the Committee that (c)(1) had been revised to reflect that no ancillary proceeding is necessary regarding money judgments and that (c)(2) had been revised to simplify what had appeared at (b)(2) in the original version. That provision, he observed, preserves two tenets of current law: that criminal forfeiture is an in personem action and that if no third party files a claim to the property, his or her rights are extinguished. Under the revised language, if no third party files a claim the court is not required to determine the extent of the defendant's interest. It is only required to decide whether the defendant had an interest in the property.

Finally, Mr. Pauley noted that (e)(1) had been revised to make it clear that the right to a bifurcated procedure does not apply to forfeiture of substitute assets or to the addition of newly-discovered property to an existing forfeiture order.

Judge Wilson indicated that the right to jury trial is a broad concern but that other members of the Standing Committee might approve of the Department's changes.

The ensuing discussion focused first on the issue of procedures for forfeiting "specific assets" in (b)(2) and its relationship to (c)(2). Mr. Cassella noted that forfeiture procedures can create complicated issues and that the Rule is intended to simplify the process by recognizing a presumption that if no third party comes forward, the defendant is presumed to have an interest in the property. Following additional discussion, the Committee agreed that any language about presumptive interests should go in the Note and not in the Rule itself.

Judge Roll raised a question about the proposed change to (a) that would permit the government to simply provide notice to the defendant in the indictment. Following brief discussion concerning clarification of the "notice" provision, the Committee voted 6 to 3 to adopt the Department's suggested change in subdivision (a).

In (b)(4), with regard to the issue of distinguishing money judgments from forfeiture of specific assets, the Committee voted 7 to 4 to use the term property instead of "specific assets." And by a vote of 4 to 3, the Committee approved the jury provision in (b)(4).

The Committee generally discussed the issue of whether to recommend that the Rule be republished for public comment on the proposed changes. A consensus emerged that the changes were in effect largely conforming changes resulting from comments from

the Standing Committee and that the Chair should present the Rule to the Standing Committee for its determination on whether the changes required additional publication.

Thereafter, the Committee voted unanimously to present the revised Rule to the Standing Committee at its January 1999 meeting.

G. Rule 43. Presence of Defendant.

The Reporter provided a brief overview of the proposed changes to Rule 43 that would permit the defendant to appear before an initial appearance and arraignment through teleconferencing. The proposal had been raised in a letter from Judge Fred Biery (W.D. Tex.) recommending that Rule 5 be amended to permit such appearances. The Reporter stated that the Committee had published a proposed amendment in 1993 and 1994 that would have accomplished the same result. But the matter was tabled pending the outcome of an FJC pilot program involving teleconferencing. Judge Roll noted that although the proposal focused on Rule 5, amendments to Rules 10 and 43 would also be required. Following further discussion, Judge Davis appointed a subcommittee to study that matter and report back to the Committee: Judge Roll (Chair), Judge Bucklew, Judge Miller, and Mr. Pauley.

H. Rules Governing Habeas Corpus Proceedings.

Judge Davis indicated that as a result of its study of the Rules Governing Habeas Corpus, the Subcommittee consisting of Judge Carnes (Chair), Judge Miller, Mr. Jackson, Mr. Pauley and Ms. Harkenrider was prepared to recommend changes to those Rules. Judge Miller, speaking on behalf of the Subcommittee in the absence of Judge Carnes, explained the need for a number of changes to the Rules.

First, it was necessary, he said, that the reference in Rule 6(c), Rules Governing § 2254 cases and Rule 8(c), Rules Governing § 2255 cases contain an outdated reference to 18 U.S.C. § 3006A(g). The Committee voted unanimously to change the reference to § 3006A.

Judge Miller also noted that the Subcommittee believed that potential conflicts created between the time requirements in Civil Rule 81 and the Rules Governing Habeas Corpus might be best resolved by recommending that the time provisions in Rule 81 be deleted. Following brief discussion the Committee voted unanimously to so recommend.

With regard to Rule 2(e) in the Rules Governing § 2254 Proceedings and in Rule 2(d) for the Rules Governing § 2255 Proceedings, the Subcommittee recommended that

the word "receives" should be changed to "filed" to bring those rules into conformity with Civil Rule 5(e). The Committee voted unanimously to make the change.

Judge Miller next noted that language in Rules 3(b) in the Rules Governing § 2254 Proceedings and § 2255 Proceedings, contains language that conflicts with Rule of Civil Procedure 5(e) and current practice. As written, Rule 3(b) refers to the clerk filing the papers when in fact the practice is for the clerk to file the petition and refer it to a judge for consideration of any defects in the petition. Proposed language to resolve the problem was presented to the Committee and approved by a unanimous vote.

Regarding Rule 2(c) in the Rules Governing § 2254 Proceedings and in Rule 2(b) for the Rules Governing § 2255 Proceedings, Judge Miller noted that the Subcommittee had considered proposing an amendment that would require that a petitioner indicate in his or her petition whether a previous petition has been filed. He noted that several magistrate judges had opposed this change and that upon further consideration, the Subcommittee was withdrawing its proposal.

Turning to Rule 5 in the Rules Governing § 2254 Proceedings and Rule 5(a) for the Rules Governing § 2255 Proceedings, Judge Miller informed the Committee that the magistrate judges who had responded to the proposed amendments disfavored the proposal which would require the government to state in its answer whether other petitions had been filed and whether or not the petition complied with the statute of limitations. During the ensuing discussion, several Committee members observed that the proposed changed appeared to be substantive in nature. Others noted that the judge is capable of reviewing the petition to determine if it complies with the statute. Judge Miller noted that the proposed amendment was a reaction to provisions in the Antiterrorism Act. The Committee rejected the proposed amendment by a vote of 4 to 7.

Judge Miller explained the Subcommittee's proposal that Rule 9(b) in the Rules Governing § 2254 Proceedings and Rule 9(b) for the Rules Governing § 2255 Proceedings be deleted. The subcommittee believed that those provisions, which address second or successive petitions, have been superseded by provisions in the Antiterrorism and Effective Death Penalty Act of 1996. The Committee voted 9 to 0 (1 abstention) to adopt that recommendation.

Judge Miller noted that the Reporter had suggested that some consideration be given to consolidating the Rules Governing § 2254 Proceedings and the Rules Governing § 2255 Proceedings. He believed that that was possible and following brief discussion by the Committee received approval to attempt a consolidation

Finally, he stated that the Subcommittee had recommended that Rule 1 of both sets of Rules should be amended to reflect that habeas cases filed under § 2241 should be

I-C

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 7-8, 1999
Marco Island, Florida

Draft Minutes

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Marco Island, Florida on Thursday and Friday, January 7-8, 1999. The following members were present:

Judge Anthony J. Scirica, Chair
Judge Frank W. Bullock, Jr.
Charles J. Cooper, Esquire
Professor Geoffrey C. Hazard, Jr.
Gene W. Lafitte, Esquire
Patrick F. McCartan, Esquire
Judge James A. Parker
Sol Schreiber, Esquire
Judge Morey L. Sear
Judge A. Wallace Tashima
Chief Justice E. Norman Veasey
Judge William R. Wilson, Jr.

Judge Phyllis A. Kravitch and Deputy Attorney General Eric H. Holder were unable to be present. The Department of Justice was represented at the meeting by Neal K. Katyal, Advisor to the Deputy Attorney General. Roger A. Pauley also participated in the meeting on behalf of the Department.

Providing support to 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, deputy chief of that office, and Nancy G. Miller, the Administrative Office's judicial fellow.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Will L. Garwood, Chair
Advisory Committee on Bankruptcy Rules —
Judge Adrian G. Duplantier, Chair
Professor Alan N. Resnick, Reporter
Advisory Committee on Civil Rules —
Judge Paul V. Niemeyer, Chair
Professor Edward H. Cooper, Reporter

Advisory Committee on Criminal Rules —
Judge W. Eugene Davis, Chair
Professor David A. Schlueter, Reporter
Advisory Committee on Evidence Rules —
Judge Fern M. Smith, Chair
Professor Daniel J. Capra, Reporter

Also participating in the meeting were: Joseph F. Spaniol, Jr., consultant to the committee; Professor Mary P. Squiers, project director of the local rules project; and Marie C. Leary of the Research Division of the Federal Judicial Center.

Alan C. Sundberg, former member of the committee attended the meeting and was presented with a certificate of appreciation, signed by the Chief Justice, for his distinguished service on the committee over the past six years.

INTRODUCTORY REMARKS

Judge Scirica reported that Judge Stotler was unable to attend the meeting because she had to participate in the dedication of the new federal courthouse in Santa Ana, California. He added that she would participate at the next committee meeting, to be held in Boston in June 1999.

Judge Scirica noted that he was participating in his first meeting as chair of the Standing Committee. He stated that it had been his great honor to have served for six years as a member of the Advisory Committee on Civil Rules under three extraordinary chairmen — Judges Pointer, Higginbotham, and Niemeyer.

Judge Scirica observed that it was very important for the rules committees to uphold the integrity of the Rules Enabling Act and be vigilant against potential violations of the Act. At the same time, he pointed out that the committees had to be careful in their work in distinguishing between matters of procedure and substance.

He emphasized the importance of establishing and maintaining good professional relations with members and staff of the Congress. He said that it would be ideal if these relationships were personal and long-lasting. But membership changes in the Congress and on the committees make it difficult as a practical matter to achieve that goal. Nevertheless, he said, it is possible to keep the Congress informed about the benefits of the Rules Enabling Act, the important institutional role of the rules committees, and ways in which the committees can be of service to the Congress.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on June 18-19, 1998.

REPORT OF THE ADMINISTRATIVE OFFICE

Legislative Report

Mr. Rabiej presented a list of 41 bills introduced in the 105th Congress that would have had an impact on the federal rules or the rulemaking process. (Agenda Item 3A) He pointed out that the Administrative Office had monitored the bills on behalf of the rules committees and the Judicial Conference, and it had prepared several letters for the chair to send to members of Congress commenting on the language of specific bills and emphasizing the need to comply with the provisions of the Rules Enabling Act. He noted that only three of the 41 bills had actually been enacted into law, and their impact on the federal rules would be comparatively minor. They included provisions: (1) establishing a new evidentiary privilege governing communications between a taxpayers and an authorized tax practitioner, (2) requiring each court to establish voluntary alternative dispute resolution procedures through local rules, and (3) subjecting government attorneys to attorney conduct rules established under state laws or rules.

Mr. Rabiej stated that comprehensive bankruptcy legislation had come close to being enacted in the 105th Congress, and it likely would be reintroduced in the 106th Congress. He pointed out that the legislation, if enacted, would create an enormous amount of work for the Advisory Committee on Bankruptcy Rules. He also predicted that legislation would also be reintroduced in the new Congress to federalize virtually all class actions.

Administrative Actions

Mr. Rabiej reported that the Rules Committee Support Office was now sending comments from the public on proposed amendments to the rules to committee members by electronic mail. He noted that the Administrative Office had received about 160 comments from the bench and bar on the proposed amendments to the bankruptcy rules, about 110 comments on the amendments to the civil rules, and about 65 comments on the amendments to the evidence rules. He added that all the comments, together with committee minutes, would be placed on a CD-ROM and made available to all the members of the advisory and standing committees.

REPORT OF THE FEDERAL JUDICIAL CENTER

Ms. Leary reported that Judge Rya Zobel had announced that she would be leaving her position as director of the Federal Judicial Center to return to work as a United States district judge in Boston. She noted that a search committee had been appointed by the Chief Justice to find a successor, and it was expected that the Center's board would name a new director by April 1999.

Ms. Leary presented a brief update on the Center's recent publications, educational programs, and research projects. (Agenda Item 4) She noted that as a consequence of the comprehensive, ongoing studies of class actions and mass torts conducted by the Advisory Committee on Civil Rules and the Mass Torts Working Group, the Center had decided that revisions to the *Manual for Complex Litigation* were needed. To that end, the Chief Justice had appointed a board of editors to oversee the work, including Judges Stanley Marcus, John G. Koeltl, J. Frederick Motz, Lee H. Rosenthal, and Barefoot Sanders. The Chief Justice, she said, had also selected two attorneys to serve on the board of editors, and the Center was awaiting their response to his invitation. (Sheila Birnbaum and Frank A. Ray were later announced as the new members.) She added that staff of the Research Division would provide support for the work of the board of editors.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Garwood presented the report of the advisory committee, as set forth in his memorandum and attachments of December 7, 1998. (Agenda Item 5)

Judge Garwood stated that the advisory committee had no action items to present to the standing committee. He noted, though, that the advisory committee had approved a number of additional amendments to the appellate rules, but had decided not to forward them to the standing committee for publication until the bar has had adequate time to become accustomed to the restyled body of appellate rules. He added that a package of amendments would probably be ready for publication by the year 2000.

Committee Notes

Judge Garwood pointed out that the Standing Committee had recommended previously that the notes accompanying proposed rules amendments be referred to as "Committee Notes," rather than "Advisory Committee Notes." He reported that the Advisory Committee on Appellate Rules, although accepting the recommendation, had discussed this matter at its last meeting and had concluded that the term "Advisory Committee Notes" was both more traditional and more accurate. Judge Garwood pointed out, for example, that "Advisory Committee Notes" had long been used by the Chief Justice

when transmitting rules amendments to Congress, by legal publications, and by the legal profession generally.

Professor Cooper and Mr. Rabiej responded that the use of the term "Committee Notes" had been selected over "Advisory Committee Notes" because the Standing Committee from time to time revises or supplements the notes of an advisory committee. As a result, the published notes will contain language representing the input of both the pertinent advisory committee and the standing committee, and it is often difficult to tell exactly what has been authored by each committee.

Judge Garwood pointed out that when the Standing Committee proposes that a change be made in a note *before publication,* the chair of the advisory committee will take the matter back to the advisory committee for consideration of the change. As a rule, the advisory committee will in fact agree with — and often improve upon — the proposed change and incorporate it into the publication distributed to bench and bar. Therefore, the note effectively remains that of the advisory committee. On the other hand, when changes in a note are made by the standing committee *after publication,* the chair of the advisory committee will normally accept the changes at the standing committee meeting on behalf of the advisory committee and thereby avoid the delay of returning them for further consideration by the advisory committee.

Professor Coquillette added that the standing committee has always been deferential to the advisory committees in the preparation of committee notes, and it normally will make only minor changes in the notes and obtain the agreement of the chair and reporter of the pertinent advisory committee in doing so. But, he said, when the standing committee proposes changes that are major in nature, or disputed, it will normally send the note back to the advisory committee for further consideration and redrafting. He concluded that the question of the appropriate terminology for the notes was an important matter that would be discussed further at the reporters' next luncheon.

Proposed Effective Date for Local Rules

Judge Garwood reported that the advisory committee at its April 1998 meeting had drafted a proposed amendment to FED. R. APP. P. 47(a)(1) that would mandate an effective date of December 1 for all local court rules, except in cases of "immediate need." After the meeting, however, the advisory committee was informed by the Advisory Committee on Civil Rules that the concept of having a uniform, national effective date for local rules may conflict with the Rules Enabling Act, which gives each court authority to prescribe the effective date of their local rules. 28 U.S.C. § 2071(b).

Judge Garwood said that the Advisory Committee on Appellate Rules had not considered this potential legal impediment at its April meeting. Rather, it had focused only on the merits of the proposal referred to all the advisory committees to fix a uniform national effective date for all local rules. Accordingly, he suggested that it would be appropriate for the standing committee to make a threshold decision on whether the Rules Enabling Act would permit amendments to the national rules to mandate effective dates for local rules. If the committee were to decide that there would be no conflict with the Rules Enabling Act, the Advisory Committee on Appellate Rules would recommend fixing a single annual date of December 1 for all local rules of court, except in the case of emergencies.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Duplantier and Professor Resnick presented the report of the advisory committee, as set forth in his memorandum and attachments of December 3, 1998. (Agenda Item 6)

Pending Amendments to the Bankruptcy Rules

Judge Duplantier reported that a heavy volume of comments had been received from bench and bar in response to the "litigation package" of proposed amendments to the Federal Rules of Bankruptcy Procedure. He said that the great majority of the comments had expressed opposition to the package generally. The most common argument made in the comments, he said, was that the proposed amendments were simply not needed and would impose elaborate and burdensome procedures for the handling of a heavy volume of relatively routine matters in the bankruptcy courts. Most of the bankruptcy judges who commented, he said, had argued that FED. R. BANKR. P. 9013 and 9014 currently work well because they give judges flexibility — through local rules on motion practice — to distinguish among various types of "contested matters" and to fashion efficient and summary procedures to decide routine matters.

He added that many judges also had commented negatively about the requirement in revised Rule 9014 that would make FED. R. CIV. P. 43(e) inapplicable at an evidentiary hearing on an administrative motion. The proposed amendment would thus require witnesses to appear in person and testify — rather than give testimony by affidavit — when there is a genuine issue of material fact.

Judge Duplantier pointed out that the advisory committee would hold a public hearing on the proposed amendments on January 28, 1999, and it would meet again in March to consider all the comments and make appropriate decisions on the amendments.

Omnibus Bankruptcy Legislation

Professor Resnick reported that comprehensive bankruptcy legislation was likely to be introduced early in the new Congress. Among other things, it would probably add new provisions to the Bankruptcy Code to govern small business cases and international or transnational bankruptcies. In addition, the Congress may alter the appellate structure for bankruptcy cases and authorize direct appeals from a bankruptcy judge to the court of appeals. He said that the sheer magnitude of the expected legislative changes would likely require the Advisory Committee on Bankruptcy Rules to review in essence the entire body of Federal Rules of Bankruptcy Procedure and Official Forms in order to implement all the new statutory provisions.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Niemeyer presented the report of the advisory committee, as set forth in his memorandum and attachments of December 10, 1998. (Agenda Item 7)

He pointed out that the committee was seeking authority to publish for comment proposed amendments that would abrogate the copyright rules and bring copyright impoundment procedures explicitly within the injunction procedures of FED. R. CIV. P. 65.

Copyright Rules

Professor Cooper noted that the proposed abrogation of the Copyright Rules of Practice had been proposed in 1964, but had been deferred for various reasons since that time. He explained that the advisory committee was now recommending:

1. abrogating the separate body of copyright rules;
2. adding a new subdivision (f) to FED. R. CIV. P. 65 to bring copyright impoundment procedures within that rule's injunction procedures; and
3. amending FED. R. CIV. P. 81 to reflect the abrogation of the copyright rules.

He noted that FED. R. CIV. P. 81 would also be amended both to restyle its reference to the Federal Rules of Bankruptcy Procedure and eliminate its anachronistic reference to mental health proceedings in the District of Columbia.

Professor Cooper explained that the language of the current Rule 81 was the starting point in considering the proposed amendments. RULE 81 states explicitly that the Federal Rules of Civil Procedure do not apply to copyright proceedings, except to the extent that a rule adopted by the Supreme Court makes them apply. Professor Cooper then pointed out that Rule 1 of the Copyright Rules of Procedure promulgated by the Supreme Court

specifies that copyright proceedings are to be governed by the Federal Rules of Civil Procedure. But that rule applies only to proceedings brought under the 1909 Copyright Act, which was repealed by the Congress in 1976. Thus, on the face of it, there appear to be no current rules governing copyright infringement proceedings.

Professor Cooper pointed out that the remainder of the copyright rules establish a pre-judgment procedure for seizing and holding infringing items and the means of making those items. But the procedure does not provide for notice to the defendant of the proposed impoundment, even when notice can reasonably be provided. Nor does it provide for a showing of irreparable injury as a condition of securing relief, nor for the exercise of discretion by the court. Rather, the Copyright Rules provide that an application to seize and hold items is directed to the clerk of court, who signs the writ and gives it to the marshal.

To that extent, he said, the rules are inconsistent with the 1976 copyright statute that vests a court with discretion both to order impoundment and to establish reasonable terms for the impoundment. Professor Cooper added that the pertinent case law leads to the conclusion that the procedures established by the copyright rules would likely not pass constitutional muster.

He stated that most of the courts have reacted to the lack of explicit legal authority for copyright impoundment procedures by applying the Federal Rules of Civil Procedure, especially FED. R. CIV. P. 65, which sets forth procedures for issuing restraining orders and authorizing no-notice seizures in appropriate circumstances. He added that the amendments proposed by the advisory committee would regularize the current practices of the courts and provide them with a firm legal foundation.

He also noted that another important advantage of the proposed amendments is that they would make it clear that the United States will meet its responsibilities under international conventions to provide effective remedies for preventing copyright infringements. To that end, the proposed changes would give fair and timely notice to defendants, vest adequate authority in the judiciary, and provide other elements of due process. He said that the proposed amendments would let the international community know that the United States has clear and effective procedures against copyright infringements. He added that the copyright community had expressed its acceptance of the advisory committee's proposal.

The committee approved abrogation of the copyright rules and adoption of the proposed amendments to the civil rules for publication without objection.

Discovery Rules

Judge Niemeyer reported that the standing committee had approved publication of a package of changes to the discovery rules at its last meeting. He noted that the volume of public comments received in response to the proposed amendments had been heavy. The majority of the comments, he said, were favorable to the package, but there had also been many negative comments. He added that the advisory committee had conducted one public hearing on the amendments in Baltimore, and it would conduct additional hearings in San Francisco and Chicago. Following the hearings and additional review of all the comments at its next business meeting, he said, the advisory committee could present a package of proposed amendments to the standing committee for final action in June 1999.

Mass Torts

Judge Niemeyer reported that the Chief Justice had authorized a Mass Torts Working Group, spearheaded by the Advisory Committee on Civil Rules, to conduct a comprehensive review of mass-tort litigation for the Judicial Conference. The group held four meetings in various parts of the country to which it invited prominent attorneys, litigants, judges, and law professors to discuss mass tort litigation. Judge Niemeyer stated that the legal and policy problems raised by mass torts were both numerous and complex. He added that the group had prepared a draft report identifying the principal problems arising in mass torts and suggesting a number of possible solutions that might be pursued by the Judicial Conference, in cooperation with the Congress and others. The final report, he said, would be presented to the Chief Justice in February 1999.

Special Masters

Judge Niemeyer noted that the Advisory Committee on Civil Rules had appointed a special subcommittee, chaired by Chief Judge Roger C. Vinson, to study the issues arising from the use of special masters in the courts.

Local Rules of Court

Judge Niemeyer reported that the advisory committee would address a number of concerns raised by the proliferation of local rules of court. He noted that the Civil Justice Reform Act had encouraged local variations in civil procedure, with a resulting erosion of national procedural uniformity among the district courts. He noted that the advisory committee was giving preliminary consideration to two alternative amendments to FED. R. CIV. P. 83.

The first suggested amendment would provide that a local rule of court could not be enforced until it is received in both the Administrative Office and the judicial council of the

circuit. The second alternative would go much further and provide that a court could not enforce a new local rule or amended rule — except in case of "immediate need" — until 60 days after the court has: (a) given notice of it to the judicial council of the circuit and the Administrative Office; and (b) made it available to the public and provided them with an opportunity to comment. Under this alternative, the Administrative Office would be required to review all new local rules or amendments and report to the district court and the circuit council if it finds that they do not conform to the requirements of Rule 83. If a new rule or amendment has been reported by the Administrative Office, enforcement of it would be prohibited until the judicial council has approved the provision.

Judge Niemeyer pointed out that the advisory committee would like to see greater national procedural uniformity and fewer local rules. He added that proposed changes in the provisions dealing with local rule authority would have to be coordinated among the other advisory committees under the supervision of the standing committee.

One of the members responded that there was a legitimate need for local rules of court, especially to govern matters that necessarily have to be treated individually in each district — such as issues flowing from geographic considerations. In addition, he said, local rules help to reduce variations in practice among the judges within a district. He pointed out that the Rules Enabling Act requires the circuit councils to review and, if necessary, modify or abrogate local rules. Accordingly, he said, the most appropriate way to deal with problems that may arise from local rules of court is not to limit the authority of the courts to issue local rules, but to persuade the respective circuit councils to review the rules adequately. He added that the council in his own circuit had been very conscientious in reviewing and commenting on the local rules of the courts within the circuit.

Judge Scirica said that the proposed amendments were very helpful, and he suggested that they be referred to the local rules project for consideration in connection with a new, national study of local rules.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Davis presented the report of the advisory committee, as set forth in his memorandum and attachments of December 3, 1998. (Agenda Item 8)

FED. R. CRIM. P. 32.2 - *Criminal Forfeiture*

Judge Davis reported that the proposed new FED. R. CRIM. P. 32.2 — together with proposed conforming amendments to FED. R. CRIM. P. 7, 31, 32, and 38 — would govern criminal forfeiture in a comprehensive manner. He noted that an earlier version of the new rule had been presented to the standing committee at its June 1998 meeting but rejected by a

vote of 7 to 4. He said that much of the discussion at the standing committee meeting had focused on whether a defendant would be entitled to a jury trial on the issue of the nexus between the offense committed by the defendant and the property to be forfeited. In addition, concerns had been raised at the meeting regarding the right of the defendant to present evidence at the post-verdict ancillary proceeding over ownership of the property.

Judge Davis explained that the advisory committee had considered the rule anew at its October 1998 meeting, taking into account the concerns expressed by the standing committee. As a result, the advisory committee had made changes in the rule to accommodate those concerns, and it had made a number of other improvements in the rule as well. The advisory committee, he said, recommended approval of the revised version of Rule 32.2, and he directed attention to a side-by-side comparison of the June 1998 version and the revised version of the rule. He then proceeded to summarize each of the principal changes made by the advisory committee since the last meeting.

First, he pointed out that the principal change made by the advisory committee had been to paragraph (b)(4) of the rule. The revised language would specify that either the defendant or the government may request that the jury determine the issue of the requisite nexus between the property to be forfeited and the offense committed by the defendant.

He said that the advisory committee had also added language to paragraph (b)(1) to provide explicitly that both the government and the defendant have the right to present evidence to the court on the issue of the nexus between the property and the offense. To that end, the revised rule provided specifically that the court's determination may be based on evidence already in the record, including any written plea agreement, or — if the forfeiture is contested — on evidence or information presented by the parties at a hearing after the verdict or finding of guilt.

Judge Davis stated that the advisory committee had amended paragraph (b)(1) to include a specific reference to money judgments. He noted that the courts of appeals of four circuits had held that the government may seek not only the forfeiture of specific property, but also a personal money judgment against the defendant. He said that there was no reason to treat a forfeiture of specific property in the same manner as a forfeiture of a sum of money. Thus, paragraph (c)(1) had also been amended to provide that an ancillary proceeding is not required to the extent that the forfeiture consists of a money judgment.

Judge Davis noted that the advisory committee had amended Rule 32.2(a) to make it clear that the government need only give the defendant notice in the indictment or information that it will seek forfeiture of property. The earlier version had required an allegation of the defendant's interest in property subject to forfeiture.

Paragraph (b)(2) had been revised to make it clear that resolution of a third party's interest in the property to be forfeited had to be deferred until the ancillary proceeding. Paragraph (b)(3) had been amended to allow the Attorney General to designate somebody outside the Department of Justice, such as the Department of the Treasury, to seize property.

Judge Davis noted that paragraph (c)(2) had been simplified to make it clear that if no third party is involved, the court's preliminary order of forfeiture becomes the final order if the court finds the defendant had an interest in the property that is forfeitable under the applicable statute. He said that under subdivision (e) there would be no right to a jury trial on the issue of subsequently located property or substitute property

Judge Davis said that the advisory committee had spent more than two and one-half years in considering the rule and had devoted two hearings and several meetings to it. He said that the committee was very comfortable with the revised rule and believed that it would bring order to a complicated area of the law.

Judge Wilson moved to approve the revised rule, subject to appropriate restyling, and send it to the Judicial Conference. He added that he had opposed the rule at the June 1998 meeting, but said that inclusion of a provision for the jury to determine the issue of the nexus between the property and the offense had led him to support the current proposal.

One of the members expressed continuing concern over the jury trial issue and suggested that the revised rule was internally inconsistent in that it provided for a jury's determination in certain situations, but not in others. He said that he was troubled over the issue of money judgments, in that the government would be given not only a right to forfeit specific property connected with an offense, but also a right to restitution for an amount of money equal to the amount of the property that would otherwise be seized. He suggested that the money judgment concept constituted a improper extension beyond what is authorized by the pertinent forfeiture statutes.

Judge Davis responded that at least four of the circuits had authorized the practice. He added that the advisory committee was only attempting to provide appropriate procedures to follow in those circuits where money judgments are authorized under the substantive law of the circuit. The underlying authority, he said, is provided by circuit law, not by the rule. At Judge Tashima's request, Judge Davis agreed to insert language in the committee note to the effect that the committee did not take a position on the correctness of those rulings, but was only providing appropriate procedures for those circuits that allowed money judgments in forfeiture cases.

One member expressed concern about the concept of seizure in connection with a money judgment. He noted that paragraph (b)(3) of the revised draft provided that the

government may "seize the property," and he suggested that the word "specific" be added before the word "property." Thus, the government could not "seize" money. It could only seize the "specific property" specified in paragraph (b)(2). Judge Davis agreed to accept the language change.

Another member questioned why a jury trial would be required to determine the nexus of the property to the offense, but not when substitute property is involved. Judge Davis responded that it would be very difficult to do so, since substitute property is usually not found until after the trial is over and the original property has been converted or removed. Mr. Pauley added that the pertinent case law had been uniform in holding that there is no jury-tial right as to substitute and later-found property.

Chief Justice Veasey expressed support for the substance of the revised amendments submitted by the advisory committee. But he pointed to a letter recently received from the National Association of Criminal Defense Lawyers, which had been distributed to the members before the meeting. The letter argued that the advisory committee had made major changes in the original proposal, had approved the rule by a vote of 4 to 3, and should be required to republish it for additional public comment. He said that he was concerned about forwarding the revised new rule to the Judicial Conference without further publication. **Accordingly, Chief Justice Veasey moved to republish proposed new Rule 32.2 for additional public comment.**

Professor Schlueter responded that the 4-3 vote in the advisory committee had been on the question of whether a right to a jury determination should be preserved in light of the Supreme Court's decision in *Libretti v. United States.* In that case, the Court held that criminal forfeiture is a part of the sentencing process. He added that considerable sentiment remained in the advisory committee that a jury determination is simply not required.

Judge Davis and three members of the committee added that it was unlikely that any additional, helpful information would be received if the proposed rule were to be published again. They recommended that the committee approve the revised rule and send it to the Conference.

The motion to republish the rule for further comment was defeated by a vote of 9 to 2.

Judge Tashima moved to adopt the proposed Rule 32.2 and the companion amendments to Rules 7, 31, 32, and 38 and send them to the Judicial Conference, subject to: (a) making appropriate style revisions, and (b) adding language to the committee note stating that the committee takes no position on the merits of using money judgments in forfeiture proceedings. The committee thereupon voted to approve the proposed new rule without objection.

Judge Davis and Professor Schlueter presented the committee with an additional sentence that would be inserted at line 277 of the committee note. After accepting suggestions from Mr. Sundberg and Judge Duplantier, they agreed to add the following language: "A number of courts have approved the use of money forfeiture judgments. The committee takes no position on the correctness of those rulings."

Professor Schlueter added that the advisory committee wished to delete the words "legal or possessory" from line 422 of the committee note. Thus, the pertinent sentence in the note would read: "Under this provision, if no one files a claim in the ancillary proceeding, the preliminary order would become the final order of forfeiture, but the court would first have to make an independent finding that at least one of the defendants had an interest in the property such that it was proper to order the forfeiture of the property in a criminal case."

Presence of Defense Attorneys in Grand Jury Proceedings

Judge Davis reported that the congressional conference report on the Judiciary's appropriations legislation required the Judicial Conference to report to Congress by April 15, 1999, on whether Rule 6(d) of the Federal Rules of Criminal Procedure should be amended to allow a witness appearing before a grand jury to have counsel present.

He noted that the time frame provided by the Congress was extremely short and simply did not permit a comprehensive study of the issues. The Advisory Committee on Criminal Rules, he said, had appointed a special subcommittee to consider the matter and make recommendations. The subcommittee reviewed earlier studies, including: (a) a comprehensive report by the Judicial Conference to the Congress in 1975 that declined to support a change to Rule 6(d); and (b) a 1980 report by the Department of Justice to the Congress opposing pending legislation that would have allowed attorney representation in the grand jury room. He noted that the subcommittee had decided that the reasons stated in the past for declining to amend Rule 6(d) remained valid today. In summary, he said, the three principal reasons for not allowing a witness to bring an attorney into the grand jury were that the practice would lead to:

1. loss of spontaneity in testimony;
2. transformation of the grand jury into an adversary proceeding; and
3. loss of secrecy, with a resultant chilling effect on witness cooperation, particularly in cases involving multiple representation.

Judge Davis said that the subcommittee had concluded by a vote of 3 to 1 not to recommend any changes Rule 6(d). The full advisory committee was then polled by a mail vote, and it concurred in the recommendation of the subcommittee by a vote of 9 to 3.

Judge Davis reported that members of the advisory committee had been concerned that allowing attorneys in the grand jury without a judge present would create problems and prolong the proceedings. He pointed out that about half the states that have retained a grand jury system do in fact permit lawyers in grand jury proceedings, but he noted that there were other ways to indict defendants in these states.

One member stated that he was in favor of amending Rule 6 to relax the restriction on the presence of attorneys. He suggested that it was not necessary to allow individual lawyers for every witness, but at least one attorney might be present to protect the basic rights of witnesses and prevent abuse and mistreatment by prosecutors. A second member expressed support for the suggestion and added that it would be fruitful to establish pilot districts to test out the concept and see whether a limited presence of attorneys for witnesses would lead to improvements in the grand jury system.

A third member concurred with the suggestion to establish pilot projects. He said that the advisory committee might wish to explore an amendment to Rule 6(d) to allow an attorney for a witness in the grand jury room upon the express approval of the court or the United States attorney. He added, however, that the time given by the Congress to respond was unreasonably short and did not allow for thoughtful consideration of alternatives. As a result, the committee would have to take a quick "up or down" vote at this time, but it could at a later date consider the advisability of further research and the establishment of pilot projects. Judge Scirica added that the judiciary had inquired informally as to whether the Congress would be amenable to giving additional time to respond, but had been informed that a request along those lines would not be well received.

Mr. Pauley expressed the strong support of the Department of Justice for the advisory committee's report and recommendation. He pointed out that the proposal to amend Rule 6(d) was not new and had been rejected in the past. He added that the Department was very much opposed to a change in the rule and feared that it would adversely impact its ability to investigate organized crime. He concluded a prerequisite for consideration of any change in the rule should be the demonstration of an "overwhelming" case of need for the change.

Mr. Pauley also emphasized that the Department of Justice had taken effective steps against potential prosecutorial abuses and had set forth effective safeguards in the United States attorneys' manual. Among other things, the manual requires prosecutors to give *Miranda* warnings to witnesses who may be the target of grand jury proceedings. He added that the Department enforced the manual strictly.

Chief Justice Veasey moved to approve the report of the advisory committee.

Judge Wilson moved, by way of amendment, to have the committee inform the Judicial Conference that it did not support changes in Rule 6(d) at this time, but that it would enthusiastically support the establishment of pilot studies to test the impact of the presence of lawyers for witnesses in the grand jury.

Another member said that empirical data would be needed to test the concerns expressed on both sides of the issue and how they would play out in practice. He suggested that, rather than establishing a pilot program, it would be advisable at the outset to research the practice and experience in the states that permit lawyers into the grand jury room.

Three other members said that the advisory committee might well study the issues further and make appropriate recommendations for change in the future, but they emphasized that the Judicial Conference had been required by legislation to provide a quick response to the Congress. Therefore, the committee had to take a "yes or no" vote on whether to amend Rule 6(d) at this time.

Judge Scirica proceeded to call the question, noting that the committee could discuss at a later point whether any pilot projects or additional research were needed. He noted that the Advisory Committee on Criminal Rules would be responsible for taking the lead on giving any additional consideration to the matter.

The committee voted to reject Judge Wilson's amendment by a voice vote.

It then approved Chief Justice Veasey's motion to approve the report of the advisory committee by a vote of 7 to 2. Judges Wilson and Tashima noted for trhe record their opposition to the motion.

One of the members said that there was no need to discuss the matter of pilot projects further since the chair and reporter of the Advisory Committee on Criminal Rules had just participated in the discussion and could take the issues and suggestions back to the advisory committee for any additional consideration. Judge Davis concurred and noted that the Rules Committee Support Office had already begun to gather information on state practices regarding attorneys for witnesses in grand jury proceedings.

Restyling of the Criminal Rules

Professor Schlueter reported that the advisory committee had been working with the style subcommittee to restyle the Federal Rules of Criminal Procedure. He said that the committee would spend a substantial amount of time on the restyling project at its next several meetings, and it would address other matters only if they were found to be essential. He added that Professor Stephen Saltzburg had been engaged by the Administrative Office to work with the advisory committee and the style subcommittee on the restyling project.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Smith presented the report of the advisory committee, as set forth in her memorandum and attachments of December 1, 1998. (Agenda Item 9)

Judge Smith reported that the advisory committee had no action items to present to the standing committee. She noted that a substantial number of public comments had been received in response to the package of rule amendments published in August 1998 and that:

1. eight commentators had appeared before the committee at its October 1998 hearing in Washington;
2. the December 1998 hearing in Dallas had been canceled; and
3. at least 15 people had filed requests to date to testify at the San Francisco hearing in January 1999.

Judge Smith said that most of the comments received had been directed to the proposed amendments to FED. R. EVID. 701-703, dealing with expert testimony.

FED. R. EVID. 701-703

Judge Smith noted that the proposed amendment to FED. R. EVID. 701 was designed to prohibit the use of expert testimony in the guise of lay testimony. The Department of Justice, she said, had submitted a negative comment on the proposal, but the other public comments in response to the rule had been positive. She added that the advisory committee was listening to the Department's concerns and was open to refining the language of the amendment further, particularly with regard to drawing a workable distinction between lay testimony and expert testimony.

Judge Smith explained that the proposed amendment to FED. R. EVID. 702 would provide specific requirements that must be met for the admission of all categories of expert testimony. She said that the public comments received in response to the proposed amendments to Rule 702 were about evenly divided, with defense lawyers strongly in favor of the amendments and plaintiffs' lawyers strongly opposed to them.

She noted that the Supreme Court had recently granted certiorari in *Kumho Tire v. Carmichael,* where the issue was whether the gatekeeping standards set down by the Supreme Court in the *Daubert* case apply to the testimony of a tire failure expert who had testified largely on the basis of his personal experience. She said that the Department of Justice had cautioned against making amendments in the rule before the Court renders its decision in the *Kumho* case. But, she said, the advisory committee wanted to continue receiving public comments on the merits of the proposed amendment to Rule 702. The

advisory committee, though, would await the outcome of the *Kumho* case before forwarding any amendment to the Standing Committee.

Judge Smith pointed out that the amendment to FED. R. EVID. 703 would limit the ability of an attorney to introduce hearsay evidence in the guise of information relied upon by an expert. She said that the advisory committee wanted to admit the opinion of the expert into evidence but have a presumption against admitting the underlying information relied upon by the expert unless it is independently admissible. She reported that the public comments on Rule 703 had been uniformly positive.

FED. R. EVID. 103

Judge Smith noted that the proposed amendment to FED. R. EVID. 103 would provide that there is no need for an attorney to renew an objection to an advance ruling of the court on an evidentiary matter as long as the court makes a "definitive ruling" on the matter. She said that some public comments had questioned whether the term "definitive ruling" was sufficiently explicit.

FED. R. EVID. 404

Judge Smith pointed out that the proposed amendment to FED. R. EVID. 404 would provide that if an accused attacked the character of a victim, evidence of a "pertinent" character trait of the accused may also be introduced. She explained, however, that use of the term "pertinent" in the proposed amendment might allow the introduction of more matters than the advisory committee believes advisable. Accordingly, she said, it was inclined to refine the language of the proposed amendment to allow the introduction only of evidence bearing on the "same" character trait of the witness. She added that the issue arises most frequently in matters of self-defense. Thus, for example, if the defendant were to attack the aggressiveness of a witness, the witness could in turn raise the question of the aggressiveness of the defendant.

FED. R. EVID. 803 AND 902

Judge Smith said that the proposed amendments to FED. R. EVID. 803(g) and 902 would allow certain business records to be admitted into evidence as a hearsay exception without calling the custodian for in-court testimony. She said that the proposed rule would provide consistency in the treatment of domestic business records and foreign business records. Currently, she noted, proof of foreign business records in criminal cases may be made by certification, but business records in civil cases and domestic business records in criminal cases must be proven by the testimony of a qualified witness.

DISCLOSURE OF FINANCIAL INTERESTS

Professor Coquillette stated that recent news accounts had focused attention on the need to provide federal judges with assistance in meeting their statutory responsibility of recusing themselves in cases of financial conflict. He said that the Judicial Conference's Committee on Codes of Conduct had suggested that it would be beneficial to "revis[e] the Federal Rules of Civil Procedure or local district court rules to require corporate parties to disclose their parents and subsidiaries (along the lines of FED. R. APP. P. 26.1) and possibly also to require periodic updating of such affiliations." The Codes of Conduct Committee had reported to the Conference in September 1998 that it would coordinate with the standing committee on the possible addition of corporate disclosure requirements in the federal rules.

Professor Coquillette reported that the reporters had discussed this matter collectively at their luncheon and had agreed to coordinate with each other in drafting common language for the advisory committees that might be used as the basis for proposed amendments to the various sets of federal rules on corporate disclosure. He pointed out, though, that bankruptcy cases presented special problems and that some adjustments in the common language might be needed in proposed amendments to the Federal Rules of Bankruptcy Procedure.

Mr. Rabiej pointed out that FED. R. APP. P. 26.1 was quite narrow in scope and did not apply to subsidiaries. He suggested that the advisory committees might seek some guidance from the Standing Committee as to whether a proposed common disclosure rule should include subsidiaries or in other respects be broader than the current FED. R. APP. 26.1.

Judge Garwood said that the Advisory Committee on Appellate Rules had considered Rule 26.1 recently and had concluded that it would simply not be possible to devise a workable disclosure statement rule that would cover all the various types of conflicting situations and financial interests that require recusal on the part of a judge. He said that the rule should focus on those categories of conflicts that require automatic recusal under the statute, rather than the conflicts that entail judicial discretion.

PROPOSED RULES GOVERNING ATTORNEY CONDUCT

Professor Coquillette referred to his memorandum of December 6, 1998, and reported that each of the five advisory committees had appointed two members to serve on the Special Committee on Rules Governing Attorney Conduct. He said that Judge Stotler had named Chief Justice Veasey and Professor Hazard to serve on the committee as representatives of the standing committee and that the Department of Justice would also be asked to name participants.

He said that the special committee would hold a meeting in Washington on May 4, 1999. At that time, the members would review the pertinent empirical studies and consider the major recommendations submitted to date by various organizations and individuals. All options would be discussed at the May meeting, but no decisions would be made at that time.

The special committee would then meet again in the fall of 1999. At that time, it would be expected to approve concrete proposals to bring before the respective advisory committees for a vote at their fall meetings. The standing committee at its January 2000 meeting could then consider the final attorney conduct recommendations of the special committee and the advisory committees.

Professor Coquillette said that the options at this point appeared to be either:

1. to adopt a single federal rule adopting the attorney conduct statutes and rules of the state in which a federal district court sits; or
2. to adopt a single federal rule adopting the attorney conduct statutes and rules of the state in which a federal district court sits; except for a small number of "core" issues to be governed by uniform, national federal rules. These would be limited to matters of particular concern to federal courts and federal agencies, such as the Department of Justice.

He pointed out that there was considerable disagreement over these options within the legal community.

SHORTENING THE RULEMAKING PROCESS

Judge Scirica reported that the Executive Committee of the Judicial Conference had asked the committee to consider ways in which the length of the rulemaking process might be shortened without adverse effect. He said that there were, essentially, two basic options that might accomplish that objective — either eliminating the participation in the rules process of one of the bodies presently required to approve rule amendments or shortening the time periods now prescribed by statute or Judicial Conference procedures. He said that neither alternative was attractive and added that most of the members of the standing committee had already expressed opposition to shortening the time allotted for public comment on proposed amendments.

Some members added that it was apparent that the Supreme Court wanted to continue playing a significant role in the rulemaking process. They said that it would be very difficult, in light of the Court's schedule, to reduce the amount of time that the justices currently are given to review proposed rules amendments. Nevertheless, they said, it might

be useful to take a fresh look at all the time limits currently imposed by statute or Judicial Conference procedures.

Judge Scirica reported that it had been suggested that the committee consider adopting an emergency procedure for adopting amendments on an expedited basis when there is a clear need to do so. Several members pointed out that the rules committees had, in fact, acted on an expedited basis on several occasions in response to pending action by the Congress. Most recently, they noted, the committees had acted outside the normal, deliberative Rules Enabling Act process in responding to the Congressional mandate for their views on the advisability of amending FED. R. CRIM. P. 6(d) to permit witnesses to bring their lawyers into the grand jury room.

But several members also cautioned against establishing a regularized procedure for handling potential amendments on an expedited basis. They said that the Rules Enabling Act process, as protracted as it may seem, ensures the integrity of the rulemaking process. It assures careful research and drafting, thorough committee deliberations, and meaningful input by the public. They added that only a few selective matters require expedited treatment, and these exceptions can be dealt with expeditiously on a case-by-case basis. They said that the very establishment of a regularized "fast track" procedure would only encourage its use and undermine the effectiveness of the rulemaking process.

Judge Scirica said that the committee might respond to the Executive Committee by stating that the present deliberative process serves the public very well, but that the rules committees are prepared to respond to individual situations on an expedited basis whenever necessary. The members agreed with his observation and suggested that he explore it with the chairman of the Executive Committee.

REPORT OF THE STYLE SUBCOMMITTEE

Judge Parker reported that the restyling of the body of the Federal Rules of Criminal Procedure was the major task pending before the style subcommittee. He noted that soon after the Supreme Court had promulgated the revised Federal Rules of Appellate Procedure, Bryan Garner, the Standing Committee's style consultant, prepared a first draft of a restyled set of criminal rules. That draft, he said, was then revised by each member of the style subcommittee and by Professor Stephen Saltzburg, who had been engaged specially by the Administrative Office to assist in the restyling task. Mr. Garner then prepared a second draft of the criminal rules, and the style subcommittee met in Dallas to begin work on reviewing the product.

Judge Parker reported that the style subcommittee had completed its review of FED. R. CRIM. P. 1-11, 54, and 60, and it planned to complete action on another dozen rules

by mid-February 1999. Judge Davis added that the Advisory Committee on Criminal Rules was working closely with the style subcommittee on the project. He stated that one of the great challenges was to avoid making inadvertent, substantive changes in the rules as they are restyled.

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Mr. Lafitte reported that the technology subcommittee was monitoring developments in technology with a view towards their potential impact on the federal rules. He noted that the subcommittee was concentrating its efforts on considering rules amendments that might be needed to accommodate the judiciary's Electronic Case Files (ECF) initiative. He said that, among other things, ECF will permit: (a) electronic filing and service of court papers, (b) maintenance of the court's case files in electronic format, (c) electronic linkage of docket entries to the underlying documents, and (d) widespread electronic access to the court's files and records. The project, he added, was being tested in 10 pilot courts and was expected to be made available by the Administrative Office to all federal courts within one to two years.

Mr. Lafitte reported that the subcommittee had met the afternoon before the standing committee meeting to review the status of ECF and identify any federal rules that might need to be changed to accommodate electronic processing of case papers. He said that the subcommittee had been aided substantially in that effort by a comprehensive policy paper prepared by Nancy Miller, the Administrative Office's judicial fellow.

Mr. Lafitte said that the 1996 amendments to the rules had authorized a court by local rule to "permit papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference . . . establishes." [FED. R. CIV. P. 5(e); FED. R. BANKR. P. 5005; FED. R. APP. P. 25(a)(2). *See also* FED. R. CRIM. P. 49(d).] The rules, however, do not authorize service by electronic means. Accordingly, he said, the ECF pilot courts have relied on the consent of the parties in experimenting with electronic service in the prototype systems.

Mr. Lafitte reported that the subcommittee had concluded that it was necessary to legitimize the experiments taking place in the pilot courts and amend the federal rules to provide an appropriate legal foundation for electronic service. To that end, he said, the subcommittee would like the advisory committees to consider a common amendment to the rules that would authorize courts by local rule to permit papers to be *served* by electronic means — just as they may currently authorize papers to be *filed, signed, or verified* by electronic means. He said that the subcommittee had asked Professor Cooper to prepare a draft rule, using as a model the proposed amendment to FED. R. BANKR. P. 9013(c) published in August 1998.

I-D

AGENDA DOCKETING

ADVISORY COMMITTEE ON CRIMINAL RULES

Proposal	Source, Date, and Doc #	Status
[CR 4] — Require arresting officer to notify pretrial services officer, U.S. Marshal, and U.S. Attorney of arrest	Local Rules Project	10/95 — Subc appointed 4/96 — Rejected by subc **COMPLETED**
[CR 5] — Video Teleconferencing of Initial Appearances and Arraignments	Judge Fred Biery 5/98	5/98 — Referred to chair and reporter for consideration 10/98 — Referred to subcomte **PENDING FURTHER ACTION**
[CR 5] — To allow initial appearances, arraignments, attorney status hearings, and possibly petty pleas to be taken by video conferencing.	Judge Durwood Edwards 6/98	6/98 — Referred to chair and reporter for consideration 10/98 — Referred to subcomte **PENDING FURTHER ACTION**
[CR 5(a)] — Time limit for hearings involving unlawful flight to avoid prosecution arrests	DOJ 8/91; 8/92	10/92 — Subc appointed 4/93 — Considered 6/93 — Approved for publication 9/93 — Published for public comment 4/94 — Revised and forwarded to ST Cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CR 5(c)] — Misdemeanor defendant in custody is not entitled to preliminary examination. Cf CR58(b)(2)(G)	Magistrate Judge Robert B. Collings 3/94	10/94 — Deferred pending possible restylizing efforts **PENDING FURTHER ACTION**
[CR 5(c)] — Eliminate consent requirement for magistrate judge consideration	Judge Swearingen 10/28/96 (96-CR-E)	1/97 — Sent to reporter 4/97 — Recommends legislation to ST Cmte 6/97 — Recommitted by ST Cmte 10/97—Adv. Cmte declines to amend provision. 3/98 — Jud Conf instructs rules committees to propose amendment 4/98 — Approves amendment, but defers until style project completed 6/98 — Stg Comte concurs with deferral **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 5.1] — Extend production of witness statements in CR26.2 to 5.1.	Michael R. Levine, Asst. Fed. Defender 3/95	10/95 — Considered 4/96 — Draft presented and approved 6/96 — Approved by ST Cmte 8/96— Published for public comment 4/97— Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court 12/98 — Effective **COMPLETED**
[CR 6] — Statistical reporting of indictments	David L. Cook AO 3/93	10/93 — Committee declined to act on the issue **COMPLETED**
[CR6(a)] — Reduce number of grand jurors	H.R. 1536 introduced by Cong Goodlatte	5/97 — Introduced by Congressman Goodlatte, referred to CACM with input from Rules Cmte 10/97—Adv Cmte unanimously voted to oppose any reduction in grand jury size. 1/98—ST Cmte voted to recommend that the Judicial Conference oppose the legislation. 3/98 — Jud Conf concurs **COMPLETED**
[CR 6(d)] — Allow witness to be accompanied into grand jury by counsel	Omnibus Approp. Act (P.L.105-277)	10/98 — Considered; Subcomm. Appointed 1/99 — Stg Cmte approved subcomm rec. not to allow representation 3/99 — Jud Conf approves report for submission to Congress **COMPLETED**
[CR 6(d)] — Interpreters allowed during grand jury	DOJ 1/22/97 (97-CR-B)	1/97 — Sent directly to chair 4/97 — Draft presented and approved for request to publish 6/97 — Approved by ST Cmte for publication 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Approved by Stg Comte 9/98 — Approved by Jud Conf **PENDING FURTHER ACTION**
[CR 6(e)] — Intra-Department of Justice use of Grand Jury materials	DOJ	4/92 — Rejected motion to send to ST Cmte for public comment 10/94 — Discussed and no action taken **COMPLETED**
[CR 6(e)(3)(C)(iv)] — Disclosure of Grand Jury materials to State Officials	DOJ	4/96 — Cmte decided that current practice should be reaffirmed **COMPLETED**
[CR 6(e)(3)(C)(iv)] — Disclosure of Grand Jury materials to State attorney discipline agencies	Barry A. Miller, Esq. 12/93	10/94 — Considered, no action taken **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR6 (f)] — Return by foreperson rather than entire grand jury	DOJ 1/22/97 (97-CR-A)	1/97 — Sent directly to chair 4/97— Draft presented and approved for publication 6/97 — Approved by ST Cmte for publication 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Approved by Stg Comte 9/98 — Approved by Judicial Conference **COMPLETED**
[CR7(c)(2)] — Reflect proposed new Rule 32.2 governing criminal forfeitures		4/97— Draft presented and approved for publication 6/97 — Approved by ST Cmte for publication 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Withdrawn in light of R. 32.2 rejection by Stg. Comte 10/98 — revised and resubmitted to stg cmte for transmission to conference — 1/99— Approved by Stg Comte 3/99— Approved by Jud Conf **COMPLETED**
[CR 10] — Arraignment of detainees through video teleconferencing	DOJ 4/92	4/92 — Deferred for further action 10/92 — Subc appointed 4/93 — Considered 6/93 — Approved for publication by ST Cmte 9/93 — Published for public comment 4/94 — Action deferred, pending outcome of FJC pilot programs 10/94 — Considered 10/98 — Comte considered-subcomte appointed **PENDING FURTHER ACTION**
[CR 10] — Guilty plea at an arraignment	Judge B. Waugh Crigler 10/94	10/94 — Suggested and briefly considered **DEFERRED INDEFINITELY**
[CR 10] — Defendant's presence not required		10/97 — Considered in lieu of video transmission 4/98 —Draft amendments considered, but subcomte appointed to further study 10/98 — Considered by comte; reporter to redraft and submit at next meeting **PENDING FURTHER ACTION**
[CR 11] — Magistrate judges authorized to hear guilty pleas, and inform accused of possible deportation	James Craven, Esq. 1991	4/92 — Disapproved **COMPLETED**
[CR 11] — Advise defendant of impact of negotiated factual stipulation	David Adair & Toby Slawsky, AO 4/92	10/92 — Motion to amend withdrawn **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 11(c)] — Advise defendant of any appeal waiver provision which may be contained in plea agreement	Judge Maryanne Trump Barry 7/19/96 (96-CR-A)	10/96 — Considered, draft presented 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98 — Approved and forwarded to Stg Cmte 6/98 — Approved by Stg Comte 9/98 — Approved by Jud Conf **PENDING FURTHER ACTION**
[CR 11(d)] — Examine defendant's prior discussions with an government attorney	Judge Sidney Fitzwater 11/94	4/95 — Discussed and no motion to amend **COMPLETED**
[CR 11(e)] — Judge, other than the judge assigned to hear case, may take part in plea discussions	Judge Jensen 4/95	10/95 — Considered 4/96 —Tabled as moot, but continued study by subcommittee on other Rule 11 issues **DEFERRED INDEFINITELY**
[CR 11(e)(4) — Binding Plea Agreement (Hyde decision)	Judge George P. Kazen 2/96	4/96 — Considered 10/96 — Considered 4/97 — Deferred until Sup Ct decision **COMPLETED**
[CR 11(e)(1) (A)(B) and (C)] — Sentencing Guidelines effect on particular plea agreements	CR Rules Committee 4/96	4/96 — To be studied by reporter 10/96 — Draft presented and considered 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98 — Approved and forwarded to Stg Cmte 6/98 — Approved by Stg Comte 9/98 — Approved by Jud Conf **COMPLETED**
[CR 11]—Pending legislation regarding victim allocution	Pending legislation 97-98	10/97—Adv Cmte expressed view that it was not opposed to addressing the legislation and decided to keep the subcommittee in place to monitor/respond to the legislation.
[CR 11(e)(6) — Court required to inquire whether the defendant is entitled to an adjustment for acceptance of responsibility	Judge John W. Sedwick 10/98 (98-CR-C)	**PENDING FURTHER ACTION**
[CR 12] — Inconsistent with Constitution	Paul Sauers 8/95	10/95 — Considered and no action taken **COMPLETED**
[CR 12(b)] — Entrapment defense raised as pretrial motion	Judge Manuel L. Real 12/92 & Local Rules Project	4/93 — Denied 10/95 — Subcommittee appointed 4/96 — No action taken **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 12(i)] — Production of statements		7/91 — Approved by ST Cmte for publication 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR12.2]—authority of trial judge to order mental examination.	Presented by Mr. Pauley on behalf of DOJ at 10/97 meeting.	10/97—Adv Cmte voted to consider draft amendment at next meeting. 4/98 — Deferred for further study of constitutional issues 10/98 — Considered draft amendments, continued for further study **PENDING FURTHER ACTION**
[CR 16] — Disclosure to defense of information relevant to sentencing	John Rabiej 8/93	10/93 — Cmte took no action **COMPLETED**
[CR 16] — Prado Report and allocation of discovery costs	'94 Report of Jud Conf	4/94 — Voted that no amendment be made to the CR rules **COMPLETED**
[CR 16] — Prosecution to inform defense of intent to introduce extrinsic act evidence	CR Rules Committee '94	10/94 — Discussed and declined **COMPLETED**
[CR 16(a)(1)] — Disclosure of experts		7/91 — Approved by for publication by St Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 16(a)(1)(A)] — Disclosure of statements made by organizational defendants	ABA	11/91 — Considered 4/92 — Considered 6/92 — Approved by ST Committee for publication, but deferred 12/92 — Published 4/93 — Discussed 6/93 — Approved by ST Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 12/94 — Effective **COMPLETED**
[CR 16(a)(1)(C)] — Government disclosure of materials implicating defendant	Prof. Charles W. Ehrhardt 6/92 & Judge O'Brien	10/92 — Rejected 4/93 — Considered 4/94 — Discussed and no motion to amend **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 16(a)(1)(E)] — Require defense to disclose information concerning defense expert testimony	Jo Ann Harris, Asst. Atty. Gen., CR Div., DOJ 2/94; clarification of the word "complies" Judge Propst (97-CR-C)	4/94 — Considered 6/94 — Approved for publication by ST Cmte 9/94 — Published for public comment 7/95 — Approved by ST Cmte 9/95 — Rejected by Jud Conf 1/96 — Discussed at ST meeting 4/96 — Reconsidered and voted to resubmit to ST Cmte 6/96 — Approved by ST Cmte 9/96 — Approved by Jud Conf 4/97 — Approved by Sup Ct 12/97 — Effective **COMPLETED** 3/97 — Referred to reporter and chair 10/98 — Incorporated in proposed amendments to Rule 12.2 **PENDING FURTHER ACTION**
[CR 16(a) and (b)] — Disclosure of witness names and statements before trial	William R. Wilson, Jr., Esq. 2/92	2/92 — No action 10/92 — Considered and decided to draft amendment 4/93 — Deferred until 10/93 10/93 — Considered 4/94 — Considered 6/94 — Approved for publication by ST Cmte 9/94 — Published for public comment 4/95 — Considered and approved 7/95 — Approved by ST Cmte 9/95 — Rejected by Jud Conf **COMPLETED**
[CR 16(d)] — Require parties to confer on discovery matters before filing a motion	Local Rules Project & Mag Judge Robert Collings 3/94	10/94 — Deferred 10/95 — Subcommittee appointed 4/96 — Rejected by subcommittee **COMPLETED**
[CR23(b)] — Permits six-person juries in felony cases	S. 3 introduced by Sen Hatch 1/97	1/97 — Introduced as § 502 of the Omnibus Crime Prevention Act of 1997 10/97—Adv. Cmte voted to oppose the legislation 1/98— ST Cmte expressed grave concern about any such legislation. **COMPLETED**
[CR 24(a)] — Attorney conducted voir dire of prospective jurors	Judge William R. Wilson, Jr. 5/94	10/94 — Considered 4/95 — Considered 6/95 — Approved for publication by ST Cmte 9/95 — Published for public comment 4/96 — Rejected by advisory cmte, but should be subject to continued study and education; FJC to pursue educational programs **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 24(b)] — Reduce or equalize peremptory challenges in an effort to reduce court costs	Renewed suggestions from judiciary; Judge Acker (97-CR-E); pending legislation S-3.	2/91 — ST Cmte, after publication and comment, rejected CR Cmte 1990 proposal 4/93 — No motion to amend 1/97 — Omnibus Crime Control Act of 1997 (S.3) introduced [Section 501] 6/97 — Stotler letter to Chairman Hatch **COMPLETED** 10/97—Adv. Cmte decided to take no action on proposal to randomly select petit and venire juries and abolish peremptory challenges. 10/97—Adv. Cmte directed reporter to prepare draft amendment equalizing peremptory challenges at 10 per side. 4/98 — Approved by 6 to 5 vote and will be included n style package **PENDING FURTHER ACTION**
[CR 24(c)] — Alternate jurors to be retained in deliberations	Judge Bruce M. Selya 8/96 (96-CR-C)	10/96 — Considered and agreed to in concept; reporter to draft appropriate implementing language 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98 — Approved and forwarded to Stg Cmte 6/98 — Approved by Stg Comte 9/98 — Approved by Jud Conf **PENDING FURTHER ACTION**
[CR 26] — Questioning by jurors	Prof. Stephen Saltzburg	4/93 — Considered and tabled until 4/94 4/94 — Discussed and no action taken **COMPLETED**
[CR 26] — Expanding oral testimony, including video transmission	Judge Stotler 10/96	10/96 — Discussed 4/97 — Subcommittee will be appointed 10/97—Subcommittee recommended amendment. Adv Cmte voted to consider a draft amendment at next meeting. 4/98 — Deferred for further study 10/98 — Comte approved, but deferred request to publish until spring meeting or included in style package **PENDING FURTHER ACTION**
[CR 26] — Court advise defendant of right to testify	Robert Potter	4/95 — Discussed and no motion to amend **COMPLETED**
[CR 26.2] — Production of statements for proceedings under CR 32(e), 32.1(c), 46(i), and Rule 8 of § 2255		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 26.2] — Production of a witness' statement regarding preliminary examinations conducted under CR 5.1	Michael R. Levine, Asst. Fed. Defender 3/95	10/95 — Considered by cmte 4/96 — Draft presented and approved 6/96 — Approved by ST Cmte 8/96 — Published for public comment 4/97— Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Jud Conf approves 4/98 — Approved by Supreme Court 12/98 — Effective **COMPLETED**
[CR26.2(f)] — Definition of Statement	CR Rules Cmte 4/95	4/95 — Considered 10/95 — Considered and no action to be taken **COMPLETED**
[CR 26.3] — Proceedings for a mistrial		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 29(b)] — Defer ruling on motion for judgment of acquittal until after verdict	DOJ 6/91	11/91 — Considered 4/92 — Forwarded to ST Cmte for public comment 6/92 — Approved for publication, but delayed pending move of RCSO 12/92 — Published for public comment on expedited basis 4/93 — Discussed 6/93 — Approved by ST Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 12/94 — Effective **COMPLETED**
[CR 30] — Permit or require parties to submit proposed jury instructions before trial	Local Rules Project	10/95 — Subcommittee appointed 4/96 — Rejected by subcommittee **COMPLETED**
[CR 30] — discretion in timing submission of jury instructions	Judge Stotler 1/15/97 (97-CR-A)	1/97 — Sent directly to chair and reporter 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98 — Deferred for further study 10/98 — Considered by comte, but deferred pending Civil Rules Comte action on CV 51 **PENDING FURTHER ACTION**
[CR 31] — Provide for a 5/6 vote on a verdict	Sen. Thurmond, S.1426, 11/95	4/96 — Discussed, rulemaking should handle it **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 31(d)] — Individual polling of jurors	Judge Brooks Smith	10/95 — Considered 4/96 — Draft presented and approved 6/96 — Approved by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court 12/98 — Effective **COMPLETED**
[31(e)] — Reflect proposed new Rule 32.2 governing criminal forfeitures		4/97— Draft presented and approved for publication 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Withdrawn in light of rejection of R. 32.2 by Stg Comte 10/98 — revised and resubmitted to stg comte for transmission to conference 1/99— Approved by Stg Comte 3/99 — Approved by Jud Conf **PENDING FURTHER ACTION**
[CR 32] — Amendments to entire rule; victims' allocution during sentencing	Judge Hodges, before 4/92; pending legislation reactivated issue in 1997/98.	10/92 — Forwarded to ST Cmte for public comment 12/92 — Published 4/93 — Discussed 6/93 — Approved by ST Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 12/94 — Effective **COMPLETED** 10/97—Adv Cmte expressed view that it was not opposed to addressing the legislation and decided to keep the subcommittee in place to monitor/respond to the legislation. **PENDING FURTHER ACTION**
[CR 32]—mental examination of defendant in capital cases	Extension of amendment to CR 12.2(DOJ) at 10/97 meeting.	10/97— Adv Cmte voted to proceed with the drafting of an amendment. 10/98 — Incorporated in proposed amendments to Rule 12.2 **PENDING FURTHER ACTION**
[CR 32]—release of presentence and related reports	Request of Criminal Law Committee	10/98 — Reviewed recommendation of subcomm and agreed that no rules necessary **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 32(d)(2) — Forfeiture proceedings and procedures reflect proposed new Rule 32.2 governing criminal forfeitures	Roger Pauley, DOJ, 10/93	4/94 — Considered 6/94 — Approved by ST Cmte for public comment 9/94 — Published for public comment 4/95 — Revised and approved 6/95 — Approved by ST Cmte 9/95 — Approved by Jud Conf 4/96 — Approved by Sup Ct 12/96 — Effective **COMPLETED** 4/97— Draft presented and approved for publication 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Withdrawn in light of rejection of R. 32.2 by Stg Comte 10/98 — revised and resubmitted to stg comte for transmission to conference 1/99— Approved by Stg Comte 3/99 — Approved by Jud Conf **PENDING FURTHER ACTION**
[CR 32(e)] — Delete provision addressing probation and production of statements (later renumbered to CR32(c)(2))	DOJ	7/91 — Approved by ST Committee for publication 4/92 — Considered 6/92 — Approved by ST Committee 9/92 — Approved by Judicial Conference 4/93 — Approved by Supreme Court 12/93 — Effective **COMPLETED**
[CR 32.1] — Production of statements		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 32.1]— Technical correction of "magistrate" to "magistrate judge."	Rabiej (2/6/98)	2/98—Letter sent advising chair & reporter 4/98 — Approved, but deferred until style project completed **PENDING FURTHER ACTION**
[CR 32.1]—pending victims rights/allocution litigation	Pending litigation 1997/98.	10/97—Adv Cmte expressed view that it was not opposed to addressing the legislation and decided to keep the subcommittee in place to monitor/respond to the legislation. **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 32.2] — Create forfeiture procedures	John C. Keeney, DOJ, 3/96 (96-CR-D)	10/96 — Draft presented and considered 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Rejected by Stg Comte 10/98 — revised and resubmitted to stg comte for transmission to conference 1/99 — Approved by Stg Cmte 3/99 — Approved by Jud Conf **PENDING FURTHER ACTION**
[CR 33] — Time for filing motion for new trial on ground of newly discovered evidence	John C. Keeney, DOJ 9/95	10/95 — Considered 4/96 — Draft presented and approved 6/96 — Approved for publication by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court 12/98 — Effective **COMPLETED**
[CR 35(b)] — Recognize combined pre-sentencing and post-sentencing assistance	Judge T. S. Ellis, III 7/95	10/95 — Draft presented and considered 4/96 — Forwarded to ST Cmte 6/96 — Approved for publication by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court 12/98 — Effective **COMPLETED**
[CR 35(b)] — Recognize assistance in any offense	S.3, Sen Hatch 1/97	1/97 — Introduced as § 602 and 821 of the Omnibus Crime Prevention Act of 1997 6/97 — Stotler letter to Chairman Hatch **COMPLETED**
[CR 35(c)] — Correction of sentence, timing	Jensen, 1994 9th Cir. decision	10/94 — Considered 4/95 — No action pending restylization of CR Rules **PENDING FURTHER ACTION**
[CR35(b)] — Substantial asssistance provided after one year	Judge Edward E. Carnes 3/99 (99-CR-A)	**PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 38(e)] — Conforming amendment to CR 32.2		4/97— Draft presented and approved for publication 6/97 — Approved by ST Cmte for publication 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Withdrawn in light of rejection of R. 32.2 by Stg Comte 10/98 — revised and resubmitted to stg comte for transmission to conference 1/99— Approved by Stg Comte 3/99 — Approved by Jud Conf **PENDING FURTHER ACTION**
[CR 40] — Commitment to another district (warrant may be produced by facsimile)		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 40] —Treat FAX copies of documents as certified	Mag Judge Wade Hampton 2/93	10/93 — Rejected **COMPLETED**
[CR 40(a)] — Technical amendment conforming with change to CR5	Criminal Rules Cmte 4/94	4/94 — Considered, conforming change no publication necessary 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CR 40(a)] —Proximity of nearest judge for removal proceedings	Mag Judge Robert B. Collings 3/94	10/94 — Considered and deferred further discussion until 4/95 10/96 — Considered and rejected **COMPLETED**
[CR 40(d)] — Conditional release of probationer; magistrate judge sets terms of release of probationer or supervised release	Magistrate Judge Robert B. Collings 11/92	10/92 — Forwarded to ST Cmte for publication 4/93 — Discussed 6/93 — Approved by ST Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 12/94 — Effective **COMPLETED**
[CR 41] — Search and seizure warrant issued on information sent by facsimile		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 41] — Warrant issued by authority within the district	J.C. Whitaker 3/93	10/93 — Failed for lack of a motion **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 41(c)(2)(D)] — recording of oral search warrant	J. Dowd 2/98	4/98 — Tabled until study reveals need for change **DEFERRED INDEFINITELY**
[CR 41(c)(1) and (d) — enlarge time period	Judge B. Waugh Crigler 11/98 (98-CR-D)	**PENDING FURTHER ACTION**
[CR 43(b)] —Sentence absent defendant	DOJ 4/92	10/92 — Subcommittee appointed 4/93 — Considered 6/93 — Approved for publication by ST Cmte 9/93 — Published for public comment 4/94 — Deleted video teleconferencing provision & forwarded to ST Cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CR 43(b)] — Arraignment of detainees by video teleconferencing		10/98 — Subcmte appointed **PENDING FURTHER ACTION**
[CR 43(c)(4)] — Defendant need not be present to reduce or change a sentence	John Keeney, DOJ 1/96	4/96 — Considered 6/96 — Approved for publication by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court 12/98 — Effective **COMPLETED**
[CR 43(c)(5) — Defendant to waive personal arraignment on subsequent, superseding indictments and enter plea of not guilty in writing	Judge Joseph G. Scoville, 10/16/97 (97-CR-I) and Mario Cano 97---	10/97 — Referred to reporter and chair 4/98 —Draft amendments considered, subcomte appointed 10/98 — Comte considered; reporter to submit draft at next meeting **PENDING FURTHER ACTION**
[CR 46] — Production of statements in release from custody proceedings		6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 46] — Release of persons after arrest for violation of probation or supervised release	Magistrate Judge Robert Collings 3/94	10/94 — Defer consideration of amendment until rule might be amended or restylized **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 46] — Requirements in AP 9(a) that court state reasons for releasing or detaining defendant in a CR case	11/95 Stotler letter	4/96 — Discussed and no action taken **COMPLETED**
[CR 46 (e)] — Forfeiture of bond	H.R. 2134	4/98 — Opposed amendment **COMPLETED**
[CR 46(i)] — Typographical error in rule in cross-citation	Jensen	7/91 — Approved for publication by ST Cmte 4/94 — Considered 9/94 — No action taken by Jud Conf because Congress corrected error **COMPLETED**
[CR 47] — Require parties to confer or attempt to confer before any motion is filed	Local Rules Project	10/95 — Subcommittee appointed 4/96 — Rejected by subcommittee **COMPLETED**
[CR 49] — Double-sided paper	Environmental Defense Fund 12/91	4/92 — Chair informed EDF that matter was being considered by other committees in Jud Conf **COMPLETED**
[CR 49(c)] — Fax noticing to produce substantial cost savings while increasing efficiency and productivity	Michael E. Kunz, Clerk of Court 9/10/97 (97-CR-G)	9/97 — Mailed to reporter and chair 4/98 — Referred to Technology Subcmte **PENDING FURTHER ACTION**
[CR49(c)] — Facsimile service of notice to counsel	William S. Brownell, 10/20/97 (CR-J)	11/97 — Referred to reporter and chair, pending Technology Subcomte study **PENDING FURTHER ACTION**
[CR 49(e)] —Delete provision re filing notice of dangerous offender status — conforming amendment	Prof. David Schlueter 4/94	4/94 — Considered 6/94 — ST Cmte approved without publication 9/94 — Jud Conf approved 4/95 — Sup Ct approved 12/95 — Effective **COMPLETED**
[CR53] — Cameras in the courtroom		7/93 — Approved by ST Cmte 10/93 — Published 4/94 — Considered and approved 6/94 — Approved by ST Cmte 9/94 — Rejected by Jud Conf 10/94 — Guidelines discussed by cmte **COMPLETED**
[CR54] — Delete Canal Zone	Roger Pauley, minutes 4/97 mtg	4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98 — Approved and forwarded to Stg Cmte 6/98 —Approved by Stg Comte 9/98 — Approved by Jud Conf **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 57] — Local rules technical and conforming amendments & local rule renumbering	ST meeting 1/92	4/92 — Forwarded to ST Cmte for public comment 6/93 — Approved for publication by ST Cmte 9/93 — Published for public comment 4/94 — Forwarded to ST Cmte 12/95 — Effective **COMPLETED**
[CR 57] — Uniform effective date for local rules	Stg Comte meeting 12/97	4/98 — Considered an deferred for further study **PENDING FURTHER ACTION**
[CR 58] — Clarify whether forfeiture of collateral amounts to a conviction	Magistrate Judge David G. Lowe 1/95	4/95 — No action **COMPLETED**
[CR 58 (b)(2)] — Consent in magistrate judge trials	Judge Philip Pro 10/24/96 (96- CR-B)	1/97 — Reported out by CR Rules Committee and approved by ST Cmte for transmission to Jud Conf without publication; consistent with Federal Courts Improvement Act 4/97 — Approved by Sup Ct 12/97 — Effective **COMPLETED**
[CR 59] — Authorize Judicial Conference to correct technical errors with no need for Supreme Court & Congressional action	Report from ST Subcommittee on Style	4/92 — Considered and sent to ST Cmte 6/93 — Approved for publication by ST Cmte 10/93 — Published for public comment 4/94 — Approved as published and forwarded to ST Cmte 6/94 — Rejected by ST Cmte **COMPLETED**
[Megatrials] — Address issue	ABA	11/91 — Agenda 1/92 — ST Cmte, no action taken **COMPLETED**
[Rule 8. Rules Governing §2255] — Production of statements at evidentiary hearing		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[Rules Governing Habeas Corpus Proceedings]— miscellaneous changes to Rule 8 & Rule 4 for §2255 & §2254 proceedings	CV Cmte	10/97 — Subcomte appointed 4/98 — Considered; further study 10/98 — Comte approved some proposals and deferred others for further consideration **PENDING FURTHER ACTION**
[CR8(c)] — Apparent mistakes in Federal Rules Governing § 2255 and § 2254	Judge Peter Dorsey 7/9/97 (97-CR-F)	8/97 — Referred to reporter 10/97 — Referred to subcomte 4/98 — Comte considered 10/98 — Comte considered **PENDING FURTHER ACTION**

II-D

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

March 30, 1999

MEMORANDUM TO THE ADVISORY COMMITTEE ON CRIMINAL RULES

SUBJECT: *Proposed Style Amendments to Rules of Criminal Procedure*

I am attaching the style revision of Criminal Rules 1-9 recommended by Subcommittee "A." The revision includes edits by Subcommittee "A" on the original draft prepared by the Standing Committee's Subcommittee on Style.

Also attached are research questions posed by Judge Parker, Professor Saltzburg's responses to those questions, Judge Wilson's response to other specific questions, a memorandum from Professor Schlueter on military authorities, and a chart depicting the various references to judicial officers.

John K. Rabiej

Attachments

I. SCOPE, PURPOSE, AND CONSTRUCTION	**Title I. Applicability of Rules**[1]
Rule 1. Scope	**Rule 1. Title; Scope; Definitions**
These rules may be known and cited as the Federal Rules of Criminal Procedure.[2]	**(a) Title.** These rules are to be known as the Federal Rules of Criminal Procedure.

[1] The Style Subcommittee (SSC) expanded Rule 1 by incorporating Rules 54 and 60, a step that seems organizationally preferable. Rule 60 is the short statement of title of all the rules; logically, it should be at the beginning. Rule 54, meanwhile, deals with the application of the rules — even though existing Rule 1 purports to cover "Scope." The SSC believes that a statement of the scope of the rules should be at the beginning to show readers which proceedings are governed by these rules. If that principle is sound, then both 54(a) and 54(b) belong up front.

This draft also shows Rule 54(c) — "Application of Terms" — as a new Rule 1 (d), now entitled "Definitions." The SSC believes that it may be helpful to have at the beginning the definitions that apply generally to all the rules. But if moving the definitions into Rule 1 makes it too long, Rule 54 could be retained as a separate rule of general definitions. Professor Saltzburg recommends the latter, but with our pared down definitions, keeping them under Rule 1 doesn't seem to create an unwieldy rule. The Advisory Committee should consider this point.

[2] This is the language of Rule 60 — currently the *last* provision in the Rules.

These rules govern the procedure in all criminal proceedings in the courts of the United States, as provided in Rule 54(a); and, whenever specifically provided in one of the rules, to preliminary, supplementary, and special proceedings before United States magistrate judges and at proceedings before state and local judicial officers.[3] These rules apply to all criminal proceedings in the United States District Courts; in the District of Guam; in the District Court for the Northern Mariana Islands, except as otherwise provided in articles IV and V of the covenant provided by the Act of March 24, 1976 (90 Stat. 263); in the District Court of the Virgin Islands; and (except as otherwise provided in the Canal Zone) in the United States District Court for the District of the Canal Zone; in the United States Courts of Appeals; and in the Supreme Court of the United States; except that the prosecution of offenses in the District Court of the Virgin Islands shall be by indictment or information as otherwise provided by law.	**(b) Scope.** **(1)** ***In General.*** These rules govern the procedure in all criminal proceedings in the United States District Courts, United States Courts of Appeals, and the Supreme Court of the United States. **(2)** ***State or Local Officer.*** When a rule so states, it applies to a proceeding before a state or local officer. **(3)** ***Territorial Courts.*** These rules also govern the procedure in criminal proceedings in the following courts: (A) the district court of Guam; (B) the district court for the Northern Mariana Islands, except as otherwise provided by law;[4] and (C) the district court of the Virgin Islands, except that the prosecution of offenses in that court must be by indictment or information as otherwise provided by law.

[3] This is the language of current Rule 1 — in its entirety.

[4] Professor Saltzburg suggests deleting the statutory reference to 48 U.S.C. § 1801 because 99.9% of the users of these rules will never need it, the deletion makes this provision parallel with (C) just below, and we save a couple of words.

(1) Removed Proceedings. These rules apply to criminal prosecutions removed to the United States district courts from state courts and govern all procedure after removal, except that dismissal by the attorney for the prosecution shall be governed by state law.	(4) ***Removed Proceedings.*** Although these rules govern all proceedings after removal from a state court, state law governs a dismissal by the prosecution.
(2) Offenses Outside a District or State. These rules apply to proceedings for offenses committed upon the high seas or elsewhere out of the jurisdiction of any particular state or district, except that such proceedings may be had in any district authorized by 18 U.S.C. § 3238.	~~(2) ***Offenses Outside a District or State.*** These rules apply to proceedings for offenses committed on the high seas or elsewhere outside the jurisdiction of any particular state or district, as provided in 18 U.S.C. § 3238.~~[6]
(3) Peace Bonds. These rules do not alter the power of judges of the United States or of United States magistrate judges to hold security of the peace and for good behavior under Revised Statutes, § 4069, 50 U.S.C. § 23, but in such cases the procedure shall conform to these rules so far as they are applicable.	~~(3) ***Peace Bonds.*** These rules do not alter the power of a judge, including a magistrate judge, to hold security of the peace and for good behavior under 50 U.S.C. § 23. In such a case, however, the procedure must conform to these rules when applicable.~~[7]
(4) Proceedings Before United States Magistrate Judges. Proceedings involving misdemeanors and other petty offenses are governed by Rule 58.[5]	~~(4) ***Misdemeanors and Petty Offenses.*** Rule 58 governs proceedings involving misdemeanors and petty offenses.~~[8]

[5] All the language in the left column currently appears in Rule 54(b). We think it logically belongs here.

[6] This paragraph refers to a venue statute dealing with where an offense committed on the high seas or elsewhere outside the jurisdiction of a particular district is to be tried. Once venue has been established, the Criminal Rules automatically apply.

[7] Professor Saltzburg says that this provision is inconsistent with the statute itself and therefore suggests deleting it.

[8] This duplicates what is said in Rule 58. We suggest deleting it.

(5) Other Proceedings. These rules are not applicable to extradition and rendition of fugitives; civil forfeiture of property for violation of a statute of the United States; or the collection of fines and penalties. Except as provided in Rule 20(d) they do not apply to proceedings under 18 U.S.C. Chapter 403 — Juvenile Delinquency — so far as they are inconsistent with that chapter. They do not apply to summary trials for offenses against the navigation laws under Revised Statutes §§ 4300-4305, 33 U.S.C. §§ 391-396, or to proceedings involving disputes between seamen under Revised Statutes §§ 4079-4081, as amended, 22 U.S.C. §§ 256-258, or to proceedings for fishery offenses under the Act of June 28, 1937, c. 392, 50 Stat. 325-327, 16 U.S.C. §§ 772-772i, or to proceedings against a witness in a foreign country under 28 U.S.C. § 1784.[9]	**(5)** ***Excluded Proceedings.*** These rules do not govern the procedure in: (A) the extradition and rendition of a fugitive; (B) a civil property forfeiture for the violation of a federal statute; (C) the collection of a fine or penalty; (D) a proceeding under a statute governing juvenile delinquency to the extent the procedure is inconsistent with the statute, unless Rule 20(d) provides otherwise;[10]or (E) a dispute between seamen under 22 U.S.C. §§ 256–58.

[9] All the language in the left column currently appears in Rule 54(b). We think it logically belongs here.

[10] Here we have substituted broader language because, as Professor Saltzburg notes, there are many proposals for new legislation affecting juveniles

On another point, however, the SSC notes that this provision appears to say that a rule can trump a statute. How can this be?

(c) Application of Terms. As used in these rules the following terms have the designated meanings. "Act of Congress" includes any act of Congress locally applicable to and in force in the District of Columbia, in Puerto Rico, in Puerto Rico, in a territory or in any insular possession.[11] "Attorney for the government" means the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney, when applicable to cases arising under the laws of Guam the Attorney General of Guam or such other person or persons as may be authorized by the laws of Guam to act therein, and when applicable to cases arising under the laws of the Northern Mariana Islands the Attorney General of the Northern Mariana Islands or any other person or persons as may be authorized by the laws of the Northern Marianas to act therein. "Civil action" refers to a civil action in a district court.[12] The words "demurrer," "motion to quash," "plea in abatement," "plea in bar" and "special plea in bar," or words to the same effect, in any act of Congress shall be construed to mean the motion raising a defense or objection provided in Rule 12. "District court" includes all district courts named in subdivision (a) of this rule.	**(c) Definitions.** The following definitions apply to these rules: (1) "Demurrer," "motion to quash," "plea in abatement," "plea in bar," and "special plea in bar," or similar words in a federal statute mean a Rule 12 motion. (2) "Government attorney"[13] includes: (A) the Attorney General, or an authorized assistant; (B) a United States attorney, or an authorized assistant; (C) when applicable to cases arising under Guam law, the Guam Attorney General or other person whom Guam law authorizes to act in the matter; and (D) when applicable to cases arising under the laws of the Northern Mariana Islands, the Northern Mariana Islands Attorney General or other person whom Northern Mariana Islands law authorizes to act in the matter.

[11] The phrase *Act of Congress* is not used in the restyled rules. The SSC has consistently used *federal statute* instead. Professor Saltzburg approves this approach.

[12] This definition seems unnecessary. Professor Saltzburg agrees.

[13] Throughout these rules, *attorney for the government* has been changed to *government's attorney*. Currently, the rules contain eight variations: (1) *government*, (2) *government('s) attorney*, (3) *attorney(s) for the government*, (4) *counsel for the government*, (5) *United States attorney*, (6) *the prosecution*, (7) *attorney for the prosecution*, and (8) *prosecuting attorney*. We have substituted *government's attorney* throughout, except where *government* seemed more appropriate. We have also provided a chart showing where each variation appears in the current rules.

"Federal magistrate judge" means a United States magistrate judge as defined in 28 U.S.C. §§ 631-639, a judge of the United States or another judge or judicial officer specifically empowered by statute in force in any territory or possession, the Commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates.[14] "Judge of the United States" includes a judge of the district court, court of appeals, or the Supreme Court.[15] "Law" includes statutes and judicial decisions.[16] "Magistrate judge" includes a United States magistrate judge as defined in 28 U.S.C. §§ 631-639, a judge of the United States, another judge or judicial officer specifically empowered by statute in force in any territory or possession, the Commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates, and a state or local judicial officer, authorized by 18 U.S.C. § 3041 to perform the functions prescribed by Rules 3, 4, and 5. "Oath" includes affirmations. "Petty offense" is defined in 18 U.S.C. § 19. "State" includes District of Columbia, Puerto Rico, territory and insular possession. "United States magistrate judge" means the officer authorized by 28 U.S.C. §§ 631-639.[17]	(3) "Federal judge" means: (A) a justice of the Supreme Court of the United States; (B) a judge of the United States as defined in 28 U.S.C. § 451; or (C) a United States magistrate judge. (4) "Judge" means a federal judge or a state or local officer. (5) "Magistrate Judge"[18] means a United States magistrate judge appointed under 28 U.S.C. § 631.[19] (6) "State or local officer" includes: (A) a state or local officer authorized to act under 18 U.S.C. § 3041; and (B) a judicial officer specifically empowered by statute in force in any commonwealth, territory, or possession, including the District of Columbia, to perform a function to which a particular rule relates (7) "Oath" includes an affirmation. (8) "Petty offense" is defined in 18 U.S.C. § 19. (9) "State" includes the District of Columbia, and any commonwealth, territory, or

[14] In the current rules, there are three definitions of *magistrate judge*. The SSC has consolidated these into one: Rule 1(c)(5). Professor Saltzburg agrees with this approach.

[15] The phrase *Judge of the United States* does not appear in the restyled rules. The SSC has uniformly used the phrase *federal judge* instead. Professor Saltzburg has approved this approach.

[16] Professor Saltzburg agrees with the SSC that this definition is superfluous. If anything, it suggests that administrative regulations are somehow excluded. The SSC has deleted it.

[17] All the language in the left column derives from current Rule 54(c). We think it might be better here, especially given that we have shortened it.

[18] The current rules define *magistrate judge* in three places (as seen in the left column). We have consolidated the definitions here.

[19] We plan to put the following language in Rule 54: "When these rules authorize a magistrate judge to act, a United States judge as defined in 28 U.S.C. § 451 may act."

Rule 2. Purpose and Construction	**Rule 2. Purpose and Construction**
These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.	These rules are intended to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay.

II. PRELIMINARY PROCEEDINGS	**Title II. Preliminary Proceedings**
Rule 3. The Complaint	**Rule 3. The Complaint**
The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a magistrate judge.	The complaint is a written statement of the essential facts constituting the offense charged. It must be made under oath before a judge.[20]

[20] Professor Saltzburg says Rule 3 does not require a complainant, who swears to the facts in a complaint, to actually appear before a magistrate judge. The intent of Rule 3 is to require the complaint to be sworn although it may be presented to the magistrate judge by someone other than the complainant. If this is correct, Rule 3 should be revised to so state.

Rule 4. Arrest Warrant or Summons upon Complaint	Rule 4. Arrest Warrant or a Summons on a Complaint
(a) Issuance. If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest[21] of the defendant shall issue to any officer authorized by law[22] to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.	**(a) Issuance.** If the complaint or one or more affidavits filed with the complaint show probable cause to believe that an offense has been committed and that the defendant committed it, the judge must [23]issue an arrest warrant to any officer authorized to execute it. At the request of the government's attorney, the judge must [24]issue a summons instead of a warrant. More than one warrant or summons may issue on the same complaint. If a defendant voluntarily fails to appear in response to a summons, a judge must[25] issue a warrant.[26]
(b) Probable Cause. The finding of probable cause may be based upon hearsay evidence in whole or in part.	**(b) Probable Cause.** Hearsay evidence may be used to establish probable cause.[27]

[21] The Supreme Court, in various opinions, has referred to *arrest warrant*. That phrase would be an improvement on *warrant for the arrest*.

[22] Wright & Miller, in *Federal Practice and Procedure*, recommend deleting the phrase *by law*, which is implied in the concept of authorization.

[23] Professor Saltzburg says *will* is preferable in this sentence.

[24] Ditto.

[25] Professor Saltzburg says *may* is the correct word here. *Must* is inappropriate because valid reasons such as inclement weather may prevent a person from appearing, but such a person should not always be subject to arrest.

[26] Professor Saltzburg agreed that the sentences should be in active voice and that the actor should be a magistrate judge.

[27] Professor Saltzburg would abolish Rule 4(b) because this is covered by Fed. R. Evid. 1101(d) and Supreme Court cases. The same language appears in Rule 5.1(d). Professor Saltzburg reasons that the specific mention of hearsay could lead to the inference that hearsay is excluded in other places where it's not specifically mentioned. Also, Rule 32 doesn't refer to hearsay even though it is admissible in sentencing hearings. Cf. note 50.

(c) Form. **(1) Warrant.** The warrant shall be signed by the magistrate judge and shall contain the name of the defendant or, if the defendant's name is unknown, any name or description by which the defendant can be identified with reasonable certainty. It shall describe the offense charged in the complaint. It shall command that the defendant be arrested and brought before the nearest available magistrate judge. **(2) Summons.** The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a magistrate at a stated time and place.	**(c) Form.** **(1)** ***Warrant.*** A warrant must[28]: (A) contain the defendant's name or, if it is unknown, a name or description by which the defendant can be identified with reasonable certainty; (B) describe the offense charged in the complaint; (C) command that the defendant be arrested and brought before the nearest available judge; and (D) be signed by a judge. **(2)** ***Summons.*** A summons is to [29]be in the same form as a warrant except that it must[30] require the defendant to appear before a judge at a stated time and place.

[28] Professor Saltzburg says *must* is the correct word here. The SSC suggests that *is to* might also be considered.

[29] Ditto.

[30] Ditto.

(d) Execution or Service; and Return. **(1) By Whom.** The warrant shall be executed by a marshal or by some other officer authorized by law.[31] The summons may be served by any person authorized to serve a summons in a civil action. **(2) Territorial Limits.** The warrant may be executed or the summons may be served at any place within the jurisdiction of the United States.	**(d) Execution or Service, and Return.** (1) ***By Whom.*** Only a marshal or other authorized officer may execute a warrant. Any person authorized to serve a summons in a federal civil case may serve the summons. **(Revisit issue regarding civil case versus civil action.)** (2) ***Territorial Limits.*** A warrant may be executed, or a summons served, only within the jurisdiction of the United States.
(3) Manner. The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant at the time of the arrest but upon request shall show the warrant to the defendant as soon as possible. If the officer does not have the warrant at the time of the arrest, the officer shall then inform the defendant of the offense charged and of the fact that a warrant has been issued. The summons shall be served upon a defendant by delivering a copy to the defendant personally, or by leaving it at the defendant's dwelling house[32] or usual place of abode with some person of suitable age and discretion then residing therein and by mailing a copy of the summons to the defendant's last known address.	(3) ***Manner.*** (A) A warrant is executed by arresting the defendant. If the officer does not possess the warrant at the time of arrest, the officer must inform the defendant of its existence and of the offense charged. At the defendant's request, the officer must show the warrant to the defendant as soon as possible. (B) A summons is served on a defendant: (i) by personal delivery; or (ii) by leaving it at the defendant's residence or usual place of abode with a person of suitable age and discretion residing at that location and by mailing a copy to the defendant's last known address.

[31] See note 19.

[32] Professor Saltzburg approves the change from *dwelling house* to *residence*.

(4) Return. The officer executing a warrant shall make return thereof[33] to the magistrate judge or other officer before whom the defendant is brought pursuant to Rule 5. At the request of the attorney for the government any unexecuted warrant shall be returned to and canceled by the magistrate judge by whom it was issued. On or before the return day the person to whom a summons was delivered for service shall make return thereof to the magistrate judge before whom the summons is returnable. At the request of the attorney for the government made at any time while the complaint is pending, a warrant returned unexecuted and not canceled or summons returned unserved or a duplicate thereof[34] may be delivered by the magistrate judge to the marshal or other authorized person for execution or service.	**(4)** ***Return.*** (A) After executing a warrant, the officer must return it to the judge[35] before whom the defendant is brought in accordance with Rule 5. At the government attorney's request, an unexecuted warrant must be brought back[36] to and cancelled by a judge. (B) The person to whom a summons was delivered for service must return it on or before the return day. (C) At the request of the government attorney, a judge may deliver an unexecuted warrant or an unserved summons to the marshal or other authorized person for execution or service.

[33] Professor Saltzburg approves the change from *shall make return thereof* to *must return it.*

[34] Professor Saltzburg says *duplicate thereof* refers only to *summons*, and not also to *warrant*. Hence, revised Rule 4(d)(4)(C) refers only to a copy of the summons.

[35] Because of Rule 1(c)(4), the deleted language *or other officer* is now unnecessary.

[36] Professor Saltzburg approved our suggestion of *brought back*. The word *return* appears earlier in the paragraph in a different sense from what is here intended

Rule 5. Initial Appearance Before the Magistrate Judge	Rule 5. Initial Appearance
(a) In General. An officer making an arrest under a warrant issued upon a complaint[37] or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate judge or, in the event that a federal magistrate judge is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041. If a person arrested without a warrant is brought before a magistrate judge, a complaint shall be filed forthwith which shall comply with the requirements of Rule 4(a) with respect to the showing of probable cause. When a person, arrested with or without a warrant or given a summons, appears initially before the magistrate judge, the magistrate judge shall proceed in accordance with the applicable subdivisions of this rule.[38]	**(a) In General.** (1) Any person making an arrest must, without unnecessary delay, take the arrested person before the nearest available federal judge or, if none is reasonably available, before a state or local officer. [39] (2) When a person arrested without a warrant is brought before a judge, a complaint meeting Rule 4(a)'s requirement of probable cause must be filed promptly.

[37] Professor Saltzburg says the phrase *issued upon a complaint* can be deleted as superfluous.

[38] Professor Saltzburg approved the deletion of this sentence.

[39] Judge Tommy Miller is researching issue of whether "nearest available federal judge" should include a Supreme Court justice or a court of appeals judge.

(b) Offenses Not Triable by the United States Magistrate Judge. If the charge against the defendant is not triable by the United States magistrate judge, the defendant shall not be called upon[40] to plead. The magistrate judge shall inform the defendant of the complaint against the defendant and of any affidavit filed therewith, of the defendant's right to retain counsel or to request the assignment of counsel if the defendant is unable to obtain counsel, and of the general circumstances under which the defendant may secure pretrial release. The magistrate judge shall inform the defendant that the defendant is not required to make a statement and that any statement made by the defendant may be used against the defendant. The magistrate judge shall also inform the defendant of the right to a preliminary examination. The magistrate judge shall allow the defendant reasonable time and opportunity to consult counsel and shall detain or conditionally release the defendant as provided by statute or in these rules.	**(b) Felonies.** (1) If the offense charged is a felony, the judge must inform the defendant of the following: (A) the complaint against the defendant, and any affidavit filed with it; (B) the defendant's right to retain counsel[41] or to request that counsel be appointed if the defendant cannot obtain counsel; (C) the circumstances under which the defendant may secure pretrial release; (D) the defendant's right to a preliminary hearing;[42] and (E) the defendant's right not to make a statement, and that any statement made may be used against the defendant. (2) The judge must allow the defendant reasonable opportunity to consult counsel.[43] (3) The judge must detain or conditionally release the defendant as provided by statute or these rules.
(c) Misdemeanors and Other Petty Offenses. If the charge against the defendant is a misdemeanor or other petty offense triable by a United States magistrate judge under 18 U.S.C. § 3401, the magistrate judge shall proceed in accordance with Rule 58.	**(c) Misdemeanors.** If a defendant is charged with a misdemeanor, a federal judge must inform the defendant in accordance with Rule 58(b)(2).

[40] Professor Saltzburg approved changing *called upon* to *asked.*

[41] Professor Saltzburg recommends using *counsel* here because of the Supreme Court's Sixth Amendment cases, which refer to the right of *counsel.* At other places in these rules, however, *defendant's attorney* is used instead of *defendant's counsel* when *attorney* seems more appropriate. See, e.g., Rule 11(e)(1).

[42] On the use of *preliminary hearing*, see note 48.

[43] See preceding note.

A defendant is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, which is to be tried by a judge of the district court. If the defendant waives preliminary examination, the magistrate judge shall forthwith hold the defendant to answer[44] in the district court. If the defendant does not waive the preliminary examination, the magistrate judge shall schedule a preliminary examination. Such examination shall be held within a reasonable time but in any event not later than 10 days following the initial appearance if the defendant is in custody and no later than 20 days if the defendant is not in custody, provided, however, that the preliminary examination shall not be held if the defendant is indicted or if an information against the defendant is filed in district court before the date set for the preliminary examination.	
With the consent of the defendant and upon a showing of good cause, taking into account the public interest in the prompt disposition of criminal cases, time limits specified in this subdivision may be extended one or more times by a federal magistrate judge. In the absence of such consent by the defendant, time limits may be extended by a judge of the United States only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice.[45]	

[44] Professor Saltzburg approved changing *forthwith hold the defendant to answer* to *promptly require the defendant to appear*, which now appears in restyled Rule 5.1(a).

[45] All the language in the left column, which might have become paragraphs (5) and (6) of stylized Rule 5(c), has been moved to Rule 5.1. Logically, it belongs there

Rule 5.1 Preliminary Examination	Rule 5.1 Preliminary Hearing in a Felony Case[46]
	(a) In General. If charged with a felony, a defendant is entitled to a preliminary hearing.
	(b) Scheduling. A preliminary hearing must be held within a reasonable time, but no later than 10 days after the initial appearance if the defendant is in custody and no later than 20 days if not in custody, unless: (1) the defendant waives the hearing; (2) the defendant is indicted; or (3) the government files an information.
	(c) Extending the Time. With the defendant's consent and upon a showing of good cause — taking into account the public interest in the prompt disposition of criminal cases — a federal judge may extend the time limits in Rule 5.1(b)[47] one or more times. If the defendant does not consent, a federal judge may extend the time limits only on a showing that extraordinary circumstances exist and justice requires the delay.
(a) Probable Cause Finding. If from the evidence it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it, the federal magistrate judge shall forthwith hold the defendant to answer in district court. The finding of probable cause may be based upon hearsay evidence in whole or in part. The defendant may cross-examine adverse witnesses and may introduce evidence. Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination. Motions to suppress must be made to the trial court as provided in Rule 12.	**(d) Probable-Cause Finding.** If the federal judge finds probable cause to believe an offense has been committed and the defendant committed it, the federal judge must promptly require the defendant to appear for further proceedings. Hearsay evidence may be used to establish probable cause.[48] The defendant may cross-examine adverse witnesses and may introduce evidence but cannot[49] object to evidence on the ground that it was unlawfully acquired.

[46] Although the statute uses the phrase *preliminary examination*, the phrase *preliminary hearing* is more accurate: what happens is more than just an examination. It includes an evidentiary hearing, argument, and a judicial ruling. And in any event, the phrase *preliminary hearing* predominates in actual usage, by a margin of 7,450 to 4,818 in ALLFEDS in early February 1999. If we make this change in these rules, then there will need to be a conforming amendment to Rule 1101 of the Federal Rules of Evidence.

[47] Note the changed cross-reference from current Rule 5(c) to stylized Rule 5.1(b) as a result of the reorganization.

[48] See note 27.

[49] Some years ago, Judge Keeton pointed out that the phrase *may not* is sometimes ambiguous. That is, it sometimes means *might or might not* (as in, *I may not be able to come next weekend*). The SSC hasn't used it since. Here, *cannot* is correct if we take it to mean "doesn't have the power to" — a figurative extension of the physical sense.

(b) Discharge of Defendant. If from the evidence it appears that there is no probable cause to believe that an offense has been committed or that the defendant committed it, the federal magistrate judge shall dismiss the complaint and discharge the defendant. The discharge of the defendant shall not preclude the government from instituting a subsequent prosecution for the same offense.	**(e) Discharging the Defendant.** If the federal judge finds no probable cause to believe an offense has been committed or the defendant committed it, the federal judge must dismiss the complaint and discharge the defendant. A discharge does not preclude the government from later prosecuting the defendant for the same offense.
(c) Records. After concluding the proceeding the federal magistrate judge shall transmit forthwith to the clerk of the district court all papers in the proceeding. The magistrate judge shall promptly make or cause to be made[50] a record or summary of such proceeding. (1) On timely application to a federal magistrate judge, the attorney for a defendant in a criminal case may be given the opportunity to have the recording of the hearing on preliminary examination made available to that attorney in connection with any further hearing or preparation for trial. The court may, by local rule, appoint the place for and define the conditions under which such opportunity may be afforded counsel.	**(f) Records.** The preliminary hearing must be recorded by a court reporter or by a suitable recording device. A copy of the recording will be available to either party's attorney on request.
(2) On application of a defendant addressed to the court or any judge thereof, an order may issue that the federal magistrate judge make available a copy of the transcript, or of a portion thereof, to defense counsel. Such order shall provide for prepayment of costs of such transcript by the defendant unless the defendant makes a sufficient affidavit that the defendant is unable to pay or to give security therefor, in which case the expense shall be paid by the Director of the Administrative Office of the United States Courts from available appropriated funds. Counsel for the government may move also that a copy of the transcript, in whole or in part, be made available to it, for good cause shown, and an order may be entered granting such motion in whole or in part, on appropriate terms, except that the government need not prepay costs nor furnish security therefor.	

[50] This phrasing — *do or cause to be done* — has been much criticized in drafting literature, most notably by Elmer Driedger (*The Composition of Legislation*). The SSC has deleted it.

(d) Production of Statements.[51] *(1) In General. Rule 26.2(a)-(d) and (f) applies at any hearing under this rule, unless the court, for good cause shown, rules otherwise in a particular case.* *(2) Sanctions for Failure to Produce Statement. If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the moving party, the court may not consider the testimony of a witness whose statement is withheld.*	**(g) Production of Statements.** (1) ***In General.*** Rule 26.2(a)-(d) and (f) applies at any hearing under this rule, unless the court, for good cause shown, rules otherwise in a particular case. (2) ***Sanctions for Failure to Produce Statement.*** If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the moving party, the court must not consider the testimony of a witness whose statement is withheld.

[51] Took effect on December 1, 1998.

III. INDICTMENT AND INFORMATION	**Title III. The Grand Jury, The Indictment, and The Information**
Rule 6. The Grand Jury	**Rule 6. The Grand Jury**
(a) Summoning Grand Juries. **(1) Generally.** The court shall order one or more grand juries to be summoned at such time as the public interest requires. The grand jury shall consist of not less than 16 nor more than 23 members. The court shall direct that a sufficient number of legally qualified persons be summoned to meet this requirement. **(2) Alternate Jurors.** The court may direct that alternate jurors may be designated at the time a grand jury is selected. Alternate jurors in the order in which they were designated may thereafter be impanelled as provided in subdivision (g) of this rule. Alternate jurors shall be drawn in the same manner and shall have the same qualifications as the regular jurors, and if impanelled shall be subject to the same challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors.	**(a) Summoning a Grand Jury.** **(1)** ***In General.*** When the public interest so requires, the court must order that one or more grand juries be summoned. A grand jury must have 16 to 23 members, and the court must order that enough legally qualified persons be summoned to meet this requirement. **(2)** ***Alternate Jurors.*** When a grand jury is selected, the court[52] may designate alternate jurors. They must be drawn and summoned in the same manner and must have the same qualifications as regular jurors. Alternate jurors will be impaneled in the sequence in which they are designated. If impaneled, an alternate juror is subject to the same challenges, takes the same oath, and has the same functions, duties, powers, and privileges[53] as a regular juror.

[52] Professor Saltzburg says the court designates the alternate jurors.

[53] Professor Saltzburg proposed *functions, duties, powers, and privileges*. The SSC agrees.

(b) Objections to Grand Jury and to Grand Jurors. **(1) Challenges.** The attorney for the government or a defendant who has been held to answer in the district court may challenge the array of jurors on the ground that the grand jury was not selected, drawn or summoned in accordance with law, and may challenge an individual juror on the ground that the juror is not legally qualified. Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court. **(2) Motion to Dismiss.** A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. It shall be made in the manner prescribed in 28 U.S.C. § 1867(e) and shall be granted under the conditions prescribed in that statute. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.	**(b) Objections to the Grand Jury or to a Grand Juror.** **(1)** ***Challenges.*** Either the government or a defendant may challenge the grand jury on the ground that it was not lawfully drawn, summoned, or selected, and may challenge an individual juror on the ground that the juror is not legally qualified. All challenges must be made — and be ruled on by the court — before the grand jurors take their oaths.[54] **(2)** ***Motion to Dismiss an Indictment.*** A party may move to dismiss the indictment based on an objection to the grand jury or on an individual juror's lack of legal qualification, unless the court has previously ruled on the same objection under Rule 6(b)(1). The motion to dismiss is governed by 28 U.S.C. § 1867(e). The court cannot dismiss the indictment on the ground that a grand juror was not legally qualified if the record shows that at least 12 qualified jurors concurred in the indictment.
(c) Foreperson and Deputy Foreperson. The court shall appoint one of the jurors to be foreperson and another to be deputy foreperson. The foreperson shall have power to administer oaths and affirmations and shall sign all indictments. The foreperson or another juror designated by the foreperson shall keep record of the number of jurors concurring in the finding of every indictment and shall file the record with the clerk of the court, but the record shall not be made public except on order of the court. During the absence of the foreperson, the deputy foreperson shall act as foreperson.	**(c) Foreperson and Deputy Foreperson.** The court will appoint one juror as the foreperson and another as the deputy foreperson. In the foreperson's absence, the deputy foreperson will act as the foreperson. The foreperson may administer oaths and affirmations and will sign all indictments. The foreperson — or another juror designated by the foreperson — will record the number of jurors concurring in every indictment and will file the record with the district clerk, but the record may not be made public unless the court so orders.

[54] Professor Saltzburg agrees with the SSC that this sentence makes no sense in modern practice. The first sentence of (b)(1) makes sense, but not the second — because a defendant would not know the composition of a grand jury or the identities of all grand jurors before they take their oaths and hear the defendant's case. The Advisory Committee might consider a substantive change, so that the court could consider these challenges anytime before indictment.

(d) Who May Be Present. Attorneys for the government, the witness under examination,[55] interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.. *(1) While Grand Jury is in Session[56]. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session.* *(2) During Deliberations and Voting. No person other than the jurors, and any interpreter necessary to assist a juror who is hearing or speech impaired, may be present while the grand jury is deliberating or voting.*	**(d) Who May Be Present.** **(1)** ***While the Grand Jury Is in Session.*** The following persons may be present while the grand jury is in session: government attorneys, the witness being questioned, interpreters when needed, and a stenographer or operator of a recording device. **(2)** ***During Deliberations and Voting.*** No person other than the jurors, and any interpreter needed to assist a hearing-impaired or speech-impaired juror,[57] may be present while the grand jury is deliberating or voting.

[55] Professor Saltzburg approved the change from *witness under examination* to *witness being questioned.*

[56] Amendments take effect on December 1, 1999, subject to Supreme Court approval and Congressional acquiescence.

[57] This new language is not yet a part of Rule 5(d). It has been approved by the Judicial Conference and will be acted on by the Supreme Court before May 1, 1999.

(e) Recording and Disclosure of Proceedings.	**(e) Recording and Disclosing Proceedings.**
(1) Recording of Proceedings. All proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device. An unintentional failure of any recording to reproduce all or any portion of a proceeding shall not affect the validity of the prosecution. The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government unless otherwise ordered by the court in a particular case.[58]	**(1)** ***Recording the Proceedings.*** Except while the grand jury is deliberating or voting, all proceedings must be recorded stenographically or by a suitable recording device. The validity of a prosecution is not affected by the unintentional failure to make a recording. Unless the court orders otherwise, a government attorney will retain control[59] of the recording, the reporter's notes, and any transcript prepared from those notes.
(2) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.	**(2)** ***General Rule of Secrecy.*** Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury: (A) a grand juror; (B) an interpreter; (C) a stenographer; (D) an operator of a recording device; (E) a person who transcribes recorded testimony; (F) a government attorney; or (G) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii).

[58] Professor Saltzburg approved deleting *in a particular case* because it adds nothing.

[59] Since *control* defines the lesser standard, we should go with that word alone — not *custody or control*. Professor Saltzburg approved this change.

(3) Exceptions. (A) Disclosure otherwise prohibited by this rule[60] of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to— (i) an attorney for the government for use in the performance of such attorney's duty; and (ii) such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law. (B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made, and shall certify that the attorney has advised such persons of their obligation of secrecy under this rule.	**(3) *Exceptions.*** (A) Disclosure of a grand-jury matter — other than the grand jury's deliberations or any grand juror's vote — may be made to: (i) a government attorney for use in performing that attorney's duty; or (ii) any government personnel — including those of a state or state subdivision or of an Indian tribe — that a government attorney considers necessary to assist in performing that attorney's duty to enforce federal criminal law. (B) A person to whom information is disclosed under Rule 6(e)(3)(A)(ii) may use that information only to assist a government attorney in performing that attorney's duty to enforce federal criminal law. A government attorney must promptly provide the district court that impaneled the grand jury with the names of all persons to whom a disclosure has been made, and must certify that the attorney has advised those persons of their obligation of secrecy under this rule.

[60] Professor Saltzburg is now researching whether *otherwise prohibited by this rule* can be omitted as the SSC suggests.

(C) Disclosure otherwise prohibited by this rule[61] of matters occurring before the grand jury may also be made— (i) when so directed by a court preliminarily to or in connection with a judicial proceeding; (ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury; (iii) when the disclosure is made by an attorney for the government to another federal grand jury; or (iv) when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of state criminal law, to an appropriate official of a state or subdivision of a state for the purpose of enforcing such law. If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.	(C) A government attorney may disclose any grand-jury matter to another federal grand jury. (D) The court may authorize disclosure — at a time, in a manner, and subject to any other conditions that it directs — of a grand-jury matter: (i) preliminarily to or in connection with a judicial proceeding; (ii) at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury; or (iii) at the request of the government if it shows that the matter may disclose a violation of state or Indian tribal criminal law, as long as the disclosure is to an appropriate state or state-subdivision official for the purpose of enforcing that law. (iv) **(Consider adding new subparagraph to handle communications between government attorney and JAG officer.)**[62]
(D) A petition for disclosure pursuant to subdivision (e)(3)(C)(i) shall be filed in the district where the grand jury convened. Unless the hearing is ex parte, which it may be when the petitioner is the government, the petitioner shall serve written notice of the petition upon (i) the attorney for the government, (ii) the parties to the judicial proceeding if disclosure is sought in connection with such a proceeding, and (iii) such other persons as the court may direct. The court shall afford those persons a reasonable opportunity to appear and be heard.	(E) A petition to disclose a grand jury matter under Rule 6(e)(3)(D)(i) must be filed in the district where the grand jury convened. Unless the hearing is ex parte — as it may be when the government is the petitioner — the petitioner must serve the petition on, and the court must afford a reasonable opportunity to appear and be heard to: (i) the government's attorney; (ii) the parties to the judicial proceeding; and (iii) any other person as the court may direct.

[61] See note 64.

[62] Professor David Schlueter addresses this issue in his March 28, 1999, memorandum.

(E) If the judicial proceeding giving rise to the petition is in a federal district court in another district, the court shall transfer the matter to that court unless it can reasonably obtain sufficient knowledge of the proceeding to determine whether disclosure is proper. The court shall order transmitted to the court to which the matter is transferred the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand jury secrecy. The court to which the matter is transferred shall afford the aforementioned persons a reasonable opportunity to appear and be heard.	(F) If the petition to disclose arises out of a proceeding pending in another district court, the petitioned court must transfer the petition to the other court unless the petitioned court can reasonably determine whether disclosure is proper.[63] The transferring court must send to the transferee court the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand-jury secrecy. The transferee court must afford those persons identified in Rule 6(e)(3)(E) a reasonable opportunity to appear and be heard.
(4) Sealed Indictments. The federal magistrate judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons. **(5) Closed Hearing.** Subject to any right to an open hearing in contempt proceedings, the court shall order a hearing on matters affecting a grand jury proceeding to be closed to the extent necessary to prevent disclosure of matters occurring before a grand jury. **(6) Sealed Records.** Records, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury.	**(4)** ***Sealed Indictment.*** The federal judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. The clerk must then seal the indictment, and no person may disclose the indictment's existence except as necessary to issue or execute a warrant or summons. **(5)** ***Closed Hearing.*** Subject to any right to an open hearing in a contempt proceeding, the court must close any hearing to the extent necessary to prevent disclosure of a matter occurring before a grand jury.[64] **(6)** ***Sealed Records.*** Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as is necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury.

[63] This is Professor Saltzburg's recommended wording. The SSC agrees.

[64] Professor Saltzburg is now researching whether *a matter occurring before a grand jury* can be substituted for *matters affecting a grand jury proceeding*, as the SSC suggests.

(f) Finding and Return of Indictment. An indictment may be found only upon the concurrence of 12 or more jurors. The indictment shall be returned by the grand jury to a federal magistrate judge in open court. If a complaint or information is pending against the defendant and 12 persons do not concur in finding an indictment, the foreperson shall so report to a federal magistrate judge in writing forthwith.	**(f) Indictment and Return.** A grand jury may indict only if at least 12 jurors concur. The grand jury — or its foreperson or deputy foreperson [66]— must return the indictment to a federal judge in open court. If a complaint or information is pending against the defendant and 12 jurors do not concur in the indictment, the foreperson must promptly and in writing report the lack of concurrence to the federal judge.
(f) Finding and Return of Indictment.[65] *A grand jury may indict only upon the concurrence of 12 or more jurors. The indictment shall be returned by the grand jury, or through the foreperson or deputy foreperson on its behalf, to a federal magistrate judge in open court. If a complaint or information is pending against the defendant and 12 persons do not vote to indict, the foreperson shall so report to a federal magistrate judge in writing as soon as possible.*	**(g) Discharge.** A grand jury must serve until the court discharges it, but it may serve more than 18 months only if the court, having determined that an extension is in the public interest, extends the grand jury's service for no more than 6 months.
	(h) Excuse. At any time, for good cause, the court may excuse a juror either temporarily or permanently, and if permanently, the court may impanel an alternate juror in place of the excused juror.
(g) Discharge and Excuse. A grand jury shall serve until discharged by the court, but no grand jury may serve more than 18 months unless the court extends the service of the grand jury for a period of six months or less upon a determination that such extension is in the public interest. At any time for cause shown the court may excuse a juror either temporarily or permanently, and in the latter event the court may impanel another person in place of the juror excused.	**(i) Indian Tribe.** Indian tribe means an Indian tribe recognized by the Secretary of the Interior on a list published in the Federal Register under section 104 of Public Law 103-454 (25 U.S.C. § 479a-1).[67]
	(j) Contempt. A knowing violation of Rule 6 may be punished as a contempt of court.

[65]Amendments to take effect on December 1, 1999, subject to Supreme Court approval and Congressional acquiescence.

[66] This new language is not yet a part of the rule. It has been approved by the Judicial Conference and will be acted on by the Supreme Court before May 1, 1999

[67] Subcommittee "A" is considering whether the definition is needed only "for purposes of this rule" or whether it may apply to other rules.

Rule 7. The Indictment and the Information	Rule 7. The Indictment and the Information
(a) Use of Indictment or Information. An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.[68]	**(a) When Used.** (1) ***Felony.*** An offense must be prosecuted by an indictment if it is punishable: (A) by death; or (B) by imprisonment for more than one year or at hard labor — unless the defendant waives indictment. (2) ***Misdemeanor.*** An offense punishable by imprisonment for one year or less — and not at hard labor—may be prosecuted by indictment or information in accordance with Rule 58(b)(1).
(b) Waiver of Indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor may be prosecuted by information if the defendant, after having been advised of the nature of the charge and of the rights of the defendant, waives in open court prosecution by indictment.	**(b) Waiving Indictment.** An offense punishable by imprisonment for more than one year or at hard labor may be prosecuted by information if the defendant — in open court and after being advised of the nature of the charge and of the defendant's rights — waives prosecution by indictment.

[68] This sentence (in the left column) appears to refer only to misdemeanor informations. It's not very clear. Professor Saltzburg agreed that the right column is a considerable improvement — and a nonsubstantive one.

(c) Nature and Contents. **(1) In General.** The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement.[69] Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. **(2) Criminal Forfeiture.** No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information shall allege the extent of the interest or property subject to forfeiture. *(2)* ***Criminal Forfeiture.***[70] *No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information provides notice that the defendant has an interest in property that is subject to forfeiture in accordance with the applicable statute.* **(3) Harmless Error.** Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to the defendant's prejudice.	**(c) Nature and Contents.** (1) ***In General.*** The indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged and must be signed by a government attorney. It need not contain a formal introduction or conclusion. A count may incorporate by reference an allegation made in another count. A count may allege that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. For each count, the indictment or information must give the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated. (2) ***Harmless Error.*** Unless the defendant was misled and thereby prejudiced, neither an error in a citation nor a citation's omission is a ground to dismiss the indictment or information or to reverse a conviction. (3) ***Criminal Forfeiture.*** The court may enter a judgment of forfeiture in a criminal proceeding only if the indictment or information alleges the extent of the property interest[71] subject to forfeiture.[72]
(d) Surplusage. The court on motion of the defendant may strike surplusage from the indictment or information.	**(d) Surplusage.** On the defendant's motion, the court may strike surplusage from the indictment or information.

[69] Professor Saltzburg says he would delete this entire sentence. The SSC believes the condensed, revised version would be helpful.

[70] Approved by the Judicial Conference in March 1999 to take effect on December 1, 2000.

[71] Professor Saltzburg agreed that this wording — *property interest* — is much preferable to *property or interest*. He also agreed with the SSC that the only forfeitable interests are property interests

[72] The new forfeiture rule (32.2) would abrogate stylized Rule 7(c)(3).

(e) Amendment of Information. The court may permit an information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.	**(e) Amending an Information.** Unless an additional or different offense is charged or a substantial right of the defendant is prejudiced, the court may permit an information to be amended at any time before verdict or finding.
(f) Bill of Particulars. The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within ten days after arraignment or at such later time as the court may permit. A bill of particulars may be amended at any time subject to such conditions as justice requires.	**(f) Bill of Particulars.** The court may direct the government to file a bill of particulars. The defendant may move for a bill of particulars before or within 10 days after arraignment or at a later time if the court permits. The government may amend a bill of particulars subject to such conditions as justice requires.

Rule 8. Joinder of Offenses and of Defendants	Rule 8. Joinder of Offenses or Defendants
(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.	**(a) Joinder of Offenses.** The indictment or information may charge a defendant in separate counts with two or more offenses if the offenses charged — whether felonies or misdemeanors or both — are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan.
(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.	**(b) Joinder of Defendants.** The indictment or information may charge two or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions constituting an offense or offenses. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count.

Rule 9. Warrant or Summons Upon Indictment or Information	Rule 9. Arrest Warrant or Summons on an Indictment or Information
(a) Issuance. Upon the request of the attorney for government the court shall issue a warrant for each defendant named in an information supported by a showing of probable cause under oath as is required by Rule 4(a), or in an indictment. Upon the request of the attorney for the government a summons instead of a warrant shall issue. If no request is made, the court may issue either a warrant or a summons in its discretion. More than one warrant or summons may issue for the same defendant. The clerk shall deliver the warrant or summons to the marshal or other person authorized by law to execute or serve it. If a defendant fails to appear in response to the summons, a warrant shall issue. When a defendant arrested with a warrant or given a summons appears initially before a magistrate judge, the magistrate judge shall proceed in accordance with the applicable subdivisions of Rule 5.	**(a) Issuance.** At the government attorney's request, the court must issue a warrant for each defendant named in an indictment, or in an information supported by a probable cause showing under Rule 4(a). If requested, the court must issue a summons instead of a warrant. If no request is made, the court may issue either a warrant or a summons. More than one warrant or summons may issue for the same defendant. The clerk must deliver the warrant or summons to the marshal or other person authorized to execute or serve it. If a defendant fails to appear in response to a summons, the court may issue a warrant. When a defendant is arrested or summoned and first appears before a judge, the judge must proceed under Rule 5.[73]
(b) Form. **(1) Warrant.** The form of the warrant shall be as provided in Rule 4(c)(1) except that it shall be signed by the clerk, it shall describe the offense charged in the indictment or information and it shall command that the defendant be arrested and brought before the nearest available magistrate judge. The amount of bail may be fixed by the court and endorsed on the warrant. **(2) Summons.** The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a magistrate judge at a stated time and place.	**(b) Form.** **(1)** ***Warrant.*** The warrant must conform to Rule 4(c)(1) except that it must be signed by the clerk and must describe the offense charged in the indictment or information. The court may fix[74] the amount of bail and endorse it on the warrant. **(2)** ***Summons.*** The summons must be in the same form as the warrant except that it must summon the defendant to appear before a federal judge at a stated time and place.

[73] Throughout this subdivision, the SSC has followed Professor Saltzburg's suggestions on words of authority (*may, will, must*). It's tricky. But the revisions show how very slippery *shall* was in the original.

[74] Subcommittee "A" is considering whether the sentence should be eliminated entirely or the words "may recommend" be substituted for the words "may fix."

(c) Execution or Service; and Return. **(1) Execution or Service.** The warrant shall be executed or the summons served as provided in Rule 4(d)(1), (2) and (3). A summons to a corporation shall be served by delivering a copy to an officer or to a managing or general agent or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the corporation's last known address within the district or at its principal place of business elsewhere in the United States. The officer executing the warrant shall bring the arrested person without unnecessary delay before the nearest available federal magistrate judge or, in the event that a federal magistrate judge is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041.	**(c) Execution or Service; Return.** **(1)** ***Execution or Service.*** (A) The warrant must be executed or the summons served as provided in Rule 4(d)(1), (2), and (3). (B) The officer executing the warrant must proceed in accordance with Rule 5(a)(1). (C) A summons to a corporation is served by delivering a copy to an officer or to a managing or general agent or to another agent appointed or legally authorized to receive service of process. If the agent is one statutorily authorized to receive service and if the statute so requires, a copy must also be mailed to the corporation's last known address within the district or to its principal place of business elsewhere in the United States.
(2) Return. The officer executing a warrant shall[75] make return thereof to the magistrate judge or other officer before whom the defendant is brought. At the request of the attorney for the government any unexecuted warrant shall[76] be returned and cancelled. On or before the return day the person to whom a summons was delivered for service shall[77] make return thereof. At the request of the attorney for the government made at any time while the indictment or information is pending, a warrant returned unexecuted and not cancelled or a summons returned unserved or a duplicate thereof may be delivered by the clerk to the marshal or other authorized person for execution or service.	**(2)** ***Return.*** A warrant or summons will be returned in accordance with Rule 4(d)(4).
[(d) Remand to United States Magistrate for Trial of Minor Offenses] (Abrogated Apr. 28, 1982, eff. Aug. 1, 1982).	

[75] Professor Saltzburg says this means *must*

[76] Ditto.

[77] Ditto.

RESEARCH QUESTIONS POSED BY JUDGE PARKER FOR PROFESSOR SALTZBURG'S CONSIDERATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO
POST OFFICE BOX 566
ALBUQUERQUE, NEW MEXICO 87103

JAMES A. PARKER
Judge

RECEIVED
9/14/98

September 11, 1998

John K. Rabiej, Esq.
Chief, Rules Committee Support Office
Administrative Office of the United States Courts
Washington, DC 20544

Re: ***Research - Criminal Rules 1 through 17.1 (Titles I through IV)***

Dear John:

Enclosed is a list of items to be researched in regard to language in Rules 1 through 17.1 (Titles I through IV) of the Criminal Rules.

In many instances, there is a question whether certain language can be substituted for the existing language of a rule or whether existing language can be deleted or changed . In these instances, research must be done to determine whether the existing language, that is proposed to be changed, has been interpreted by a court and whether it appears in a statute or regulation.

Also enclosed is a May 14, 1998 letter to me from Judge Wilson setting forth the results of his research of certain language appearing in Criminal Rules 1 through 9. Judge Wilson's research is most valuable and a copy of his May 14, 1998 letter should be provided to Professor Saltzburg. Many of the subjects researched by Judge Wilson also appear in the enclosed list of language in Rules 1 through 17.1 that should be researched.

Sincerely,

JAMES A. PARKER

JAP:dm

cc: Members, Style Subcommittee

RESEARCH SUBJECTS FOR PROFESSOR STEVEN SALTZBURG

Rule 1

1. Can Rules 54 and 60 be incorporated into a new Rule 1?

2. What is the meaning of the language "to hold security of the peace" that appears in Rule 1(b)(3) relating to peace bonds? This language was not lifted, verbatim, from 50 U.S.C. §23 which is referenced in Rule 1(b)(3).

3. Could the reference in Rule 1(b)(5) to "18 U.S.C. Chapter 403 – Juvenile Delinquency" be changed to "The Federal Juvenile Delinquency Act, 18 U.S.C. §§5031-5042"? 52 Stat. 764, Chap. 486, Sec. 9 (approved June 16, 1938) states: "This Act may be cited as 'The Federal Juvenile Delinquency Act.'" However, an entry found at U.S.C.A., Tables, Vol. I, p. 385 indicates that Section 9 of Chapter 486 of the Laws of June 16, 1938, 52 Stat. 764 was "eliminated."

Rule 3

1. Does this mean the complainant must appear in person before the Magistrate Judge or only that a sworn complaint must be submitted to a Magistrate Judge?

Rule 4(a)

1. Can "an arrest warrant" be substituted for "a warrant for the arrest of the defendant"?

2. Is the language "a warrant for the arrest of the defendant shall issue" mandatory ("must") or predictive("will")?

3. Can "by law" be deleted from "officer authorized by law"? That is, does "authorized" imply "authorized by law"?

4. Can "government's request" be substituted for "the request of the attorney for the government"?

5. Is the language "upon the request of the attorney for the government a summons instead of a warrant shall issue" mandatory ("must") or predictive ("will")?

6. Can "respond to a summons" be substituted for "appear in response to the summons"?

7. Is the language "shall issue" in the last sentence of Rule 4(a) mandatory ("must") or predictive ("will")?

Rule 4(b)

1. There is a proposal to change Rule 4(b) to read "Hearsay evidence may be used to establish probable cause." Have there been judicial interpretations of Rule 4(b), as presently worded, that would make this change problematic?

Rule 4(c)

1. Is the word "shall" as used four times in Rule 4(c)(1) and two times in Rule 4(c)(2) mandatory ("must") or predictive ("will")?

Rule 4(d)(1)

1. Can "by law" by deleted from "officer authorized by law"?

Rule 4(d)(3)

1. Can the wording "dwelling house or usual place of abode" that appears in the last sentence be changed to "residence"?

Rule 4(d)(4)

1. Can the words "shall make return thereof" that appear in the first sentence be changed to "must return it"?

2. Can the words "shall make return thereof" that appear in the third sentence be changed to "must be returned"?

3. Can the words "before whom the summons is returnable" that appear in the third sentence be changed to "the appropriate magistrate judge"?

4. Can the words "shall make return thereof" that appear in the third sentence be changed to "must be brought back"? This would avoid using "returned" in a sense that is different from the sense of the word "return" that appears elsewhere in Rule 4(d)(4).

5. Does the word "duplicate" that appears in the last sentence modify only "summons" or also "warrant"?

6. Does the last sentence of Rule 4(d)(4) mean that the marshal or other person must try again to make execution or service?

Rule 5(a)

1. Can the words "issued upon a complaint" be deleted as superfluous because a

warrant seems to issue only upon a complaint?

2. Can the words "without unnecessary delay" that appear in the first sentence be changed to "promptly"?

3. Can the last sentence of Rule 5(a) be deleted because it states the obvious? Has this sentence ever been interpreted by a court?

Rule 5(b)

1. Is a "misdemeanor" a "petty offense"? Has any statute, regulation or judicial opinion defined "misdemeanor" as a type of "petty offense"?

Rule 5(c)

1. Can the word "counsel" be changed to "attorney"? Both "counsel" and "attorney" are used throughout the Criminal Rules. There is no apparent consistency in the way either word is used. It would be preferable to use either "attorney" or "counsel" and not both, if that can be done without creating problems. "Attorney" appears to be more specific. "Counsel" could refer to a non-attorney who counsels a defendant. In Miranda v. Arizona, 384 U.S. 436, 444-445 (1966), the United States Supreme Court used the word "attorney" in discussing the rights of which a defendant under custodial interrogation must be advised.

2. Can the words "be called upon" that appear in the first sentence of Rule 5(c) be changed to "be asked"?

3. Can the words "forthwith hold" that appear in the seventh sentence of Rule 5(c) be changed to "promptly require"?

Rule 5.1

1. Can Rule 5.1 regarding preliminary examination be made a part of Rule 5(c)? Rule 5(c) contains various references to a preliminary examination. Having a separate Rule 5.1 entitled "Preliminary Examination" may lead a reader to believe, incorrectly, that everything related to a "preliminary examination" is set forth in Rule 5.1.

Rule 5.1(c)

1. Can the words "all papers in the proceeding" that appear in the first sentence be changed to "the file"? It would seem that "all papers in the proceeding" constitute "the file."

2. Can the words "or cause to be made" that appear in the second sentence be deleted?

Rule 5.1(c)(1)

1. Have the words "further hearing" that appear in the first sentence of Rule 5.1(c)(1) been interpreted by a court? Would "later hearing" or "another hearing" be more appropriate? Does "further hearing" refer only to another hearing relating to the preliminary examination (the title of Rule 5.1) or does it refer to any type of additional or other hearing?

Rule 6(a)(2)

1. What is the meaning of alternate jurors being "designated" (first sentence) and alternate jurors being "drawn" (third sentence)? Is the word "drawn" synonymous with the word "summoned" that appears in Rule 6(a)(1)?

2. What is the meaning of the first sentence of Rule 6(a)(2)? Does it mean that the court designates the alternate jurors? Or, does it mean that the court may order that someone else (who?) may designate alternate jurors?

Rule 6(a)(1) and (2)

1. Can the word "direct" that appears both in Rule 6(a)(1) and 6(a)(2) be changed to "order"? Rule 6(a)(1) in the first sentence states that "the court shall order" and in the third sentence states that "the court shall direct." In Rule 6(a)(2) the first sentence states that "the court may direct." Is there any substantive difference between "order" and "direct" as those words are used in Rule 6(a)(1) and (2)?

2. The last sentence of Rule 6(a)(2) refers to the "functions, powers, facilities and privileges" of alternate jurors. Has there ever been a judicial interpretation of this language? What are the "powers" and the "facilities" of alternate jurors?

Rule 6(b)(1)

1. The first sentence states that a party may "challenge the array of jurors on the ground that the grand jury was not selected, drawn or summoned . . .". Can the words "the array of jurors" be changed to "grand jury"?

2. What is the difference in meaning of "selected" - "drawn" - "summoned"? Have these words as they appear in Rule 6(b)(1) ever been interpreted by a court?

Rule 6(b)(2)

1. Is the reference in the second sentence to 28 U.S.C. §1867(e) accurate? Should the

reference be to §1867 as a whole, without specifying subdivision (e)?

Rule 6(c)

1. Can "foreperson" and "deputy foreperson" be changed to "presiding juror" and "deputy presiding juror," respectively?

Rule 6(d)

1. Can "witness under examination" be changed to "witness being questioned"?

2. Can "for the purpose of taking the evidence" be changed to "to record evidence"?

Rule 6(e)(1)

1. Does the second sentence refer to equipment failure or to an operator's human error or to both?

2. Can "in a particular case" that appears in the last sentence be deleted?

3. Has the language "custody or control" that appears in the last sentence been interpreted by a court?

Rule 6(e)(3)(A)

1. Rule 6(e)(3)(A) states that disclosure of certain matters occurring before a grand jury "may be made" to certain persons. Who is permitted to make these disclosures? Has this been decided by a court?

Rule 6(e)(3)(C)

1. Does Rule 6(e)(3)(C) permit disclosure of grand jury deliberations and the vote of a grand juror under specified conditions? Rule 6(e)(3)(A) permits disclosure of certain information "other than its deliberations and the vote of any grand juror." What is the reason for the content of Rule 6(e)(3)(A) and 6(e)(3)(C) being set forth in separate subparagraphs?

Rule 6(e)(3)(C)(ii)

1. Can "for a motion to dismiss" be changed to "to dismiss"?

Rule 6(e)(3)(E)

1. Can "matter" that appears in the first sentence be changed to "petition"? Or, is there more involved in the transfer than transferring the petition? Has this language ever

been interpreted by a court?

2. Can "reasonably obtain sufficient knowledge of" that appears in the first sentence be changed to "sufficiently understand"?

Rule 6(e)(5)

1. Can "the court shall order a hearing on matters affecting a grand jury proceeding to be closed" be changed to "the court must close a hearing on a matter affecting a grand jury proceeding"?

Rule 7(a) and (b)

1. Can the words "or at hard labor" that appear in Rule 7(a) and (b) be deleted? Has this language ever been interpreted by a court? Does a statute or regulation require its continued inclusion in Rule 7(a) and (b)?

Rule 7(c)(1)

1. Can the words "other matter not necessary to such statement" that appears in the third sentence be changed to "other unnecessary matter"?

Rule 8 (a)

1. Are both "scheme" and "plan" necessary, or can one be omitted?

Rule 8(a) and (b)

1. Can "or transaction" and "or transactions" that appear in Rule 8(a) and (b) be deleted? Or, does "transaction" have a meaning different from "act"?

Rule 9(a)

2. Is the word "shall" as used in the first, second, fifth, sixth and seventh sentences mandatory ("must") or predictive ("will")?

Rule 9(c)(1)

1. Can "without unnecessary delay" that appears in the last sentence be changed to "promptly"?

Rule 9(c)(2)

1. Can "shall make return thereof" that appears in the first sentence be changed to "must return it"?

2. Can the words "shall make return thereof" that appear in the third sentence be changed to "must be brought back"? This would avoid using "return" in a different sense from the sense of the word "return" that appears elsewhere in Rule 9(c)(2).

3. Is the word "shall" as it appears in the second sentence mandatory ("must") or predictive ("will")?

4. Can the words "person to whom a summons was delivered for service" that appear in the third sentence be changed to "person who was to serve a summons"?

5. The last sentence of Rule 9(c)(2) states that an unexecuted warrant or summons on an indictment or an information "may be delivered by the clerk" to the Marshal. The last sentence of Rule 4(d)(4) states that an arrest warrant or summons may be delivered by the "magistrate judge" to the marshal. Is there a reason for this difference? Can only a magistrate judge deliver an arrest warrant and only a clerk deliver a warrant or summons issued on an indictment or information?

6. Do the words "duplicate thereof" that appear in the last sentence of Rule 9(c)(2) modify only "summons" or also "warrant"?

7. Does the last sentence of Rule 9(c)(2) mean that the marshal or other person must try again to make execution or service?

Rule 10

1. Can "calling on" be changed to "asking" and can "called upon" be changed to "asked"?

Rule 11(c)

1. Rule 11(c) has five subparagraphs – (1) through (5) – describing what a judge must tell a defendant before accepting a plea of guilty. Some of these paragraphs include more than one subject that must be discussed with the defendant. In fact, there appear to be twelve different subjects (including a new provision approved by the Standing Committee for transmission to the Judicial Conference relating to waiving right to appeal or collaterally attack a sentence). If it can be done without creating significant problems, Rule 11(c) should have twelve paragraphs, each of which covers a separate subject. Would such renumbering be problematic? This may depend on how many times courts have interpreted the current five paragraphs of Rule 11(c).

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO
333 LOMAS N.E., SUITE 760
ALBUQUERQUE, NEW MEXICO 87102

JAMES A. PARKER
JUDGE

December 3, 1998

To: John Rabiej, Esq.,

Chief, Rules Committee Support Office

Re: Additional Research – Criminal Rules 4(a); 4(d)(4)(C); 7(f); 15(a)(2); 16(d); 17.1; 20(a) and (b)

Dear John:

A review of Bryan Garner's November 1998 stylized redraft of the Criminal Rules has brought to light the need for some additional research by Prof. Saltzburg. Enclosed is a list of these research projects.

If possible, the Style Subcommittee would like to have the report of Prof. Saltzburg's research to discuss at the meeting in Dallas on December 13. However, the Style Subcommittee appreciates that this is very short notice and that Prof. Saltzburg may not be able to complete the research by that time.

Sincerely,

JAMES A. PARKER

JAP:dm

enclosures as indicated

Rule 4(a)

The first sentence states that an arrest warrant "will issue" and the second sentence states that a summons "will issue." Bryan Garner strongly recommends that actors be inserted into these sentences. This raises the questions of who is responsible for issuing the arrest warrant (first sentence) and who is responsible for issuing, on the government attorney's request, the summons (second sentence).

Rule 4(d)(4)(C)

Judge Wilson recommends deleting Rule 4(d)(4)(C) because he believes there is no need for it. Can it be deleted?

Rule 7(f)

Judge Wilson questioned the meaning of the last sentence. He thinks it may mean either:

(1) "The government may [*must*] amend a bill of particulars if justice requires an amendment."

or

(2) "The government may [*must*] amend a bill of particulars if it ought, in fairness, to do so."

What does the last sentence mean?

Rule 15(a)(2)

Can the word "signed" be substituted for the word "subscribed" in the last sentence, or does "subscribed" infer "signed under oath"?

Rule 16(d)

Can a showing of "good cause" be substituted in place of "sufficient showing" in the first sentence as Bryan Garner proposes?

Rule 16(a)(2)

Would omission of the last sentence of the present rule, as Bryan Garner proposes, be a substantive change?

PROFESSOR SALTZBURG'S RESPONSES
TO
RESEARCH QUESTIONS POSED BY JUDGE PARKER

AND

JUDGE WILSON'S RESPONSE
TO
OTHER SPECIFIC QUESTIONS

October 13, 1998

MEMORANDUM

TO: **JOHN RABIEJ**

FOR: **JUDGE PARKER, JUDGE DAVIS**

RE: **STYLE CHANGES**

FROM: **STEVE SALTZBURG**

At your suggestion, I have begun work on answering Judge Parker's questions. It is clear to me at the outset that it will be impossible for anyone to be certain that the changes do not change substance, at least in some jurisdictions, because some of the "shalls" and other words used in the current rules have no one clear meaning. I plan to point out some of this as I go along.

Rule 1

1. Rule 54 and 60 can be incorporated in Rule 1. However, I would recommend leaving Rule 54 (c), the definitions, where they are if the definitions are to be retained. The Garner recommendation is to eliminate the definitions, but I question whether this can be done without adding considerable language to other rules.

2. The language "to hold security of the peace" appears to be intended to refer to the statutory provision relating to wartime detention of aliens. My recommendation is to delete this altogether. The statute, 50 U.S.C. § 23, is a stand-alone statute, and arguably it is inconsistent with Rule 54 (b)(3) as now written which requires adherence to procedures in "these Rules." The statute permits the Executive to create its own procedures. Given the specialized nature of the war provision, I see no reason to leave it in the Criminal Rules.

3. I urge that the style committee consider omitting references to statutes wherever possible. Why not refer in the rules to juvenile delinquency proceedings and not have a statutory reference. This avoids the need to amend the rules each time a statute is added, changed, or renumbered. If reference is to be made, it could be to "The Federal Juvenile Delinquency Act." With all the proposals being discussed about being tougher on juvenile crime, there is every reason to believe that new statutes may be enacted and therefore every reason to avoid specific references wherever possible.

4. Incorporation of 48 U.S.C. § 1801 into Rule 54 (a) is appropriate. But, why not simply say that neither trial by jury not indictment will be required unless by law local law and avoid the need for a statutory citation in the text?

Rule 3

1. There is nothing in Rule 3 that requires that the complainant actually appear. I believe that the intent of the rule is to require that the complaint be sworn. There is no reason why an FBI agent who writes up a warrant and avers the facts in an affidavit cannot also swear out a complaint, even if it is delivered by another agent or an attorney for the government to the Magistrate Judge.

Rule 5 (a)

1. The words "issued upon a complaint" can be deleted as superfluous given that the rule requires a complaint.

2. Whether the word "promptly" can be substituted for "without unnecessary delay" poses an interesting question. The Supreme Court equated the two terms in *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), interpreting its earlier decision in *Gerstein v. Pugh*. McLaughlin is a constitutional decision and does not hold that the criminal rules cannot be more protective. The word "promptly" suggests more flexibility to me than "without unnecessary delay." The Supreme Court has used the two terms as though they were one and the same. Thus, the choice is one of preference and emphasis. Arguably, a change in wording makes a change in emphasis, and that change will be regarded as significant by many observers.

3. The last sentence of 5 (a) can be deleted because it adds nothing to the rule and cannot be interpreted without reference to the rest of 5 (a).

4. You might consider eliminating the reference to 18 USC § 3041 in this section. If you simply changed "before a state or local judicial officer authorized by 18 U.S.C. § 3041" to "any magistrate judge" as long as you leave the definition of magistrate judge as it is.

Rule 5 (b)

1. A petty offense is defined by 18 U.S.C. § 19, which excludes class A misdemeanors and includes infractions. Thus, some misdemeanors are petty offenses but not all are. Both terms appear to be needed.

Rule 5 (c)

1. It would be dangerous to change the word "counsel" to "attorney" given the Supreme Court's Sixth Amendment cases which consistently refer to the right to counsel and the Sixth Amendment itself which uses the word "counsel." It is possible to add a definition of counsel to 54 (c) if the definitions are kept. *Miranda*, as interpreted by the Supreme Court, is a Fifth Amendment case, and the warnings are meant to protect the privilege against self-incrimination, not the right to counsel.

2. There is no reason why "be called upon" cannot be changed to "be asked."

3. The language "forthwith hold" can be changed to "promptly require."

Rule 5.1

1 Rule 5.1 regarding preliminary examination can be made a part of Rule 5(c). Combining the two rules makes good sense.

Rule 5.1(c)

1. The words "all papers in the proceeding" that appear in the first sentence can be changed to "the file." The redraft is somewhat confusing, as is the original rule, because I think that the Federal Magistrate Judge makes the record before the proceeding ends. It might even be better to change the rule to read: "The Federal Magistrate Judge must provide for a recording of the proceeding, include the recording and the probable cause determination as part of the file, and promptly submit the file to the district court clerk after the preliminary hearing ends."

2. The words "or cause to be made" may be deleted especially if language such as I suggest is used. The problem with the redraft is that it appears to cause the Federal Magistrate Judge to be the court reporter. My change fixes this.

Rule 5(c)(1)

1. Although the words "further hearing" that appear in the first sentence of Rule 5.1(c)(1) have not been interpreted by a court, it appears that the drafters considered that a defendant might need the preliminary hearing transcript for use in a suppression hearing, which Rule 5.1 (a) anticipates. Thus, I believe that "further hearing" refers not only to another hearing relating to the preliminary examination (the title of Rule 5.1), but to any type of additional or other hearing.

The advisory notes indicate that the first sentence of this rule was meant to "eliminate delay and expense occasioned by preparation of transcripts where listening to the tape recording would be sufficient." The concern of the drafters would exist whenever an application was made, regardless of the nature of the hearing.

My suggestion is to use the words "subsequent proceedings" which is broad enough to cover any type of hearing, trial, or sentencing. At the moment, the redraft would not seem to permit a defense motion for a defendant who pleaded guilty and wanted the preliminary hearing recording to prepare for sentencing, unless sentencing is deemed a trial or a hearing as opposed to a proceeding. Why not draft more inclusively?

October 14, 1998

MEMORANDUM

TO: **JOHN RABIEJ**

FOR: **JUDGE PARKER, JUDGE DAVIS**

RE: **STYLE CHANGES**

FROM: **STEVE SALTZBURG**

Rule 4 (a)

1. An "arrest warrant" can be substituted for the current language. The Supreme Court refers to arrest warrants in such cases as *Payton v. New York*, 445 U.S. 573 (1980).

2. The choice of whether a warrant "must" or "will" issue is difficult. In 1971, then-Judge Marvin E. Frankel proposed a change that would require the prosecution to show why a summons should not be issued instead of a warrant, and the Supreme Court accepted the proposal only to have it shot down by the Congress. Thus, the "shall" in the rule is intended to assure that the magistrate judge is not the determiner of whether a warrant or summons is to be used. What is less clear, however, is whether anyone intended to say that the judge must issue a warrant to arrest when there is probable cause that an offense has been committed but the judge believes that the underlying statute is invalid. On balance, I think that the use of the word "will" is preferable because it recognizes that no warrant can issue if the judge finds a constitutional defect in the application.

3. "By law" can be deleted as long as "authorized" is retained. The concept of authorization implies by law. *Wright & Miller* recommend deletion of the words "by law."

4. Changing "the request of the attorney for the government" to "government's request" changes the substance of the rule. It would permit a judge to issue a summons rather than an arrest warrant when an FBI agent filled out a complaint and asked for a summons. At the moment, only the prosecutor can make the decision to forego an arrest warrant. The words "attorney for the government" are words of art, as Federal Rule of Evidence 410 reminds us.

5. The word "will" should be used with respect to a summons issuing if the word "will" is used for arrest warrants, as discussed in 2 above. Again, this word recognizes that there may be constitutional limitations that the judge will respond to.

6. Changing "appear in response" to a summons to "respond" may change meaning. Suppose that a summoned person calls the judge to say that "I'm not coming." That would be a response, but one that would surely cause a warrant to issue.

7. If a person fails to appear, the provision should be that a warrant "may" issue. Otherwise, a summoned person who is victim of a snowstorm and cannot physically appear automatically will be subject to an arrest warrant even if the judge believes that a valid reason for nonappearance likely exists.

Rule 4 (b)

1. I would abolish Rule 4 (b). The rules of evidence do not apply to warrant proceedings. This is established in Federal Rule of Evidence 1101 (d). Thus, not only do hearsay rules not apply, but authentication and best evidence rules do not apply. There is no need for the rule. If the rule is to be maintained, then it is clear that hearsay evidence may be used There are not many cases because of Federal Rule of Evidence 1101. The Supreme Court has made clear that hearsay is sufficient to support warrant applications. *Cf. Spinelli v. United States*, 393 U.S. 410 (1969); *Illinois v. Gates*, 462 U.S. 213 (1983).

Rule 4 (c)

1. The four "shalls" require "must" as a substitution, since they set forth the requirements for a valid warrant as many cases indicate.

Rule 4(d)(1)

1. The word "authorized" ought to be sufficient.

October 16, 1998

MEMORANDUM

TO: **JOHN RABIEJ**

FOR: **JUDGE PARKER, JUDGE DAVIS**

RE: **STYLE CHANGES**

FROM: **STEVE SALTZBURG**

Rule 4(d)(3)

1. It is attractive to get rid of the words "dwelling house or usual place of abode." There is little law on the subject. Yet, the change to "residence" may be too narrow. A usual place of abode would or could include a place where the defendant "hangs out" or spends most of his time. It would be better to change the words to "residence or other place where the defendant usually may be found."

Rule 4(d)(4)

1. The change from "shall make return thereof" to "must return it" is okay.

2. The change from "shall make return thereof" to "must be returned" is also okay, but it would be possible to substitute "must be brought back" as suggested in 4, below.

3. I have previously suggested that you might consider eliminating the reference to 18 USC § 3041 in Rule 5. I suggested that you simply could change "before a state or local judicial officer authorized by 18 U.S.C. § 3041" to "any magistrate judge" as long as you leave the definition of magistrate judge as it is in Rule 54. If you made this change, you would not need to have the words "or other authorized person" in proposed Rule 4(d)(4)(A). If you made my change, you could simply say "a magistrate judge" in proposed subdivision (A). It seems to me that the last sentence of (A) must say returned to the issuing magistrate judge or the meaning is changed. As for the use of "appropriate magistrate judge" in proposed (B), this may cause confusion. Why not say "a designated magistrate judge."

4. The change from "shall make return thereof" to "must be returned" is also okay, but it would be possible to substitute "must be brought back" as discussed in 2, above.

5. The word "duplicate" appears to be restricted to a summons, perhaps because the Rule assumes that an officer may have a duplicate as well as an original for mailing purposes.

6. The last sentence of this Rule seems to say that the magistrate judge may deliver the warrant or summons to the marshal or other person for execution, which means that the judge is

directing the execution to take place. The change might be made to say "to the marshal or other authorized person who must try to execute or serve it." This assumes that the warrant is a judicial command to the marshal or other person.

Rule 7a) and (b)

1. The term "or at hard labor" probably ought not to be eliminated. The Supreme Court has defined "infamous crime" as including one at hard labor. Several states have defined "boot camps" as hard labor even for misdemeanants. If it is possible that a misdemeanor defendant would be placed in a boot camp at any time, then the omission of the language would be substantive and might violate the Fifth Amendment.

Rule 7 (c)(1)

1. The change from "other matter not necessary to such statement" to "other unnecessary matter" is nonsubstantive. But, why not delete this sentence altogether? It does not preclude an introduction or unnecessary matter, nor does it require it.

Rule 8(a)

1. Common scheme and plan may be redundant. But, the extra two words do little harm, and omitting one may suggest an intent to be more restrictive, which is not the intent.

Rule 8(a) and (b)

1. I think that the word "transaction" is distinct from the word "act." Suppose that one defendant is charged with offering to sell narcotics and another is charged with offering to buy the same. This may be one transaction but two acts. The words "two or more" could be deleted without changing the meaning of the Rule.

Rule 9 (a)

1. For reasons previously explained in connection with Rule 4(a), I believe that the following make sense: "may issue a warrant," "a warrant must issue," "clerk will," "warrant may issue," and "judge must." The "clerk will" language prevents anyone from challenging an action if the clerk delays performing it. The "judge must" language mandates that the magistrate judge will follow Rule 5.

Rule 9 (c)(1)

1. Whether the word "promptly" can be substituted for "without unnecessary delay" poses an interesting question. As I noted in connection with Rule 5, the Supreme Court equated the two terms in *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), interpreting its earlier decision in *Gerstein v. Pugh*. *McLaughlin* is a constitutional decision and does not hold that the criminal rules cannot be more protective. Moreover, the case does not apply where an arrest is

pursuant to a warrant. The word "promptly" suggests more flexibility to me than "without unnecessary delay." The Supreme Court has used the two terms as though they were one and the same. Thus, the choice is one of preference and emphasis. Arguably, a change in wording makes a change in emphasis, and that change will be regarded as significant by many observors. Again, I urge consideration of deleting the reference to 18 U.S.C. 3041 provided that the definitional section in Rule 54 (c) is retained.

Rule 9 (c)(2)

1. The change from "shall make return thereof" to "must return it" is okay.

2. The change from "shall make return thereof" to "must be returned" is also okay, but it would be possible to substitute "must be brought back" as suggested in connection with Rule 4(d)(4).

3. At the request of the government, an unexecuted warrant must be returned.

4. The change "person to whom a summons was delivered for service" could be changed to "the person who was to serve a summons" but the change might be confusing in that it appears to suggest that it applies when someone who was to serve a summons no longer is expected to do so.

5. The difference between Rules 4(d)(4) and 9(c)(2) is that the indictment or information is filed with and maintained by the clerk. The arrest warrant in a pre-indictment or pre-information setting is delivered to the marshal by the Magistrate Judge without the clerk's participation. Once the information or indictment is filed, the clerk will keep a file containing the charging instrument and the unserved warrant or summons. Thus, there is a rhyme and reason to the distinction.

6. The word "duplicate" appears to be restricted to a summons, perhaps because the Rule assumes that an officer may have a duplicate as well as an original for mailing purposes.

7. The last sentence of this Rule seems to say that the magistrate judge may deliver the warrant or summons to the marshal or other person for execution, which means that the judge is directing the execution to take place. The change might be made to say "to the marshal or other authorized person who must try to execute or serve it." This assumes that the warrant is a judicial command to the marshal or other person.

Rule 10

1. "Called upon" can be changed to "asked."

October 16, 1998

MEMORANDUM

TO: **JOHN RABIEJ**

FOR: **JUDGE PARKER, JUDGE DAVIS**

RE: **STYLE CHANGES**

FROM: **STEVE SALTZBURG**

Rule 6 (a)(2)

1. The federal statute on jurors, 28 U.S.C. §§ 1864 & 1866, talks about drawing jurors and summoning them. Rule 6 (a) uses the term summoning to mean asking jurors whose names have been drawn to appear for service. The rule uses the term designated to mean that the court has selected a juror to be a regular or alternate. So, a juror who is number 24 might be designated as first alternate. This subdivision would read better if the third sentence came first and read: "Alternative jurors will be drawn and summoned in the same manner . . ." Then, I would follow with the original first two sentences, and end with the final sentence.

2. The court designates the alternate jurors.

Rule 6 (a)(1) and (2)

1. There is no substantive difference between order and direct. It makes sense to use one term consistently.

2. There is nothing in the law to amplify the last sentence of (2), but I would change the wording at the end to read "the same functions, duties, powers and privileges." This would add the word duties and delete the word facilities, and change no meaning.

Rule (6)(b)(1)

1. This subdivision attempts to distinguish between challenges to the grand jury as a whole and challenges to individual grand jurors. The word "array" is not used in (a) and is not very helpful. The draft could say that " ... may challenge the manner in which a grand jury was drawn, summoned or selected, or the qualifications of an individual grand juror."

2. As noted above, names are drawn, jurors are summoned, and then they are selected from the group summoned. This may involve two drawings – one for the pool and one among the pool. The word selected responds to the second drawing – among the pool.

Rule (6)(b)(2)

1. As I have noted and will note, I am for deleting cross-references to statutes. Thisis a good example. The cited portion of the statute adds nothing to the procedures. The redraft changes the law, since the rule as currently written permits the government or the defendant to make the motion, and the statute also permits this. This rule could be clarified without changing the meaning by saying that: "A motion to dismiss the indictment based upon the manner in which a grand jury was drawn, summoned or selected, or the qualifications of an individual grand juror may be made unless previously ruled upon by the court." Then we could eliminate the statutory reference and leave the redrafted final sentence.

Rule 6 (c)

1. As we all know, the jury's leader used to be "foreman." We changed the term to gender neutralize it. It is difficult to believe that the words "presiding juror" could be problematic as long as the duties of the person are the same.

Rule 6 (d)

1. Although "witness being questioned" might suggest that the witness must leave if the grand jurors have a discussion with the attorney for the government in the witness's presence, I think that the two meanings are the same, since one could argue that a witness is not under examination unless being questioned. The result should be the same.

2. I would delete the words "to record evidence" and not substitute anything. But, if you must substitute, the words "to record evidence" is probably okay, although we usually talk about recording testimony and not recording exhibits.

Rule 6(e)(1)

1. There is little law on this point, but the rule appears to be saying that machine or human failure may be excused unless it is intentional.

2. The words " in a particular case" add nothing.

3. The words "custody or control" have little law to explain them. On the other hand, it is doubtful that much is needed. This goes hand in hand with the secrecy requirement of Rule 6 (e)(2) and imposes on the government the responsibility for handling material. It is not clear to me whether you want to use "government's attorney" instead of "attorney for the government" which is Rule 54 (c).

Rule 6(e)(3)

1. There is little law on who may make disclosure, but the intent of the rule seems clear. The attorney for the government is responsible under (a) for custody and control and is the one

who discloses with permission of the court. This subdivision could say that "The attorney for the government may disclose grand jury matters . . ." I am concerned that changing the words "attorney for the government" to "government attorney" in this Rule changes meaning. I do not think that any government attorney may receive grand jury material.

Rule 6(e)(3)(C)

1. I believe that any matter including vote of a grand juror can be disclosed under this subdivision if the Court orders disclosure. But, I suggest that the portion that permits an attorney for the government to disclose to another federal grand jury should be moved to (a) so that it is automatic. All three other disclosures require court approval, and the rule should be written to emphasize that "The court may order disclosure of a grand jury matter . . ." The three other paragraphs should follow so that it is clear whether anyone can make a request or only the defendant or the attorney for the government. The three paragraphs indicate that "standing" to make the request is different for each one.

Rule 6(e)(3)(C)(ii)

1. It should be okay to change "motion to dismiss" to "to dismiss."

Rule 6(e)(3)(E)

1. The word "petition" is accurate. This is not the subject of case law. It would be better to say: "The court must transfer a petition to the federal district court in which the proceeding to which the petition relates is pending, unless the court can reasonably obtain sufficient knowledge of the proceeding to determine whether disclosure is proper."

2. I think sufficiently understand would be an adequate substitute and not change the meaning of the rule.

Rule 6(e)(5)

1. The words "the court must close a hearing on a matter affecting a grand jury proceeding" may be substituted for the original language, although both versions are misleading. I don't think the rule really means that a matter has to "affect" a proceeding. A better choice of words might be "on a matter arising in a grand jury proceeding."

December 10, 1998

MEMORANDUM

TO: **JOHN RABIEJ**

FOR: **JUDGE PARKER, JUDGE DAVIS**

RE: **STYLE CHANGES**

FROM: **STEVE SALTZBURG**

Rule 4 (a)

1. The magistrate judge, referred to in Rule 3, issues the warrant. The magistrate judge also issues the summons, but only on request of the attorney for the government.

Rule 4 (d)(4)(C)

1. I would not delete this, because without it a defendant might argue that a new warrant must be issued.

Rule 7 (f)

1. The rule as written and as redrafted is miserable. My belief is that Judge Wilson's second suggestions is close to the mark. The intent seems to be: "The government must amend a bill of particulars upon discovery that it is inaccurate, incomplete or misleading."

Rule 15 (a)(2)

1. I am not certain whether "signed under oath" is the same as subscribed, but I prefer "signed under oath" because it makes clear what is required.

Rule 16 (d)

1. Since "sufficient showing" must mean the same as "good cause," there is not reason why the latter cannot be used. It is a more familiar term to judges and lawyers.

Rule 16 (a)(2)

1 The omission of the Jencks Act reference does not change the meaning of the rule. The Jencks Act is essentially codified in Rule 26.1. Nothing in Rule 16 purports to cover witness statements. That subject is left to Rule 26.2.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
600 W. CAPITOL, ROOM 149
LITTLE ROCK, ARKANSAS 72201
(501) 324-6863
FAX (501) 324-6869

BILL WILSON
JUDGE

May 14, 1998

Re: Research on Stylistic Revision of Criminal Rules 1-9

The Honorable James A. Parker
United States District Court
Post Office Box 566
Albuquerque, NM 87103

Dear Judge Parker:

Enclosed, for your ready reference, is a copy of your letter to me dated November 17, 1997. I will reply to your inquiries seriatim.

R4(b) -------- "wholly or partly"

My research does not reveal that there are any court interpretations of this phrase, ergo, the change to "hearsay evidence may be used to establish probable cause" would not, in my opinion, constitute a substantive change.

R4(d)(3)(A) -- Entire subparagraph

I found no case law on this paragraph, therefore, I think the following language would not constitute a substantive change:

(A) The warrant is executed by the defendant's arrest. If the officer does not have the arrest warrant at the time of the arrest, the officer must inform the defendant of the existence of the warrant and the offenses charged. Upon request by the defendant, the officer must show the warrant to the defendant as soon as possible.

NOTE: I believe the reworded language reflects events as they occur.

R5(a)(3) ---- "given a summons"

I found no case law which would prevent us from deleting this subparagraph.

R5(c)(1) ---- Entire paragraph

I found no case law that would prevent a change here; and I recommend that (c)(1) be changed to read as follows:

> If the offense charged in the complaint is not triable by a federal magistrate judge, the defendant ~~cannot~~ must not be called upon to plea.

R5(c)(5)(A)
and R5.1(a) -- "hold the defendant to answer"

With respect to R5(c)(5)(A) I found no law which would require the retention of the last sentence, but after first recommending deletion of this sentence, I now wonder if the defendant would know what happens if he waives a preliminary hearing if we do not have this sentence. In other words, I am wavering on my recommendation that we remove this sentence. We might substitute "require the defendant to appear" for "hold the defendant to answer."

With respect to R5.1(a) I could find no case law requiring the retention of the second sentence, so I would recommend that we substitute, "hearsay evidence may be used to establish probable cause."

R6(e)(1) ----- "in a particular case"

I found no case law which would prevent us from deleting "in a particular case."

R6(e)(3)(A) -- "otherwise prohibited by this rule"

I found no case law that would prevent us from deleting "otherwise prohibited by this rule." However the word "matter" in this rule has been discussed in several cases. For example, see In the matter of special March 1998 grand jury. Appeal of Almond Pharmacy, Inc., et al. 753 F.2d 575 (7th Cir) 1985; In re grand jury proceeding (Daewoo). 613 F. Supp. 672 (D. Or 1985) there are at least three other

cases discussing this point. I don't see that these cases prohibit the use of a word other than "matter" but since it has been discussed several times I think we run the risk of running afoul of a case, or someone will think we have.

R7(a)(1)(B) -- "at hard labor"

Before we get to "at hard labor" I propose that Rule 6(e)(3)(C) be changed to read as follows:

(C) Disclosure of a grand jury matter may also be made:

(i) at the defendant's request before or in connection with a judicial proceeding;

(ii) at the defendant's request and on a showing that a ground may exist for a motion to dismiss the indictment because of a matter occurring before the grand jury;

(iii) at the government's request and on a showing that the matter may disclose a violation of state criminal law, to an appropriate state or state-subdivision official for the purpose of enforcing that law; or

(iv) when a government attorney makes the disclosure to another federal grand jury.

Court ordered disclosure must be made in the manner, time and under the conditions prescribed by the Court.

Now, to "at hard labor." To my surprise I could find no case interpreting "at hard labor", and I have no idea why this language was ever included. Perhaps the fount of wisdom, Joe Spaniol, will know. I don't think it adds anything, but I am nervous about recommending a deletion because surely someone thought it meant something at some time.

R7(c)(1) ---- Entire second sentence: "It need not contain a formal introductory clause, a formal conclusion, or other matter not necessary to the statement."

In U. S. v. Gicinto (W.D. Mo. 1953) the Court relied upon this language in denying a request to dismiss an indictment. The Court went on to point out that, even without this language, the Supreme Court of the United States, in Frisbie v. U. S., 157 U. S. 160 (1895) had already held that such formalities were not necessary.

If we deleted the language, however, someone might argue that we did intend to require more formality, unless we put something to the contrary in the committee note. And, if we are going to put something in the committee note, why not leave it in the rule as is?

With respect to Rule 9(a), the last sentence, I recommend that it read as follows:

> When a defendant is arrested ~~under a warrant~~ or ~~is given a summons~~ summoned, and first appears before a magistrate judge, the magistrate judge will proceed according to Rule 5's applicable subdivisions.

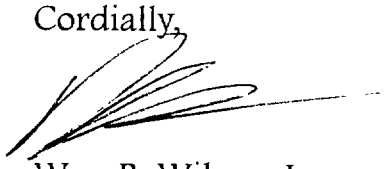
R9(c)(1)(C) --- "without unnecessary delay"

First, Porter v. U.S., 258 F.2d 685 (C.A. D.C. 1958) held that "without unnecessary delay" is a "compendious" (wow!) restatement, without substantive change -- of the various former statutory requirements for prompt presentation of an arrested person before an authorized magistrate. So, I don't think changing it back to "promptly" would be a substantive change. On the other hand, there are cases interpreting "without unnecessary delay." See Ginoza v. U. S., 279 F.2d 1616 (9th Cir 1960) and Symons v. U. S., 178 F.2d 615 (9th Cir 1950). These interpretations, however, would not change if we went back to "promptly."

When I use the word "I" in connection with research what I really meant, as almost all judges do, was that my law clerk got to work on her Ouija board computer and did the research. In this case it was Ms. Cynthia Walton Moriconi, lately of this office. Since doing the research she has "retired" to become an alleged full-time mother of a beautiful little girl, age 10-1/2 months.

The reason I tell you about Ms. Moriconi is that I don't want you, or anyone else, to think I think I know how to look up the law.

Cordially,



Wm. R. Wilson, Jr.

cc: Each Member of Style Committee
The Honorable Alicemarie Stotler

P.S. This research and the original draft of this letter were done before the last Criminal Rules Committee meeting.

MEMO TO: Members, Criminal Rules Style Subcommittee A

FROM: Professor Dave Schlueter, Reporter

RE: Rule 6: Including Reference to Disclosure to Military Authorities

DATE: March 28, 1999

At the Subcommittee's meeting in Washington, a question was raised about whether provision should be made in Rule 6(e) for disclosure of grand jury materials to military attorneys and personnel. Although I have found no cases directly on point, I have talked with several present or former Army JAGC's (Division Chiefs) about the issue. The consensus seems to be that for the most part the DOJ and the DOD conduct separate investigations; but they could envision situations where the DOJ might need to share grand jury information with a military attorney. As indicated in the attached Memorandum of Understanding between the DOJ and the DOD, the two agencies may be involved in joint investigations.

There are two possible areas for consideration. First, I believe that Rule 6(e)(3)(A)(ii) would probably authorize disclosure to military attorneys, in their capacity as "government personnel." If the subcommittee believes that the matter deserves more specific attention, the current parenthetical could be amended to read: "(including personnel of a state or subdivision of a state or military personnel). This provision would apparently be limited to those situations where the disclosure is being made to assist the government attorney in enforcing federal criminal law.

The second situation could arise where the DOJ has decided not to prosecute a person but believes that the information should be shared with the miltiary which is proceeding with a court-martial against the individual, e.g., in a government fraud case. Rule 6 probably does not cover that situation. The proposed restyled Rule 6(e)(3)(C)(iii) permits the government attorney to request the court to permit disclosure where there is a "violation of state criminal law" in order that state authorities might enforce their law. A similar provision could be made for military criminal prosecutions by either amending that provision or adding a new provision to read as follows:

> (iv) at the request of the government if it shows that the matter may disclose a violation of military criminal law under the 10 U.S.C. §§ 801, et seq.[Uniform Code of Military Justice], as long as the disclosure is to an appropriate military official for the purpose of enforcing that law.

Because of my class schedule this week, I will not be able to join you in your conference call. If I can answer any questions, please call me at (210) 431-2212.

APPENDIX 3
DoD Directive 5525.7

Department of Defense
DIRECTIVE

January 22, 1985
NUMBER 5525.7

GC/IG, DoD

SUBJECT:
Implementation of the Memorandum of Understanding Between the Department of Justice and the Department of Defense Relating to the Investigation and Prosecution of Certain Crimes

References:

(a) DoD Directive 1355.1, "Relationships with the Department of Justice on Grants of Immunity and the Investigation and Prosecution of Certain Crimes," July 21, 1981 (hereby canceled)

(b) Memorandum of Understanding Between the Department Relating to the Investigation and Prosecution of Certain Crimes, August 1984

(c) Title 18, United State Code

(d) Title 10, United States Code, Sections 801-940 (Articles 1-140), "Uniform Code of Military Justice (UCMJ)"

(e) Manual for Courts-Martial, United States, 1984 (R.C.M. 704)

A. REISSUANCE AND PURPOSE

This Directive reissues reference (a), updates policy and procedures, assigns responsibilities, and implements the 1984 Memorandum of Understanding (MOU) between the Department of Justice (DoJ) and the Department of Defense (DoD).

B. APPLICABILITY

This Directive applies to the Office of the Secretary of Defense, the Military Departments, the Office of Inspector General, DoD, the Organization of the Joint Chiefs of Staff, the Defense Agencies, and Unified and Specified Commands (hereafter referred to collectively as "DoD Components"). The term "DoD criminal investigative organizations," as used herein, refers collectively to the United States Army Criminal Investigation Command (USACIDC); Naval Investigative Service (NIS); U.S. Air Force Office of Special Investigations (AFOSI), and Defense Criminal Investigative Service (DCIS), Office of the Inspector General, DoD.

C. POLICY

It is DoD policy to maintain effective working relationships with the DoJ in the investigation and prosecution of crimes involving the programs, operations, or personnel of the Department of Defense.

D. PROCEDURES

With respect to inquiries for which the DoJ has assumed investigative responsibility based on the MOU, DoD investigative agencies should seek to participate jointly with DoJ investigative agencies whenever the inquiries relate to the programs, operations, or personnel of the Department of Defense. This applies to cases referred to the Federal Bureau of Investigation (FBI) under paragraph C.1.a. of the attached MOU (*see* enclosure 1) as well as to those cases for which a DoJ investigative agency is assigned primary investigative responsibility by a DoJ prosecutor. DoD components shall comply with the terms of the MOU and DoD Supplemental Guidance (*see* enclosure 1).

E. RESPONSIBILITIES

1. *The Inspector General, Department of Defense* (IG, DoD), shall:

a. Establish procedures to implement the investigative policies set forth in this Directive.

b. Monitor compliance by DoD criminal investigative organizations to the terms of the MOU.

c. Provide specific guidance regarding investigative matters, as appropriate.

2. *The General Counsel, Department of Defense*, shall:

a. Establish procedures to implement the prosecutive policies set forth in this Directive.

b. Monitor compliance by the DoD Components regarding the prosecutive aspects of the MOU.

c. Provide specific guidance, as appropriate.

d. Modify the DoD Supplemental Guidance at enclosure 1, with the concurrence of the IG, DoD, after requesting comments from affected DoD Components.

3. The *Secretaries of the Military Departments* shall establish procedures to implement the policies set forth in this Directive.

F. EFFECTIVE DATE AND IMPLEMENTATION

This Directive is effective immediately. The Military Departments shall forward two copies of implementing documents to the Inspector General, Department of Defense, within 90 days. Other DoD Components shall disseminate this Directive to appropriate personnel.

Signed by William H. Taft, IV
Deputy Secretary of Defense

Enclosure—1
Memorandum of Understanding Between the Departments of Justice And Defense Relating to the Investigation and Prosecution of Certain Crimes

MEMORANDUM OF UNDERSTANDING BETWEEN THE DEPARTMENTS OF JUSTICE AND DEFENSE

This enclosure contains the verbatim text of the 1984 Memorandum of Understanding Between the Departments of Justice and Defense Relating to the Investigation and Prosecution of Certain Crimes (reference (b)). Matter that is identified as "DoD Supplemental Guidance" has been added by the Department of Defense. DoD Components shall comply with the MOU and the DoD Supplemental Guidance.

MEMORANDUM OR UNDERSTANDING BETWEEN THE DEPARTMENTS OF JUSTICE AND DEFENSE RELATING TO THE INVESTIGATION AND PROSECUTION OF CERTAIN CRIMES

A. PURPOSE, SCOPE AND AUTHORITY

This Memorandum of Understanding (MOU) establishes policy for the Department of Justice and the Department of Defense with regard to the investigation and prosecution of criminal matters over which the two Departments have jurisdiction. This memorandum is not intended to confer any rights, benefits, privileges or form of due process procedure upon individuals, associations, corporations or other persons or entities.

This Memorandum applies to all components and personnel of the Department of Justice and the Department of Defense. The statutory bases for the Department of Defense and the Department of Justice investigation and prosecution responsibilities include, but are not limited to:

1. Department of Justice: Titles 18, 21 and 28 of the United States Code; and

2. Department of Defense: The Uniform Code of Military Justice, Title 10, United States Code, Sections 801-940; the Inspector General Act of 1978, Title 5 United States Code, Appendix 3; and Title 5 United States Code, Section 301.

B. POLICY

The Department of Justice has primary responsibility for enforcement of federal laws in the United States District Courts. The Department of Defense has responsibility for the integrity of its programs, operations and installations and for the discipline of the Armed Forces. Prompt administrative actions and completion of investigations within the two (2) year statute of limitations under the Uniform Code of Military Justice require the Department of Defense to assume an important role in federal criminal investigations. To encourage joint and coordinated investigative efforts, in appropriate cases where the Department of Justice assumes investigative responsibility for a matter relating to the Department of Defense, it should share information and conduct the inquiry jointly with the interested Department of Defense investigative agency.

It is neither feasible nor desirable to establish inflexible rules regarding the responsibilities of the Department of Defense and the Department of Justice as to each matter over which they may have concurrent interest. Informal arrangements and agreements within the spirit of this MOU are permissible with respect to specific crimes or investigations.

C. INVESTIGATIVE AND PROSECUTIVE JURISDICTION

1. CRIMES ARISING FROM THE DEPARTMENT OF DEFENSE OPERATIONS

a. Corruption Involving the Department of Defense Personnel

The Department of Defense investigative agencies will refer to the FBI on receipt all significant allegations of bribery and conflict of interest involving military or civilian personnel of the Department of Defense. In all corruption matters the subject of a referral to the FBI, the Department of Defense shall obtain the concurrence of the Department of Justice prosecutor or the FBI before initiating any independent investigation preliminary to any action under the Uniform code of Military Justice. If the Department of Defense is not satisfied with the initial determination, the matter will be reviewed by the Criminal Division of the Department of Justice.

The FBI will notify the referring agency promptly regarding whether they accept the referred matters for investigation. The FBI will attempt to make such decision in one (1) working day of receipt in such matters.

DoD Supplemental Guidance

A. Certain bribery and conflict of interest allegations (also referred to as "corruption" offenses in the MOU) are to be referred immediately to the FBI.

B. For the purposes of this section, bribery and conflict of interest allegations are those which would, if proven, violate 18 U.S.C., Sections 201, 203, 205, 208, 209, or 219 (reference (c)).

C. Under paragraph C.1.a., DoD criminal investigative organizations shall refer to the FBI those "significant" allegations of bribery and conflict of interest that implicate directly military or civilian personnel of the Department of Defense, including allegations of bribery or conflict of interest that arise during the course of an ongoing investigation.

1. All bribery and conflict of interest allegations against present, retired, or former General or Flag officers and civilians in grade GS-16 and above, the Senior Executive Service and the Executive Level will be considered "significant" for purposes of referral to the FBI.

2. In cases not covered by subsection C.1., above, the determination of whether the matter is "significant" for purposes of referral to the FBI should be made in light of the following factors: sensitivity of the DoD program, involved, amount of money in the alleged bribe, number of DoD personnel implicated, impact on the affected DoD program, and with respect to military personnel, whether the matter normally would be handled under the Uniform Code of Military Justice (reference (d)). Bribery and conflicts of interest allegations warranting consideration of Federal prosecution, which were not referred to the FBI based on the application of these guidelines and not otherwise disposed of under reference (d), will be developed and brought to the attention of the Department of Justice through the "conference" mechanism described in paragraph C.1.b. of the MOU(reference (b)).

D. Bribery and conflict of interest allegations when military or DoD civilian personnel are not subjects of the investigation are not covered by the referral requirement of paragraph C.1.a of reference (b). Matters in which the suspects are solely DoD contractors and their subcontractors, such as commercial bribery between a DoD subcontractor and a DoD prime contractor, do not require referral upon receipt to the FBI. The "conference" procedure described in paragraph C.1.b. of reference (b) shall be used in these types of cases.

E. Bribery and conflict of interest allegations that arise from events occurring outside the United States, its territories, and possessions, and requiring investigation outside the United States, its territories, and possessions need not be referred to the FBI.

b. Frauds Against the Department of Defense and Theft and Embezzlement of Government Property

The Department of Justice and the Department of Defense have investigative responsibility for frauds against the Department of Defense and theft and embezzlement of Government property from the Department of Defense. The Department of Defense will investigate frauds against the Department of Defense and theft of government property from the Department of Defense. Whenever a Department of Defense investigative agency identifies a matter which, if developed by investigation, would warrant federal prosecution, it will confer with the United States Attorney or the Criminal Division, the Department of Justice, and the FBI field office. At the time of this initial conference, criminal investigative responsibility will be determined by the Department of Justice in consultation with the Department of Defense.

DoD Supplemental Guidance

A. Unlike paragraph C.1.a. of the MOU (reference (b)), paragraph C.1.b. does not have an automatic referral requirement. Under paragraph C.1.b., DoD criminal investigative organizations shall confer with the appropriate federal prosecutor and the FBI on matters which, if developed by investigation, would warrant Federal prosecution. This "conference" serves to define the respective roles of DoD criminal investigative organizations and the FBI on a case-by-case basis. Generally, when a conference is warranted, the DoD criminal investigative organization shall arrange to meet with the prosecutor and shall provide notice to the FBI that such meeting is being held. Separate conferences with both the prosecutor and the FBI normally are not necessary.

B. When investigations are brought to the attention of the Defense Procurement Fraud Unit (DPFU), such contact will satisfy the "conference" requirements of paragraph C.1.b. (reference (b)) as to both the prosecutor and the FBI.

C. Mere receipt by DoD criminal investigative organizations of raw allegations of fraud or theft does not require conferences with the DoJ and the FBI. Sufficient evidence should be developed before the conference to allow the prosecutor to make an informed judgment as to the merits of a case dependent upon further investigation. However, DoD criminal investigative organizations should avoid delay in scheduling such conferences, particularly in complex fraud cases, because an early judgment by a prosecutor can be of assistance in focusing the investigation on those matters that most likely will result in criminal prosecution.

2. CRIMES COMMITTED ON MILITARY INSTALLATIONS

a. Subject(s) can be Tried by Court-Martial or are Unknown

Crimes (other than those covered by paragraph C.1.) committed on a military installation will be investigated by the Department of Defense investigative agency concerned and, when committed by a person subject to the Uniform Code of Military Justice, prosecuted by the Military Department concerned. The Department of Defense will provide immediate notice to the Department of Justice of significant cases in which an individual subject/victim is other than a military member or dependent thereof.

b. One or More Subjects cannot be Tried by Court-Martial

When a crime (other than those covered by paragraph C.1.) has occurred on a military installation and there is reasonable basis to believe that it has been committed by a person or persons, some or all of whom are not subject to the Uniform Code of Military Justice, the Department of Defense investigative agency will provide immediate notice of the matter to the appropriate Department of Justice investigative agency unless the Department of Justice has relieved the Department of Defense of the reporting requirement for that type or class of crime.

DoD Supplemental Guidance

A. Subsection C.2. of the MOU (reference (b)) addresses crimes committed on a military installation other than those listed in paragraphs C.1.a. (bribery and conflict of interest) and C.1.b. (fraud, theft, and embezzlement against the Government).

B. Unlike paragraph C.1.a. of reference (b), which requires "referral" to the FBI of certain cases, and paragraph C.1.b., which requires "conferences" with respect to certain cases, subsection C.2. requires only that "notice" be given to DoJ of certain cases. Relief from the reporting requirement of subsection C.2. may be granted by the local U.S. attorney as to types or classes of cases.

C. For purposes of paragraph C.2.a. (when the subjects can be tried by court-martial or are unknown), an allegation is "significant" for purposes of required notice to the DoJ only if the offense falls within the prosecutorial guidelines of the local U.S. attorney. Notice should be given in other cases when the DoD Component believes that Federal prosecution is warranted or otherwise determines that the case may attract significant public attention.

3. CRIMES COMMITTED OUTSIDE MILITARY INSTALLATIONS BY PERSONS WHO CAN BE TRIED BY COURT-MARTIAL

a. Offense is Normally Tried by Court-Martial

Crimes (other than those covered by paragraph C.1.) committed outside a military installation by persons subject to the Uniform Code of Military Justice which, normally, are tried by court-martial will be investigated and prosecuted by the Department of Defense. The Department of Defense will

provide immediate notice of significant cases to the appropriate Department of Justice investigative agency. The Department of Defense will provide immediate notice in all cases where one or more subjects is not under military jurisdiction unless the Department of Justice has relieved the Department of Defense of the reporting requirement for that type or class of crime.

DoD Supplemental Guidance

For purposes of this paragraph, an allegation is "significant" for purposes of required notice to the DoJ only if the offense falls within prosecutorial guidelines of the local U.S. attorney. Notice should be given in other cases when the DoD Component believes that Federal prosecution is warranted, or otherwise determines that the case may attract significant public attention.

b. Crimes Related to Scheduled Military Activities

Crimes related to scheduled Military activities outside of a military installation, such as organized maneuvers in which persons subject to the Uniform Code of Military Justice are suspects, shall be treated as if committed on a military installation for purposes of this Memorandum. The FBI or other Department of Justice investigative agency may assume jurisdiction with the concurrence of the United States Attorney or the Criminal Division, Department of Justice.

c. Offense is not Normally Tried by Court-Martial

When there are reasonable grounds to believe that a Federal crime (other than those covered by paragraph C.1.) normally not tried by court-martial, has been committed outside a military installation by a person subject to the Uniform Code of Military Justice, the Department of Defense investigative agency will immediately refer the case to the appropriate Department of Justice investigative agency unless the Department of Justice has relieved the Department of Defense of the reporting requirement for that type or class of crime.

D. REFERRALS AND INVESTIGATIVE ASSISTANCE

1. REFERRALS

Referrals, notices, reports, requests and the general transfer of information under this Memorandum normally should be between the FBI or other Department of Justice investigative agency and the appropriate Department of Defense investigative agency at the field level.

If a Department of Justice investigative agency does not accept a referred matter and the referring Department of Defense investigative agency then, or subsequently, believes that evidence exists supporting prosecution before civilian courts, the Department of Defense agency may present the case to the United States Attorney or the Criminal Division, Department of Justice, for review.

2. INVESTIGATIVE ASSISTANCE

In cases where a Department of Defense or Department of Justice investigative agency has primary responsibility and it requires limited assistance to pursue outstanding leads, the investigative agency requiring assistance will promptly advise the appropriate investigative agency in the other Department and, to the extent authorized by law and regulations, the requested assistance should be provided without assuming responsibility for the investigation.

E. PROSECUTION OF CASES

1. With the concurrence of the Department of Defense, the Department of Justice will designate such Department of Defense attorneys as it deems desirable to be Special Assistant United States Attorneys for use where the effective prosecution of cases may be facilitated by the Department of Defense attorneys.

2. The Department of Justice will institute civil actions expeditiously in United States District Courts whenever appropriate to recover monies lost as a result of crimes against the Department of Defense; the Department of Defense will provide appropriate assistance to facilitate such actions.

3. The Department of Justice prosecutors will solicit the views of the Department of Defense prior to initiating action against an individual subject to the Uniform Code of Military Justice.

4. The Department of Justice will solicit the views of the Department of Defense with regard to its Department of Defense-related cases and investigations in order to effectively coordinate the use of civil, criminal and administrative remedies.

DoD Supplemental Guidance

Prosecution of Cases and Grants of Immunity

A. The authority of court-martial convening authorities to refer cases to trial, approve pretrial agreements, and issue grants of immunity under the UCMJ (reference (d)) extends only to trials by court-martial. In order to ensure that such actions do not preclude appropriate action by Federal civilian authorities in cases likely to be prosecuted in the U.S. district courts, court-martial convening authorities shall ensure that appropriate consultation as required by this enclosure has taken place before trial by court-martial, approval of a pretrial agreement, or issuance of a grant of immunity in cases when such consultation is required.

B. Only a general court-martial convening authority may grant immunity under the UCMJ (reference (d)), and may do so only in accordance with R.C.M. 704 (reference (e)).

1. Under reference (d), there are two types of immunity in the military justice system:

a. A person may be granted transactional immunity from trial by court-martial for one or more offenses under reference (d).

b. A person may be granted testimonial immunity, which is immunity from the use of testimony, statements, and any information directly or indirectly derived from such testimony or statements by that person in a later court-martial.

2. Before a grant of immunity under reference (d), the general court-martial convening authority shall ensure that there has been appropriate consultation with the DoJ with respect to offenses in which consultation is required by this enclosure.

3. A proposed grant of immunity in a case involving espionage, subversion, aiding the enemy, sabotage, spying, or violation of rules or statutes concerning classified information or the foreign relations of the United States shall be forwarded to the General Counsel of the Department of Defense for the purpose of consultation with the DoJ. The General Counsel shall obtain the views of other appropriate elements of the Department of Defense in furtherance of such consultation.

C. The authority of court-martial convening authorities extends only to grants of immunity from action under reference (d). Only the Attorney General or other authority designated under 18 U.S.C. Secs. 6001-6005 (reference (c)) may authorize action to obtain a grant of immunity with respect to trials in the U.S. district courts.

F. MISCELLANEOUS MATTERS

1. THE DEPARTMENT OF DEFENSE ADMINISTRATIVE ACTIONS

Nothing in this Memorandum limits the Department of Defense investigations conducted in support of administrative actions to be taken by the Department of Defense. However, the Department of Defense investigative agencies will coordinate all such investigations with the appropriate Department of Justice prosecutive agency and obtain the concurrence of the Department of Justice prosecutor or the Department of Justice investigative agency prior to conducting any administrative investigation during the pendency of the criminal investigation or prosecution.

2. SPECIAL UNIFORM CODE OF MILITARY JUSTICE FACTORS

In situations where an individual subject to the Uniform Code of Military Justice is a suspect in any crime for which a Department of Justice investigative agency has assumed jurisdiction, if a Department of Defense investigative agency believes that the crime involves special factors relating to the administration and discipline of the Armed Forces that would justify its investigation, the Department of Defense investigative agency will advise the appropriate Department of Justice investigative agency or the Department of Justice prosecuting authorities of these factors. Investigation of such a crime may be undertaken by the appropriate Department of Defense investigative agency with the concurrence of the Department of Justice.

3. ORGANIZED CRIME

The Department of Defense investigative agencies will provide to the FBI all information collected during the normal course of agency operations pertaining to the element generally known as "organized crime" including both traditional (La Cosa Nostra) and nontraditional organizations whether or not the matter is considered prosecutable. The FBI should be notified of any investigation involving any element of organized crime and may assume jurisdiction of the same.

4. DEPARTMENT OF JUSTICE NOTIFICATIONS TO DEPARTMENT OF DEFENSE INVESTIGATIVE AGENCIES

a. The Department of Justice investigative agencies will promptly notify the appropriate Department of Defense investigative agency of the initiation of the Department of Defense related investigations which are predicated on other than a Department of Defense referral except in those rare instances where notification might endanger agents or adversely affect the investigation. The Department of Justice investigative agencies will also notify the Department of Defense of all allegations of the Department of Defense related crime where investigation is not initiated by the Department of Justice.

b. Upon request, the Department of Justice investigative agencies will provide timely status reports on all investigations relating to the Department of Defense unless the circumstances indicate such reporting would be inappropriate.

c. The Department of Justice investigative agencies will promptly furnish investigative results at the conclusion of an investigation and advise as to the nature of judicial action, if any, taken or contemplated.

d. If judicial or administrative action is being considered by the Department of Defense, the Department of Justice will, upon written request, provide existing detailed investigative data and documents (less any federal grand jury material, disclosure of which would be prohibited by Rule 6(e), Federal Rules of Criminal Procedure), as well as agent testimony for use in judicial or administrative proceedings, consistent with Department of Justice and other federal regulations. The ultimate use of the information shall be subject to the concurrence of the federal prosecutor during the pendency of any related investigation or prosecution.

5. TECHNICAL ASSISTANCE

a. The Department of Justice will provide to the Department of Defense all technical services normally available to federal investigative agencies.

b. The Department of Defense will provide assistance to the Department of Justice in matters not relating to the Department of Defense as permitted by law and implementing regulations.

6. JOINT INVESTIGATIONS

a. To the extent authorized by law, the Department of Justice investigative agencies and the Department of Defense investigative agencies may agree to enter into joint investigative endeavors, including undercover operations, in appropriate circumstances. However, all such investigations will be subject to Department of Justice guidelines.

b. The Department of Defense, in the conduct of any investigation that might lead to prosecution in Federal District Court, will conduct the investigation consistent with any Department of Justice guidelines. The Department of Justice shall provide copies of all relevant guidelines and their revisions.

DoD Supplemental Guidance

When DoD procedures concerning apprehension, search and seizure, interrogation, eyewitnesses, or identification differ from those of DoJ, DoD procedures will be used, unless the DoJ prosecutor has directed that DoJ procedures be used instead. DoD criminal investigators should bring to the attention of the DoJ prosecutor, as appropriate, situations when use of DoJ procedures might impede or preclude prosecution under the UCMJ (reference (d)).

7. APPREHENSION OF SUSPECTS

To the extent authorized by law, the Department of Justice and the Department of Defense will each promptly deliver or make available to the other suspects, accused individuals and witnesses where authority to investigate the crimes involved is lodged in the other Department. This MOU neither expands nor limits the authority of either Department to perform apprehensions, searches, seizures, or custodial interrogations.

G. EXCEPTION

This Memorandum shall not affect the investigative authority now fixed by the 1979 "Agreement Governing the Conduct of the Defense Department Counter intelligence Activities in Conjunction with the Federal Bureau of Investigation" and the 1983 Memorandum of Understanding between the Department of Defense, the Department of Justice and the FBI concerning "Use of Federal Military Force in Domestic Terrorist Incidents."

VARIOUS REFERENCES TO "JUDGE" AND "GOVERNMENT ATTORNEY" IN THE CRIMINAL RULES

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO
POST OFFICE BOX 566
ALBUQUERQUE, NEW MEXICO 87103

JAMES A. PARKER
Judge

September 2, 1998

TO: STYLE SUBCOMMITTEE MEMBERS

Re: *Criminal Rules – Terminology including "Judge" or "Magistrate"*

Considerable confusion arises from the different terminology in the Criminal Rules describing judicial officers. The following appear at various places throughout the rules:

"Magistrate"
"Federal Magistrate"
"Magistrate Judge"
"Federal Magistrate Judge"
"United States Magistrate"
"United States Magistrate Judge"
"Judge"
"Federal Judge"
"Judge of the United States"

In an effort to get a grip on this, I asked one of my clerks to prepare a schedule showing where each of these descriptions of a judicial officer appears in the Criminal Rules. A copy of the schedule is enclosed.

The first column on the left identifies the existing rule in which one or more of the descriptions is found.

The word "old" refers to the existing rule; the word "new" refers to Bryan Garner's July, 1998 draft of the rule. The numbers beside "old" or "new" identify the number of times the description is found either in the old or new version of the rule.

I hope this schedule will be of assistance to you while you are editing Bryan's July, 1998 draft and after you receive from Bryan, next week, his proposals regarding definitions.

Sincerely,

JAMES A. PARKER

JAP:dm

enclosure as indicated

PHRASES									
FEDERAL RULES OF CRIMINAL PROCEDURE RULE NO.	"magistrate"	"magistrate judge"	"federal magistrate"	"federal magistrate judge"	"United States magistrate"	"United States magistrate judge"	"judge"	"federal judge"	"judge of the United States"
	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule
1						Old 1; New 1			
3		Old 1; New 1							
4(c)(1)-(2)	Old 1; New 1	Old 2; New 2							
4(d)(4)		Old 4; New 3							
5		Old 1; New 1							
5(a)		Old 3; New 1		Old 2; New 1			New 1		
5(b)		Old 1; New 1		New 1		Old 1			
5(c)		Old 6; New 7		Old 1; New 3		Old 2		New 1	Old 1
5.1(a) - (c)		Old 1		Old 5; New 5			Old 1		
6(e)(4)				Old 1; New 1					
6(f)				Old 2; New 2					
9(a) - (c)		Old 5; New 4		Old 2; New 2					
12(b)							Old 1		

PHRASES									
FEDERAL RULES OF CRIMINAL PROCEDURE RULE NO.	"magistrate"	"magistrate judge"	"federal magistrate"	"federal magistrate judge"	"United States magistrate"	"United States magistrate judge"	"judge"	"federal judge"	"judge of the United States"
	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule
16(d)(1)							Old 1		
17(a)	New 1	Old 1				Old 1; New 1			
17(g)						Old 1; New 1			
25(a)-(b)							Old 7; New 7		
31(a)							Old 1; New 1		
32(d)(1)							Old 1; New 1		
32.1(a)(1)	New 1		Old 1		Old 1; New 2		Old 1; New 2		
40(a)		New 3		Old 2; New 2					
40(b)		New 1		Old 2; New 1					
40(d)		Old 1; New 4		Old 2; New 2					
40(e)		Old 1; New 2		Old 2; New 1					
40(f)		Old 1; New 2		Old 2; New 1			New 1		
41(a)				Old 2; New 2					

PHRASES									
FEDERAL RULES OF CRIMINAL PROCEDURE RULE NO.	"magistrate"	"magistrate judge"	"federal magistrate"	"federal magistrate judge"	"United States magistrate"	"United States magistrate judge"	"judge"	"federal judge"	"judge of the United States"
	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule
41(c)(1)				Old 4; New 2			New 4		
41(c)(2)		Old 1; New 6		Old 14; New 3			New 3		
41(d)		New 1		Old 1					
41(g)				Old 1; New 1					
42(a) - (b)							Old 6; New 5		
44(a)				Old 1; New 1					
50(b)						Old 1; New 1			
54(b)(3)-(4)						Old 2; New 1			
54(c)		Old 1; New 1		Old 1; New 1		Old 3; New 2	Old 3; New 2		Old 3;New 2
55						Old 1; New 1			
58(a)(1)						Old 1; New 1			
58(b)(2)		Old 1; New 1				Old 1; New 1			
58(b)(3)		Old 4; New 4				Old 1; New 1			

PHRASES									
FEDERAL RULES OF CRIMINAL PROCEDURE RULE NO.	"magistrate"	"magistrate judge"	"federal magistrate"	"federal magistrate judge"	"United States magistrate"	"United States magistrate judge"	"judge"	"federal judge"	"judge of the United States"
	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule
58(c)(2)		Old 1; New 2							
58(d)(2)		Old 1; New 1							
58(g)(2)		Old 4; New 4			Old 1; New 1				

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO
POST OFFICE BOX 566
ALBUQUERQUE, NEW MEXICO 87103

JAMES A. PARKER
JUDGE

September 14, 1998

TO: STYLE SUBCOMMITTEE MEMBERS

Re: **Criminal Rules Stylization Project –**
(1) "Attorney" versus "counsel."
(2) "Government" – "Government's attorney" – "Prosecution"

(1) "Attorney" versus "counsel."

In Footnote 22, which relates to Rule 5(c), in his July 1998 draft, Bryan noted that we need to ensure consistent use of "counsel" versus "attorney." I favor "attorney" because I believe it is more precise and because "attorney" is the word used in advice of rights as mandated by Miranda v. Arizona, 384 U.S. 436, 444-445 (1996). Enclosed is a copy of a schedule that identifies each place in the existing ("Old") Criminal Rules and each place in Bryan's proposed revision ("New") that "counsel," "attorney," and "attorneys" appear independently. (The schedule discussed below identifies where these words appear with a modifier).

(2) "Government" – "Government's attorney" – "Prosecution."

The government and/or the government's attorney are identifed eight different ways in the Criminal Rules:

"government"
"government('s) attorney"
"attorney(s) for (the) government"
"counsel for the government"
"United States attorney"
"the prosecution"
"attorney for the prosecution"
"prosecuting attorney"

Enclosed is a schedule identifying where these terms appear in the "Old" and "New" Criminal Rules. Although it seems to be preferable to use "government" in most instances, there are certain rules in which the use of "government('s) attorney" would be more appropriate. However, it seems that we should be able to change all of the other variations on the theme to either "government" or "government('s) attorney."

Sincerely,

JAMES A. PARKER

JAP:dm

enclosure as indicated

cc-w/enc: John Rabiej, Esq.

TERM		
FEDERAL RULES OF CRIMINAL PROCEDURE RULE NO.	– A – "counsel"	– B – "attorney" or "attorneys"
	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule
5(c)	Old 4; New 4	
5.1(c)	Old 2; New 4	Old 2
6(e)(3)		Old 4; New 4
11(c)	Old 2; New 2	Old 2; New 3
11(d)		Old 1; New 1
11(e)	Old 1	Old 1; New 1
12.1		Old 2; New 2
12.3		Old 4; New 4
15(c)	Old 1	Old 1; New 2
16(b)(2) & (c)		Old 3; New 3
17(c)		Old 1; New 1
17.1	Old 1	Old 2; New 2
20(d)	Old 1; New 1	
24(a)		Old 3; New 2
26.2	Old 1; New 1	Old 1
30	Old 1; New 1	
32(b)(2)	Old 2; New 1	New 2
32(b)(6)	Old 2	Old 1; New 1
32(c)	Old 6	New 5
32.1	Old 3; New 1	New 2
42(b)		Old 1; New 1
43(c)	Old 1; New 1	
44	Old 8; New 9	
49		Old 3; New 3
58(b)(2)	Old 4; New 4	

PHRASES								
FEDERAL RULES OF CRIMINAL PROCEDURE RULE NO.	-- 1 -- "government"	-- 2 -- "government('s) attorney"	-- 3 -- "attorney(s) for (the) government"	-- 4 -- "counsel for the government"	-- 5 -- "United States attorney"	-- 6 -- "the prosecution"	-- 7 -- "attorney for the prosecution"	-- 8 -- "prosecuting attorney"
	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule
4(a)	New 1		Old 1					
4(d)(4)	New 2		Old 2					
5(c)(5)(B)	New 1							
5.1(b)	Old 1; New 1							
5.1(c)	Old 1; New 2			Old 1				
6(b)(1)		New 1	Old 1					
6(d)			Old 1; New 1					
6(e)(1)-(2)		New 1	Old 2, New 1			Old 1		
6(e)(3)	Old 1; New 2	New 6	Old 8					
7(c)(1)		New 1	Old 1					
7(f)	New 2							
9(a)	New 2		Old 2					
9(c)(2)	New 2		Old 2					
11(a)	Old 1; New 1							
11(d) - (e)		New 4	Old 4					

PHRASES								
FEDERAL RULES OF CRIMINAL PROCEDURE RULE NO.	– 1 – "government"	– 2 – "government('s) attorney"	– 3 – "attorney(s) for (the) government"	– 4 – "counsel for the government"	– 5 – "United States attorney"	– 6 – "the prosecution"	– 7 – "attorney for the prosecution"	– 8 – "prosecuting attorney"
	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule
12	Old 5; New 6					Old 2; New 2		
12.1	Old 1, New 3	New 5	Old 3					
12.2		New 3	Old 3					
12 3	Old 5; New 5	New 7	Old 5					
13	New 1					Old 1		
14	Old 2; New 2	New 1	Old 1					
15	Old 4, New 5							
16(a)	Old 23; New 22	New 3	Old 4					
16(b)	Old 11; New 17							
17	Old 2; New 1							
17 1	New 1							
18	New 1					Old 1		
20	New 2				Old 4; New 4	Old 3; New 4		
21						Old 2; New 1		
23	Old 1; New 1							

PHRASES								
FEDERAL RULES OF CRIMINAL PROCEDURE RULE NO.	– 1 – "government"	– 2 – "government('s) attorney"	– 3 – "attorney(s) for (the) government"	– 4 – "counsel for the government"	– 5 – "United States attorney"	– 6 – "the prosecution"	– 7 – "attorney for the prosecution"	– 8 – "prosecuting attorney"
	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule
24	Old 1, New 1	New 2	Old 2					
26.2		New 2	Old 3					
26.3	Old 1; New 1							
28	Old 1; New 1							
29	Old 1, New 1							
29.1	New 1					Old 2; New 1		
32(b)(6)		New 1	Old 3					
32(c)	Old 1	New 2	Old 3					
32.1(b)		New 2	Old 1					
35(b)	Old 2, New 2							
40	New 3					Old 3; New 4		
41(a)		New 1	Old 1					
41(e)	New 1							
41(h)	Old 1, New 1	New 1	Old 1					
42					Old 1; New 1			

PHRASES								
FEDERAL RULES OF CRIMINAL PROCEDURE RULE NO.	**– 1 – "government"**	**– 2 – "government('s) attorney"**	**– 3 – "attorney(s) for (the) government"**	**– 4 – "counsel for the government"**	**– 5 – "United States attorney"**	**– 6 – "the prosecution"**	**– 7 – "attorney for the prosecution"**	**– 8 – "prosecuting attorney"**
	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule	NO. OF REFERENCES Old; New Rule
46(g)		New 3	Old 3					
48	New 1	New 1	Old 1		Old 1; New 1	Old 1		
54(a)						Old 1; New 1		
54(b)(1)							Old 1	New 1
54(c)		New 1	Old 1		Old 2; New 1			
58(b) - (d)						Old 1; New 1	Old 1	New 1
58(g)	Old 1				Old 1; New 1			

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO
POST OFFICE BOX 566
ALBUQUERQUE, NEW MEXICO 87103

JAMES A. PARKER
Judge

August 20, 1998

TO: STYLE SUBCOMMITTEE MEMBERS

Re: ***Language in Criminal Rule 54(a) Regarding the District Court for the Northern Mariana Islands - Proposed to Become New Rule 1(a)(3) - Statutory Reference***

Present Rule 54(a) states that the Criminal Rules apply to proceedings in the District Court for the Northern Mariana Islands "except as otherwise provided in Articles IV and V of the Covenant provided by the Act of March 24, 1996 (90 Stat. 263)." I propose replacing the quoted language with "48 U.S.C. §1801."

Enclosed for your consideration is a copy of 48 U.S.C §1801. It is a single sentence which approves the Covenant of commonwealth status. Referring to the Covenant, the statute contains the words "the text of which is as follows . . ." The full text of the Covenant then appears under "HISTORICAL AND STATUTORY NOTES" following the one sentence §1801.

It seems that reference in the rule to 48 U.S.C §1801 should suffice. I see no need for the detailed reference to Articles IV and V of the Covenant as stated in current Rule 54(a). Any reader should be able to find this through the reference to 48 U.S.C §1801.

Sincerely,

JAMES A. PARKER

JAP:dm

enclosures as indicated

SUBCHAPTER I—APPROVAL AND SUPPLEMENTAL PROVISIONS

§ 1801. Approval of text of Covenant to Establish a Commonwealth of the Northern Mariana Islands

The Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, the text of which is as follows, is hereby approved.

(Pub.L. 94-241, § 1, Mar. 24, 1976, 90 Stat. 263.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1976 Acts. Senate Report No. 94-596, see 1976 U.S. Code Cong. and Adm. News, p. 448.

References in Text

The Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, referred to in text, is set out as a note under this section.

Codifications

Section was formerly classified as a note under section 1681 of this title.

Applicability of Requirement of United States Citizenship or Nationality as Prerequisite of Any Benefit, Right, Etc. to Citizens of Northern Mariana Islands

Pub.L. 98-213, §§ 17-25, Dec. 8, 1983, 97 Stat. 1463-1466, exempted citizens of Northern Mariana Islands from laws prohibiting the United States from compensating or employing non-citizens, and from requirement of United States citizenship in certain Federal laws providing Federal services or financial assistance to Northern Mariana Islands, authorized the President to issue proclamations exempting citizens of Northern Marianas from United States citizenship or nationality requirements of certain statutes, provided that if the President fails to timely issue any such proclamation, the requirement of United States citizenship or nationality as a prerequisite of any benefit, right, privilege, or immunity in any statute made applicable to the Northern Mariana Islands shall not apply to citizens of the Northern Marianas, provided rule of construction not extending to the Northern Mariana Islands any statutory provision or regulation, particularly statutes relating to immigration and nationality, not otherwise applicable to or within the Northern Marianas, provided for termination of President's authority to issue proclamations upon establishment of Commonwealth of the Northern Mariana Islands, defined terms, and provided for merger of benefits into those acquired by virtue of United States citizenship unless recipient exercises his privilege to become a national but not a citizen of United States.

Authorization of Appropriation for Transition of Mariana Islands District to Commonwealth Status

Pub.L. 94-27, § 2, May 28, 1975, 89 Stat. 95, authorized appropriation of $1,500,000 to aid in transition of the Mariana Islands District to Commonwealth status as a territory of the United States, with proviso that no part of such sum may be obligated or expended until Congress approves final agreement between Marianas Political Status Commission and the United States.

Recital Clauses

Pub.L. 94-241 contained several "whereas" clauses reading as follows:

"Whereas the United States is the administering authority of the Trust Territory of the Pacific Islands under the terms of the trusteeship agreement for the former Japanese-mandated islands entered into by the United States with the Security Council of the United Nations on April 2, 1947, and approved by the United States on July 18, 1947; and

"Whereas, the United States, in accordance with the trusteeship agreement and the Charter of the United Nations, has assumed the obligation to promote the development of the peoples of the trust territory toward self-government or independence as may be appropriate to the particular circumstances of the trust territory and its peoples and the freely expressed wishes of the peoples concerned; and

"Whereas the United States, in response to the desires of the people of the Northern Mariana Islands clearly expressed over the past twenty years through public petition and referendum, and in response to its own obligations under the trusteeship agreement to promote self-determination, entered into political status negotiations with representatives of the people of the Northern Mariana Islands; and

"Whereas, on February 15, 1975, a Covenant to Establish A Commonwealth of the Northern Mariana Islands in Political Union with the United States of America was signed by the Marianas Political Status Commission for the people of the Northern Mariana Islands and by the President's Personal Representative, Ambassador F. Haydn Williams for the United States of America, following which the covenant was approved by the unanimous vote of the Mariana Islands District Legislature on February 20, 1975 and by 78.8 per centum of the people of the Northern Mariana Islands voting in a plebiscite held on June 17, 1975."

Text of Covenant

Section 1 of Pub.L. 94-241, as amended Pub.L. 98-213, § 9, Dec. 8, 1983, 97 Stat. 1461; Pub.L. 104-208, Div. A, Title I, § 101(d) [Title II, Sept. 30, 1996, 110 Stat. 3009-196, contained the Covenant to Establish Commonwealth of Northern Mariana Islands in Political Union with United States of America as follows:

"COVENANT TO ESTABLISH A COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS IN POLITICAL UNION WITH THE UNITED STATES OF AMERICA

"Whereas, the Charter of the United Nations and the Trusteeship Agreement between the Security Council of the United Nations and the United States of America guarantee to the people of the Northern Mariana Islands the right freely to express their wishes for self-government or independence; and

"Whereas, the United States supports the desire of the people of the Northern Mariana Islands to exercise their inalienable right of self-determination; and

"Whereas, the people of the Northern Mariana Islands and the people of the United States share the goals and values found in the American system of government based upon the principles of government by the consent of the governed, individual freedom and democracy; and

"Whereas, for over twenty years, the people of the Northern Mariana Islands, through public petition and referendum, have clearly expressed their desire for political union with the United States;

"Now, therefore, the Marianas Political Status Commission, being the duly appointed representative of the people of the Northern Mariana Islands, and the Personal Representative of the President of the United States have entered into this Covenant in order to establish a self-governing commonwealth for the Northern Mariana Islands within the American political system and to define the future relationship between the Northern Mariana Islands and the United States. This Covenant will be mutually binding when it is approved by the United States, by the Mariana Islands District Legislature and by the people of the Northern Mariana Islands in a plebiscite, constituting on their part a sovereign act of self-determination.

"ARTICLE I

"POLITICAL RELATIONSHIP

"Section 101. The Northern Mariana Islands upon termination of the Trusteeship Agreement will become a self-governing commonwealth to be known as the "Commonwealth of the Northern Mariana Islands", in political union with and under the sovereignty of the United States of America.

"Section 102. The relations between the Northern Mariana Islands and the United States will be governed by this Covenant which, together with those provisions of the Constitution, treaties and laws of the United States applicable to the Northern Mariana Islands, will be the supreme law of the Northern Mariana Islands.

"Section 103. The people of the Northern Mariana Islands will have the right of local self-government and will govern themselves with respect to internal affairs in accordance with a Constitution of their own adoption.

"Section 104. The United States will have complete responsibility for and authority with respect to matters relating to foreign affairs and defense affecting the Northern Mariana Islands.

"Section 105. The United States may enact legislation in accordance with its constitutional processes which will be applicable to the Northern Mariana Islands, but if such legislation cannot also be made applicable to the several States the Northern Mariana Islands must be specifically named therein for it to become effective in the Northern Mariana Islands. In order to respect the right of self-government guaranteed by this Covenant the United States agrees to limit the exercise of that authority so that the fundamental provisions of this Covenant, namely Articles I, II and III and Sections 501 and 805, may be modified only with the consent of the Government of the United States and the Government of the Northern Mariana Islands.

"ARTICLE II

"CONSTITUTION OF THE NORTHERN MARIANA ISLANDS

"Section 201. The people of the Northern Mariana Islands will formulate and approve a Constitution and may amend their Constitution pursuant to the procedures provided therein.

"Section 202. The Constitution will be submitted to the Government of the United States for approval on the basis of its consistency with this Covenant and those provisions of the Constitution, treaties and laws of the United States to be applicable to the Northern Mariana Islands. The Constitution will be deemed to have been approved six months after its submission to the President on behalf of the Government of the United States unless earlier approved or disapproved. If disapproved the Constitution will be returned and will be resubmitted in accordance with this Section. Amendments to the Constitution may be made by the people of the Northern Mariana Islands without approval by the Government of the United States, but the courts established by the Constitution or laws of the United States will be competent to determine whether the Constitution and subsequent amendments thereto are consistent with this Covenant and with those provisions of the Constitution, treaties and laws of the United States applicable to the Northern Mariana Islands.

"Section 203. (a) The Constitution will provide for a republican form of government with separate executive, legislative and judicial branches, and will contain a bill of rights.

"(b) The executive power of the Northern Mariana Islands will be vested in a popularly elected Governor and such other officials as the Constitution or laws of the Northern Mariana Islands may provide.

"(c) The legislative power of the Northern Mariana Islands will be vested in a popularly elected legislature and will extend to all rightful subjects of legislation. The Constitution of the Northern Mariana Islands will provide for equal representation for each of the chartered municipalities of the Northern Mariana Islands in one house of a bicameral legislature, notwithstanding other provisions of this Covenant or those provisions of the Constitution or laws of the United States applicable to the Northern Mariana Islands.

"(d) The judicial power of the Northern Mariana Islands will be vested in such courts as the Constitution or laws of the Northern Mari-

the Islands may provide. The Constitution or laws of the Northern Mariana Islands may vest in such courts jurisdiction over all cases in the Northern Mariana Islands over which any court established by the Constitution or laws of the United States does not have exclusive jurisdiction.

"'Section 204. All members of the legislature of the Northern Mariana Islands and all officers and employees of the Government of the Northern Mariana Islands will take an oath or affirmation to support this Covenant, those provisions of the Constitution, treaties and laws of the United States applicable to the Northern Mariana Islands, and the Constitution and laws of the Northern Mariana Islands.

"'ARTICLE III

"'CITIZENSHIP AND NATIONALITY

"'Section 301. The following persons and their children under the age of 18 years on the effective date of this Section, who are not citizens or nationals of the United States under any other provision of law, and who on that date do not owe allegiance to any foreign state, are declared to be citizens of the United States, except as otherwise provided in Section 302:

"'(a) all persons born in the Northern Mariana Islands who are citizens of the Trust Territory of the Pacific Islands on the day preceding the effective date of this Section, and who on that date are domiciled in the Northern Mariana Islands or in the United States or any territory or possession thereof;

"'(b) all persons who are citizens of the Trust Territory of the Pacific Islands on the day preceding the effective date of this Section, who have been domiciled continuously in the Northern Mariana Islands for at least five years immediately prior to that date, and who, unless under age, registered to vote in elections for the Marianas Islands District Legislature or for any municipal election in the Northern Mariana Islands prior to January 1, 1975; and

"'(c) all persons domiciled in the Northern Mariana Islands on the day preceding the effective date of this Section, who, although not citizens of the Trust Territory of the Pacific Islands, on that date have been domiciled continuously in the Northern Mariana Islands beginning prior to January 1, 1974.

"'Section 302. Any person who becomes a citizen of the United States solely by virtue of the provisions of Section 301 may within six months after the effective date of that Section or within six months after reaching the age of 18 years, whichever date is the later, become a national but not a citizen of the United States by making a declaration under oath before any court established by the Constitution or laws of the United States or any court of record in the Commonwealth in the form as follows:

"'I _____ being duly sworn, hereby declare my intention to be a national but not a citizen of the United States.'

"'Section 303. All persons born in the Commonwealth on or after the effective date of this Section and subject to the jurisdiction of the United States will be citizens of the United States at birth.

"'Section 304. Citizens of the Northern Mariana Islands will be entitled to all privileges and immunities of citizens in the several States of the United States.

"'ARTICLE IV

"'JUDICIAL AUTHORITY

"'Section 401. The United States will establish for and within the Northern Mariana Islands a court of record to be known as the "District Court for the Northern Mariana Islands". The Northern Mariana Islands will constitute a part of the same judicial circuit of the United States as Guam.

"'Section 402. (a) The District Court for the Northern Mariana Islands will have the jurisdiction of a district court of the United States, except that in all causes arising under the Constitution, treaties or laws of the United States it will have jurisdiction regardless of the sum or value of the matter in controversy.

"'(b) The District Court will have original jurisdiction in all causes in the Northern Mariana Islands not described in Subsection (a) jurisdiction over which is not vested by the Constitution or laws of the Northern Mariana Islands in a court or courts of the Northern Mariana Islands. In causes brought in the District Court solely on the basis of this subsection, the District Court will be considered a court of the Northern Mariana Islands for the purposes of determining the requirements of indictment by grand jury or trial by jury.

"'(c) The District Court will have such appellate jurisdiction as the Constitution or laws of the Northern Mariana Islands may provide. When it sits as an appellate court, the District Court will consist of three judges, at least one of whom will be a judge of a court of record of the Northern Mariana Islands.

"'Section 403. (a) The relations between the courts established by the Constitution or laws of the United States and the courts of the Northern Mariana Islands with respect to appeals, certiorari, removal of causes, the issuance of writs of habeas corpus and other matters or proceedings will be governed by the laws of the United States pertaining to the relations between the courts of the United States and the courts of the several States in such matters and proceedings, except as otherwise provided in this Article; provided that for the first fifteen years following the establishment of an appellate court of the Northern Mariana Islands the United States Court of Appeals for the judicial circuit which includes the Northern Mariana Islands will have jurisdiction of appeals from all final decisions of the highest court of the Northern Mariana Islands from which a decision could be had in all cases involving the Constitution, treaties or laws of the United States, or any authority exercised thereunder, unless those cases are reviewable in the District Court for the Northern Mariana Islands pursuant to Subsection 402(c).

"'(b) Those portions of Title 28 of the United States Code which apply to Guam or the District Court of Guam will be applicable to the Northern Mariana Islands or the District Court for the Northern Mariana Islands, respectively, except as otherwise provided in this Article.

"'ARTICLE V

"'APPLICABILITY OF LAWS

"'Section 501. (a) To the extent that they are not applicable of their own force, the following provisions of the Constitution of the United States will be applicable within the Northern Mariana Islands as if the Northern Mariana Islands were one of the several States: Article I, section 9, Clauses 2, 3, and 8; Article I, Section 10, Clauses 1 and 3; Article IV, Section 1 and Section 2, Clauses 1 and 2; Amendments 1 through 9, inclusive; Amendment 13; Amendment 14, Section 1; Amendment 15; Amendment 19; and Amendment 26; provided, however, that neither trial by jury nor indictment by grand jury shall be required in any civil action or criminal prosecution based on local law, except where required by local law. Other provisions of or amendments to the Constitution of the United States, which do not apply of their own force within the Northern Mariana Islands, will be applicable within the Northern Mariana Islands only with approval of the Government of the Northern Mariana Islands and of the Government of the United States.

"'(b) The applicability of certain provisions of the Constitution of the United States to the Northern Mariana Islands will be without prejudice to the validity of and the power of the Congress of the United States to consent to Sections 203, 506 and 805 and the proviso in Subsection (a) of this Section.

"'Section 502. "(a) The following laws of the United States in existance on the effective date of this Section and subsequent amendments to such laws will apply to the Northern Mariana Islands, except as otherwise provided in this Covenant:

"'(1) those laws which provide federal services and financial assistance programs and the federal banking laws as they apply to Guam; Section 228 of Title II and Title XVI of the Social Security Act as it applies to the several States; the Public Health Service Act as it applies to the Virgin Islands; and the Micronesian Claims Act as it applies to the Trust Territory of the Pacific Islands;

"'(2) those laws not described in paragraph (1) which are applicable to Guam and which are of general application to the several States as they are applicable to the several States; and

"'(3) those laws not described in paragraph (1) or (2) which are applicable to the Trust Territory of the Pacific Islands, but not their subsequent amendments unless specifically made applicable to the Northern Mariana Islands, as they apply to the Trust Territory of the Pacific Islands until termination of the Trusteeship Agreement, and will thereafter be inapplicable.

"'(b) The laws of the United States regarding coastal shipments and the conditions of employment, including the wages and hours of employees, will apply to the activities of the United States Government and its contractors in the Northern Mariana Islands.

"'Section 503. The following laws of the United States, presently inapplicable to the Trust Territory of the Pacific Islands, will not apply to the Northern Mariana Islands except in the manner and to the extent made applicable to them by the Congress by law after termination of the Trusteeship Agreement:

"'(a) except as otherwise provided in Section 506, the immigration and naturalization laws of the United States;

"'(b) except as otherwise provided in Subsection (b) of Section 502, the coastwise laws of the United States and any prohibition in the laws of the United States against foreign vessels landing fish or unfinished fish products in the United States; and

"'(c) the minimum wage provisions of Section 6, Act of June 25, 1938, 52 Stat. 1062, as amended.

"'Section 504. The President will appoint a Commission on Federal Laws to survey the laws of the United States and to make recommendations to the United States Congress as to which laws of the United States not applicable to the Northern Mariana Islands should be made applicable and to what extent and in what manner, and which applicable laws should be made inapplicable and to what extent and in what manner. The Commission will consist of seven persons (at least four of whom will be citizens of the Trust Territory of the Pacific Islands who are and have been for at least five years domiciled continuously in the Northern Mariana Islands at the time of their appointments) who will be representative of the federal, local, private and public interests in the applicability of laws of the United States to the Northern Mariana Islands. The Commission will make its final report and recommendations to the Congress within one year after the termination of the Trusteeship Agreement, and before that time will make such interim reports and recommendations to the Congress as it considers appropriate to facilitate the transition of the Northern Mariana Islands to its new political status. In formulating its recommendations the Commission will take into consideration the potential effect of each law on local conditions within the Northern Mariana Islands, the policies embodied in the law and the provisions and purposes of this Covenant. The United States will bear the cost of the work of the Commission.

"'Section 505. The laws of the Trust Territory of the Pacific Islands, of the Mariana Islands District and its local municipalities, and all other Executive and District orders of a local nature applicable to the Northern Mariana Islands on the effective date of this Section and not inconsistent with this Covenant or with those provisions of the Constitution, treaties or laws of the United States applicable to the Northern Mariana Islands will remain in force and effect until and unless altered by the Government of the Northern Mariana Islands.

"'Section 506. (a) Notwithstanding the provisions of Subsection 503(a), upon the effective date of this Section the Northern Mariana Islands will be deemed to be a part of the United States under the Immigration and Nationality Act, as amended for the following purposes only, and the said Act will apply to the

Joseph F. Spaniol, Jr.
5602 Ontario Circle
Bethesda, MD 20816

July 22, 1998

Hon. James A. Parker
United States District Court
Post Office Box 566
Albuquerque, New Mexico 87103

Re: Judicial Conference Style Committee

Dear Judge Parker,

I am enclosing my edited copy of Bryan's restyled version of the criminal rules. Please send it along to Bryan when you have finished with it. I have not retained a copy.

In reviewing the draft I spotted three items that John Rabiej's staff might research.

1. Rule 7(a)and (b) – Bryan's draft, page 22 – refers to punishment at hard labor. If these words no longer appear in the Criminal Code or elsewhere, perhaps they can be dropped.

2. Rule 32.1(a)(1)(B)(I) = Bryan's draft, page 95 – refers to a magistrate being authorized to conduct a preliminary hearing in a probation revocation. It is odd that such a provision does not appear elsewhere in these rules, even though there are other duties requiring court approval. Perhaps the provision is obsolete. If not, I believe that under 28 U.S.C. 636 the criminal rules could grant the authorization.

3. Rule 54(c) – Bryan's draft, page 137 – refers to demurrers, etc. When the criminal rules were adopted, there were probably many uses of these terms in the statutes. If research shows they have not survived, perhaps reference to them could be deleted.

Sincerely,

Joseph F. Spaniol, Jr.

Cc: Bryan Garner

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Amendments to Rules 10 and 43; Presence of Defendant at Arraignment**

DATE: **March 24, 1999**

For the past several meetings the Committee has discussed possible amendments to Rules 10 and 43 that would permit a defendant to waive his or her personal appearance at an arraignment. At the last meeting—in the Fall 1998 – the Committee agreed on some language proposed by a subcommittee consisting of Judge Miller and Mr. Martin. The Committee asked me to draft the appropriate amendment.

Attached is a revised draft of the proposed changes to Rules 10 and 43, based upon the Committee's action. Please note that I have suggested some slight revisions from the draft that I presented at the Fall 1998 meeting. For example, I have recommended that the limitation for felony informations be set out separately at the beginning of subsection (c).

I recommend that the amendments to Rules 10 and 43 not be published for comment at this time. Instead, Rule 10 should be referred to both the Standing Committee's Style Subcommittee and Subcommittee B for restyling and discussion at the June 1999 meeting. Rule 43 can be considered later by the appropriate Subcommittee on Style.

Criminal Rules Committee
Proposed Amendment—Rule 10
March 1999

Rule 10. Arraignment

(a) Arraignment, which shall be conducted in open court, ~~and shall~~ consists of:

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

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

(b) The defendant shall be given a copy of the indictment or information before being called upon to enter a plea ~~plead~~.

(c) A defendant need not be present for the arraignment if :

(i) the defendant has been charged by indictment or misdemeanor information;

(ii) the defendant has waived such appearance in a written waiver signed by the defendant and counsel and the waiver affirms that the defendant has received and understands the indictment or information and states that the defendant's plea is not guilty to the charges, and

(ii) the court accepts the waiver.

COMMITTEE NOTE

Read together, Rules 10 and 43 require the defendant to be present in court for the arraignment. *See, e.g., Valenzuela-Gonzales v. United States*, 915 F.2d 1276, 1280 (9th Cir. 1990)(Rules 10 and 43 are broader in protection than the Constitution). The amendment to Rule 10, in addition to several stylistic changes, creates an exception to that rule and provides that the court may permit arraignments when the defendant has waived the right to be present in writing and the court consents to that waiver. A conforming amendment has also been made to Rule 43.

In amending the rule, and Rule 43, the Committee was very much aware of the argument that permitting a defendant to be absent from the arraignment could be viewed as an erosion of an important element of the judicial process. First, it may be important for a defendant to see, and experience first-hand the formal impact of the reading of the charge. Second, it may be necessary for the court to personally see and speak with the defendant at the arraignment, especially where there is a real question whether the defendant really understands the gravity of the proceedings. And third, there may be

defendant really understands the gravity of the proceedings. And third, there may be difficulties in providing the defendant with effective and confidential assistance of counsel if counsel, but not the defendant, appears at the arraignment.

The Committee nonetheless believed that in appropriate circumstances the court, and the defendant, should have the option of conducting the arraignment in the absence of the defendant. The question of when it would be appropriate for a defendant to waive his or her appearance is not spelled out in the rule. That is left to the defendant and the court in each case.

A critical element to the amendment is that no matter how convenient or cost effective a defendant's waiver might be, the defendant's right be present in court stands unless he or she waives that right. As with other rules including an element of waiver, whether a defendant voluntarily waived the right to be present in court during an arraignment will be measured by the same standards. An effective means of meeting that requirement in Rule 10 is to require that any waiver of the right be in writing. Under the amendment, the waiver must be signed by both the defendant and his or her attorney, if one is representing the defendant. Further, the amendment requires that the waiver specifically state that the defendant has received a copy of the charging instrument and understands it.

If the trial court has reason to believe that in a particular case the defendant should not be permitted to waive the right, the court may reject the waiver and require that the defendant actually appear in court. That might be particularly appropriate where the court wishes to discuss substantive or procedural matters in conjunction with the arraignment and the court believes that the defendant's presence is important in resolving those matters.

The amendment does not permit waiver of an appearance where the defendant is charged with a felony information. In that instance, the defendant is required by Rule 7(b) to be present in court to waive the indictment. Nor does the amendment permit a waiver of appearance where the defendant is standing mute, see Rule 11(a)1) or entering a conditional plea, see Rule 11(a)(2), a nolo contendere plea, see Rule 11(11(b), or a guilty plea, see Rule 11(c). In each of those instances the Committee believed that it was more appropriate for the defendant to appear personally before the court.

II-E-2

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Proposed Amendments to Rule 12.2**

DATE: **March 25, 1999**

At the Fall 1998 meeting in Maine, the Committee continued its discussion of several amendments to Rule 12.2. Those amendments address three areas: First, they would require a defendant to give notice of an intent to introduce expert testimony in a capital case sentencing proceeding. Second, the proposed amendment would authorize the trial court to order a defendant, who had provided such notice, to undergo a compelled mental examination. Third, the proposal would place some limits on the ability of the government to see the results of the examination before the penalty phase had begun.

One of the issues the Committee addressed was the question of the impact of the amendment on the defendant's privilege against self-incrimination insofar as the government would have ultimately have access to statements made by an accused during the compelled mental examination. After further discussion, the Committee voted 9 to 2 to amend the Rule to require the trial court to seal the results of any compelled mental examination until the penalty phase had begun.

Second, regarding the issue of whether earlier disclosure should be permitted, the Committee voted 7 to 4 to amend the Rule to provide that if the trial court provides earlier release to the defense, the prosecution must receive a copy as well.

The attached draft and Committee Note reflect those actions.

I recommend that this Rule not be forwarded to the Standing Committee at this time. Under the current plan for re-styling the Rules, this Rule should be reviewed by the Style Subcommittee of the Standing Committee and this Committee's Subcommittee B.

Rule 12.2. Notice of Insanity Defense or Expert Testimony ~~of~~ on Defendant's Mental Condition

* * * * *

(b) EXPERT TESTIMONY OF DEFENDANT'S MENTAL CONDITION. If a defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing upon (1) the issue of guilt or (2) whether in a capital case, a sentence of capital punishment should be imposed, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(c) MENTAL EXAMINATION OF DEFENDANT.

(1) *Authority to Order Examination; Procedures.* If the defendant provides notice under subdivision (a) ~~In an appropriate case~~ the court ~~may~~ must, upon motion of the attorney for the government, order the defendant to submit to an examination conducted pursuant to 18 U.S.C. ~~4241 or~~ 4242. If the defendant provides notice under subdivision (b) the court may, upon motion of the attorney for the government, order the defendant to submit to an examination conducted pursuant to procedures as ordered by the court.

(2) *Disclosure of Results of Examination.* The results of the examination conducted solely pursuant to notice under subdivision (b)(2) shall be sealed and not disclosed to any attorney for the government or the defendant unless and until

the defendant is found guilty of one or more capital crimes and the defendant confirms his or her intent to offer mental condition evidence during sentencing proceedings.

(ii) The results of the examination may be disclosed earlier to the defendant upon good cause shown.

(iii) If early disclosure is made to the defendant, similar disclosure shall be made to the attorney for the government.

(3) Disclosure of Statements by the Defendant No statement made by the defendant in the course of any examination provided for by this rule, whether the examination be with or without the consent of the defendant, no testimony by the expert based upon such statement, and no other fruits of the statement shall be admitted in evidence against the defendant in any criminal proceeding except on an issue respecting mental condition on which the defendant has introduced testimony.

COMMITTEE NOTE

The changes to Rule 12.2 are designed to address three issues. First, the amendment clarifies that Rule 12.2(c) authorizes a trial court to order a mental examination for a defendant who has indicated an intention to raise the defense of insanity. The second amendment relates to a requirement that the defendant provide notice of an intent to present evidence of his or her mental condition during a capital sentencing proceeding. And finally, the amendments address the ability of the trial court to order a mental examination for a defendant who has given notice of an intent to present evidence of his or her mental condition during sentencing and when the results of that examination may be disclosed.

Subdivision (b). Under current subdivision (b), a defendant who intends to offer expert testimony on the issue of his or her mental condition on the question of guilt must provide pretrial notice of that intent. The amendment extends that notice requirement to

a defendant who intends to offer expert testimony on his or her mental condition during a capital sentencing proceeding. As several courts have recognized, the better practice is to require pretrial notice of that intent so that any mental examinations can be conducted without unnecessarily delaying capital sentencing proceedings. *See, e.g., United States v. Beckford*, 962 F. Supp. 748, 754-764 (E.D. Va. 1997); *United States v. Haworth*, 942 F. Supp. 1406, 1409 (D.N.M. 1996). The amendment adopts that view.

Subdivision (c). The change to subdivision (c) clarifies the authority of the court to order mental examinations for a defendant. As currently written, the trial court has the authority to order a mental examination of a defendant who has indicated under subdivision (a) that he or she intends to raise the defense of insanity. Indeed, the corresponding statute, 18 U.S.C. § 4242 indicates that the court must order an examination if the defendant has provided notice of an intent to raise that defense and the government moves for the examination. The amendment conforms subdivision (c) to that statute. And any examination conducted on the issue of the insanity defense would thus be conducted in accordance with the procedures set out in the statutory provision.

While the authority of a trial court to order a mental examination on a defendant who has registered an intent to raise the insanity defense seems clear, the authority to order an examination on a defendant who intends only to present expert testimony on his or her mental condition is not so clear. Some courts have concluded that a court may order such an examination. *See, e.g., United States v. Stackpole*, 811 F.2d 689, 697 (1st Cir. 1987); *United States v. Buchbinder*, 796 F.2d 910, 915 (1st Cir. 1986); and *United States v. Halbert*, 712 F.2d 388 (9th Cir. 1983). In *United States v. Davis*, 93 F.3d 1286 (6th Cir. 1996), however, the court in a detailed analysis of the issue concluded that the district court lacked the authority to order a mental examination on a defendant who had provided notice of an intent to offer evidence, inter alia, on a defense of diminished capacity. The court noted first, that the defendant could not be ordered to undergo commitment and examination under 18 U.S.C. 4242, because that provision relates to situations where the defendant intends to rely on the defense of insanity. The court also rejected the argument that examination could be ordered under Rule 12.2(c) because this was, in the words of the rule "an appropriate case." The court concluded, however, that the trial court had the inherent authority to order such an examination.

The amendment is intended to make it clear that the authority of a court to order a mental examination under Rule 12.2(c) explicitly extends to those cases where the defendant has provided notice, under Rule 12.2(b), of an intent to present expert testimony on his or her mental condition, either on the merits or at sentencing.

The amendment to Rule 12.2(c) is not intended to limit or otherwise change the authority, which a court might have, either by statute or under its inherent authority, to order other mental examinations.

The amendment also addresses the question of what procedures should be used for a court-ordered examination. As currently stated in the Rule, if the examination is being ordered in connection with the defendant's stated intent to present an insanity defense, the procedures are dictated by 18 U.S.C. § 4242. On the other hand, if the examination is being ordered in conjunction with a stated intent to present expert testimony on the defendant's mental condition (not amounting to a defense of insanity) either at the guilt or sentencing phases, no specific statutory counterpart is available. Accordingly, the court is given the discretion to specify the procedures to be used. In doing so, the court may certainly be informed by other provisions, which address hearings on a defendant's mental condition. *See, e.g.*, 18 U.S.C. 4241, et. seq.

The final changes to Rule 12.2 address the question of when the results of an examination ordered under the rule, may, or must, be disclosed. The courts, which have addressed the issue generally, recognize that use of a defendant's statements made during a court-ordered examination may compromise the defendant's right against self-incrimination. *See, e.g., Estelle v. Smith*, 451 U.S. 454 (1981) (defendant's privilege against self-incrimination violated where he was not advised of right to remain silent during court-ordered examination and prosecution introduced statements during capital sentencing hearing). But subsequent cases have indicated that where the defendant has decided to introduce expert testimony on his or her mental condition, the courts have found a waiver of the privilege. That view is reflected in Rule 12.2(c) which indicates that the statements of the defendant may be used against the defendant only after the defendant has introduced testimony on his or her mental condition. What the current rule does not address is the issue of when, and to what extent, the prosecution may see the results of the examination, which may include the defendant's statements, where evidence of the defendant's mental condition is being presented solely at a capital sentencing proceeding.

The proposed change adopts the procedure used by some courts to seal or otherwise insulate the results of the examination until it is clear that the defendant will introduce expert testimony about his or her mental condition at a capital sentencing hearing, i.e., after a verdict of guilty on one or more capital crimes. *See, e.g., United States v. Beckford*, 962 F. Supp. 748 (E.D.Va. 1997). Most courts that have addressed the issue have recognized that if the government obtains early access to the accused's statements, it will be required to show that it has not made any derivative use of that evidence. Doing so, can consume time and resources. At the same time, the Committee believed that there might be instances where there may be sound reasons for releasing the results before the verdict to the defendant. Under the amendment, the defendant may request early release of the results of the examination, on good cause shown. If the defense obtains the results of the examination, then similar disclosure also must be made to the government to permit it to adequately prepare for sentencing issues.

Court-Ordered Mental Examinations of Capital Defendants: Procedures in Ten States

Laural L. Hooper
Jennifer Evans
Robert Nida

March 26, 1999

Report to the Judicial Conference Advisory Committee on Criminal Rules

TABLE OF CONTENTS

Introduction and Background[1]

Federal Rule of Criminal Procedure 12.2,[2] last amended in 1987,[3] requires notice prior to trial of the defendant's intention either to rely upon the defense of insanity or to introduce expert testimony of mental disease or defect on the theory that such mental condition is inconsistent with the mental state required for the offense charged.[4] One objective of the rule is to afford the government time to prepare to address the mental health issue, which usually involves reliance on expert testimony. In the event that the defendant fails to give notice or to submit to a court-ordered examination, the court may exclude the testimony of any expert witness offered by the defendant on the issue of the defendant's guilt.[5]

The Judicial Conference Advisory Committee on Criminal Rules (Committee) is currently considering a proposed amendment to Rule 12.2. First, the proposed amendment would require a defendant in a capital case to give **pretrial** notice if the defendant intends to introduce expert mental health testimony during the **sentencing phase** of the trial. Requiring pretrial notice of that intent will allow any mental examination to be conducted without unnecessarily delaying the sentencing proceedings.

Second, the proposed amendment would authorize the trial court to order a capital defendant who has given such notice to undergo a mental examination by a government expert. The proposed amendment makes clear that the authority of a court to order a mental examination under Rule 12.2(c) explicitly extends to those cases where the defendant has provided notice, under Rule 12.2(b), of an intent to present expert testimony on his or her mental condition, either in the guilt phase or at sentencing.

Third, the proposed amendment would limit the government's ability to review the results of the examination before the penalty phase so that any information the capital defendant divulges to a mental health expert cannot be inadvertently or intentionally used against him in the guilt phase of the trial. Currently, the rule does not address the issues

---

[1] Special acknowledgments are made to Molly Treadway Johnson and David Rauma for their assistance with this report.

[2] Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition.

[3] The last amendment was non-substantive in nature and was made when Public Law 99-646 was adopted to make minor or technical amendments to provisions enacted by the Comprehensive Crime Control Act of 1984.

[4] Rule 12.2(b).

of when, and to what extent, the prosecution may review the results of the examination, including the defendant's statements, when evidence is being presented solely at the capital sentencing phase. The Committee's proposed amendment would suggest the procedure used by some state courts to seal or withhold the results of the examination until the defendant has indicated that he will introduce expert testimony about his mental condition at a capital sentencing hearing. While the amendment does not require sealing the results, the Committee recognizes that the results should not be used to the detriment of the defendant on the issue of guilt or innocence. At the same time, there might be instances where, for good cause shown, examination results may be released before the verdict. Under the proposed amendment, either the government or the defendant could request early release of the examination results. If the government obtains the results of the examination, then similar disclosure would also have to be made to the defendant.

The Committee asked the Federal Judicial Center to study the procedures governing court-ordered mental examinations of capital defendants implemented by five to ten states with extensive death penalty experience. The Committee specifically requested that we study procedures used in California, Florida, Ohio, Texas and Virginia. We have included the following five additional states: Alabama, Arizona, Idaho, New York, and Tennessee. These additional states provide a geographic balance to the Committee's list of states. Geography is important because it shows the different types of systems, throughout the nation, including the differences in regions.

Specifically, the Committee seeks answers to the following questions:

- Does the state provide, either by statute or by case law, for the court to order a pretrial state-sponsored mental examination if the defendant announces his/her intent to use the testimony of a mental health expert during the penalty phase of the trial?

- If so,

  a) What is the triggering mechanism that allows the government to move for examination (e.g., notice by the defendant of his/her intent to call a mental health expert during the penalty phase)?

  b) If a state-sponsored examination is ordered, what device is used to prevent the state from using self-incriminatory

[5] Rule 12.2(d).

statements the defendant may make to the state-appointed expert during the examination as evidence in the guilt phase of the case?

c) Is the defendant given access to the state expert's report at the same time the state receives it?

Methods

Information contained in this report was derived primarily from published materials, including statutes, rules and case law, in each of the selected states. While we focused on the rules and case law in each jurisdiction, actual practices may vary. In some instances, we contacted individuals familiar with death penalty litigation to clarify what we perceived to be conflicts or discrepancies in the published materials. From these materials and conversations, we identified the critical elements of each state's procedures. Given what we learned, we included additional variables, beyond those requested by the Committee, as needed to clarify the states' procedures. For example, we obtained information about the various sentencing schemes of the states. This information is important because it informs the reader of who ultimately determines whether a defendant will be sentenced to death and how the mental health expert information will be incorporated into the decision-making process. Finally, we looked at several federal cases that have addressed some of these issues.

This report comprises three parts. Part I provides a summary analysis comparing and contrasting the various approaches employed by the states. Part II consists of tables summarizing the states' procedures. Part III provides a detailed description of each state's procedures. This section will help a reader understand how all of the components operate as a whole system. Finally, in the appendix we include either complete copies or excerpts of each state's most relevant statutes, rules, and case law. Some of these materials suggest language that the Committee may find helpful as it drafts amendments to the current rule.

Part I – General Description and Key areas of Variation in Procedures Governing Court-Ordered Mental Examinations of Capital Defendants in Ten States

In this part we describe variations in the procedures of the ten states and highlight the following key areas: sentencing authority, legal source of mitigation authority, whether a state is required to prove future dangerousness, the triggering mechanism that allows the government to request a mental health examination of a defendant, and mental health examination and reporting procedures.

As background and context for the ten states studied, Table A shows the number of people currently on death row and the number of individuals who have been executed since reinstatement of the death penalty in 1976.[6] Note that some states, such as New York, did not have the death penalty until recently.

Table A: Number of death row inmates and executions[7]

State	Number of people on death row as of January 1, 1999	Number of executions since 1976 as of March 1, 1999
Alabama	173	17
Arizona	122	16
California	519	6
Florida	390	43
Idaho	22	1
New York	2	0
Ohio	191	1
Tennessee	102	0
Texas	441	171
Virginia	36	61

Who determines whether a defendant will be sentenced to death?

Whether the jury, judge, or a combination is charged with sentencing the defendant is important, as it indicates who will receive the mental health expert information, how it will be presented and how such information will be used in the decision-making process. In five states—California, New York, Tennessee, Texas and Virginia—the jury determining the sentence is responsible for weighing and evaluating

[6] *Gregg v. Georgia*, 428 U.S. 153 (1976).
[7] Source: The Death Penalty Information Center, Washington, D.C.

aggravating and mitigating factors. The jury members alone determine the relative importance of the mental health evidence.

In three states—Alabama, Florida and Ohio—the jury issues an "advisory" sentence to the judge, who then determines the actual sentence. In two of these states, Alabama and Florida, a judge may sentence a defendant to death over the jury's advice. In Ohio, a jury (unless a jury is waived), upon finding beyond a reasonable doubt that the circumstances warrant a death sentence, makes a recommendation to the judge. The judge may ultimately sentence the defendant to death or imprisonment, but may not sentence the defendant to death contrary to the recommendation of the jury.

Finally, in Arizona and Idaho, the judge alone determines the defendant's sentence as there is no jury involvement in the sentencing phase. In both these states, a judge holds a separate hearing that addresses mitigating and aggravating factors and subsequently determines whether the death penalty is warranted.

In federal death penalty cases, a sentencing hearing is normally held in front of a jury, which determines the sentence.

Source of mitigation law authorizing court-ordered mental health examinations

In three states—Florida, New York, and Virginia—statutory law governs the procedures for court-ordered mental examinations. In the other seven states—Alabama, Arizona, California, Idaho, Ohio, Tennessee, and Texas—case law, or a combination of case law and rules, govern such procedures. In addition, the controlling law's enactment date allows one to assess the law's "entrenchment" in the adjudication system and determine whether the law has encountered constitutional challenges.[8] For example, in 1995, New York enacted a statute to provide guidelines to the parties about the use of mental health expert testimony, so this has not had much time to be tested.

---

[8] *See, e.g.*, Stephen Michael Everhart, *Precluding Psychological Experts From Testifying for Defense in the Penalty Phase of Capital Trials: The Constitutionality of Florida Rule of Criminal Procedure 3.202(E)*, 23 Fla. St. U. L. Rev. 933 (1996).

Is the state required to prove future dangerousness?

Whether future dangerousness is a required factor in a state's sentencing scheme is important because it mandates that the government prove the future dangerousness of the defendant and more than likely will affect the presentation and use of mental health evidence. Such a scheme also provides the defendant an opportunity to show a lack of future dangerousness, thereby giving the government an opportunity to rebut defendant's mental health evidence on this issue.

Of the ten states studied, only one, Texas, explicitly requires jurors to decide the issue of future dangerousness,[9] and the state must prove future dangerousness beyond a reasonable doubt. In practice, much of this is done through the presentation of record evidence and hypothetical questions to experts. In contrast, in Idaho, a judge-sentencing jurisdiction, there is no requirement to prove future dangerousness; however, it is one of nine factors used to meet the aggravating prong of the capital punishment sentencing structure. At sentencing, if the defendant's mental condition is at issue, the judge must consider the risk of danger that the defendant may create for the public if released. Furthermore, any mental examination report must include a consideration of this risk. In Virginia, for example, the Commonwealth's expert may testify to the presence or absence of mitigating circumstances, and may testify to the defendant's future dangerousness.

The remaining seven states—Alabama, Arizona, California, Florida,[10] New York, Ohio, and Tennessee—have no explicit requirement that the state address the issue of future dangerousness in the sentencing proceedings. Consequently, issues regarding the results of court-ordered examinations are more likely to arise in the context of their use as rebuttal to a defendant's evidence in mitigation.

Restriction on sentencing the mentally retarded to death

This report includes information on the states studied that prohibit the sentencing of the mentally retarded to death. The federal system currently prohibits the execution of the mentally retarded. This information is important to understand, as the evidence that is

---

[9] The U.S. Supreme Court in *Jurek v. Texas*, 428 U.S. 227 (1976) upheld the Texas statute as not unconstitutional on its face. *See also,* Tex. Crim. P. Code Ann. § 37.071 (West 1998).

[10] The state may offer rebuttal evidence if the defense raises the issue of the unlikelihood of future dangerousness as a mitigating factor. *Elledge v. State*, 706 So.2d 1340, 1345 (Fla. 1997).

presented in the sentencing hearing may be affected if mental retardation is a sentencing factor. While twelve[11] of the thirty-eight death penalty states prohibit the execution of the mentally retarded, different standards are used to determine what rises to the level of mental retardation to prohibit a death sentence. Some states, including New York, utilize standards outlined in the current version of the *Diagnostic Manual of Mental Disorders.*[12]

Of the two states studied that permit the execution of the mentally retarded, New York and Tennessee, New York allows the execution of the mentally retarded in the limited circumstance where the defendant is convicted of killing a corrections officer. The other eight states place no prohibition of the execution of the mentally retarded. All states, including those that allow the execution of the mentally retarded, however, permit mental retardation or impairment to be argued as a mitigating factor.

Triggering mechanism that allows the government to move for a court-ordered mental examination of a defendant

We found that four activities may trigger whether the government will move for a mental health examination of a capital defendant. These activities are: 1) notice of intent to use mental health expert testimony in the sentencing phase; 2) a request for a presentence report; 3) the defendant's request for expert funds or the submission of an expert's witness list; and 4) a motion requesting a court-ordered mental health examination. Below we describe each activity in more detail. Any one of these activities is sufficient to result in the order of an examination.

1. Notice

Notice commences the process of mental health evaluations in most states. Generally, when either party intends to offer mental health evidence, the party must serve notice to the other party and to the court. When notice is required differs in the states studied. For example, in four states—Florida, New York, Tennessee and Virginia—notice must be given pretrial, while in Alabama and California, notice must be given after the guilt phase and before the sentencing phase begins. The other states vary

[11] The twelve states are: Arkansas, Colorado, Georgia, Indiana, Kansas, Maryland, Nebraska, New Mexico, New York, Tennessee, and Washington. *See* Death Penalty Information Center, Washington, D.C., *Mental Retardation and the Death Penalty* (Updated March 16, 1999).

[12] DIAGNOSTIC AND STATISTICS MANUAL OF MENTAL DISORDERS (4th ed. 1994).

in their requirements, ranging from no requirement (Idaho) to any time after charges are filed (Arizona).

The contents of notice documents also varies. For example, in California, counsel must provide not only the names and addresses of the witnesses, but also the reports of the experts, including examination results, tests, experiments conducted, and any comparisons. In three states—Florida, New York, and Tennessee—in addition to witness names and addresses, counsel must provide a brief summary of the type of evidence the expert will introduce. The remaining six states require only simple notification that mental health mitigation evidence will be offered, or are silent on this issue.

Six states—Alabama, Arizona, California, Florida, Idaho, and Texas—do not provide for sanctions in the event a party fails to give proper notice. In contrast, in New York, if a party fails to give notice the opposing side is entitled to a continuance and the counsel may be fined, but the expert's testimony will not be barred from inclusion in the sentencing trial. In Tennessee and Virginia, however, defense experts' testimony may be barred as a result of failure to give notice.

2. Request for Presentence Report

In Ohio, a defendant has the option of requesting a presentence report, and this request must be granted in a capital case. The report generally addresses all relevant mental health issues. If the defense makes such a request, the court will appoint a mental health expert, who performs the examination and provides a copy of the report to the court, the trial jury, counsel for the government, and the defendant simultaneously.

3. Request for expert funds or submission of a witness list

In Ohio and Texas, constructive notice is provided when a party requests funds to hire an expert or submits a witness list. After notice is provided, the government can move to request that the defendant be examined by its expert.

4. Motion from state or defendant

In Arizona, at any time after an information or complaint is filed or an indictment returned, any party may request the court to order a mental examination to evaluate mental competency to stand trial or to investigate the defendant's mental state at the time the offense. The right of examination includes mitigating arguments that defendant, due to defendant's mental retardation, lacked intent.

In Arizona and Idaho, jurisdictions in which the judge determines the sentence, a judge *sua sponte* may order an examination to investigate the defendant's mental condition, if there is reason to believe that a defendant's mental health will be a sentencing issue.

If an examination is ordered, who selects the expert?

There are generally two types of experts that may be appointed by the court for the state's examination. Whether the expert is hired by the state or appointed by the court may influence how the mental health examination evidence is presented. In some states, the experts are offered on behalf of the parties within the adversarial system, but in other states, a court-appointed expert testifies from a neutral standpoint on behalf of both parties.

In five states—California, Florida, New York, Tennessee and Texas—the state selects its own expert. In contrast, in Idaho, Ohio (under the presentence investigation option), and Virginia the court appoints a neutral expert.

In Alabama, examinations are most often conducted by the state mental health hospital professionals. In Arizona, the court appoints at least two mental health experts from a list of experts provided by the parties. The court allows the parties to stipulate to one expert. Finally, in Ohio, under the partisan option, the defendant may select the expert and, if the defendant is indigent, the court will pay the expert's fees.

When is defendant examined by the state's expert?

The timing of an examination of a defendant by the state's expert varies considerably, and will determine when the parties receive certain types of mental health information. As a result, the timing of the examination may play a role in the parties' evidentiary strategies. In states that use a jury to determine the sentence, timing is more critical, as the same trial jury is often used for sentencing immediately after the guilt phase. In states where the judge determines the sentence, timing is not as critical, because a break in the proceedings is common. In four states—Alabama, California, Florida, and Ohio (under the presentence report option)—a defendant is not examined by the state's expert until after the guilt phase has concluded. Three states—New York, Tennessee and

Virginia—allow for pretrial examination. In Arizona, the state's examination is conducted within ten days of the expert's appointment. It appears that Idaho and Texas, upon good cause shown, allow the state's examination to take place at any time during the adjudication process.

Is counsel permitted to be present during the state's court-ordered examination?[13]

Some states allow defense counsel to be present during a court-ordered examination because the examination is seen as a critical stage of the prosecution. Moreover, counsel's presence may be viewed as providing the defendant with effective assistance of counsel. Two states, Florida and New York, permit prosecutors and defense counsel to be present at the examination. In *People v. Whitfield*,[14] a non-capital New York case, the court held that while the accused's counsel had a right to be at a court-ordered psychiatric examination conducted at the request of the prosecution, it was proper to require counsel as well as a stenographer to be placed behind a one-way mirror from which point they could observe and hear the examination without constituting a visual interference.[15]

In Texas, defense counsel may be present outside the examination, and the defendant may be excused to consult with counsel. [16]

In five states—Alabama, Arizona, California, Idaho, and Tennessee—defense counsel has no right to be present during the court-ordered examination. However, in Arizona, the court, at its discretion may permit defense counsel to be present. Several arguments are commonly raised for not allowing defense counsel to attend the examination. First, counsel's presence can inhibit the defendant's responses, thereby limiting the effectiveness of the examination. Second, counsel's presence increases the

---

[13] Counsel has the absolute right to know an examination will take place and the purpose of the examination. *See Estelle v. Smith,* 451 U.S. 454 (1981); *Powell v. Texas*, 109 S.Ct. 3146, 3149 (1989).
[14] 411 N.Y.S.2d 104 (1978).
[15] Timothy E. Travers, *Right of Accused in Criminal Prosecution to Presence of Counsel at Court-Appointed or –Approved Psychiatric Examination*, 3 A.L.R. 4th 910, n22.
[16] Specifically, in *Lagrone v. State*, 942 S.W.2d 602, 610, n.6 (Tex. Crim. App. 1997), the court suggested the following protections for the defendant: first, the defendant should be able to recess the examination to consult with his counsel who may be present in an adjoining room; second, the mental health professional should not relate specific statements from the interview to the prosecutors, but should reduce his findings to a report delivered directly to the court; third, the court should review the findings and decide whether to

likelihood of disruption. Finally, since information learned is not privileged, counsel would only be able to observe the examination and would not be able to contribute anything meaningful to the examination. Ohio's laws are silent on whether counsel may be present.

Are cautionary statements provided to defendant by the state's expert?

What types of safeguards do the states implement to prevent the government from using evidence derived from a pretrial court-ordered mental health examination inappropriately? First, it should be noted that in most states professional ethical standards recommend that the examiner make particular cautionary statements to the defendant prior to the examination.[17]

Currently, there is wide variation in the Miranda-type protections[18] and the seals placed on expert reports in the different states. For example, we found that for seven of the ten states studied—Arizona, Florida, New York, Ohio, Tennessee, Texas, and Virginia—the law is silent or does not appear to require any Miranda-type warning or similar cautionary statement prior to a court-ordered examination. In contrast, Idaho case law specifically requires that the state's expert provide Miranda warnings to the defendant. In two states, Alabama and California, the case law suggests providing a cautionary statement to a defendant. For example, in 1990, the Alabama Supreme Court held that Fifth Amendment warnings were proper in a particular case.[19]

---

release only the ultimate conclusions and Brady evidence; and finally, the full report should be released at the time the defense calls its expert.

[17] The information a mental health professional should typically provide includes the following:

(1) The name or role of the person(s) or agencies for whom the clinician is conducting the evaluation and to whom the clinician will submit a report.
(2) The legal issues that will be addressed in the evaluation.
(3) The kinds of information most likely to be material to the evaluation and the proposed techniques (interview, testing, etc.) to be used to gather the information.
(4) The legal proceeding(s) (e.g., hearing; trial; posttrial sentencing hearing) at which testimony is anticipated.
(5) The kinds of information that may require special disclosure to third parties and the potential consequences for the individual.
(6) Whether there is a legal right to decline/ limit participation in the evaluation and any known sanctions for declining. Gary B. Melton, et al., *Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers*, 88 (2d ed. 1997).

[18] If statements made during a pretrial competency hearing are to be used later in the penalty phase, Miranda warnings are required. *See Estelle v. Smith*, 451 U.S. 454, 461-63, 466-68 (1981).

[19] *Ex parte Wilson*, 571 So.2d 1251, 1258 (Ala. 1990).

Sanctions for defendant's non-cooperation with the state's expert

The types of sanctions that may be imposed often influence the defense's strategic decision-making about whether to allow an examination and offer mitigation evidence. In three states— Florida, Tennessee, and Virginia—if the defendant fails to cooperate with the state's expert, the court, at its discretion, bar the defendant from presenting his own expert evidence. Similarly, in New York, if the defendant willfully fails to cooperate with the state's expert, the court, upon motion of the state, will instruct the jury of the defendant's failure to cooperate, but a defense expert will not be precluded from testifying. Any statements made by the defendant to the state's expert will be precluded from use for any purpose other than rebuttal evidence in the sentencing portion of the trial. In two states, California and Texas, the state's expert may be allowed to testify about the defendant's lack of cooperation. However, in California, the court may not exclude a defendant's mental health evidence from the sentencing phase, in spite of the defendant's lack of cooperation with the state's expert.

In Idaho, there is no explicit sanction imposed for failure to cooperate. However, the sentencing judge will be aware of defendant's non-compliance and may factor it into the sentencing process. Finally, Alabama, Arizona, and Ohio do not appear to impose sanctions for a defendant's non-cooperation with the state's expert.

Safeguards used to prevent the state from using self-incriminatory statements the defendant may make to the court-appointed expert during defendant's mental health examination

Of the ten states studied, Tennessee is the only one that explicitly requires the reports of the state and defense experts to be placed under seal prior to jury selection. The state does not receive either report until after the guilt phase and confirmation that the defense intends to introduce mental health evidence as a mitigating factor. The state may use the information from the reports only after the defendant actually presents his expert.

In Texas, case law suggests that reports are held by the court until defendant's expert actually takes the stand. In Arizona, once the reports are complete, they are presented to the court and to counsel within ten working days. Court staff distribute

copies of the state's examination to both sides only after defense counsel has had the opportunity to edit any statements made by the defendant during the examination.

Although the remaining seven states have no explicit provision for protections or seals, these states allow the evidence from the state's examination to be used only to rebut mitigation evidence, and in Texas and Virginia, to prove future dangerousness.

Is the defendant given access to the state expert's report at the same time the state receives it?

In six states—Alabama, California, New York, Ohio, Tennessee, and Virginia—upon completion of the state-sponsored examination, all records and reports relating to the examination are made available to defense counsel. In Ohio, the presentence investigation report is furnished to defense counsel and to the jury. In California, the defendant receives the probation department's presentence report, which includes mental health information. In Arizona, the court requires the state's report be delivered to the defendant within ten days of the examination. In Idaho, the court forwards a copy to defense counsel once it has received it.

In Florida, there is no specific rule that requires the state's report to be delivered to the defense. However, since the rule allows both the government and defense counsel to be present during the state-sponsored examination, in practice the mental health information, but not the conclusions, is immediately available to all counsel. Finally, in Texas, while there is no clear law, the *Lagrone* case suggests that a court review the state's expert report for Brady material, which would then be turned over to the defense. In the absence of Brady material, the court holds the report until the defendant's expert takes the stand.[20]

When is the defense expert's report released to the state?

When, and whether, the government receives the defense expert's report varies from state to state. For example, four states—Arizona, Florida, Ohio and Virginia—require the defense to provide a copy of its expert report prior to the guilt phase of the trial. Specifically, in Arizona, the defense must submit its report at least 15

[20] *Lagrone v. State*, 942 S.W.2d 602, 610 n. 6(5) (Tex. Crim. App. 1997).

days prior to trial. Similarly, in Florida, the defense must present a statement of particulars listing statutory and non-statutory mental mitigating circumstances to be established at sentencing, 20 days before trial. The defendant's expert's report is given to the government only as a sanction for the defendant's refusal to cooperate with the state's expert. In Ohio, the rule provides that the defendant, upon request, must provide the government copies of reports and examinations that will be used in testimony. The rule further requires that discovery be provided three days prior to the beginning of trial or seven days after the government provides its discovery. In Virginia, the defense expert's evaluations, medical records, and mental examination report are provided to the state after pretrial notice is provided to the court (notice is required no later than 21 days prior to trial).

In contrast, in Tennessee, the defense expert's report is filed pretrial with the court under seal and is provided to the state only after conviction and confirmation that the defendant will actually introduce evidence of mental health as a mitigating factor.

California law requires that, once the guilt phase of a capital trial is completed, the defendant must reveal his sentencing phase witnesses and reports. Finally, Alabama, New York, and Texas do not require the defense to release its expert's report to the state.

Federal Cases

In *United States v. Hall*,[21] the Fifth Circuit Court of Appeals recently addressed some of the issues raised in this report. In *Hall*, the defendant contended, *inter alia*, that the district court could not properly compel him to undergo a government psychiatric examination as a condition of his being allowed to introduce psychiatric evidence at sentencing, because doing so forced him unconstitutionally to choose between exercising his Fifth Amendment privilege against self-incrimination and his Eighth Amendment right to present evidence. In addition, the defendant had requested that the results of his court-ordered mental examination be sealed until the penalty phase of his trial. The court stated that "a defendant who puts his mental state at issue with psychological evidence may not then use the Fifth Amendment to bar the state from rebutting in kind."[22] Also, it appears that the *Hall* decision does not require the court to seal the results of a defendant's court-ordered examination prior to the penalty phase to adequately safeguard defendant's Fifth Amendment rights, although the court indicated that it might be desirable to do so.[23]

In *United States v. Haworth*,[24] two defendants were eligible for the death penalty under 21 U.S.C. § 848(e). The government moved for an order requiring the defendants to provide notice of their intent to rely on mental health conditions as mitigation at the penalty phase and, if such notice was given, requiring the defendants to be examined by government experts. The defendants contended that there is no statute or rule that expressly permits a court to order an independent psychological examination for the government's use in rebuttal in the penalty phase. The court granted the government's motion and cited several statutes that provide indirect support for the government's request. First, 21 U.S.C. § 848(m) states that the "defendant may introduce evidence of

---

[21] 152 F.3d 381 (5th Cir. 1998).

[22] *Id.* at 398.

[23] Specifically, the court stated:

> "While we acknowledge that such a [procedure] is doubtless beneficial to defendants and that it likely advances interests of judicial economy by avoiding litigation over whether particular pieces of evidence that the government seeks to admit prior to the defendant's offering psychiatric evidence were derived from the government psychiatric examination, we nonetheless conclude that such a [procedure] is not constitutionally mandated. *Id.* at 398.

[24] 942 F.Supp. 1406 (D.N.M. 1996).

any mitigating factor, including the significant impairment of the defendant's capacity to appreciate the wrongfulness of his conduct. Such evidence would most likely be presented by an expert in psychology or psychiatry."[25] In addition, § 848(j) provides that the "government is entitled to rebut 'any information to establish the existence of any of the ... mitigating factors[.]'"[26] Moreover, the court stated that the "[g]overnment's ability to rebut a defendant's evidence of mental condition would be sharply curtailed if it is not allowed to have the defendant examined by an independent mental health professional."[27] Finally, the court stated that "the government's expert cannot meaningfully address the defense expert's conclusions unless the government's expert is given similar access to the 'basic tool' of his or her area of expertise: an independent interview with and examination of the defendant."[28] Consequently, the court held that the government would be permitted independent psychological examinations of the defendants' mental condition during the penalty phase of trial, for the use in rebuttal of anticipated defendants' expert testimony during the penalty phase.[29] Also, in *Haworth*, the court required that the court-ordered examination results be filed under seal and released to the parties only after a verdict of guilty on the capital charges.[30]

Similarly, in *United States v. Beckford*,[31] (a 21 U.S.C. § 848 case) the government filed a motion for notice[32] and reciprocal discovery of mental health defenses. The court

---

[25] 942 F.Supp. 1406.
[26] *Id.* (citations omitted).
[27] *Id.* at 1408.
[28] *Id.*
[29] Specifically, the court ordered:

> (1) the parties to submit their recommendations regarding the expert to be appointed, the timing of the examination, and the safeguards to be implemented in the completion of the examination;
> (2) an independent examination by a psychiatrist or psychologist;
> (3) the results of the court-ordered examination and any examination initiated by the defendants to be filed under seal with the court, and that neither party could discuss the court-ordered examination with the court-appointed mental health professional;
> (4) that in the event of a guilty verdict, the results of any court-ordered examination be released at the court's discretion with respect to that defendant;
> (5) that the government would not be permitted to introduce at the penalty phase any evidence obtained as a result of any court-ordered examination until the defendant who is the subject of the examination introduces evidence of his mental condition; and
> (6) if a defendant fails to provide notice or fails to participate in a court-ordered mental examination that defendant may forfeit his right to introduce evidence of his mental condition at the penalty phase. *Id.*

[30] *Id.* at 1408-09; *see also United States v. Vest*, 905 F.Supp. 651, 654 (W.D.Mo. 1995.).
[31] 962 F.Supp. 748 (E.D.Va. 1997)

held that even where defendant is required to give pretrial notice of intent to use mental health evidence at the sentencing phase of trial, the statements made in any court-ordered examination cannot constitutionally be used against the defendant in the guilt phase. Therefore, the results of any court-ordered examination must be deferred until after defendant's guilt is determined.[33] Also, in a footnote, the court stated that "[m]aking the report of the examination available to the prosecution before conclusion of the guilt phase would present the risk of inadvertent use and would lead to difficult problems respecting the source of prosecution evidence and questioning in the guilt phase."[34] Consequently, the court stated that "where the [c]ourt-ordered examination will take place well before the start of the trial, the Fifth Amendment requires that the report of the [g]overnment's expert remain sealed until after the guilt phase."[35]

In summary, these three published federal case opinions demonstrate judges' attempts to balance the prosecution's need to prepare adequately for rebuttal of the defendant's expert testimony during the penalty phase with the court's concerns about potentially improper uses of a defendant's statements during a mental health examination. Sealing the results of government-requested expert examinations until after the conclusion of the guilt phase is one solution to the tension between these two conflicting needs.

---

[32] In its motion, the government also requested that "the defense be ordered to provide the government with any and all materials supplied to the defense expert that form the basis of his or her opinion." *U.S. v. Beckford,* 962 F.Supp. 748, 764. The court stated that "[a]n order of that scope would violate the defendants' Sixth Amendment right to effective assistance of counsel in that defense planning and strategy would necessarily be revealed through the production of 'any and all materials supplied to the defense expert.'" *Id.*

[33] *Id.* at 760.

[34] *Id.* at 760, n.11.

[35] *Id.* at 764.

Conclusion

This study of ten states' procedures governing court-ordered mental examinations of capital defendants identifies numerous issues of interest to judges and attorneys involved in the development of amendments to Federal Rule of Criminal Procedure 12.2. Some states do not have case law in particular areas. For example, five of the ten states have not developed law dictating what protections or seals are placed on mental health examination reports. Eight of the ten states have not fully defined whether and what kinds of cautionary statements are provided to examinees. In other areas, however, there is extensive case law. These areas include the use and impact of mental retardation evidence, who selects the examiner, and who sentences a capital defendant.

Those considering amendments to Federal Rule of Criminal Procedure 12.2 may wish to consider the following:

- First, the use of mitigating mental health evidence depends on the state sentencing structure. In Arizona and Idaho, only the judge is involved in the sentencing process, and therefore, time is not as critical an issue as it is in jury sentencing states. In contrast, in Texas and Florida, the sentencing hearing must be held before a jury immediately after the guilt phase is concluded. The current capital sentencing structure in the federal system allows for an interval between conviction and sentencing, and generally places the sentencing decision with the jury that convicted the defendant of a death-eligible crime.

- Second, mental health examination procedures may be governed by statutes, a system developed through case law, and/or a system based on rules. The statutory systems in Florida, Virginia, and New York are complete systems that cover many of the issues studied in this report. These statutory systems, all relatively new, yet developed from previous case law, offer a comprehensive set of procedures governing the mental examination of defendants and the potential uses of that evidence.

- Third, whether the sentencing procedures require a showing of defendant's future dangerousness affects the presentation and use of mental health evidence. For example, in Texas, the capital sentencing structure places the burden of proving the future dangerousness of the convicted on the government. There, because the use of rebuttal evidence of future dangerousness is commonly presented, the government will be afforded an opportunity to examine the defendant so that it may adequately respond to evidence offered by the defendant that he is not a danger to society.

- Fourth, there is no consistency across the states as to when notice and what type of notice must be given that mental health experts will be used at sentencing. Six states require either full or limited pretrial notice. Some leave this to the discretion of the individual trial judge. Four states do not require notice until after the guilt phase. The content required in the notice document varies considerably from a list of particulars to only the name of the potential expert witness. Although compliance with the notice requirement is usually the mechanism that triggers the examination process, this may vary from state to state.

- Fifth, whether an expert is hired by a party or appointed by the court may influence the role and responsibilities of the expert. Some states provide funds for private experts to be hired for the state and for the defendant. Other states (e.g., Alabama) require that the examination be conducted in a state hospital.

- Sixth, the right to have counsel present during a court-ordered examination is not universal. Five states appear to bar defense counsel's presence. Some states allow counsel to be present, while others have not developed case law in this area. At least one state, Texas, allows counsel to be present outside of the examination room so that the defendant is able to consult with counsel as needed.

- Seventh, a system without sanctions or an enforcement mechanism may have few incentives for either side to comply with procedural requirements. The sanctions for defendant's non-cooperation with state or court-appointed experts in the ten states studied range from no sanction to the exclusion of the defense expert's testimony. Some states provide sanctions for violations of the notice requirement that may include continuances, exclusion of witnesses, and personal monetary sanctions against the attorney who fails to provide notice.

- Finally, protecting the defendant's statements made during the examination from improper use by the prosecutors must be balanced by the need for prosecutors to adequately and effectively prepare for the sentencing hearing. In some states, reports are held until after the guilt phase, while other states release the reports to parties immediately after they are completed. Procedures should be developed not only for the release of the government expert's report, but also for the defense expert's report.

Part II – Tables Summarizing States' Procedures

A Note on Tables I - XVI

In the following tables, we summarize the procedures implemented by the ten states for court-ordered mental health examinations of capital defendants. As stated previously, to get a complete picture of a state's procedure we address those issues that are directly relevant to that state's procedure. We also note, where necessary, the supporting statute, rule or case law.

Tables I through IV report on general statutory, rule, or case law requirements, while Tables V through VII report on notice issues. Finally, Tables VIII through XVI summarize specific mental health examination procedures, including the release of the experts' reports.

Table I

Source of Mental Health Mitigation Laws & Year Established

State	Source of Mental Health Mitigation Law
Alabama	● Only used to rebut evidence offered by defendant. *Ex Parte Wilson,* 571 So.2d 1251 (Ala. 1990); Ala. Code § 13A-5-45(g) (1975).
Arizona	● Mental health mitigation evidence not specifically addressed for sentencing, but may be argued to show a "lack of specific intent" during guilt phase, which may later be considered in penalty phase. *Tison v. Arizona,* 481 U.S. 137 (Ariz. 1987); Ariz. R. Crim. P. 11(1975).
California	● *People v. McPeters,* 832 P.2d. 146, 9 Cal.Rptr.2d 834 (Cal. 1992); Cal. Penal Code § 190.3 (West 1998).
Florida	● Fla. R. Crim. P. 3.202 (1996).
Idaho	Examination done by court as part of presentence investigation. ● Idaho Code §19-2523 (1982). ● Idaho Code §19-2522 (1982). ● Idaho Judge's Sentencing Manual § 5.1 (1987).
New York	● N.Y. Crim. Proc. Law § 400.27(13) (McKinney 1995).
Ohio	● Ohio affords the defendant a choice between a court presentence investigation report, which is mandatory upon defendant's request or a partisan expert option that the state may pay for upon showing cause. ● Ohio Sup. Ct. Rule 20(IV)(D)(1987) (defendant's partisan expert option); Ohio Rev. Code Ann. § 2929.03(D) (West 1996) (presentence report option).
Tennessee	● *State v. Reid,* 981 S.W.2d. 166 (Tenn. 1998). ● Tenn. R. Crim. P. 12.2 (1998).
Texas	● *Lagrone v. Texas,* 942 S.W.2d 602 (Tex. Crim. App. 1997) (permitting exams to rebut mitigation evidence) ● *Soria v. State,* 933 S.W.2d 46 (Tex. Crim. App. 1996) (permitting exam to provide sur-rebuttal evidence to future dangerousness).
Virginia	● Va. Code Crim. Proc. Ann. § 19.2-264.3:1 (Michie 1986).

Table II
Capital Punishment Sentencing Authority

State	Sentencing Authority
Alabama	● The jury issues an "advisory" sentence, followed by the judge actually sentencing. Alabama allows a judge to sentence a defendant to death over the jury's advice. Ala. Code § 13A-5-39 through 59 (1998); Ala. R. Crim. § 26.6(a); *Beck v. State,* 396 So.2d 645 (Ala. 1980).
Arizona	● The judge determines all sentences – no jury involvement. Ariz. Rev. Stat. § 13-703(B).
California	● The jury determines the sentence, unless defendant waives right to jury trial. Cal. Penal. Code §190.3 (West 1998).
Florida	● The jury issues an "advisory" sentence, followed by the judge actually sentencing, which may be a death sentence over jury advice if the death sentence determination is "so clear and convincing that virtually no reasonable person could differ." Fla. Stat. Ann. 921.141 and 921.142 (West 1998); *Zakrzewski v. Florida*, 717 So.2d 488, 494 (Fla. 1998).
Idaho	● The judge determines all sentences – no jury involvement. Idaho Code § 19-2515 (1997).
New York	● The jury determines death sentences. N.Y. Crim. Proc. Law § 400.27(2) (McKinney 1998).
Ohio	● A sentencing hearing is conducted before a jury, unless waived for a three-judge panel, which renders a recommendation to the judge. Ohio Rev. Code Ann. § 2929.03(C)(2)(b) (1998). ● The judge may sentence the defendant to a sentence no higher than the jury's recommendation. Ohio Rev. Code Ann. § 2929.03(D)(2) (1998).
Tennessee	● The jury determines the sentence. Tenn. Code Ann. § 39-13-204 (a) (1998).
Texas	● The jury determines the sentence. Tex. Crim. P. Code Ann. § 37.071 (West 1998).
Virginia	● The jury determines the sentence. Va. Code Ann. Sec. 19.2-264 (Michie 1998).

Table III
Is the State Required To Prove Future Dangerousness?

State	Future Dangerousness
Alabama	● No; not addressed as an issue in the Alabama sentencing scheme. Ala. Code § 13A-5-49 (1998).
Arizona	● No; not an issue in Arizona sentencing scheme. Ariz. Rev. Stat. § 13-703 (1998).
California	● No; not an issue in the California sentencing scheme. Cal. Penal Code §190.3 (West 1998).
Florida	● No; ● However, state may offer rebuttal evidence if defendant raises the lack of future dangerousness as a mitigating factor. *Elledge v. State,* 706 So.2d 1340, 1345-46 (1997).
Idaho	● No; there is no absolute requirement, but future dangerousness may be one of 9 factors used to meet the aggravating prong of the capital punishment sentencing structure. Idaho Code 19-2515(h)(8) (1997). ● In Idaho's general sentencing provisions, if mental health is a "significant factor" in determining a sentence, the court shall consider any risk the defendant may create to the public. Idaho Code 19-2523(1)(D) (1997).
New York	● No; not a factor in the New York capital sentencing scheme. N.Y. Crim. Proc. Law § 400.27 (9) (McKinney 1998).
Ohio	● No; not a factor in Ohio sentencing scheme. Ohio Rev. Code Ann. § 2929.03 & 04 (West 1998).
Tennessee	● No. Tenn. Code Ann. § 39-13-204(i) (1998).
Texas	● Yes; state is required to prove affirmatively the future dangerousness of the defendant. Texas provides for a three question sentencing structure, which asks the jury to determine an aggravating factor, future dangerousness and mitigation. TEX. Crim. P. Code Ann. § 37.071(3)(b)(2) (West 1998).
Virginia	● Yes; Virginia requires the Commonwealth to prove future dangerousness beyond a reasonable doubt. Va. Code Ann. § 19.2-264.4(c) (Michie 1998).

Table IV

Are there Restrictions on Sentencing the Mentally Retarded to Death?

State	Mental Retardation
Alabama	● No ● However, mental conditions may be argued for mitigation purposes. Ala. Code § 13A-5-51 (2) & (6) (1998).
Arizona	● No ● However, mental conditions may be argued for mitigation purposes. Ariz. Rev. Stat. § 13-703(G)(1) (1998).
California	● No ● Mental retardation may be argued as a mitigation factor. Cal. Penal Code § 190.3(h) (West 1998).
Florida	● No ● May be argued as a mitigating factor. Fla. Stat. § 921.142 (7)(e) (West 1998).
Idaho	● No ● May be argued as a mitigating factor. *Idaho v. Osborn*, 631 P.2d 187, 197 (Idaho 1981).
New York	● Yes, anyone determined to be legally mentally retarded will not be sentenced to death. N.Y. Crim. Proc. Law § 400.27(12) (McKinney 1998). ● Mental conditions, not rising to the legal level to preclude a death sentence, may be argued as a mitigating factor to the jury. N.Y. Crim. Proc. Law § 400.27(9)(b) (McKinney 1998).
Ohio	● No; ● Mental conditions, not rising to the legal level to preclude a death sentence, may be argued as a mitigating factor to the jury. Ohio Rev. Code Ann. § 2929.04(B)(3) & (7) (West 1998).
Tennessee	● Yes, Tenn. does not sentence the mentally retarded to death. Tenn. Code Ann. Sec. 39-13-203 (1998); ● Mental retardation, not rising to the level to be exempt from a death sentence, may be argued as a mitigation factor. Tenn. Code Ann. § 39-13-204(j)(8) & (9) (1998).
Texas	● No ● However, Tex. Code Crim. P. Ann. § 37.071 has been interpreted to allow "unbridled" discretion in the type mitigation evidence to be considered, including the defendant's background. *Shannon v. State*, 942 S.W.2d 591 (Tex. Crim. App.1996).
Virginia	● No; no prohibition on the sentencing of the mentally retarded. ● Mental retardation or impairment, not rising to the legal level to preclude a death sentence, may be argued as a mitigating factor to the jury. Va. Code Ann § 19.2-264.4(B) (Michie 1998).

Table V
When is Notice Required for the Introduction of Mental Heath Expert Testimony?

State	When Notice Required
Alabama	● After the guilt phase. *Ex Parte Wilson,* 571 So.2d 1251, 1257 (Ala. 1990).
Arizona	● After charges, any party or the court may request an examination to determine competency or to investigate the defendant's mental condition at the time of the offense. Ariz. R. Crim. P. 11.2(a)
California	● Notice is not required until after the guilt phase is complete, and witness lists are due for the sentencing phase. *People v. Mitchell,* 23 Cal.Rptr.2d 403 (Cal. 1993).
Florida	● The defendant shall give notice of intent to present expert testimony of mental mitigation not less than 20 days before trial. Fla. R. Crim. P. § 3.202 (b) & (c) .
Idaho	● Provides no notice requirement. Idaho, where the judge is the sentencing body, does not require sentencing immediately after guilt phase. ● If there is reason to believe that mental health will be a sentencing issue, the judge may order an exam to be conducted after guilt phase. Idaho Code § 19-2522(1)(1997); Idaho Judge's Sentencing Manual § 5.1 (1987 rev.).
New York	● Parties must provide notice within a "reasonable time" prior to trial. N.Y. Crim. Proc. Law § 400.27(13)(b) (McKinney 1998). ● Not withstanding the above statutory requirement, a New York court has ruled that, in some cases, a defendant may not be compelled to provide such notice prior to a guilty verdict, but a continuance may be granted if notice is not given pretrial. *People of New York v. Mateo,* 676 N.Y.S.2d 903 (Monroe County 1998).
Ohio	● If the defendant selects the partisan option, no notice is required, other than the constructive notice provided in the trial witness lists. Ohio Sup. R. 20(IV)(D). ● If the defendant selects the presentence report option, the law is unclear, but infers that notice is not required until after conviction. Ohio Rev. Code Ann. § 2929.03(D)(West 1998).
Tennessee	● Each trial judge determines when notice is required. Pretrial notice may be considered appropriate, so sentencing case may begin immediately after guilt phase. *State v. Reid,* 981 S.W.2d. 166, 168, 171-72 (Tenn. 1998).
Texas	● No specific notice rule has been adopted, but *Lagrone* suggests that a request for expert funds or submission of a witness list are deemed proper notice. *Lagrone v. State,* 942 S.W.2d 602 (1997).
Virginia	● The defense shall give notice of intent to use mental health testimony in sentencing at least 21 days prior to trial. Va. Code Ann. § 19.2.264.3:1(E) (Michie 1998).

Table VI
Content Required in Notice Document

State	Content Required
Alabama	● No specific content cited in case law. *Ex Parte Wilson,* 571 So.2d 1251, 1257 (Ala. 1990).
Arizona	● The state's or defendant's written motion requesting an exam shall state "facts" upon which an exam is sought. Ariz. R. Crim. P. 11.2(a).
California	● Names and addresses of witnesses. Cal. Penal Code § 1054.3(a)(West 1998). ● Reports of experts, including results of mental and physical examinations. Cal. Penal Code §1054.3(a)(West 1998). ● Disclosure of any real evidence the expert will introduce. Cal. Penal Code § 1054.3(b)(West 1998).
Florida	● Names and addresses of defendant's examiners. ● Statement of particulars listing the statutory and non-statutory mental mitigating circumstances to be established. *See* Fla. R. Crim. P. 3.202(c).
Idaho	● No specific content required, but the court order must state the issues to be 'resolved' by the examination. Idaho Code § 19-2522(1) (1997).
New York	● List of witnesses providing psychiatric evidence. ● A brief, but detailed statement specifying the nature and type of evidence. N.Y. Crim. Proc. Law Sec. 400.27(13)(b) (McKinney 1998).
Ohio	● No specific content appears to be required, other than the name of the testifying witness.
Tennessee	● The notice shall include the name and professional qualifications of any mental health professional who will testify and a brief, general summary of the topics to be addressed. *State v. Reid,* 981 S.W.2d. 166, 174 (Tenn. 1998).
Texas	● Statutes and case law appear to be silent on this issue.
Virginia	● The code requires notice of intent to present evidence, but no specific guidance as to content is provided. Va. Code Ann. § 19.2-264.3:1(E) (Michie 1998).

Table VII
Sanctions for Failure to Provide Notice

State	Sanctions
Alabama	● No specific sanctions cited in law, but notice of witness must be provided in order to present evidence. *Ex Parte Wilson,* 571 So.2d 1251, 1257 (Ala. 1990).
Arizona	● Notice is not required at any particular time, but the court, state or defense may request the examination to prove evaluate *mens rea* during the guilt phase. Ariz. R. Crim. P. 11.2(a).
California	● Failure to provide required discovery, including expert witness lists, may result in sanctions, including contempt proceedings, a continuance, or any other lawful order. After the exhaustion of all sanctions, and compliance still has not occurred, the court may exclude the expert from testifying. Cal. Penal. Code §1054.5(b) & (c). (West 1998).
Florida	● No codified sanctions.
Idaho	● Since the procedures are most likely initiated by the judge, no sanctions are provided in the statute. Idaho Code § 19-2522(1) (1997).
New York	● If a party fails to file notice, the other party may get a reasonable continuance, but the court may not preclude the testimony. N.Y. Crim. Proc. Law § 400.27(13)(b) (McKinney 1998). ● Attorneys who fail to provide proper notice may be personally sanctioned by the court with a financial penalty. N.Y. Crim. Proc. Law § 400.27(13)(b) (McKinney 1998).
Ohio	● No notice appears to be required. However, failure to inform the court of a testifying witness, may result in the exclusion of that witness. Ohio R. Crim. P. 16(A)(1)(c) & 16(E)(3).
Tennessee	● The court may exclude defendant's expert's testimony for failure to comply with the notice requirement. Tenn. R. Crim. P. Rule 12.2(d).
Texas	● No specific holding, but Texas generally appears to afford the defendant latitude in presenting mitigation evidence. *Shannon v. State,* 942 S.W.2d 591, 597 (Tex. Crim. App. 1996).
Virginia	● Upon objection by the Commonwealth for defendant's failure to provide proper notice, the court may grant a continuance, or under appropriate circumstances, bar the defense from presenting expert evidence. Va. Code Ann. § 19.2-264.3:1(E) (Michie 1998).

Table VIII
Triggering Mechanism Authorizing the Court to Order Mental Health Examinations

State	Triggering Mechanism
Alabama	● Upon notice, which is not required until after the guilt phase. *Ex Parte Wilson,* 571 So.2d 1251, 1257 (Ala. 1990). ● If the defendant requests a mental heath expert per *Ake v. Oklahoma*, the defendant may first be compelled to submit to a state examination prior to being granted his own expert. *Ex Parte Wilson,* 571 So.2d 1251, 1257-58 (Ala. 1990).
Arizona	● Approval or a motion from state or defendant, or court's *sua sponte* order. Ariz. R. Crim. Proc. 11.2(a). ● Court may order a preliminary exam to determine if a more extensive examination is necessary. Ariz. R. Crim. Proc. 11.2(c).
California	● Upon notice that defendant will present expert evidence. *People v. McPeters,* 9 Cal.Rptr.2d 834, 856 (Cal. 1992).
Florida	● An exam is triggered when the defendant provides notification that he intends to present mental health mitigation evidence in a death sentencing hearing. Notice must be presented no less then 20 days prior to trial. Fla. R. Crim. P. 3.202 (c) & (d).
Idaho	● Reports are generally presented after the guilt phase at the discretion of the judge. Idaho Judge's Sentencing Manual, § 5.1 (1987 rev.); Idaho Crim. R. 32; *State v. Romero*, 116 Idaho 391-97 (1989).
New York	● Upon receiving notice of intent of defendant to present mental health mitigation evidence, the state may make motion to examine the defendant. N.Y. Crim. Proc. Law § 400.27(13)(c) (McKinney 1998).
Ohio	● If the defendant selects the partisan option, there is no court-ordered exam. Ohio Sup. R. 20(IV)(D) (West 1987). ● If the defendant requests a presentence investigation report, notice of the request triggers an examination. Ohio Rev. Code Ann. § 2929.03(D) (West 1998).
Tennessee	● Upon notice of defendant's intent to present mental health mitigation evidence during the sentencing phase. *State v. Reid,* 981 S.W.2d. 166, 172-73 (Tenn. 1998).
Texas	● Once a defendant provides notice that he will present future dangerousness rebuttal evidence or mental health mitigation evidence, the state may request to conduct an examination. *Lagrone v. State,* 942 S.W.2d 602, 610 (Tex. Crim. App. 1997).
Virginia	● Upon receiving notice of intent to introduce mental health expert evidence during the penalty phase, the court may order the examination. Va. Code Ann. § 19.2-264.3:1(F) (Michie 1998).

Table IX
Selection of State's Expert to Conduct Mental Health Examination

State	Selection of State's Expert
Alabama	● Exams are conducted by state mental health hospital professionals. *Ex Parte Wilson,* 571 So.2d 1251, 1257 (Ala. 1990).
Arizona	● The Court will appoint at least 2 mental health experts to conduct the evaluation. Ariz. R. Crim. Proc. 11.3(a). ● Each side may provide a list of experts to the court for nomination. Ariz. R. Crim. Proc. 11.3(c). ● Both sides may stipulate to only 1 expert. Ariz. R. Crim. Proc. 11.3 (c).
California	● The prosecutor may select the examiner, with the court's permission. *People v. McPeters,* 9 Cal.Rptr.2d 834, 856 (Cal. 1992).
Florida	● The state selects its own mental health expert. Fla. R. Crim. P. § 3.202(d) (1996).
Idaho	● The court appoints a neutral examiner. Idaho Code § 19-2522(1) (1997).
New York	● A district attorney-appointed psychiatrist, psychologist, or licensed social worker examines the defendant. N.Y. Crim. Proc. Law § 400.27(13)(c) (McKinney 1998).
Ohio	● Under the partisan option, the defendant may select the expert and, if indigent, the court will pay expenses. Ohio Rev. Code Ann. § 2929.024 (West 1998). ● Under the presentence report option, the court selects the examiner. Ohio Rev. Code Ann. § 2947.06(B) (West 1998).
Tennessee	● The state selects its own examiner. *State v. Reid,* 981 S.W.2d. 166, 174 (Tenn. 1998).
Texas	● The state is permitted to select its expert. *Lagrone v. State,* 942 S.W.2d 602, 610 (Tex. Crim. App. 1997).
Virginia	● The court appoints a partisan expert to evaluate the defendant for the Commonwealth. Va. Code Ann. § 19.2-264.3:1(F) (Michie 1998).

Table X

Is Counsel Permitted to be Present During Examination of Defendant?[36]

State	Counsel's Right to Be Present
Alabama	● Defense counsel does not have right to be present. *Ex Parte Wilson,* 571 So.2d 1251, 1258 (Ala. 1990). ● No specific rule for government's attorney, but generally not present when exam conducted at a state hospital.
Arizona	● Defense counsel does not have a constitutional right to be present, but court may permit this at its discretion. *State v. Schackart,* 858 P.2d 639, 647-48 (Ariz. 1993). ● Case law is silent on whether the prosecution may be present.
California	● No specific rule. Practitioners have stated that no counsel is present as a matter of practice.
Florida	● Attorneys for the state and defense may be present at the examination. Fla. R. Crim. P. § 3.202(d).
Idaho	● There is no formal rule, but counsel is generally not present. *Idaho v. Lankford,* 781 P.2d 197, 208 (Idaho 1989).
New York	● Counsel for the state and defense shall have the right to be present at the exam. N.Y. Crim. Proc. Law § 400.27(13)(c) (McKinney 1998).
Ohio	● Ohio law appears to be silent on this issue.
Tennessee	● Defense counsel has no right to be present. *State v. Martin,* 950 S.W.2d 20, 27 (Tenn. 1997). ● While law is not codified, state counsel is not present. This is inferred from the fact that record is sealed from prosecution until after guilt phase. *State v. Reid,* 981 S.W.2d. 166, 174 (Tenn. 1998).
Texas	● Defense counsel has no right to be present in the examination room. *Bennett v. State*, 766 S.W.2d 227, 231 (Tex.Crim. App. 1989). Defense counsel may be present outside the examination, and defendant may be excused to consult with counsel. *Lagrone v. State,* 942 S.W.2d 602, 610 n.6 (Tex. Crim. App. 1997). ● No specific rule regarding prosecutor's right to be present, but *Lagrone* infers that the prosecution does not get examination results until defense calls its expert. *Lagrone v. State,* 942 S.W.2d 602, 610 n.6 (Tex. Crim. App. 1997).
Virginia	● The law is silent on this issue.

[36] Counsel has the absolute right to know an examination will take place and the purpose of the examination. *See Estelle v. Smith,* 451 U.S. 454 (1981); *Powell v. Texas,* 109 S.Ct. 3146, 3149 (1989).

Table XI
When is Defendant Examined by the State's Expert?

State	Examination by State's Expert
Alabama	● After the guilt phase, upon notice, defendant may be transferred to a state mental hospital facility for examination. *Ex Parte Wilson,* 571 So.2d 1251, 1257 (Ala. 1990).
Arizona	● Examination is conducted within 10 days from experts' appointment. Judge may alter this requirement. Ariz. R. Crim. Proc. 11.3(c).
California	● After guilt phase. *People v. McPeters,* 9 Cal.Rptr.2d 834 (Cal. 1992).
Florida	● State examines the defendant within 48 hours after conviction. Fla. R. Crim. P. 3.202(d) (1996).
Idaho	● Upon a "good cause" determination that mental health will be a "significant" factor in sentencing, the court may appoint an examiner. Idaho Code § 19-2522(1) (1997); Idaho Judge's Sentencing Manual § 5.1 (1987 rev.).
New York	● After receiving approval from the court, the district attorney shall schedule an examination, which may take place pretrial. N.Y. Crim. Proc. Law § 400.27(13)(c) (McKinney 1998).
Ohio	● Under the partisan option, the defense schedules the expert at its convenience. Ohio Sup. Ct. § 20(IV)(D). ● Under the presentence report option, the court schedules the examination after conviction, but prior to sentencing hearings. Ohio Rev. Code Ann. Sec. 2929.03(D) (West 1996).
Tennessee	● The defendant is examined prior to trial with reports returned to the court under seal prior to jury selection. *State v. Reid,* 981 S.W.2d. 166, 174 (Tenn. 1998).
Texas	● The examination may take place at anytime. *Lagrone v. State,* 942 S.W.2d 602, 610 (Tex.Crim. App. 1997).
Virginia	● After approval of the court, the exam is scheduled, and may occur pretrial. Va. Code Ann. § 19.2-264.3:1(F)(1) (Michie 1998).

Table XII
Cautionary Statements Provided to Defendant in Court-Ordered Mental Health Examinations

State	Cautionary Statements
Alabama	● While there is no specific rule, the defendant in the only published case was provided 5th Amendment warnings. *Ex Parte Wilson,* 571 So.2d 1251, 1258 (Ala. 1990).
Arizona	● The law is silent on this issue.
California	● Statements may be admitted if they were provided during an examination for competency and full Miranda warnings were provided. *People v. Arcega,* 186 Cal.Rptr.94 (Cal. 1982).
Florida	● Florida specifically does not require Miranda or other cautionary statements prior to examination. Fla. R. Crim. P. § 3.202; *Davis v. State,* 698 So.2d 1182 (1997).
Idaho	● Examiner must provide Miranda warnings to the defendant. *Idaho v. Lankford,* 781 P.2d 197, 208-210 (1989). ● When used for sentencing only, the Fifth Amendment is not violated. *Gibson v. Idaho,* 718 P.2d 283 (1986); *Idaho v. Lankford,* 781 P.2d 197 (1989).
New York	● Statutes and case law appear to be silent on this issue.
Ohio	● Statutes and case law appear to be silent on this issue.
Tennessee	● Statutes and case law appear to be silent on this issue.
Texas	● Statutes and case law appear to be silent on this issue.
Virginia	● Statutes and case law appear to be silent on this issue. ● Upon providing notice of intent to present expert evidence in the penalty phase, Fifth Amendment privileges for the defendant are waived for evidence provided to the Commonwealth from mental examinations. *Savino v. Commonwealth,* 391 S.E.2d 276 (Va. 1990).

Table XIII
Sanctions for Defendant's Non-Cooperation with State's Expert?

State	Sanctions for Defendant's Non-Cooperation
Alabama	● No sanctions appear to be developed in this area.
Arizona	● No sanctions appear to be developed in this area.
California	● State's expert can testify that defendant refused to cooperate. *People v. McPeters,* 9 Cal.Rptr. 2d 834, 856 (Cal. 1992). ● Court may not exclude defendant's mental health from penalty phase. *People v. Lucero,* 750 P.2d 1343, 1355-8 (Cal.1988).
Florida	● If the defendant refuses to fully cooperate, the court may order the defense to: 1) allow the state's examiner to review all defense reports, tests and evaluations by defendant's examiner; or 2) prohibit defense examiner from testifying concerning tests, exams and evaluations. Fla. R. Crim. P. § 3.202(e).
Idaho	● No direct sanction present in statutes or case law; however, the sentencing judge will be aware of non-compliance. Idaho Code 19-2522 (3) (1997).
New York	● If defendant "willfully" fails to "fully" cooperate with the expert, the court may instruct the jury of this fact. N.Y. Crim. Proc. Law § 400.27(13)(c) (McKinney 1998).
Ohio	● There appears to be no sanction for refusing to cooperate, as all mental exams are initiated by the defendant.
Tennessee	● If the defendant fails to comply with an examination, the court may exclude the testimony of the defense expert. Tenn. R. Crim. P. § 12.2 (d).
Texas	● The state's expert may be allowed testify about the defendant's lack of cooperation and state conclusions from the act of failing to cooperate. *Lagrone v. State,* 942 S.W.2d 602, 610 Tex. Crim. App. 1997).
Virginia	● After holding a hearing, the court may admit evidence of defendant's refusal to cooperate, or at its discretion, may bar the defendant from presenting his expert evidence. Va. Code Ann. § 19.2-264.3:1(F)(2) (Michie 1998).

Table XIV

When Is State Expert's Report Released to Prosecutors & Defense Counsel?

State	When State Expert's Report is Released to Prosecutors	When State Expert's Report is Released to Defense Counsel
Alabama	• While there is no direct rule, in one case, also involving an insanity examination, the report was turned over completion of the exam. *Ex Parte Wilson,* 571 So.2d 1251, 1257 (Ala. 1990).	• Upon completion of the exam, all records are made available to the defendant's state-paid expert. *Ex Parte Wilson,* 571 So.2d 1251, 1257 (Ala. 1990).
Arizona	• Reports are presented within 10 days after the examination. Defendant's statements or the summary of his statements concerning the crime are removed from the state's copy. Ariz.. R. Crim. Proc. § 11.4(a).	• Reports are presented within 10 days after the examination. Ariz. R. Crim. Proc. 11.4(a).
California	• Upon completion. Cal. Penal Code Sec. 1054.1(a) (West 1998).	• Upon preparation and completion. Cal. Penal Code §1054.1(a) (West 1998). • Defendant will also receive probation department's presentence report, including mental health background information. Cal. Penal Code. Sec. 1203(g) (West 1998).
Florida	• The rules do not specify when the state report is released to the prosecutors. However, since defense and state counsel may be present during examination, information is immediately available to counsel. Fla. R. Crim. P. 3.202(d).	• No specific rule of criminal procedure requires a report to be delivered to the defense. • However, all exculpatory statements and reports must be immediately turned over to the defense. Fla. R. Crim. P. 3.220(b)(1)(A)(I) & 3.220(b)(1)(K)(4). • Defense and state counsel may be present during examination, thus information is immediately available to counsel. Fla. R. Crim. P. 3.202(d).
Idaho	• Upon receiving the report, the court will forward copies to counsel Idaho Code 19-2522 (4) (1997).	• Upon receiving the report, the court will forward copies to counsel. Idaho Code 19-2522 (4) (1997).
New York	• The state's examiner will promptly report to the state in order for the state to inform the defense of its findings. N.Y. Crim. Proc. Law § 400.27(13)(c) (McKinney 1998). • A transcript of the exam shall be provided to the state and defense promptly after its completion. N.Y. Crim. Proc. Law § 400.27(13)(c) (McKinney 1998).	• The district attorney shall "promptly" serve the defendant with the examiner's findings and evaluations. N.Y. Crim. Proc. Law § 400.27(13)(c) (McKinney 1998). • A transcript of the examination shall be provided to the state and defense promptly after its conclusion. N.Y. Crim. Proc. Law § 400.27(13)(c) (McKinney 1998).
Ohio	• Once completed, the reports shall be furnished to the state, court, jury and defense. Ohio Rev. Code Ann. § 2929.03(D)(1) (West 1998).	• Once completed, the reports shall be furnished to the state, court, jury and defense. Ohio Rev. Code Ann. § 2929.03(D)(1) (West 1998).
Tennessee	• Prosecutors will only have access to the state expert's report after the completion of the guilt phase and confirmation that the defendant actually plans to use mental health mitigation evidence in the sentencing phase. *State v. Reid,* 981 S.W.2d. 166, 174 (Tenn. 1998).	• Defendant will receive the state's report upon its completion, which is prior to trial. *State v Reid,* 981 S.W.2d. 166, 173, 174 (Tenn. 1998).
Texas	• While there is no clear law, *Lagrone* offers stringent suggestions, which include the Court's review of the report for Brady material, and the release of the report to the State only after the defense calls defendant's expert to the stand. *Lagrone v. State,* 942 S.W.2d 602, 610 n.6 (Tex. Crim. App. 1997).	• While there is no clear law, *Lagrone* offers stringent suggestions, which include the Court's review of the report for Brady material, which would be turned over to the defense. In the absence of Brady material, the court will hold the report until the defendant's expert takes the stand. *Lagrone v State,* 942 S.W.2d 602, 610 n.6 (Tex. Crim. App. 1997).
Virginia	• Once the evaluation and reports are complete, including gathering all records and tests, the material is released to the prosecutors. Va. Code Ann. Sec. 19.2-264.3:1(F)(1) (Michie 1998).	• Once the evaluation and reports are complete, the reports and copies of all records are released to defense counsel. Va. Code Ann. Sec. 19.2-264.3:1(F)(1) (Michie 1998).

Table XV
Protections or Seals Required on Mental Health Experts' Reports?

State	Protections or Seals Required on Reports
Alabama	• None stated in rules or case law. *Ex Parte Wilson,* 571 So.2d 1251 (Ala. 1990).
Arizona	• Mental health reports are sealed. Ariz. R. Crim. Proc. 11.8. • State's copy of report is delivered with defendant's statements or summary of statements removed. Ariz. R. Crim. Proc. 11.4(a). • Defendant waives his Fifth Amendment right by raising issue, so evidence limited to purposes of rebutting lack of intent evidence is permissible. *State v. Schackart,* 858 P.2d 639, 645-46 (Ariz. 1993).
California	• California law appears silent on this issue. • By introducing evidence of his mental condition, defendant waives his 5th & 6th Amendment right to refuse the exam, but examination evidence is limited to rebuttal use. *People v. McPeters,* 9 Cal.Rptr.2d 834 (1992).
Florida	• Florida law appears silent on this issue.
Idaho	• Idaho law appears silent on this issue.
New York	• No specific seals on report protections appear to be required. General criminal procedure rules apply. • Statements in the report may not be used for any purpose other then mitigation or retardation evidence. N.Y. Crim. Proc. Law § 400.27(13)(c) (McKinney 1998).
Ohio	• Mental health examination reports are deemed confidential and may not be accessed by the public. Ohio Rev. Code Ann. § 2947.06(A)(2) (West 1998). • Under the Presentence Report Option, any statements or information acquired in the exam may be disclosed to the court & lawyers, or used in any retrial guilt phase proceedings. Ohio Rev. Code Ann. § 2929.03(D) (West 1998).
Tennessee	• The reports of the state and defense examiners are placed under seal prior to jury selection. State will not receive either report until after guilt phase and confirmation that the defense plans to introduce mental health mitigation evidence. *State v. Reid,* 981 S.W.2d. 166 (Tenn. 1998). • State may only use the information from reports as rebuttal evidence. *State v. Reid,* 981 S.W.2d. 166, 173 (Tenn. 1998). • There is no violation of 5th or 6th Amendment rights when used as rebuttal evidence only. *State v. Bush,* 942 S.W.2d 489 (Tenn. 1997).
Texas	• Reports are held by the court until defendant's expert actually takes the stand. *Lagrone v. State,* 942 S.W.2d 602, 610 n.6 (Tex. Crim. App. 1997). • Defendant waives his Fifth Amendment privilege, but not actually until he presents mitigation or rebuttal future dangerousness evidence, so the state may not present results of its examination until the defendant presents mitigating evidence of his mental health. *Lagrone v. State,* 942 S.W.2d 602, 610 (Tex. Crim. App. 1997).
Virginia	• Statements or disclosures made during the evaluation and evidence derived from statements may not be used to prove guilt or aggravating circumstances. Va. Code Ann. § 19.2-264-3:1(g) (Michie 1998). • Evidence from the examination may be used only to rebut mitigation evidence and to prove future dangerousness. *Stewart v. Commonwealth,* 427 S.E.2d 394, 407-08 (Va. 1993); Va. Code Ann. § 19.2-264-3:1 (Michie 1998).

Table XVI
When is Defense Expert's Report Released to the State?

State	When is Defense Expert's Report Released
Alabama	● Alabama law appears silent on this issue.
Arizona	● At least 15 days prior to trial Ariz. R. Crim. Proc. 11.4(b).
California	● Upon notice that defendant will use a mental health expert. Cal. Penal Code § 1054.3 (West 1998).
Florida	● Twenty days before trial, defense must present a statement of particulars listing statutory and non-statutory mental mitigating circumstances to be established at sentencing. Fla. R. Crim. P. 3.202(c). ● If the defendant refuses to cooperate with state's examiner, court may order defense to provide state with all mental heath reports, tests and evaluations. Fla. R. Crim. P. 3.202(e)(1).
Idaho	● The defendant has the option of providing his own expert examination and filing a report with the court. Idaho Code 19-2522 (1997).
New York	● There appears to be no affirmative duty to provide a report, other than the information provided in the notice requirement, which includes a brief but detailed statement specifying nature and type of evidence. N.Y. Crim. Proc. Law § 400.27(13)(b) (McKinney 1998).
Ohio	● Defendant, upon request, shall provide the state copies of reports and exams that will be used in testimony. The discovery rule provides that the defendant shall provide discovery three days prior to the beginning of trial or seven days after state provides discovery, presumably the beginning of the sentencing trial. Ohio R. Crim. P. 16.
Tennessee	● Defense report is filed pretrial with the court under seal and is provided to the state only after conviction and confirmation that the defendant will actually introduce mental health mitigation evidence. *State v. Reid,* 981 S.W.2d. 166, 173 (Tenn. 1998).
Texas	● The law is silent in this area.
Virginia	● After providing pretrial notice of intent to present expert evidence, the defense shall provide a copy of evaluations, medical records and examiner's report to the Commonwealth. Va. Code Ann. § 19.2-264.3:1(D) (Michie 1998).

Part III

State-by-State Practice Descriptions

Alabama:

In Alabama, in cases in which both parties, with the court's consent, waive the right to jury trial, the judge decides whether to impose the death sentence. Otherwise, in jury trials, the sentencing structure dictates that while the jury may recommend a death sentence in Alabama, the judge makes the final determination. *See* Ala. Code § 13A-5-39 - 13A-5-59 (1998); *Beck v. State*, 396 So.2d 645 (Ala. 1980). There is no affirmative duty to prove future dangerousness, so the judge is left to consider whatever aggravating and mitigating factors the parties choose to present. *See* Ala. Code § 13A-5-51(2) (1998). The defendant bears the burden of proving mitigation, and the state shall have the right to disprove facts offered by the defendant. *See* Ala. Code § 13A-5-45(g) (1998). Disputed sentencing facts shall be determined by a preponderance of evidence. *See* Ala. R. Crim. P. 26.6(b)(2). There are no codified restrictions on sentencing mentally retarded defendants to death. However, mental retardation may be presented as a mitigating factor. *See* Ala. Code § 13A-5-51(6).

To date, one published Alabama case, *Ex Parte Wilson,* 571 So.2d 1251 (Ala. 1990), has addressed the issue of court-ordered mental examinations in capital cases. The holding in the case is instructive in four respects. First, in *Wilson*, the defendant was examined by the state's expert at a pretrial examination that evaluated both the insanity defense issues and issues relating to mitigation rebuttal. Second, the judge released funds only for a defendant's expert, on the condition that the defendant comply with the court-ordered examination. Third, the defendant's attorney did not have a right to be present for the examination. *Id.* at 1258. There is no Alabama rule or case that has remarked on the government lawyers' right to be present. Fourth, the defendant was given Miranda warnings prior to the examination. *Id.* at 1258; *Estelle v. Smith*, 451 U.S. 454 (U.S. 1981).

Alabama case law appears to require that the defendant notify the court of intent to present mental health mitigation testimony no later than after the guilt phase and prior to the sentencing phase. *Ex Parte Wilson,* 571 So.2d 1251 at 1257. Case law is silent on

the content required in the notice document and there are no specific sanctions cited in the legal literature for failure to provide proper notice.

Once the defendant has given notice of intent to present mental health expert testimony, the court may order defendant to be examined by a mental health expert selected by the state. *Id.* at 1257-58. A defendant may be transferred from a jail to a state hospital for evaluation. *Id.* at 1257. Miranda warnings must be administered to the defendant prior to the examination. *Id.* at 1258. Alabama statutes and case law are silent on whether defendants may be sanctioned for failing to cooperate with the state's examiner.

Alabama law is silent on when the defense examiner's report may be released to the prosecution and to the defense. It also appears to be silent on the issues of whether the records are sealed.

Arizona:

In Arizona, after the jury finds the person guilty of a death-eligible offense, the judge becomes the sole determiner of sentence. *See* Ariz. Rev. Stat. § 13-703(B) (1998). Prior to determining the sentence, the judge must hold a hearing that addresses mitigating and aggravating factors. *Id.* Arizona law does not list future dangerousness among its aggravating factors. *See* Ariz. Rev. Stat. § 13-703(F) & (G) (1998). While Arizona law does not expressly prohibit the execution of mentally retarded defendants, it does permit evidence of mental retardation to be argued as a mitigating factor at the sentencing phase. *See* Ariz. Rev. Stat. § 13-703(G)(1) (1998).

The state has no direct case law or statute that describes the procedures for mental examination for mitigation purposes. There is, however, law that allows examination for presentation of evidence to show a lack of specific intent to commit the offense in order to mitigate sentencing. Such evidence of defendant's intent is presented in the guilt phase and may also be presented in the penalty phase.

Arizona law allows a defendant to present expert evidence in the guilt phase to show a lack of intent to kill in a felony murder case. While the "specific intent" to kill is not needed for a felony murder conviction, proof of the mental state required for the commission of the relevant felony is required. Therefore, the presentation of mental health evidence regarding the defendant's mental state is allowed in the guilt phase, and later, in the penalty phase as a potentially mitigating or aggravating factor. *See State v. McLoughlin*, 679 P.2d 504, 508-509 (Ariz. 1984); *Tison v. Arizona*, 481 U.S. 137, 156 (1987).

At any time after an information or complaint is filed or an indictment returned, Arizona rules permit any party to request (in writing) or the court to order mental examinations to evaluate competency to stand trial or to investigate the defendant's mental state at the time the offense was committed. *See* Ariz. R. Crim. P. 11.2(a). The motion shall state the facts on which the examination is sought. *Id.* The right of examination includes challenges of the defendant's mental condition for mitigation purposes. *See State v. Schackart*, 858 P.2d 639 (Ariz. 1993). The superior court has jurisdiction over the appointment of mental health experts and all competency hearings. *See* Ariz. R. Crim. P. 11.2(d). When the court orders the defendant examined, it must

appoint at least two mental health experts, at least one of whom must be a psychiatrist, to examine the defendant and to testify regarding the defendant's mental condition. *See* Ariz. R. Crim. P. 11.3(a). If the state is funding the expert, the defense does not have a right to select an expert of its own choosing. *Id.*

The defendant who places his or her mental health at issue at trial waives Fifth Amendment privileges against self-incrimination. *See State v. Schackart*, 858 P.2d 639 (Ariz. 1993). Defense counsel does not have the right to be present during a mental examination. *Id.* at 647-48. The law appears to be silent on the issue of whether Miranda warnings or other cautionary statements are required prior to defendant's participation in mental examinations. Once reports are complete, they are presented to the court and counsel within 10 working days. *See* Ariz. R. Crim. P. 11.4(a). Court staff distributes copies of the examination to both sides after defense counsel edits any statements made by the defendant during the examination from the state's copy. *Id.* Mental health experts' reports are available to the court and counsel, but are sealed from release to the public. *See* Ariz. R. Crim. P. 11.8. Arizona law is undeveloped in the area of sanctions for non-compliance with examinations.

California:

In California, the "trier of fact" (the trial jury, or alternatively, the judge, if defendant has waived the right to a jury trial) determines the sentence. *See* Cal. Penal Code § 190.3 (West, 1998). The state does not prohibit the execution of mentally retarded felons. Ordinarily, at least 30 days prior to commencement of trial of guilt issues, the defense must provide the state with copies of any mental health expert reports. *See* Cal. Penal Code § 1054.3(a) (West, 1998) & *People v. Superior Court (Mitchell)*, 859 P.2d 102, 104 (Cal. 1993). However, the trial court has the discretion to defer penalty phase discovery by the prosecution until the guilt phase has concluded. The decision to defer is predicated upon a showing that continuance is appropriate based on such considerations as probable duration of guilt phase, likelihood that guilty verdict, with special circumstances, will be returned, and the potential adverse effect disclosure could have on guilt phase defense. *See People v. Superior Court (Mitchell)*, 859 P.2d 102, 109 (Cal. 1993).

In California, once the guilt phase of a capital trial is completed, the defense must reveal its sentencing phase witnesses and reports. *See* Cal. Penal Code § 1054.3 (a) (West, 1998). In addition, upon order of the trial court, the county probation department produces a pre-sentence probation report. It may contain mental health information from the defendant's record, but will not include a mental health interview with the defendant. *See* Cal. Penal Code § 1203(g) (West, 1998). The pre-sentence probation report is provided to both parties and to the court. *See* Cal. Penal Code § 1203(d) (West, 1998).

During the penalty phase, California case law permits prosecutors to rebut mitigation testimony with evidence from mental health examinations requested by the defendant. Counsel may also present competency and sanity examinations ordered when a defendant raised the insanity defense. These examinations are usually conducted pre-trial. *See People v. Poggi*, 753 P.2d 1082 (Cal. 1988), *citing Buchanan v. Kentucky*, 107 S.Ct. 2906, 2916-2919, 97 L.Ed.2d 336, 354-357 (1987). Counsel is not usually present during those examinations, which often take place at a state hospital or in a jail. California Penal Code § 1054.1(a) (West 1998) requires that the state examiner's report be released to the state and to defense counsel upon its preparation and completion.

California Penal Code § 1054.3 (West 1998) requires that the defense examiner's report be released to the state upon notice that the defendant will use a mental health expert at trial.

In *People v. McPeters*, the California Supreme Court ruled that when a defendant places his mental condition at issue before the jury for mitigation purposes in the penalty phase, the state may have access to the defendant to conduct a mental examination. *People v. McPeters*, 832 P.2d 146 (Cal. 1992). In *McPeters*, the state's expert examined the defendant after the guilt phase. The court noted that not allowing an examination would give an unfair advantage to the defense and "encourage spurious mental illness defenses." *Id.* at 168-69. In *McPeters*, the state examiner was permitted to testify that defendant refused to cooperate with the examination. *Id.* at 856.

There is no specific requirement that the state address the issue of future dangerousness as an aggravating factor in the sentencing proceedings. In fact, at least one case, *People v. Murtishaw*, 631 P.2d 446 (Cal. 1981) was later remanded for a new penalty-phase trial after a psychopharmacologist was permitted to testify that the defendant was likely to be dangerous in prison. *Id.* at 471. The California Supreme Court, after reviewing the literature on the unreliability of dangerousness predictions, held that generally, such testimony's prejudicial impact far outweighs it probative value. *Id.* at 470. The court acknowledged that it might be possible, at times, to make more reliable forecasts of a defendant's propensity for violence. Reliable predictions might be made by a psychiatrist who had established a close, long-term relationship with the defendant, or in cases in which "the defendant had exhibited a long-continued pattern of criminal violence such that any knowledgeable psychiatrist would anticipate future violence". *Id.*

Two recent opinions are worth noting here. In *Rodriguez v. Superior Court*, 18 Cal. Rptr.2d 120, 123-124 (Cal. Ct. App. 1993), the California Fifth Circuit Court of Appeals held that defendant's statements made to a psychologist assisting counsel in the preparation of the defense were protected by attorney-client privilege. Second, the defendant did not waive the privilege by designating the psychologist as an expert witness. Finally, the defendant's production of a report from which privileged communications regarding the defendant's statements related to the offense were excised did not waive the privilege. This issue was also addressed the following year with a

slightly different outcome in *Woods v. Superior Court*, 30 Cal. Rptr.2d 182 (Cal. Ct. App. 1994). In *Woods*, the California Fourth Circuit Court of Appeals ruled as follows:

> [W]hile communications with an expert retained to assist in the preparation of a defense may initially be protected by the attorney-client privilege, the privilege is waived where as here the expert is identified, a substantial portion of his otherwise privileged evaluation is disclosed in his report, and the report is released. [E]lecting to present the expert as a witness destroys the work-product privilege. *Id.* at 187.

Florida:

The Florida death penalty sentencing structure calls for the jury to advise the judge with a recommendation of a sentence of death or imprisonment. *See* Fla. Stat. Ann. § 921.142(3) (West 1998). If the jury recommends life, the judge may still sentence the convicted defendant to death when the facts suggesting a sentence of death are "so clear and convincing that virtually no reasonable person could differ." *See* Fla. Stat. Ann. § 921.142(4) (West 1998); *Zakrzewski v. Florida,* 717 So. 2d 488, 494 (Fla. 1998). Florida does not prohibit the execution of the mentally retarded, but mental retardation may be argued as a mitigating factor. Fla. Stat. Ann. § 921.142(7)(e) (West 1998). The state is not required to prove future dangerousness of the defendant, but may offer rebuttal evidence if the defense raises the issue of the unlikelihood of future dangerousness as a mitigating factor. *Elledge v. State,* 706 So.2d 1340, 1345 (Fla. 1997).

In 1996, the Florida Supreme Court approved Florida Rule of Criminal Procedure 3.202, which sets forth policies and procedures regarding mental examinations for mitigation sentencing rebuttal. Fla. R. Crim. P. 3.202. Not less than 20 days before trial, the defendant must give written notice of intent to present expert testimony regarding mental health examinations for mitigation purposes during the sentencing phase. Fla. R. Crim. P. 3.202(b) & (c). The defense must provide the names and addresses of the experts and a statement of the information to be presented, including the statutory and non-statutory mental mitigating circumstances to be established. Fla. R. Crim. P. 3.202(c). There appear to be no codified sanctions for failure to provide proper notice. *Id.*

Upon motion by the state to seek the death penalty, the court shall order that a mental health expert may examine the defendant within 48 hours of defendant's conviction for capital murder. Fla. R. Crim. P. 3.202(d). The state selects its own mental health expert. *Id.* Attorneys for the state and the defendant may be present at the examination. *Id.* Florida's Rules of Criminal Procedure do not specifically require Miranda warnings or other cautionary statements to the defendant. If the defendant refuses to cooperate, the court may order that all defense mental health reports and notes may be reviewed by the state, or it may prohibit the defense mental heath expert from testifying. Fla. R. Crim. P. 3.202(e).

The rules do not specify when the state examiner's report is released to the prosecutors and to defense counsel. However, since both the prosecutor and the defense counsel may be present during the state examiner's evaluation, at least some information is immediately available to counsel. Most importantly, all exculpatory statements and reports must be immediately turned over to the defense. Fla. R. Crim. P. 3.220(b)(1)(A)(i) & 3.220 (b)(1)(K)(4). The criminal procedure rules and accompanying case law do not indicate that protections or seals are required on the reports.

While the statute was codified in 1996, similar practice has been on going in Florida since at least 1994. *See Dillbeck v.State,* 643 So.2d 1027, 1031 (Fla. 1994)(adopting procedures set forth in *State v. Hickson*, 630 So.2d 172, 176 (Fla. 1993)). In *Dillbeck*, the trial court allowed the state's expert to examine a defendant to prevent the state from being unduly prejudiced at the sentencing phase by providing the state with enough information to rebut defense experts. In *Hickson*, the court set forth examination policies for battered spouse syndrome cases, where the state was allowed the right to examine the defendant prior to the presentation of the defense expert. *See also Elledge v. State,* 706 So.2d 1340, 1345 (Fla. 1997)(allowing retroactive application of the Rule 3.202, since a similar custom was already in place).

See generally Stephen Michael Everhart, *Precluding Psychological Experts From Testifying For The Defense In The Penalty Phase of Capital Trials: The Constitutionality of Florida Rule of Criminal Procedure 3.202 (E)*, 23 FLA. ST. U. L. REV. 933 (1996).

Idaho:

In Idaho, the judge is the sole determiner of sentence, so all mitigation and aggravation evidence is presented orally and in writing to the judge at a hearing. *See* Idaho Code § 19-2515(c) (1997). State law does not prohibit the execution of mentally retarded defendants. Mental retardation may, however, be argued as a mitigating factor, if it impairs the defendant's capacity to appreciate the criminality (wrongfulness) of his or her conduct or to conform his or her conduct to the requirements of the law. *Idaho v. Osborn*, 631 P.2d 187, 197 (Idaho 1981). Testimony regarding the results of mental health examinations is permitted to rebut mitigation evidence. While mental illness, short of insanity, is not a defense to a crime, it may be considered in determining the appropriate sentence. *See* Idaho Code § 19-2523 (1997).

Although future dangerousness is not explicitly listed among the statutory aggravating circumstances, the defendant's "propensity to commit murder" is listed. *See* Idaho Code § 19-2515(h) (1997). In addition, at sentencing, "if the defendant's mental condition is a significant factor" (Idaho Code § 19-2523(1) (1997)), the court is required to consider "any risk of danger which the defendant may create for the public, if at large, or the absence of such risks." Idaho Code § 19-2523(e) (1997). Furthermore, any mental health examination reports must include a consideration of the risk of danger which the defendant may create for the public if at large. Idaho Code § 19-2522(2)(f) (1997).

If the judge believes that the defendant's mental condition will be a significant factor at sentencing and for good cause shown, the court will appoint at least one psychiatrist or psychologist to evaluate the defendant. *See* Idaho Code § 19-2522(1) (1997). The judge's decision to order a psychological examination will be reviewed on an abuse of discretion standard. *See State v. Pearson*, 702 P.2d 927, 929 (Ct. App. 1985). As evidenced by the following, there appears to be a strong preference for judges ordering psychological examinations to assist in sentencing decisions: "After the determination of guilt, it is essential that the court receive adequate information about the defendant before handing down the sentence. Individualizing sentences is impossible without such information." IDAHO JUDGE'S SENTENCING MANUAL, § 5.1 (1987 Rev.) (quoted in *State v. Romero*, 775 P.2d 1233, 1235 (1989) and *State v. McFarland*, 876 P.2d 158, 160-161 (1994)). Neither statutes nor case law specify the contents of a defendant's

notice of intent to use mental health evidence or testimony, nor do they state when notice is required. However, the court order directing the examination must state the issues to be resolved. *See* Idaho Code § 19-2522(1) (1997).

After conducting an examination, the mental health professional files three copies of the report with the court, which will forward copies to counsel for both sides. *See* Idaho Code § 19-2522(4) (1997). The examiner's report must include the following:

1) A description of the nature of the examination;
2) A diagnosis, evaluation or prognosis of the mental condition of the defendant;
3) An analysis of the degree of the defendant's illness or defect and level of functional impairment;
4) A consideration of whether treatment is available for the defendant's mental condition;
5) An analysis of the relative risks and benefits of treatment or nontreatment;
6) A consideration of the risk of danger which the defendant may create for the public if at large. Idaho Code § 19-2522(3) (1997).

Based on the defendant's ability to pay, defendant may be responsible for the costs associated with the examination. *See* Idaho Code § 19-2522(1) (1997). Defendants may choose their own experts to examine them, if they so wish. Idaho Code § 19-2522(5) (1997). The defense may also present its own mental health professional's testimony and report to demonstrate mitigation evidence. *See* Idaho Code 19-2522 § (5) & (6) (1997).

Requiring a defendant to submit to a psychological evaluation does not violate the defendant's right against self-incrimination, however, the examiner must review the defendant's Miranda rights with him. *See State v. Lankford*, 781 P.2d 197, 208-210 (1989); *Gibson v. State*, 718 P.2d 283, 290 (Idaho 1986). While there is no formal rule and the law is unclear, it appears that counsel is generally not present during the examination. *See State v. Lankford*, 781 P.2d 197, 208 (Idaho 1989). Idaho law is incomplete to the extent that sanctions for non-compliance are not addressed in the statutes or published case law.

New York:

In New York, the trial jury decides whether to impose the death sentence. *See* N.Y. Crim. Proc. Law § 400.27(2) & 400.27(10-11) (McKinney 1998). Future dangerousness is not a factor in the capital sentencing scheme.

New York statutes provide guidance for the use of mental health examinations of defendants. *See* N.Y. Correct. § Ch. 43, Art. 22-B (McKinney 1998); *see also* N.Y. Law § 400.27 (McKinney 1998). New York law does not permit a sentence of death to the mentally retarded. *See* N.Y. Crim. Proc. Law § 400.27(12) (McKinney 1998). New York allows for the examination of a defendant when incompetence and insanity are raised as issues, as well as in two additional situations.

First, if a defendant claims that he or she is mentally retarded, but not insane, the state is provided the opportunity to examine the defendant. *See* N.Y. Crim. Proc. Law § 400.27(13)(c) (McKinney 1998). A separate hearing is held, outside the presence of the jury, to determine if the defendant meets the legal definition of mental retardation. *See* N.Y. Crim. Proc. Law § 400.27(12)(a) (McKinney 1998). The defendant must prove retardation by a preponderance of the evidence. *Id.*

The defendant chooses whether the hearing to determine mental retardation will take place prior to trial or after the guilt phase of a bifurcated capital trial. If the hearing is prior to trial, and the court determines that the defendant is retarded, the trial will not be bifurcated, as death will not be an option. *See* N.Y. Crim. Proc. Law § 400.27 (12)(e) (McKinney 1998). If, however, the defendant raises the issue after the guilt phase, the court will hold a hearing, but will reserve judgment on the question of retardation until after the jury renders a sentence. *See* N.Y. Crim. Proc. Law § 400.27(12)(a) (McKinney 1998). There is an exception for the killing of a correctional officer in prison or jail, in which case the death sentence will still be an option for the mentally retarded. *See* N.Y. Crim. Proc. Law § 400.27(12)(d) (McKinney 1998).

Second, when the defense indicates that it will bring forth mitigation evidence to the jury of his mental history or condition, the state is also provided the opportunity to examine the defendant. *See* N.Y. Crim. Proc. Law § 400.27(13)(c) (McKinney 1998). Even if the court previously determined that the defendant is not retarded, the defense still may offer mental health evidence in mitigation. When either party intends to offer

psychiatric evidence, the party must, within a reasonable time prior to trial, serve notice to the other party and the court. *See* N.Y. Crim. Proc. Law § 400.27(13)(b) (McKinney 1998). If the party fails to give notice, the opposing side is entitled to a continuance and the attorney personally is subject to fine. The testimony, however, will not be barred from inclusion in the sentencing trial. *See* N.Y. Crim. Proc. Law § 400.27(13)(b) (McKinney 1998). It appears that the defense has no affirmative duty to provide a report of its examiner's findings. However, in accordance with notice requirements, the defense must provide a list of mental health witnesses and a brief but detailed statement specifying the nature and type of evidence to be presented. *See* N.Y. Crim. Proc. Law § 400.27(13)(b) (McKinney 1998).

Once the defendant has served notice of intent to present retardation evidence or mental health mitigation evidence, the prosecutor may, with notice to the defendant, request that the court order the defendant to submit to an examination by the prosecutor's mental health expert. *See* N.Y. Crim. Proc. Law § 400.27(13)(c) (McKinney 1998). Both prosecution and defense counsel may be present for the exam. *Id.* Statutes and case law appear to be silent on the issue of whether Miranda warnings are required. If the defendant "willfully" fails to cooperate, upon motion of the state, the court will instruct the jury of defendant's failure to cooperate. However, the defense expert will not be precluded from testifying. *Id.* Any statements made by defendant to the state's expert will be precluded from use for any purpose other than rebuttal evidence in the sentencing portion of trial. *Id.* No specific seals or report protections appear to be required.

There is only one published case that addresses the defendant's notice of intent to present mental health mitigation evidence during the penalty phase. In *People of New York v. Mateo*, 676 N.Y.S.2d 903 (Monroe County 1998), the Monroe County court ruled that the statute did not require pretrial notice of intent as the defense did not seek to introduce psychiatric evidence in the guilt phase. *Id.* at 903-905. The court indicated that in the event of a conviction, it could grant a continuance to allow for the state to examine the defendant after the guilt phase and prior to the penalty phase. *Id.* at 904-905. The decision appears to be limited to the facts in *Mateo*. *Id.* at 903, 904.

Ohio:

Ohio law calls for the trial jury to recommend a sentence to the judge. *See* Ohio Rev. Code Ann. § 2929.03(C)(2)(b) (West 1998). If the jury recommends death, the judge must find, beyond a reasonable doubt, that the aggravating circumstances outweigh the mitigating circumstances in order to impose the death sentence. *See* Ohio Rev. Code Ann. § 2929.03(D)(3) (West 1998). If the defendant waived the right to a jury trial, a three-judge panel determines the sentence using the same standard as the (jury) trial judge. *See* Ohio Rev. Code Ann. § 2929.03(C)(2)(b) & 2929.03(D)(3) (West 1998).

Ohio does not prohibit the execution of the mentally retarded. Mental impairment may be argued as a mitigating factor at sentencing. *See* Ohio Rev. Code Ann. § 2929.04(B)(3) & (7) (West 1998). Future dangerousness is not a criterion in the list of statutory aggravating or mitigating factors. *See* Ohio Rev. Code Ann. § 2929.04 (West 1998).

The defense may give constructive notice of intent to present mental health testimony upon producing its witness lists. *See* Ohio Sup. Ct. R. 20(IV)(D) (West 1998). The statutes appear to permit notice of intent to present mental health evidence during the sentencing phase as well. *See* Ohio Rev. Code Ann. § 2929.03(D) (West 1998). No specific content appears to be required. No notice appears to be required. However, failure to inform the court of a testifying witness may result in the exclusion of that witness. Ohio R. Crim. P. 16(A)(1)(c) (requiring notice of witnesses as part of discovery process) & 16(E)(3) (providing sanctions for discovery abuse, e.g., excluding evidence or witnesses).

A defendant who plans to present mental health mitigation evidence at the sentencing phase of adjudication has two options. First, defendant requests a mental health examination. When he or she is indigent, the court may order the payment of fees and expenses. *See* Ohio Rev. Code Ann. § 2929.024 (West 1998). The defendant must demonstrate that the expert is "reasonably necessary or appropriate" to present an adequate defense. *See* Ohio Sup. R. Rule 20(IV)(D) (West 1998); *see also Ake v. Oklahoma*, 470 U.S. 68 (1985). The defense selects its expert. The defense examiner's report is released to defense counsel. If the defense expert is to be called as a witness, the defense examiner's report is released to the prosecution prior to the expert testifying.

Mental health examinations are confidential and may not be accessed by the public. *See* Ohio Rev. Code Ann. § 2947.06(A)(2) (West 1998).

Ohio statutes and case law appear to be silent on the issues of whether counsel may be present at the examination, and whether cautionary statements (such as Miranda warnings) must be provided to the defendant prior to the examination. On occasion, the state will ask for its own expert. There appear to be no sanctions to the defendant for refusing to cooperate with a mental health examiner. The state's examiner's report is released to the prosecutor. It is released to defense counsel prior to the expert testifying.

Second, a defendant can request a pre-sentence investigation (with accompanying report). *See* Ohio Sup. R. 20(IV)(D) (West 1998) & Ohio Rev. Code Ann. § 2929.03(D)(1). Here, the court must appoint a mental health professional from the community or from the court psychiatric clinic, if one is available. A copy of the report goes to the court, to the trial jury, and to both the prosecutor and defense counsel. Ohio Rev. Code Ann. § 2929.03(D) (West 1998). Because of the lesser degree of control the defendant has over this option, the defense is less likely to elect for the pre-sentence examination than the first option of requesting its own expert. However, the judge must grant the presentence investigation request, whereas the judge may deny the request for an expert under section 2929.024.

Tennessee:

Tennessee law allows the trial jury to decide in favor of a death sentence. *See* Tenn. Code Ann. § 39-13-204 (1998). The statutory list of aggravating factors does not include or require a finding of defendant's future dangerousness. *Id.* at (i).

On November 23, 1998, the Tennessee Supreme Court ruled that a defendant who plans to present mitigation mental health testimony in the sentencing phase of a capital trial must provide pretrial notice. *See State v. Reid* , 981 S.W.2d 166 (Tenn. 1998). The court based its ruling on the requirement that the sentencing phase should begin as "soon as practical" after the guilt phase; therefore, without pretrial notice, the state is unable adequately to prepare its sentencing case and inevitably must request a continuance to prepare. *See Id.* at 172, *citing* Tenn.Code Ann. § 39-13-204(a) (1998). The court ruled that it is consistent with the rules of federal and state law to require pretrial notice of the intention to present mental health mitigation evidence in sentencing. *See State v. Reid,* 981 S.W.2d 166, 171-173 (Tenn. 1998).

In the lower court's decision in *Reid,* the court adopted the procedures described in Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition. Tenn. R. Crim. P. 12.2. Under Rule 12.2, the court may, upon motion of the state, order a defendant to submit to a mental examination by a psychiatrist designated by the state. *See* Tenn. R. Crim. P. Rule 12.2 (c). Neither Rule 12.2 nor case law specifically states when the defendant must be examined by the state's expert. Any evidence gathered in the state's examination may be used only for impeachment and rebuttal. *Id.* If the defendant fails to comply with notice requirements or with the examination, the court may exclude the testimony of the defense expert. *See* Tenn. R. Crim. P. 12.2 (d).

The Tennessee Supreme Court set forth the following procedures to be used in cases in which the defendant intends to introduce evidence of a mental condition at the penalty phase:

a) Each trial judge determines how much pretrial notice the defendant must provide. *State v. Reid,* 981 S.W.2d 166, 174 (Tenn. 1998).
b) The state selects its own expert upon motion to the court. *Id.*
c) The reports of both the defense and state examiners are filed under seal with the court prior to jury selection. *Id.*

d) The state will not have access to the defendant's and state's examiners' reports until the defendant has been found guilty and after the defense has confirmed its intent to use expert testimony for mitigation purposes. *Id.* Even after the reports are given to the state, the state may not use the material in the penalty phase until the defense actually presents expert testimony. *Id.*

e) The defense will receive a copy of the state examiner's report after the defense has filed a post-verdict notice of intent to offer mental condition testimony at the penalty phase. *Id.*

Tennessee law does not permit the imposition of a death sentence on the mentally retarded, so the defense may use the expert to argue that the defendant is retarded. Tenn. Code Ann. § 39-13-203 (1998).

The Tennessee Supreme Court has held that a mental health examination is not a violation of the defendant's Fifth or Sixth Amendment rights when the process does not allow the use of evidence gathered for purposes other than impeachment or rebuttal of mental condition evidence introduced by the defendant. *See State v. Huskey,* 964 S.W.2d 892, 900 (Tenn. 1998). In addition, the court has ruled that counsel does not have a right to be present for the examination. *See State v. Martin,* 950 S.W.2d 20 (Tenn. 1997). However, in *Martin*, the court did endorse recording the examination as a means of preserving evidence and enhancing "the accuracy and reliability of the truth-seeking function of the trial." *Id.* at 27. It held that the trial court has the discretion to require video or audio taping of the examination following a showing by one or both of the parties that this safeguard is feasible and not unduly intrusive. *Id.*

Texas:

Texas statutes govern the decision-making process for sentencing. The capital-sentencing structure mandates a three-question system that requires trial jurors to decide mitigation, aggravation and future dangerousness. *See* Tex. Code Crim. P. Ann. art. 37.071 (West 1998). The state puts the defendant's mental health into issue to meet its burden to prove future dangerousness beyond a reasonable doubt. This is generally done through the presentation of record evidence and hypothetical questions to experts.

Texas does not prohibit the execution of mentally retarded defendants. However, evidence of mental impairment, including cognitive impairment, may be considered as mitigating evidence. *Shannon v. State*, 942 S.W.2d 591, 597 (Tex. Crim. App. 1996), *interpreting* Tex. Code Crim. P. Ann. art. 37.071 (West 1998). Case law from the Texas Court of Criminal Appeals governs the use of mental health examinations and mitigation testimony at capital trials. *See generally Soria v. State*, 933 S.W.2d 46 (Tex. Crim. App. 1996); *Lagrone v. Texas*, 942 S.W.2d 602 (Tex. Crim. App. 1997); *Bennett v. State*, 766 S.W.2d 227 (Tex. Crim. App. 1989).

In *Soria v. State*, 933 S.W.2d 46 (Tex. Crim. App. 1996), the court held that the state may compel examination of defendant once defendant has presented expert mental testimony on lack of future dangerousness. *Id.* at 58-59. The decision expressly overruled *Bradford v. State,* 873 S.W.2d 15 (Tex.Cr.App. 1993)(plurality opinion)(holding that compelling defendant to submit to an exam violated his Fifth and Sixth amendment rights). In *Soria,* the court stated, "a defendant waives his Fifth Amendment rights to a limited extent by presenting psychiatric testimony on his behalf." *Id.* at 58-59. The court ruled that a defendant is, in essence, testifying through an expert and the state should have some opportunity to rebut that testimony. The court did limit the state's rebuttal testimony to the issues raised by the defendant. *Id.* at 59. *See generally, Estelle v. Smith,* 101 S.Ct. 1866 (1981) (holding that psychiatric examinations do not, per se, violate defendant's constitutional rights, but Fifth and Sixth Amendment safeguards must be provided).

In *Lagrone v. Texas*, 942 S.W.2d 602 (Tex. Crim. App. 1997), the court expanded the holding in *Soria* to compel a defendant to submit to a state-sponsored mental examination once the defendant indicates an intent to introduce mental health mitigation

evidence. *Id.* at 611-12. While there is no formal notice policy, notice is usually given upon defense's request for expert witness funds or its submission of a witness list. *Id.* at 609. There appear to be no formal sanctions for failing to provide notice. Neither the statute (Tex. Code Crim. P. Ann. art. 37.071) nor the *Lagrone* case directly addresses the issue of when defense examiners release their reports to the prosecutors.

Once the state requests its own mental examination, the court holds a hearing. *Id.* at 610. The state is permitted to select its own expert. *Id.* Defense counsel may be present outside the examination room, and the defendant may recess the interview to consult with counsel. *Lagrone v. State*, 942 S.W.2d 602, 610 n. 6 (Tex. Crim. App. 1997). The examination may take place at any time. *Id.* at 610. In *Lagrone*, the court permitted the state's expert to testify to defendant's lack of cooperation in the examination. *Id.* at 609-10.

In a footnote, the *Lagrone* court strongly recommended the following protections for the defendant. *Id.* at 610, n. 6. First, during the examination, the defendant should be able to consult with counsel who may be present in an adjoining room. Second, mental health professionals should not relate specific statements from the interview to the prosecutors, but should reduce their findings to a report delivered directly to the court. Third, the court should review the findings and decide whether to release only the ultimate conclusions and Brady evidence. Finally, the full report should be released at the time the defense calls its expert. *Id.*

Virginia:

The Commonwealth of Virginia delegates the capital punishment sentencing decision to the jury. *See* Va. Code Ann. § 19.2-264.3:1(B) & (C) (Michie 1998). Virginia does not prohibit the execution of the mentally retarded, but mental impairment may be argued as a mitigating factor to the jury. Va. Code Ann. § 19.264.4(B) (Michie 1998).

If a defendant is charged with a capital crime and intends to present psychiatric evidence in sentencing mitigation, the defendant must inform the Commonwealth at least 21 days prior to trial. *See* Va. Code Ann. § 19.2-264.3:1(E) (Michie 1998). Although the Code requires notice, it does not specify the content of the notice document. *Id.* Upon objection of the Commonwealth for defendant's failure to notify the Commonwealth within 21 days prior to trial, the court may grant the Commonwealth a continuance or may bar the defendant from presenting such testimony. *Id.*

When a defendant gives notice of intent to present mitigation evidence using mental health examinations and testimony, he or she waives the Fifth Amendment privilege for the purposes of information obtained in court-ordered evaluations. *See Savino v. Commonwealth,* 391 S.E.2d 276, 281 (Va. 1990). A defendant who cannot afford an expert may petition the court to appoint one. Va. Code Ann. § 19.2-264.3:1(A) (Michie 1998). However, the defendant may not select an expert of his or her own choosing and is limited to one court-appointed psychiatrist. *See Mackall v. Commonwealth of Virginia,* 372 S.E.2d 759, 764 (Va. 1988), *citing Ake v. Oklahoma,* 470 U.S. 68, 83 (1985), and *Pruett v. Commonwealth,* 351 S.E.2d 1, 7 (Va. 1986). The defense expert's report shall be subject to the attorney-client privilege and will be released to the state only upon notice that the defendant intends to present mitigation psychiatric evidence at sentencing. Va. Code Ann. § 19.2-264.3:1(D) (Michie 1998).

When the defendant informs the Commonwealth of the intent to present psychiatric evidence in mitigation, the Commonwealth may petition the court for the appointment of one or more qualified experts to evaluate the defendant on behalf of the prosecution. Va. Code Ann. § 19.2-264.3:1(F)(1) (Michie 1998). The Commonwealth's expert may examine the defendant prior to trial. Pursuant to statute and on the record, the court must inform the defendant that refusing to cooperate with the appointed expert may result in exclusion of defendant's expert evidence. *Id.* If the court later finds, after hearing

evidence, that the defendant actually failed to cooperate, the court may admit the refusal to cooperate as evidence or, at its discretion, bar defendant's expert testimony. Va. Code Ann. § 19.2-264.3:1(F)(2) (Michie 1998).

Upon receiving notice that the defendant plans to present mental health mitigation evidence, the Commonwealth is entitled to the following materials: 1) a copy of the defense expert's report, 2) the results of any other evaluation of the defendant's mental condition conducted relative to the sentencing proceeding, and 3) copies of psychiatric, psychological, medical, and other records obtained during the course of the evaluation. Va. Code Ann. § 19.2-264.3:1(D) (Michie 1998). The use of these materials is subject to certain restrictions. First, these materials may be used only during the sentencing portion of trial if the defense presents mental health mitigation evidence. *Id.* Second, information obtained from these materials may be used in sentencing only to rebut mitigation evidence presented by the defendant. Va. Code Ann. § 19.2-264.3:1(G) (Michie 1998). Finally, it may not be used to prove guilt or aggravating factors. *Id.* The Commonwealth's expert may testify not only to the existence or absence of mitigating circumstances, but also to the defendant's future dangerousness. *See Stewart v. Commonwealth*, 427 S.E.2d 394, 407-408 (Va. 1993), *citing Savino v. Commonwealth*, 391 S.E.2d 276, 281-282 (Va. 1990).

Virginia statutes and case law are silent on the issues of whether counsel are permitted to be present for the examinations and whether Miranda warnings are required prior to the examination. Copies of the expert's report and copies of records relied upon in the evaluation are presented to both sides upon completion. Va. Code Ann. § 19.2-264.3:1(F)(1) (Michie 1998). No published Virginia case addresses the issue of whether prohibiting the defense expert from testifying because the defendant refused to cooperate with Commonwealth's expert is in violation of the Supreme Court directive that a defendant may present mitigation evidence. *See Lockett v. Ohio,* 438 U.S. 586, 597 (1978).

APPENDIX[1]

[1] This appendix provides whole or excerpts from the most salient cases, statutes and rules.

ALABAMA

Ex parte Shep WILSON, Jr.
(Re Shep Wilson, Jr.
v.
State).

89-561.

Supreme Court of Alabama.

Aug. 17, 1990.

Rehearing Denied Nov. 2, 1990.

Defendant was convicted in the Talladega Circuit Court, No. CC-86-093, Jerry Fielding, J., of three counts of capital murder, and sentenced to death. Defendant appealed. The Court of Criminal Appeals, 571 So.2d 1237, affirmed. On petition for writ of certiorari, the Supreme Court, Hornsby, C.J., held that: (1) defendant gave valid consent to search of his home and automobile; (2) defendant waived right to counsel in connection with statements to police officer; (3) state's use of psychiatric evidence did not violate defendant's constitutional rights; but (4) prosecutor impermissibly commented on defendant's right not to testify.

Reversed and remanded.

Houston and Steagall, JJ., dissented.

Maddox, J., dissented and filed opinion.

On remand, Ala.Cr.App., 571 So.2d 1266.

HORNSBY, Chief Justice.

This is a death penalty case. Shep Wilson, Jr., is a 33-year old black man with a history of emotional disturbance and violence toward women, including

occasion before dumping it in the area where it was later discovered.

The trial court found that Wilson's statement had been made voluntarily and without coercion. The trial court further found that even though the statements given by Wilson were given at approximately 3:00 a.m. on the morning of February 16, 1990, he was not exhausted at the time the statements were given and was aware that he could stop the interview at any time.

At trial, the state presented evidence obtained as a result of the searches of Wilson's residence and vehicle. The incriminating statement was also allowed into evidence. Wilson did not testify. The jury convicted Wilson of three counts of capital murder, and the trial moved to the penalty phase. The defense presented testimony indicating prior mental illness and possible mental retardation, and the state presented evidence that tended to rebut the defendant's evidence as to any mental illness or defect. The jury's determination in the penalty phase was a recommendation of death by a vote of 11 to 1. The trial court subsequently sentenced Wilson to death.

Wilson makes numerous allegations of error at his trial, and several of these issues merit discussion. Specifically, he challenges the validity of the consent searches of his home and automobile, and he also contests the voluntariness of statements that he made to police officers. In connection with the statements given to police and the consent searches mentioned *1255 above, the defendant further claims that he suffered ineffective assistance of counsel. The defendant also challenges the State's use of various mental evaluations prepared pursuant to the trial court's order as a prerequisite to his receipt of state assistance in obtaining mental health evaluations to aid in his defense. We will address these issues separately.

State's Use of Psychiatric Evidence

Pursuant to the United States Supreme Court's ruling in Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), the defendant sought the assistance of a psychiatrist in the preparation of his defense. The State argued that if the defendant presented expert psychiatric testimony, it was entitled to have the defendant examined by its own experts. Following a hearing on the defendant's Ake motion, the trial court ordered that the defendant be transferred to the Taylor Hardin Secure Medical Facility for examination by State experts. The records generated by the Taylor Hardin staff were made available to the defendant's State-paid expert.

During the guilt phase of the trial, the defendant offered no psychiatric evidence. However, at the sentencing phase, the defendant informed the court that he intended to prove that the offense was committed at a time when the defendant was under extreme mental or emotional distress, in an attempt to prove a mitigating circumstance under Code 1975, § 13A-5-51(2). (We note also that from the outset the defendant had pleaded not guilty by reason of insanity.) The defendant produced a number of witnesses at this phase of the trial, including Dr. Edward Benson, a psychiatrist, who was provided to the defendant at the State's expense. Dr. Benson testified that the defendant suffered from paranoid personality disorder, underlying generalized anxiety disorder, and intermittent explosive disorder.

In rebuttal, the State called Dr. Kamal Nagi, a Taylor Hardin psychiatrist who had examined the defendant. Dr. Nagi testified that the defendant was not suffering from any mental disease or defect at the time the crime was committed.

[7][8] The defendant complains that the trial court erred in requiring that he be examined first by the State in order to receive State funds to pay his expert's expenses, and that his Fifth Amendment rights and his Sixth Amendment right to counsel were violated in this respect. However, it is clear that a trial court may compel the defendant, when he pleads insanity, to undergo psychiatric examination, without infringing on the defendant's constitutional rights. Isley v. Dugger, 877 F.2d 47, 49 (11th Cir.1989). In this regard, one court has stated:

> "Several other circuits have rejected this unconstitutionality-per-se argument on various grounds, while one has indicated approval of it. Relying on a balancing test, we choose to follow the former line of cases and permit compelled psychiatric *1258 examinations when a defendant has raised the insanity defense. Since any statement about the offense itself could be suppressed, a rule forbidding compelled examinations would prevent no threatened evil, and the government will seldom have a satisfactory method of meeting defendant's proof on the issue of sanity except by the testimony of a psychiatrist it selects--including, perhaps, the testimony of psychiatric experts offered by him--who has had the opportunity to form a reliable opinion by examining the accused. To hold that compelled psychiatric examinations are forbidden because sanity is an element of the offense and that the privilege against self-incrimination prohibits compulsory elicitation of statements going to an element of the offense would be confining ourselves within an analytical prison. Given the defendant's power to have any incriminating factual statements resulting from the examination suppressed, we think the proper analogy is to the required furnishing of handwriting exemplars by the defendant and similar procedures.
>
> "Likewise, we reject appellant's claim of a constitutional right to have an attorney present at the psychiatric examination since that might defeat

> the purpose of the examination and since the examination is not the kind of critical stage at which the assistance of counsel is needed or even useful. There would be no need for counsel to instruct the accused not to answer questions for fear of factual self-incrimination, for any such matter is subject to suppression; and interference with the examination by counsel on other grounds would be improper."

United States v. Cohen, 530 F.2d 43, 47-48 (5th Cir.), cert. denied, 429 U.S. 855, 97 S.Ct. 149, 50 L.Ed.2d 130 (1976) (footnotes omitted).

Under the analyses of the Isley and Cohen cases, any defendant who raises the insanity issue may be compelled to undergo a psychiatric examination. Thus, the defendant's claim that he was denied equal protection of the laws under the decision in Ake, supra, is not well taken. We agree with the contention of the State that the defendant would have been subject to State examination in any case. Therefore, we hold that there was no error with regard to the defendant's right of equal protection of the laws.

[9] We are mindful that the defendant offered the psychiatric testimony in this case in order to establish mitigating circumstances under Code 1975, § 13A-5-51(2). The defendant clearly bears the burden of proving mitigation under § 13A-5-45(g). However, § 13A-5-45(g) states that once the defendant interjects the issue of mitigation "the State shall have the burden of disproving the factual existence of that circumstance by a preponderance of the evidence." Thus, the State was justified in producing its own expert to rebut the evidence of mitigation offered by the defendant's expert. Moreover, we note that the defendant and his counsel were advised that the examination at Taylor Hardin would include any mitigating circumstances. In that regard, the defendant claims that the testimony of the state's expert violated his Fifth, Sixth, Eighth, and Fourteenth Amendment rights. The defendant relies heavily on the case of Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981).

We find Estelle distinguishable. In Estelle, the appellate court was required to make a finding of "future dangerousness" in order to impose the death penalty, while in the present case no such requirement exists. The Estelle court held that the examination was improper because the defendant was not informed of his Miranda rights before he was examined by the State's expert and his attorneys were not informed that the scope of the examination would include the issue of "future dangerousness." In this case, the defendant's counsel was informed that the examination would encompass matters of mitigation and the defendant was informed of his Miranda rights prior to the examination. In Estelle, the Supreme Court stated:

> "Respondent, however, introduced no psychiatric evidence, nor had he indicated that he might do so. Instead, the State ***1259** offered information obtained from the court-ordered competency examination as affirmative evidence to persuade the jury to return a sentence of death. Respondent's future dangerousness was a critical issue at the sentencing hearing, and one on which the State had the burden of proof beyond a reasonable doubt. To meet its burden the State used respondent's own statements, unwittingly made without awareness that he was assisting the State's efforts to obtain the death penalty. In these distinct circumstances, the Court of Appeals correctly concluded that the Fifth Amendment privilege was implicated."

Estelle, supra, at 466, 101 S.Ct. at 1874-75.

In this case, the defendant did enter a plea of not guilty by reason of insanity. Thus, the trial court was justified in compelling the defendant to undergo psychiatric evaluation. In addition, the defendant and his counsel were informed of the State's intention to examine the defendant on matters of mitigation and it appears that, prior to the examination, the defendant was informed of his Fifth Amendment rights. Moreover, the Supreme Court noted that "a different situation arises where a defendant intends to introduce psychiatric evidence at the penalty phase" as opposed to the case where the defendant intends to offer no such evidence. [FN1]

> FN1. Id., 451 U.S. at 472, 101 S.Ct. at 1877. The Supreme Court noted that the Fifth Circuit "carefully left open" the possibility that a defendant who intends to offer psychiatric evidence at the penalty phase of a trial could be precluded from offering such evidence unless he consents to examination by the State's own psychiatric expert. Estelle, 451 U.S. at 466 n. 10, 101 S.Ct. at 1874 n. 10.

Based on the foregoing, we conclude that the defendant's claims regarding the admission of the State's psychiatric evidence are without merit. Because we reverse on the issue addressed below regarding the comment made during the closing argument by the district attorney, we need not consider the remaining issues raised by the defendant.

Ala.Code 1975 § 13A-5-51

CODE OF ALABAMA
TITLE 13A. CRIMINAL CODE.
CHAPTER 5. PUNISHMENTS AND SENTENCES.
ARTICLE 2. DEATH PENALTY AND LIFE IMPRISONMENT WITHOUT PAROLE.

Current through End of 1998 Reg. Sess.

§ 13A-5-51. Mitigating circumstances -- Generally.

Mitigating circumstances shall include, but not be limited to. the following:
(1) The defendant has no significant history of prior criminal activity;
(2) The capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance;
(3) The victim was a participant in the defendant's conduct or consented to it;
(4) The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor;
(5) The defendant acted under extreme duress or under the substantial domination of another person;
(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantiall impaired; and
(7) The age of the defendant at the time of the crime.

(Acts 1981, No. 81-178, § 13.)

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

COLLATERAL REFERENCES

24B C.J.S. Criminal Law, § 1983(1).

21 Am. Jur. 2d, Criminal Law, § 584.

Propriety of imposing capital punishment on mentally retarded individuals. 20 A.L.R.5th 177.

Ala.Code 1975 § 13A-5-45

CODE OF ALABAMA
TITLE 13A. CRIMINAL CODE.
CHAPTER 5. PUNISHMENTS AND SENTENCES.
ARTICLE 2. DEATH PENALTY AND LIFE IMPRISONMENT WITHOUT PAROLE.

Current through End of 1998 Reg. Sess.

§ 13A-5-45. Sentence hearing -- Delay; statements and arguments; admissibility of evidence; burden of proof; mitigating and aggravating circumstances.

(a) Upon conviction of a defendant for a capital offense, the trial court shall conduct a separate sentence hearing to determine whether the defendant shall be sentenced to life imprisonment without parole or to death. The sentence hearing shall be conducted as soon as practicable after the defendant is convicted. Provided, however, if the sentence hearing is to be conducted before the trial judge without a jury or before the trial judge and a jury other than the trial jury, as provided elsewhere in this article, the trial court with the consent of both parties may delay the sentence hearing until it has received the pre-sentence investigation report specified in Section 13A-5-47(b). Otherwise, the sentence hearing shall not be delayed pending receipt of the pre-sentence investigation report.

(b) The state and the defendant shall be allowed to make opening statements and closing arguments at the sentence hearing. The order of those statements and arguments and the order of presentation of the evidence shall be the same as at trial.

(c) At the sentence hearing evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to the aggravating and mitigating circumstances referred to in Sections 13A-5-49, 13A-5-51 and 13A-5-52. Evidence presented at the trial of the case may be considered insofar as it is relevant to the aggravating and mitigating circumstances without the necessity of re-introducing that evidence at the sentence hearing, unless the sentence hearing is conducted before a jury other than the one before which the defendant was tried.

(d) Any evidence which has probative value and is relevant to sentence shall be received at the sentence hearing regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements. This subsection shall not be construed to authorize the introduction of any evidence secured in violation o the Constitution of the United States or the State of Alabama.

(e) At the sentence hearing the state shall have the burden of proving beyond a reasonable doubt the existence of any aggravating circumstances. Provided, however, any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentence

hearing.

(f) Unless at least one aggravating circumstance as defined in Section 13A-5-49 exists, the sentence shall be life imprisonment without parole.

(g) The defendant shall be allowed to offer any mitigating circumstance defined in Sections 13A-5-51 and 13A-5-52. When the factual existence of an offered mitigating circumstance is in dispute, the defendant shall have the burden of interjecting the issue, but once it is interjected the state shall have the burden of disproving the factual existence of that circumstance by a preponderance of the evidence.

(Acts 1981, No. 81-178, p. 203, § 7.)

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

CROSS REFERENCES

As to sentence hearing, see Rule 26.6, Alabama Rules of Criminal Procedure.

For subsection (d) of this section being commented on by Rule 1101, Alabama Rules of Evidence, effective January 1, 1996, see the Advisory Committee's Notes to Rule 1101 in Volume 23.

ARIZONA

95 L.Ed.2d 127, 55 USLW 4496

Ricky Wayne TISON and Raymond Curtis Tison, Petitioners

v.

ARIZONA.

No. 84-6075.

Supreme Court of the United States

Argued Nov. 3, 1986.

Decided April 21, 1987 [FN*].

FN* Together with Tison v. Arizona, also on certiorari to the same court (see this Court's Rule 19.4).

Rehearing Denied June 8, 1987.
See 482 U.S. 921, 107 S.Ct. 3201.

Petitioners, who were convicted of first-degree murder, armed robbery, kidnapping, and theft of motor vehicle, each filed a petition for postconviction relief. The Superior Court, Yuma County, No. 9299, Douglas W. Keddie, J., denied the petitions and the petitioners appealed. The Arizona Supreme Court, Hayes, J., 142 Ariz. 446, 690 P.2d 747 and 142 Ariz. 454, 690 P.2d 755, denied the relief. Certiorari was granted. The Supreme Court, Justice O'Connor, held that Eighth Amendment does not prohibit death penalty as disproportionate in case of defendant whose participation in felony that results in murder is major and whose mental state is one of reckless indifference.

Vacated and remanded.

Justice Brennan filed a dissenting opinion in which Justice Marshall joined and in parts of which Justices Blackmun and Stevens joined.

Opinion on remand, 774 P.2d 805.

*156 A critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime. Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished. The ancient concept of malice aforethought was an early attempt to focus on mental state in order to distinguish those who deserved death from those who through "Benefit of ... Clergy" would be spared. 23 Hen. 8, ch. 1, §§ 3, 4 (1531); 1 Edw. 6, ch. 12, § 10 (1547). Over time, malice aforethought came to be inferred from the mere act of killing in a variety of circumstances; in reaction, Pennsylvania became the first American jurisdiction to distinguish between degrees of murder, reserving capital punishment to "wilful, deliberate and premeditated" killings and felony murders. 3 Pa. Laws 1794, ch. 1766, pp. 186-187 (1810). More recently, in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the plurality opinion made clear that the defendant's mental state was critical to weighing a defendant's culpability under a system of guided discretion, vacating a death sentence imposed under an Ohio statute that did not permit the sentencing authority to take into account "[t]he absence of direct proof that the defendant intended to cause the death of the victim." Id., at 608, 98 S.Ct., at 2966 (opinion of Burger, C.J.); see also Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) (adopting position of Lockett plurality). In Enmund v. Florida, the Court recognized again the importance of mental state, explicitly permitting the death penalty in at least those cases where the felony murderer intended to kill and forbidding it in the case of a minor actor not shown to have had any culpable mental state.

[1] *157 A narrow focus on the question of whether or not a given defendant "intended to kill," however, is a highly unsatisfactory means of definitively distinguishing the most culpable and dangerous of **1688 murderers. Many who intend to, and do, kill are not criminally liable at all--those who act in self-defense or with other justification or excuse. Other intentional homicides, though criminal, are often felt undeserving of the death penalty--those that are the result of provocation. On the other hand, some nonintentional murderers may be among the most dangerous and inhumane of all--the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an "intent to kill." Indeed it is for this very reason that the common law and modern criminal codes alike have classified behavior such as occurred in this case along with intentional murders. See, e.g., G. Fletcher, Rethinking Criminal Law § 6.5, pp. 447-448 (1978) ("[I]n the common law, intentional killing is not the only basis for establishing the most egregious form of criminal homicide.... For example, the Model Penal Code treats reckless killing, 'manifesting extreme indifference to the value of human life,' as equivalent to purposeful and knowing killing"). Enmund held that when "intent to kill" results in its logical though not inevitable consequence--the taking of human life--the Eighth Amendment permits the State

to exact the death penalty after a careful weighing of the aggravating and mitigating circumstances. Similarly, we hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital *158 sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.

[2] The petitioners' own personal involvement in the crimes was not minor, but rather, as specifically found by the trial court, "substantial." Far from merely sitting in a car away from the actual scene of the murders acting as the getaway driver to a robbery, each petitioner was actively involved in every element of the kidnaping-robbery and was physically present during the entire sequence of criminal activity culminating in the murder of the Lyons family and the subsequent flight. The Tisons' high level of participation in these crimes further implicates them in the resulting deaths. Accordingly, they fall well within the overlapping second intermediate position which focuses on the defendant's degree of participation in the felony.

Only a small minority of those jurisdictions imposing capital punishment for felony murder have rejected the possibility of a capital sentence absent an intent to kill, and we do not find this minority position constitutionally required. We will not attempt to precisely delineate the particular types of conduct and states of mind warranting imposition of the death penalty here. Rather, we simply hold that major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the Enmund culpability requirement. [FN12] The Arizona courts have clearly found that the former exists; we now vacate the judgments below and remand for determination of the latter in further proceedings not inconsistent with this opinion. Cabana v. Bullock, 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986).

> FN12. Although we state these two requirements separately, they often overlap. For example, we do not doubt that there are some felonies as to which one could properly conclude that any major participant necessarily exhibits reckless indifference to the value of human life. Moreover, even in cases where the fact that the defendant was a major participant in a felony did not suffice to establish reckless indifference, that fact would still often provide significant support for such a finding.

It is so ordered.

17 A.R.S. Rules Crim.Proc., Rule **11.2**

ARIZONA REVISED STATUTES ANNOTATED
RULES OF **CRIMINAL PROCEDURE**
III. RIGHTS OF PARTIES
RULE 11. INCOMPETENCY AND MENTAL EXAMINATIONS

Current with amendments received through 10/01/1998

Rule **11.2**. Motion to have defendant's mental condition examined

a. Motion for Rule 11 Examination. At any time after an information or complaint is filed or indictment returned, any party may request in writing, or the court on its own motion may order, an examination to determine whether a defendant is competent to stand trial, or to investigate the defendant's mental condition at the time of the offense. The motion shall state the facts upon which the mental examination is sought. On the motion of or with the consent of the defendant, the court may order a screening examination for a guilty except insane plea pursuant to A.R.S. § 13-502 to be conducted by the mental health expert.

b. Medical and Criminal History Records. All available medical and criminal history records shall be provided to the court within three days of filing the motion for use by the examining mental health expert.

c. Preliminary Examination. The court may order that a preliminary examination be conducted pursuant to A.R.S. § 13-4503C to assist the court in determining if reasonable grounds exist to order further examination of the defendant.

d. Jurisdiction. Should any court determine that reasonable grounds exist for further competency hearings, the matter shall immediately transfer to the superior court for appointment of mental health experts; the superior court shall have exclusive jurisdiction over all competency hearings. If any court determines that competence is not an issue, the matter shall be immediately set for trial.

CREDIT(S)

1998 Main Volume

Amended May 7, 1975, effective Aug. 1, 1975; July 28, 1993, effective Dec. 1, 1993; Nov. 29, 1996, effective Jan. 1, 1997.

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

17 A.R.S. Rules Crim.Proc., Rule **11.4**

ARIZONA REVISED STATUTES ANNOTATED
RULES OF **CRIMINAL PROCEDURE**
III. RIGHTS OF PARTIES
RULE 11. INCOMPETENCY AND MENTAL EXAMINATIONS

Current with amendments received through 10/01/1998

Rule **11.4**. Disclosure of mental health evidence

a. Reports of Appointed Experts. The reports of experts made pursuant to Rule 11.3 shall be submitted to the court within ten working days of the completion of the examination and be made available to all parties, except that any statement or summary of the defendant's statements concerning the offense charged shall be made available only to the defendant. Upon receipt, court staff will copy and distribute the expert's report to the court and to defense counsel. Defense counsel is responsible for editing a copy for the State which is to be returned to court staff within 24 hours of receipt and made available for the State.

b. Reports of Other Experts. At least 15 working days prior to any hearing, the parties shall make available to the opposite party for examination and reproduction the names and addresses of mental health experts who have personally examined a defendant or any evidence in the particular case, together with the results of mental examinations of scientific tests, experiments or comparisons, including all written reports or statements made by them in connection with the particular case.

CREDIT(S)

1998 Main Volume

Amended May 7, 1975, effective Aug. 1, 1975; Nov. 29, 1996, effective Jan. 1, 1997.

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

COMMENT

1998 Main Volume

Rule **11.4**(a). All expert reports produced pursuant to Rule 11 are to be disclosed to all parties. Only one item of the report is excepted--summary of the defendant's statements concerning the actual offense, which will be given only to the defendant.

CALIFORNIA

The PEOPLE, Plaintiff and Respondent,
v.
Ronald Avery McPETERS, Defendant and Appellant.

No. S004712.

Supreme Court of California,
In Bank.

July 13, 1992.

As Modified on Denial of
Rehearing Sept. 23, 1992.

Defendant was convicted of first-degree murder committed during robbery or attempted robbery and was sentenced to death, in the Superior Court, Fresno County, No. 318047-8, James A. Ardaiz, J. Automatic appeal was taken. The Supreme Court, Lucas, C.J., held that: (1) defendant lacked standing to assert that seizure of murder weapon in cousin's house violated defendant's Fourth Amendment rights; (2) evidence supported conviction; and (3) jury was properly instructed during penalty phase.

Affirmed.

Mosk, J., dissented and filed opinion.

LUCAS, Chief Justice.

This is an automatic appeal from a judgment and sentence of death following defendant's conviction of first degree murder committed during a robbery or attempted robbery. (Pen.Code, §§ 187, 190.2, subd. (a)(17)(i); all statutory references are to this code unless otherwise indicated.) Finding no reversible error in the guilt or penalty phases of defendant's trial, we affirm the judgment in its entirety.

***1190** XXI. Testimony of the Prosecution Psychiatrist That Defendant Refused to Cooperate in an Examination

[37] Defendant presented the testimony of two expert psychiatrists as to his mental condition; their testimony was based in part on extensive interviews and psychological testing of defendant. The prosecutor requested that a prosecution psychiatrist be permitted to examine defendant before testifying in rebuttal. Defense counsel objected and further indicated he would advise his client to refuse to communicate with the prosecution psychiatrist. The court ordered the examination, whereupon defendant did so refuse. The court then permitted the psychiatrist to testify regarding defendant's refusal to participate in the examination.

Defendant claims his federal Fifth and Sixth Amendment constitutional rights were violated by this scenario and further claims a violation of Evidence Code sections 350 and 352. We disagree. By tendering his mental condition as an issue in the penalty phase, defendant waived his Fifth and Sixth Amendment rights to the extent necessary to permit a proper examination of that condition. Therefore, those rights were not violated when the examining psychiatrist testified to defendant's refusal to cooperate. (Buchanan v. Kentucky (1987) 483 U.S. 402, 107 S.Ct. 2906, 97 L.Ed.2d 336; see also People v. Poggi (1988) 45 Cal.3d 306, 330, 246 Cal.Rptr. 886, 753 P.2d 1082; People v. Williams, supra, 44 Cal.3d 883, 961-962, 245 Cal.Rptr. 336, 751 P.2d 395.) Any other result would give an unfair tactical advantage to defendants, who could, with impunity, present mental defenses at the penalty phase, secure in the ****169** assurance they could not be rebutted by expert testimony based on an actual psychiatric examination. Obviously, this would permit and, indeed, encourage spurious mental illness defenses.

West's Ann.Cal.Penal Code § 190.3
WEST'S ANNOTATED CALIFORNIA CODES
PENAL CODE
PART 1. OF CRIMES AND PUNISHMENTS
TITLE 8. OF CRIMES AGAINST THE PERSON
CHAPTER 1. HOMICIDE

Current through End of 1997-98 Reg. Sess. and 1st Ex. Sess.

§ 190.3. Death penalty or life imprisonment; determination by trier; evidence of aggravating and mitigating circumstances; factors

If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true, or if the defendant may be subject to the death penalty after having been found guilty of violating subdivision (a) of Section 1672 of the Military and Veterans Code or Sections 37, 128, 219, or 4500 of this code, the trier of fact shall determine whether the penalty shall be death or confinement in state prison for a term of life without the possibility of parole. In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition.

However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction.

However, in no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and acquitted. The restriction on the use of this evidence is intended to apply only to proceedings pursuant to this section and is not intended to affect statutory or decisional law allowing such evidence to be used in any other proceedings.

Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation.

The trier of fact shall be instructed that a sentence of confinement to state prison for a term of life without the possibility of parole may in future after sentence is imposed, be commuted or modified to a sentence that includes the possibility of parole by the Governor of the State of California.

In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole.

CREDIT(S)

1988 Main Volume

(Added by § 8 of Initiative Measure approved Nov. 7, 1978.)

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

West's Ann.Cal.Penal Code § 1054.1

WEST'S ANNOTATED CALIFORNIA CODES
PENAL CODE
PART 2. OF CRIMINAL PROCEDURE
TITLE 6. PLEADINGS AND PROCEEDINGS BEFORE TRIAL
CHAPTER 10. DISCOVERY

Current through End of 1997-98 Reg. Sess. and 1st Ex. Sess.

§ 1054.1. Prosecuting attorney; disclosure of materials to defendant

The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies:

(a) The names and addresses of persons the prosecutor intends to call as witnesses at trial.

(b) Statements of all defendants.

(c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged.

(d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial.

(e) Any exculpatory evidence.

(f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial.

CREDIT(S)

1999 Electronic Pocket Part Update

(Added by Initiative Measure (Prop. 115), approved June 5, 1990.)

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

The PEOPLE, Petitioner,
v.
The SUPERIOR COURT of Monterey County, Respondent;
Joseph D. MITCHELL, Jr., Real Party in Interest.

No. S026362.

Supreme Court of California,
In Bank.

Oct. 18, 1993.

As Modified on Denial of Rehearing Dec. 30, 1993.

In felony-murder prosecution in which special circumstances were charged, the Superior Court, Monterey County, No. MCR7945, John N. Anton, J., denied prosecutor's requested discovery of information pertinent to penalty phase of trial. State petitioned for writ of mandate or prohibition. The Court of Appeal, Capaccioli, Acting P.J., issued writ of mandate. Review was granted, superseding opinion of the Court of Appeal. The Supreme Court, Lucas, C.J., held that reciprocal pretrial discovery was available to parties with respect to penalty phase of capital trial.

Affirmed.

Mosk, J., filed dissenting opinion.

Opinion, 11 Cal.Rptr.2d 400, vacated.

*1237 III. TIMING OF DISCOVERY

Defendant next argues that the prosecution's discovery request is premature because defendant has not yet been convicted, special circumstances have not yet been found, and the penalty phase may never occur. As previously indicated, he fears that advance disclosure of his intended penalty phase evidence may jeopardize his guilt phase defense, potentially violating his privilege against self-incrimination and infringing on his right to a fair trial. We find merit in defendant's position, but we note that any such problems could be largely eliminated by deferring prosecution discovery of defense penalty phase evidence in an appropriate case pending the guilt and special circumstances determinations.

The Court of Appeal likewise acknowledged the legitimacy of defendant's concerns, stating its assumption that the trial court had discretion to defer discovery until the guilt phase was concluded. As the court stated, "We tend to agree that penalty phase discovery so early in the trial does not appear to be a very efficient use of time.... Procedural regulation is vested in the first instance in the trial court, and had it denied discovery here as premature, or otherwise disruptive, we would be inclined to defer to its superior knowledge of the parties and the case. However, the denial of discovery here was based solely on the supposed supremacy of section 190.3."

The issue is somewhat more complicated than the Court of Appeal outlined. To resolve the issue, we must consider the interplay of two potentially conflicting provisions. Under section 1054.5, subdivision (b), the party seeking a court order compelling discovery must first make an informal request for disclosure. If opposing counsel fails to comply with this request within 15 days, the proponent of discovery may seek a court order. The court "may make any order necessary to enforce the provisions of this chapter, including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order." (§ 1054.5, subd. (b), italics added.)

Viewed in isolation, the foregoing language is broad enough to authorize appropriate orders deferring penalty phase disclosure to the prosecution pending the jury's determination of the issues of guilt and special circumstances. The italicized phrase "continuance of the matter" reasonably could be construed as permitting continuance of the requested discovery, as well as continuance of trial. (See also § 1054.6 [protecting from disclosure any matter privileged under express statutory provisions or federal constitutional law]; Sturm, supra, 9 Cal.App.4th at p. 186, 11 Cal.Rptr.2d 652 [recognizing possibility of *1238 protective order under § 1054.6 where advance disclosure to prosecution of penalty phase evidence may improperly interfere with defense at guilt phase].)

Another provision, section 1054.7, requires all disclosures to be made at least 30 days prior to "trial," but allows the parties to show "good cause ... why a disclosure should be denied, restricted, or deferred." (Italics added.) That provision, however, is considerably narrower than section 1054.5, subdivision (b), for it limits "good cause" to "threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement." (§ 1054.7.)

***410 **109 Initially, it appears that the reference to "trial" in section 1054.7 cannot reasonably be construed as referring to the penalty phase of trial when penalty phase evidence is sought. In other words, we cannot simply hold that under section 1054.7, guilt phase discovery occurs before the guilt "trial" and penalty phase discovery occurs before the penalty "trial." As we previously explained in the course of determining that reciprocal discovery is available as to penalty phase evidence, a capital "trial" is a unitary proceeding that encompasses both the guilt and penalty phases. Indeed, this same reasoning induced us to hold that section 190.3 (requiring notice of aggravating evidence "prior to trial") obligates the prosecutor to give such notice prior to the commencement of the guilt phase. (See People v. Robertson, supra, 48 Cal.3d at pp. 45-46, 255 Cal.Rptr. 631, 767 P.2d

1109.)

[8] Thus, to be consistent with these decisions, we hold that the reciprocal discovery provisions contemplate both guilt and penalty phase disclosure ordinarily would occur at least 30 days prior to commencement of the trial on guilt issues. Are the trial courts empowered to defer prosecution discovery, as the Court of Appeal herein assumed? The answer largely depends on whether the limitations on "good cause" under section 1054.7 restrict the courts' general power to order continuances of such disclosure under section 1054.5.

Section 1054.7 seems aimed at deferring disclosure of particular items of evidence (such as disclosure of information which might endanger a witness, or might be lost or destroyed) when specified good cause is shown, rather than at continuing a party's general discovery request if "necessary to enforce the provisions" of the reciprocal discovery statutes (§ 1054.5, subd. (b)), including protection of the defendant's constitutional rights (see § 1054.6; Izazaga, supra, 54 Cal.3d at pp. 382-383, 285 Cal.Rptr. 231, 815 P.2d 304). Nothing in the text of section 1054.7 would necessarily override the courts' broad power under section 1054.5, subdivision (b), to order a general "continuance" of the prosecutor's discovery request. Likewise, nothing in section 1054.7 would or *1239 could constrict the court's authority to protect a defendant's constitutional rights.

[9][10] Thus, given a showing that such a continuance is appropriate (based on such considerations as the probable duration of the guilt phase, the likelihood that a guilty verdict, with special circumstances, will be returned, and the potential adverse effect disclosure could have on the guilt phase defense), trial courts possess discretion to defer penalty phase discovery by the prosecution until the guilt phase has concluded. On request, the court may permit such showing to be made in camera. (See Izazaga, supra, 54 Cal.3d at p. 383, 285 Cal.Rptr. 231, 815 P.2d 304; § 1054.5, subd. (b) [power to make "any other lawful order"]; § 1054.7, 2d par. ["any party" may request "good cause" showing to be made in camera].) If the trial court deems a particular item or items constitutionally protected from discovery until the guilt phase has concluded, the court should nonetheless order immediate disclosure of all unprotected items in accordance with the provisions of section 1054.3, as long as no other considerations suggest that deferral of discovery of the remaining evidence is appropriate.

Because we do not find the reciprocal discovery statutes (§ 1054 et seq.) necessarily inconsistent with section 190.3, we conclude that such discovery relating to the penalty phase of the trial is available to both parties. Accordingly the writ should issue, compelling the trial court to grant the People's motion for discovery unless it finds such discovery premature or constitutionally prohibited, as previously discussed.

The judgment of the Court of Appeal, issuing a peremptory writ of mandate, is affirmed. The writ should direct the trial court (1) to vacate its order denying penalty phase discovery to petitioner, and (2) to exercise its jurisdiction to compel appropriately timed reciprocal penalty phase discovery between the parties as authorized by section 1054 et seq.

FLORIDA

Fla. R. Crim. P. Rule 3.202

WEST'S FLORIDA STATUTES ANNOTATED
FLORIDA RULES OF CRIMINAL PROCEDURE
V. PRETRIAL MOTIONS AND DEFENSES

Current with Amendments received through 9/1/1998

Rule 3.202. Expert Testimony Of Mental Mitigation During Penalty Phase Of Capital Trial: Notice And Examination By State Expert

(a) Notice of Intent to Seek Death Penalty. The provisions of this rule apply only in those capital cases in which the state gives written notice of its intent to seek the death penalty within 45 days from the date of arraignment. Failure to give timely written notice under this subdivision does not preclude the state from seeking the death penalty.

(b) Notice of Intent to Present Expert Testimony of Mental Mitigation. When in any capital case, in which the state has given notice of intent to seek the death penalty under subdivision (a) of this rule, it shall be the intention of the defendant to present, during the penalty phase of the trial, expert testimony of a mental health professional, who has tested, evaluated, or examined the defendant, in order to establish statutory or nonstatutory mental mitigating circumstances, the defendant shall give written notice of intent to present such testimony.

(c) Time for Filing Notice; Contents. The defendant shall give notice of intent to present expert testimony of mental mitigation not less than 20 days before trial. The notice shall contain a statement of particulars listing the statutory and nonstatutory mental mitigating circumstances the defendant expects to establish through expert testimony and the names and addresses of the mental health experts by whom the defendant expects to establish mental mitigation, insofar as is possible.

(d) Appointment of State Expert; Time of Examination. After the filing of such notice and on the motion of the state indicating its desire to seek the death penalty, the court shall order that, within 48 hours after the defendant is convicted of capital murder, the defendant be examined by a mental health expert chosen by the state. Attorneys for the state and defendant may be present at the examination. The examination shall be limited to those mitigating circumstances the defendant expects to establish through expert testimony.

(e) Defendant's Refusal to Cooperate. If the defendant refuses to be examined by or fully cooperate with the state's mental health expert, the court may, in its discretion:

(1) order the defense to allow the state's expert to review all mental health reports, tests, and evaluations by the defendant's mental health expert; or

(2) prohibit defense mental health experts from testifying concerning mental health tests, evaluations, or examinations of the defendant.

Added Nov. 2, 1995, effective Jan. 1, 1996 (674 So.2d 83). Amended on motion for rehearing May 2, 1996 (674 So.2d 83).

IDAHO

I.C. § **19-2522**

IDAHO CODE
TITLE 19. CRIMINAL PROCEDURE
CHAPTER 25. JUDGMENT

19-2522 Examination of defendant for evidence of mental condition -- Appointment of psychiatrists or licensed psychologists -- Hospitalization -- Reports.

(1) If there is reason to believe the mental condition of the defendant will be a significant factor at sentencing and for good cause shown, the court shall appoint at least one (1) psychiatrist or licensed psychologist to examine and report upon the mental condition of the defendant. The costs of examination shall be paid by the defendant if he is financially able. The determination of ability to pay shall be made in accordance with chapter 8, title 19, Idaho Code. The order appointing or requesting the designation of a psychiatrist or licensed psychologist shall specify the issues to be resolved for which the examiner is appointed or designated.

(2) In making such examination, any method may be employed which is accepted by the examiner's profession for the examination of those alleged to be suffering from a mental illness or defect.

(3) The report of the examination shall include the following:

(a) A description of the nature of the examination;

(b) A diagnosis, evaluation or prognosis of the mental condition of the defendant;

(c) An analysis of the degree of the defendant's illness or defect and level of functional impairment;

(d) A consideration of whether treatment is available for the defendant's mental condition;

(e) An analysis of the relative risks and benefits of treatment or nontreatment;

(f) A consideration of the risk of danger which the defendant may create for the public if at large.

(4) The report of the examination shall be filed in triplicate with the clerk of the court, who shall cause copies to be delivered to the prosecuting attorney and to counsel for the defendant.

(5) When the defendant wishes to be examined by an expert of his own choice, such examiner shall be permitted to have reasonable access to the defendant for the purpose of examination.

(6) Nothing in this section is intended to limit the consideration of other evidence relevant to the imposition of sentence.

[I.C., § **19-2522,** as added by 1982, ch. 368, § 9, p. 919.]

I.C. § **19-2523**

IDAHO CODE
TITLE 19. CRIMINAL PROCEDURE
CHAPTER 25. JUDGMENT

Current through End of 1998 Reg. Sess.

19-2523 Consideration of mental illness in sentencing.

(1) Evidence of mental condition shall be received, if offered, at the time of sentencing of any person convicted of a crime. In determining the sentence to be imposed in addition to other criteria provided by law, if the defendant's mental condition is a significant factor, the court shall consider such factors as:

(a) The extent to which the defendant is mentally ill;

(b) The degree of illness or defect and level of functional impairment;

(c) The prognosis for improvement or rehabilitation;

(d) The availability of treatment and level of care required;

(e) Any risk of danger which the defendant may create for the public, if at large, or the absence of such risk;

(f) The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law at the time of the offense charged.

(2) The court shall authorize treatment during the period of confinement or probation specified in the sentence if, after the sentencing hearing, it concludes by clear and convincing evidence that:

(a) The defendant suffers from a severe and reliably diagnosable mental illness or defect resulting in the defendant's inability to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law;

(b) Without treatment, the immediate prognosis is for major distress resulting in serious mental or physical deterioration of the defendant;

(c) Treatment is available for such illness or defect;

(d) The relative risks and benefits of treatment or nontreatment are such that a reasonable person would consent to treatment. (of the offense charged.)

(3) In addition to the authorization of treatment, the court shall pronounce sentence as provided by law.

[I.C., § **19-2523,** as added by 1982, ch. 368, § 10, p. 919.]

I.C. § **19-2515**

IDAHO CODE
TITLE 19. CRIMINAL PROCEDURE
CHAPTER 25. JUDGMENT

Current through End of 1998 Reg. Sess.

19-2515 Inquiry into mitigating or aggravating circumstances -- Sentence in capital cases -- Statutory aggravating circumstances -- Judicial findings.

(a) After a plea or verdict of guilty the court shall convene a hearing to receive evidence and argument in aggravation and mitigation of the punishment.

(b) Where a person is sentenced to serve a term in the penitentiary, after conviction of a crime which falls within the provisions of section 20-223, Idaho Code, except in cases where the court retains jurisdiction, the comments and arguments of the counsel for the state and the defendant relative to the sentencing and the comments of the judge relative to the sentencing shall be recorded. If the comments are recorded electronically, they need not be transcribed. Otherwise, they shall be transcribed by the court reporter.

(c) Where a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless a notice of intent to seek the death penalty was filed and served as provided in section 18-4004A, Idaho Code, and the court finds at least one (1) statutory aggravating circumstance. Where the court finds a statutory aggravating circumstance the court shall sentence the defendant to death unless the court finds that mitigating circumstances which may be presented are sufficiently compelling that the death penalty would be unjust.

(d) One convicted of murder in the first degree shall be liable to imposition of the penalty of death if such person killed, intended a killing, or acted with reckless indifference to human life, irrespective of whether such person directly committed the acts that caused death.

(e) In all cases in which the death penalty may be imposed, the court shall, after conviction, order a presentence investigation to be conducted according to such procedures as are prescribed by law and shall thereafter convene a sentencing hearing for the purpose of hearing all relevant evidence and arguments of counsel in aggravation and mitigation of the offense. At such hearing, the state and the defendant shall be entitled to present all relevant evidence in aggravation and mitigation. Should any party present aggravating or mitigating evidence which has not previously been disclosed to the opposing party or parties, the court shall, upon request, adjourn the hearing until the party desiring to do so has had a reasonable opportunity to respond to such evidence. Evidence admitted at trial shall be considered and need not be repeated at the sentencing hearing. Evidence offered at trial but not admitted may be repeated or amplified if necessary to complete the record.

(f) Upon the conclusion of the evidence and arguments in mitigation and

aggravation the court shall make written findings setting forth any statutory aggravating circumstance found. Further, the court shall set forth in writing any mitigating factors considered and, if the court finds that mitigating circumstances are sufficiently compelling that the death penalty would be unjust, the court shall detail in writing its reasons for so finding.

(g) Upon making the prescribed findings, the court shall impose sentence within the limits fixed by law.

(h) The following are statutory aggravating circumstances, at least one (1) of which must be found to exist beyond a reasonable doubt before a sentence of death can be imposed:

(1) The defendant was previously convicted of another murder.

(2) At the time the murder was committed the defendant also committed another murder.

(3) The defendant knowingly created a great risk of death to many persons.

(4) The murder was committed for remuneration or the promise of remuneration or the defendant employed another to commit the murder for remuneration or the promise of remuneration.

(5) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.

(6) By the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life.

(7) The murder was committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, kidnapping or mayhem and the defendant killed, intended a killing, or acted with reckless indifference to human life.

(8) The defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society.

(9) The murder was committed against a former or present peace officer, executive officer, officer of the court, judicial officer or prosecuting attorney because of the exercise of official duty.

(10) The murder was committed against a witness or potential witness in a criminal or civil legal proceeding because of such proceeding.

[R.S., R.C., & C.L., § 7992; C.S., § 9036; I.C.A., § 19-2415; am. 1977, ch. 154, § 4, p. 390; am. 1984, ch. 230, § 1, p. 549; am. 1995, ch. 140, § 1, p. 594; am. 1998, ch. 96, § 3, p. 343.]

HISTORICAL NOTES

Compiler's Notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Sections 3 and 5 of S. L. 1977, ch. 154 are compiled as §§ 18- 4004 and 19-2827, respectively.

Section 2 of S.L. 1984, ch. 230 is compiled as § 20-224.

Sections 1 and 2 of S.L. 1998, ch. 96 are compiled as §§ 18- 4004 and 18-4004A, respectively.

STATE of Idaho, Plaintiff-Respondent,
v.
Mark Henry LANKFORD, Defendant-Appellant.

Nos. 15759, 16192.

Supreme Court of Idaho.

July 10, 1989.

Rehearing Denied Oct. 31, 1989.

Defendant was convicted in the District Court, Second Judicial District, County of Idaho, George Reinhardt, III, J., of two counts of first-degree murder and sentenced to death. Defendant appealed murder convictions and sentence, denial of his amended petition for postconviction relief, and denial of his second new trial motion. On consolidated appeals, the Supreme Court, Huntley, J., held that: (1) defendant was not deprived of his right to counsel when trial court allowed him to cross-examine his brother pro se; (2) defendant voluntarily, knowingly, and intelligently waived his Fifth and Sixth Amendment rights with respect to postconviction, presentencing court-ordered custodial psychiatric examination; and (3) evidence supported finding aggravating circumstances in death penalty determination, and death penalty was not disproportionate.

Affirmed.

Johnson, J., concurred in part and concurred specially in part.

Schwartzman, J. pro tem., concurred in part and concurred in result with opinion as to another part.

Huntley, J., dissented in part and adopted his dissent from another case.

V.

The testimony of the Court Appointed Psychiatrist.

Lankford claims that the court violated his rights guaranteed by the fifth and fourteenth amendments to the United States Constitution and Article 1, § 13 of the Idaho Constitution when it compelled him to be a witness against himself at a psychiatric examination conducted by Dr. Estes. Lankford also claims that the court's order subjected him to the psychiatric examination without assistance of counsel, thus, violating his sixth and fourteenth amendment rights under the United States Constitution, and his rights under Article 1, § 13 of the Idaho Constitution.

On May 17, 1984, the district court ordered Dr. Estes, a psychiatrist, to examine Mark Lankford and report upon his psychiatric medical condition. Dr. Estes followed the court order and questioned Lankford in the Ada County Jail. Lankford's attorney was not present during the questioning. Following his examination of Lankford, Dr. Estes submitted his findings to the court. Later he testified as to those findings at the sentencing hearing. Dr. Estes testified that, prior to interviewing Lankford, he orally administered the Miranda Rights. Dr. Estes did not obtain a written waiver of Lankford's Miranda rights nor did he inform Lankford that his statements would be used as evidence in proving the aggravating circumstances necessary for the death penalty. Dr. Estes did advise Lankford that their conversation would not be subject to any doctor/patient privilege. Prior to allowing Dr. Estes to testify about his interview with Lankford, the trial court questioned Dr. Estes to assure that disclosure of the interview would pass constitutional muster. The court found that the examination took place with the consent and approval of counsel, after written notice to counsel, and that Lankford's comments to the psychiatrist were made voluntarily, with knowledge of his right to remain silent, and with knowledge that any statements he made could be used against him.

[12][13] The fifth amendment privilege against self-incrimination and the sixth amendment right to counsel apply to custodial psychiatric exams conducted prior to sentencing as well as those conducted prior to trial. Adequate protection of these rights requires that the examining psychiatrist Mirandize the patient. Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981). In Estelle, after the State announced its intention to

seek the death penalty, the trial court ordered a psychiatric examination to determine Estelle's competency to stand trial. The examination was conducted in the jail where he was being held. The examining doctor determined that Estelle was competent to stand trial and he was then tried and convicted. A separate sentencing proceeding was then held before a jury, as required by Texas law. The doctor who had conducted the pre-trial psychiatric examination testified for the State. The jury determined that the death penalty should be imposed. The case ultimately made its way to the federal district court by writ of habeas corpus where the death sentence was vacated because the court found constitutional error in admitting the doctor's testimony **209 *872 at the penalty phase. The United States Court of Appeals affirmed. The case was then appealed to United States Supreme Court which affirmed. The Court stated:

> The Fifth Amendment, made applicable to the states through the Fourteenth Amendment, commands that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." The essence of this basic constitutional principle is "the requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips." Culombe v. Connecticut, 367 U.S. 568, 581- 582, 81 S.Ct. 1860, 1867, 6 L.Ed.2d 1037 (1961) (opinion announcing the judgment) (emphasis added). See also Murphy v. Waterfront Comm'n, 378 U.S. 52, 55, 84 S.Ct. 1594, 1596-1597, 12 L.Ed.2d 678 (1964); E. Griswold, The Fifth Amendment Today 7 (1955).
>
> The Court has held that "the availability of the [Fifth Amendment] privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." In re Gault, 387 U.S. 1, 49, 87 S.Ct. 1428, 1455, 18 L.Ed.2d 527 (1967). In this case, the ultimate penalty of death was a potential consequence of what respondent told the examining psychiatrist. Just as the Fifth Amendment prevents a criminal defendant from being made " 'the deluded instrument of his own conviction,' " Culombe v. Connecticut, supra, [367 U.S.] at 581, [81 S.Ct. at] 1867, quoting 2 Hawkins, Pleas of the Crown 595 (8th ed. 1824), it protects him as well from being made the "deluded instrument" of his own execution.
>
> We can discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned. (Footnote omitted.) Given the gravity of the decision to be made at the penalty phase, the State is not relieved of the obligation to observe fundamental constitutional guarantees.

Estelle v. Smith, 451 U.S. at 462-463, 101 S.Ct. at 1872-1873.

[14][15] As for the method of advising a suspect or defendant of his Miranda Rights, and of obtaining a waiver of those rights, there is no requirement that either be done in writing. The U.S. Constitution does not require a written warning or waiver, and Idaho has not required a written warning or waiver since such requirements were removed from I.C. § 19-853 in 1984. Accordingly, Dr. Estes did not violate Lankford's constitutional rights when he orally advised Lankford of his Miranda Rights and accepted an oral waiver. Since Lankford was properly Mirandized and there was no formalistic infirmity with his waiver, the only question which remains is whether Lankford's waiver was voluntary, knowing and intelligent. Lankford claims that his waiver was not voluntary, knowing and intelligent because Dr. Estes did not tell him that his disclosures could be used as evidence for the State during sentencing. We disagree. The very fact that he was Mirandized put Lankford on notice that what he said could be used against him during the sentencing hearing. This notice was furthered when Dr. Estes told Lankford that the doctor/patient privilege would not apply to Lankford's disclosures. Additionally, Lankford's attorney was involved in this process. The court sent defense counsel written notice of the court ordered psychiatric examination prior to the time it was conducted, and informed defense counsel that there was reason to believe that Lankford's mental condition would be a significant factor at sentencing. Defense counsel did not object at this point. A factor to be noted, although it is not pivotal to the outcome, is that Dr. Estes' testimony is not alleged to have presented the court with any new facts about the commission of the crime--rather the new material dealt only with psychological opinion testimony.

Because Lankford was properly informed of his rights and he voluntarily, knowingly and intelligently waived those rights and **210 *873 because Lankford's attorney knew that the psychiatric examination was going to take place, the court did not err in admitting Dr. Estes psychiatric testimony at the sentencing hearing.

NEW YORK

McKinney's CPL § 400.27

MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK ANNOTATED
CRIMINAL PROCEDURE LAW
CHAPTER 11-A OF THE CONSOLIDATED LAWS
PART TWO--THE PRINCIPAL PROCEEDINGS
TITLE L--SENTENCE
ARTICLE 400--PRE-SENTENCE PROCEEDINGS

The statutes and Constitution are current through Chs. 1-3, 5-9, 11-55, 59-167, 169-214, 216-279, 281-354, 356-371, 373-380, 382-424, 426-546 and 548-625 of the Laws of 1998.

Notes of decisions are current through 679 N.Y.S.2d 93.

§ 400.27 Procedure for determining sentence upon conviction for the offense of murder in the first degree

1. Upon the conviction of a defendant for the offense of murder in the first degree as defined by section 125.27 of the penal law, the court shall promptly conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or to life imprisonment without parole pursuant to subdivision five of section 70.00 of the penal law. Nothing in this section shall be deemed to preclude the people at any time from determining that the death penalty shall not be sought in a particular case, in which case the separate sentencing proceeding shall not be conducted and the court may sentence such defendant to life imprisonment without parole or to a sentence of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole.

2. The separate sentencing proceeding provided for by this section shall be conducted before the court sitting with the jury that found the defendant guilty. The court may discharge the jury and impanel another jury only in extraordinary circumstances and upon a showing of good cause, which may include, but is not limited to, a finding of prejudice to either party. If a new jury is impaneled, it shall be formed in accordance with the procedures in article two hundred seventy of this chapter. Before proceeding with the jury that found the defendant guilty, the court shall determine whether any juror has a state of mind that is likely to preclude the juror from rendering an impartial decision based upon the evidence adduced during the proceeding. In making such determination the court shall personally examine each juror individually outside the presence of the other jurors. The scope of the examination shall be within the discretion of the court and may include questions supplied by the parties as the court deems proper. The proceedings provided for in this subdivision shall be conducted on the record; provided, however, that upon motion of either party, and for good cause shown, the court may direct that all or a portion of the record of such proceedings be sealed. In the event the court determines that a juror has such a state of mind, the

court shall discharge the juror and replace the juror with the alternate juror whose name was first drawn and called. If no alternate juror is available, the court must discharge the jury and impanel another jury in accordance with article two hundred seventy of this chapter.

3. For the purposes of a proceeding under this section each subparagraph of paragraph (a) of subdivision one of section 125.27 of the penal law shall be deemed to define an aggravating factor. Except as provided in subdivision seven of this section, at a sentencing proceeding pursuant to this section the only aggravating factors that the jury may consider are those proven beyond a reasonable doubt at trial, and no other aggravating factors may be considered. Whether a sentencing proceeding is conducted before the jury that found the defendant guilty or before another jury, the aggravating factor or factors proved at trial shall be deemed established beyond a reasonable doubt at the separate sentencing proceeding and shall not be relitigated. Where the jury is to determine sentences for concurrent counts of murder in the first degree, the aggravating factor included in each count shall be deemed to be an aggravating factor for the purpose of the jury's consideration in determining the sentence to be imposed on each such count.

4. The court on its own motion or on motion of either party, in the interest of justice or to avoid prejudice to either party, may delay the commencement of the separate sentencing proceeding.

5. Notwithstanding the provisions of article three hundred ninety of this chapter, where a defendant is found guilty of murder in the first degree, no presentence investigation shall be conducted; provided, however, that where the court is to impose a sentence of imprisonment, a presentence investigation shall be conducted and a presentence report shall be prepared in accordance with the provisions of such article.

6. At the sentencing proceeding the people shall not relitigate the existence of aggravating factors proved at the trial or otherwise present evidence, except, subject to the rules governing admission of evidence in the trial of a criminal action, in rebuttal of the defendant's evidence. However, when the sentencing proceeding is conducted before a newly impaneled jury, the people may present evidence to the extent reasonably necessary to inform the jury of the nature and circumstances of the count or counts of murder in the first degree for which the defendant was convicted in sufficient detail to permit the jury to determine the weight to be accorded the aggravating factor or factors established at trial. Whenever the people present such evidence, the court must instruct the jury in its charge that any facts elicited by the people that are not essential to the verdict of guilty on such count or counts shall not be deemed established beyond a reasonable doubt. Subject to the rules governing the admission of evidence in the trial of a criminal action, the defendant may present any evidence relevant to any mitigating factor set forth in subdivision nine of this section; provided, however, the defendant shall not be precluded from the admission of reliable hearsay evidence. The burden of establishing any of the mitigating factors set forth in subdivision nine of this section shall be on the defendant, and must be proven by a preponderance of the evidence. The people shall not offer evidence or argument relating to any mitigating factor except in rebuttal of evidence

offered by the defendant.

7. (a) The people may present evidence at the sentencing proceeding, to the extent such evidence could not have been presented by the people at trial, to prove that the crime of murder in the first degree for which the defendant was convicted was committed in furtherance of and after substantial planning and premeditation to commit an act of terrorism. For purposes of this section, "terrorism" means activities that involve a violent act or acts dangerous to human life that are in violation of the criminal laws of this state and are intended to intimidate or coerce a civilian population, influence the policy of a government by intimidation or coercion, or affect the conduct of a government by murder, assassination or kidnapping. The defendant's commission of the crime of murder in the first degree through an act of terrorism, shall, if proven at the sentencing proceeding, constitute an aggravating factor.

(b) The people may present evidence at the sentencing proceeding to prove that in the ten year period prior to the commission of the crime of murder in the first degree for which the defendant was convicted, the defendant has previously been convicted of two or more offenses committed on different occasions; provided, that each such offense shall be either (i) a class A felony offense other than one defined in article two hundred twenty of the penal law, a class B violent felony offense specified in paragraph (a) of subdivision one of section 70.02 of the penal law, or a felony offense under the penal law a necessary element of which involves either the use or attempted use or threatened use of a deadly weapon or the intentional infliction of or the attempted intentional infliction of serious physical injury or death, or (ii) an offense under the laws of another state or of the United States punishable by a term of imprisonment of more than one year a necessary element of which involves either the use or attempted use or threatened use of a deadly weapon or the intentional infliction of or the attempted intentional infliction of serious physical injury or death. For the purpose of this paragraph, the term "deadly weapon" shall have the meaning set forth in subdivision twelve of section 10.00 of the penal law. In calculating the ten year period under this paragraph, any period of time during which the defendant was incarcerated for any reason between the time of commission of any of the prior felony offenses and the time of commission of the crime of murder in the first degree shall be excluded and such ten year period shall be extended by a period or periods equal to the time served under such incarceration. The defendant's conviction of two or more such offenses shall, if proven at the sentencing proceeding, constitute an aggravating factor.

(c) In order to be deemed established, an aggravating factor set forth in this subdivision must be proven by the people beyond a reasonable doubt and the jury must unanimously find such factor to have been so proven. The defendant may present evidence relating to an aggravating factor defined in this subdivision and either party may offer evidence in rebuttal. Any evidence presented by either party relating to such factor shall be subject to the rules governing admission of evidence in the trial of a criminal action.

(d) Whenever the people intend to offer evidence of an aggravating factor set forth in this subdivision, the people must within a reasonable time prior to trial file with the court and serve upon the defendant a notice of intention

to offer such evidence. Whenever the people intend to offer evidence of the aggravating factor set forth in paragraph (b) of this subdivision, the people shall file with the notice of intention to offer such evidence a statement setting forth the date and place of each of the alleged offenses in paragraph (b) of this subdivision. The provisions of section 400.15 of this chapter, except for subdivisions one and two thereof, shall be followed.

8. Consistent with the provisions of this section, the people and the defendant shall be given fair opportunity to rebut any evidence received at the separate sentencing proceeding.

9. Mitigating factors shall include the following:

(a) The defendant has no significant history of prior criminal convictions involving the use of violence against another person;

(b) The defendant was mentally retarded at the time of the crime, or the defendant's mental capacity was impaired or his ability to conform his conduct to the requirements of law was impaired but not so impaired in either case as to constitute a defense to prosecution;

(c) The defendant was under duress or under the domination of another person, although not such duress or domination as to constitute a defense to prosecution;

(d) The defendant was criminally liable for the present offense of murder committed by another, but his participation in the offense was relatively minor although not so minor as to constitute a defense to prosecution;

(e) The murder was committed while the defendant was mentally or emotionally disturbed or under the influence of alcohol or any drug, although not to such an extent as to constitute a defense to prosecution; or

(f) Any other circumstance concerning the crime, the defendant's state of mind or condition at the time of the crime, or the defendant's character, background or record that would be relevant to mitigation or punishment for the crime.

10. At the conclusion of all the evidence, the people and the defendant may present argument in summation for or against the sentence sought by the people. The people may deliver the first summation and the defendant may then deliver the last summation. Thereafter, the court shall deliver a charge to the jury on any matters appropriate in the circumstances. In its charge, the court must instruct the jury that with respect to each count of murder in the first degree the jury should consider whether or not a sentence of death should be imposed and whether or not a sentence of life imprisonment without parole should be imposed, and that the jury must be unanimous with respect to either sentence. The court must also instruct the jury that in the event the jury fails to reach unanimous agreement with respect to the sentence, the court will sentence the defendant to a term of imprisonment with a minimum term of between twenty and twenty-five years and a maximum term of life. Following the court's charge, the jury shall retire to consider the sentence to be imposed. Unless inconsistent with the provisions of this section, the provisions of sections 310.10, 310.20 and 310.30 shall govern the deliberations of the jury.

11. (a) The jury may not direct imposition of a sentence of death unless it unanimously finds beyond a reasonable doubt that the aggravating factor or

factors substantially outweigh the mitigating factor or factors established, if any, and unanimously determines that the penalty of death should be imposed. Any member or members of the jury who find a mitigating factor to have been proven by the defendant by a preponderance of the evidence may consider such factor established regardless of the number of jurors who concur that the factor has been established.

(b) If the jury directs imposition of either a sentence of death or life imprisonment without parole, it shall specify on the record those mitigating and aggravating factors considered and those mitigating factors established by the defendant, if any.

(c) With respect to a count or concurrent counts of murder in the first degree, the court may direct the jury to cease deliberation with respect to the sentence or sentences to be imposed if the jury has deliberated for an extensive period of time without reaching unanimous agreement on the sentence or sentences to be imposed and the court is satisfied that any such agreement is unlikely within a reasonable time. The provisions of this paragraph shall apply with respect to consecutive counts of murder in the first degree. In the event the jury is unable to reach unanimous agreement, the court must sentence the defendant in accordance with subdivisions one through three of section 70.00 of the penal law with respect to any count or counts of murder in the first degree upon which the jury failed to reach unanimous agreement as to the sentence to be imposed.

(d) If the jury unanimously determines that a sentence of death should be imposed, the court must thereupon impose a sentence of death. Thereafter, however, the court may, upon written motion of the defendant, set aside the sentence of death upon any of the grounds set forth in section 330.30. The procedures set forth in sections 330.40 and 330.50, as applied to separate sentencing proceedings under this section, shall govern the motion and the court upon granting the motion shall, except as may otherwise be required by subdivision one of section 330.50, direct a new sentencing proceeding pursuant to this section. Upon granting the motion upon any of the grounds set forth in section 330.30 and setting aside the sentence, the court must afford the people a reasonable period of time, which shall not be less than ten days, to determine whether to take an appeal from the order setting aside the sentence of death. The taking of an appeal by the people stays the effectiveness of that portion of the court's order that directs a new sentencing proceeding.

(e) If the jury unanimously determines that a sentence of life imprisonment without parole should be imposed the court must thereupon impose a sentence of life imprisonment without parole.

(f) Where a sentence has been unanimously determined by the jury it must be recorded on the minutes and read to the jury, and the jurors must be collectively asked whether such is their sentence. Even though no juror makes any declaration in the negative, the jury must, if either party makes such an application, be polled and each juror separately asked whether the sentence announced by the foreman is in all respects his or her sentence. If, upon either the collective or the separate inquiry, any juror answers in the negative, the court must refuse to accept the sentence and must direct the jury to resume its deliberation. If no disagreement is expressed, the jury

must be discharged from the case.

12. (a) Upon the conviction of a defendant for the offense of murder in the first degree as defined in section 125.27 of the penal law, the court shall, upon oral or written motion of the defendant based upon a showing that there is reasonable cause to believe that the defendant is mentally retarded, promptly conduct a hearing without a jury to determine whether the defendant is mentally retarded. Upon the consent of both parties, such a hearing, or a portion thereof, may be conducted by the court contemporaneously with the separate sentencing proceeding in the presence of the sentencing jury, which in no event shall be the trier of fact with respect to the hearing. At such hearing the defendant has the burden of proof by a preponderance of the evidence that he or she is mentally retarded. The court shall defer rendering any finding pursuant to this subdivision as to whether the defendant is mentally retarded until a sentence is imposed pursuant to this section.

(b) In the event the defendant is sentenced pursuant to this section to life imprisonment without parole or to a term of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole, the court shall not render a finding with respect to whether the defendant is mentally retarded.

(c) In the event the defendant is sentenced pursuant to this section to death, the court shall thereupon render a finding with respect to whether the defendant is mentally retarded. If the court finds the defendant is mentally retarded, the court shall set aside the sentence of death and sentence the defendant either to life imprisonment without parole or to a term of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole. If the court finds the defendant is not mentally retarded, then such sentence of death shall not be set aside pursuant to this subdivision.

(d) In the event that a defendant is convicted of murder in the first degree pursuant to subparagraph (iii) of paragraph (a) of subdivision one of section 125.27 of the penal law, and the killing occurred while the defendant was confined or under custody in a state correctional facility or local correctional institution, and a sentence of death is imposed, such sentence may not be set aside pursuant to this subdivision upon the ground that the defendant is mentally retarded. Nothing in this paragraph or paragraph (a) of this subdivision shall preclude a defendant from presenting mitigating evidence of mental retardation at the separate sentencing proceeding.

(e) The foregoing provisions of this subdivision notwithstanding, at a reasonable time prior to the commencement of trial the defendant may, upon a written motion alleging reasonable cause to believe the defendant is mentally retarded, apply for an order directing that a mental retardation hearing be conducted prior to trial. If, upon review of the defendant's motion and any response thereto, the court finds reasonable cause to believe the defendant is mentally retarded, it shall promptly conduct a hearing without a jury to determine whether the defendant is mentally retarded. In the event the court finds after the hearing that the defendant is not mentally retarded, the court must, prior to commencement of trial, enter an order so stating, but nothing in this paragraph shall preclude a defendant from presenting mitigating

evidence of mental retardation at a separate sentencing proceeding. In the event the court finds after the hearing that the defendant, based upon a preponderance of the evidence, is mentally retarded, the court must, prior to commencement of trial, enter an order so stating. Unless the order is reversed on an appeal by the people or unless the provisions of paragraph (d) of this subdivision apply, a separate sentencing proceeding under this section shall not be conducted if the defendant is thereafter convicted of murder in the first degree. In the event a separate sentencing proceeding is not conducted, the court, upon conviction of a defendant for the crime of murder in the first degree, shall sentence the defendant to life imprisonment without parole or to a sentence of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole. Whenever a mental retardation hearing is held and a finding is rendered pursuant to this paragraph, the court may not conduct a hearing pursuant to paragraph (a) of this subdivision. For purposes of this subdivision and paragraph (b) of subdivision nine of this section, "mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior which were manifested before the age of eighteen.

(f) In the event the court enters an order pursuant to paragraph (e) of this subdivision finding that the defendant is mentally retarded, the people may appeal as of right from the order pursuant to subdivision ten of section 450.20 of this chapter. Upon entering such an order the court must afford the people a reasonable period of time, which shall not be less than ten days, to determine whether to take an appeal from the order finding that the defendant is mentally retarded. The taking of an appeal by the people stays the effectiveness of the court's order and any order fixing a date for trial. Within six months of the effective date of this subdivision, the court of appeals shall adopt rules to ensure that appeals pursuant to this paragraph are expeditiously perfected, reviewed and determined so that pretrial delays are minimized. Prior to adoption of the rules, the court of appeals shall issue proposed rules and receive written comments thereon from interested parties.

13. (a) As used in this subdivision, the term "psychiatric evidence" means evidence of mental disease, defect or condition in connection with either a mitigating factor defined in this section or a mental retardation hearing pursuant to this section to be offered by a psychiatrist, psychologist or other person who has received training, or education, or has experience relating to the identification, diagnosis, treatment or evaluation of mental disease, mental defect or mental condition.

(b) When either party intends to offer psychiatric evidence, the party must, within a reasonable time prior to trial, serve upon the other party and file with the court a written notice of intention to present psychiatric evidence. The notice shall include a brief but detailed statement specifying the witness, nature and type of psychiatric evidence sought to be introduced. If either party fails to serve and file written notice, no psychiatric evidence is admissible unless the party failing to file thereafter serves and files such notice and the court affords the other party an adjournment for a

reasonable period. If a party fails to give timely notice, the court in its discretion may impose upon offending counsel a reasonable monetary sanction for an intentional failure but may not in any event preclude the psychiatric evidence. In the event a monetary sanction is imposed, the offending counsel shall be personally liable therefor, and shall not receive reimbursement of any kind from any source in order to pay the cost of such monetary sanction. Nothing contained herein shall preclude the court from entering an order directing a party to provide timely notice.

(c) When a defendant serves notice pursuant to this subdivision, the district attorney may make application, upon notice to the defendant, for an order directing that the defendant submit to an examination by a psychiatrist, licensed psychologist, or licensed psychiatric social worker designated by the district attorney, for the purpose of rebutting evidence offered by the defendant with respect to a mental disease, defect, or condition in connection with either a mitigating factor defined in this section, including whether the defendant was acting under duress, was mentally or emotionally disturbed or mentally retarded, or was under the influence of alcohol or any drug. If the application is granted, the district attorney shall schedule a time and place for the examination, which shall be recorded. Counsel for the people and the defendant shall have the right to be present at the examination. A transcript of the examination shall be made available to the defendant and the district attorney promptly after its conclusion. The district attorney shall promptly serve on the defendant a written copy of the findings and evaluation of the examiner. If the court finds that the defendant has wilfully refused to cooperate fully in an examination pursuant to this paragraph, it shall, upon request of the district attorney, instruct the jury that the defendant did not submit to or cooperate fully in such psychiatric examination. When a defendant is subjected to an examination pursuant to an order issued in accordance with this subdivision, any statement made by the defendant for the purpose of the examination shall be inadmissible in evidence against him in any criminal action or proceeding on any issue other than that of whether a mitigating factor has been established or whether the defendant is mentally retarded, but such statement is admissible upon such an issue whether or not it would otherwise be deemed a privileged communication.

14. (a) At a reasonable time prior to the sentencing proceeding or a mental retardation hearing:

(i) the prosecutor shall, unless previously disclosed and subject to a protective order, make available to the defendant the statements and information specified in subdivision one of section 240.45 and make available for inspection, photographing, copying or testing the property specified in subdivision one of section 240.20; and

(ii) the defendant shall, unless previously disclosed and subject to a protective order, make available to the prosecution the statements and information specified in subdivision two of section 240.45 and make available for inspection, photographing, copying or testing, subject to constitutional limitations, the reports, documents and other property specified in subdivision one of section 240.30.

(b) Where a party refuses to make disclosure pursuant to this section, the

provisions of section 240.35, subdivision one of section 240.40 and section 240.50 shall apply.

(c) If, after complying with the provisions of this section or an order pursuant thereto, a party finds either before or during a sentencing proceeding or mental retardation hearing, additional material subject to discovery or covered by court order, the party shall promptly make disclosure or apply for a protective order.

(d) If the court finds that a party has failed to comply with any of the provisions of this section, the court may enter any of the orders specified in subdivision one of section 240.70.

15. The court of appeals shall formulate and adopt rules for the development of forms for use by the jury in recording its findings and determinations of sentence.

CREDIT(S)

1999 Electronic Update

(Added L.1995, c. 1, § 20.)

<<CRIMINAL PROCEDURE LAW>>

<Laws 1970, Chapter 996, § 1>

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

HISTORICAL AND STATUTORY NOTES

1999 Electronic Update

Effective Date; Applicability; Continuing Effectiveness of Repealed Provisions. Section effective Sept. 1, 1995, and applicable only to offenses committed on or after that date, offenses committed prior to that date to be governed by laws in effect at the time the offense was committed, pursuant to L.1995, c. 1, § 38, set out as a note under Correction Law § 650.

Separability of Provisions of L.1995, c. 1. See L.1995, c. 1, § 37, set out as a note under Correction Law § 650.

OHIO

R.C. § **2929.03**

BALDWIN'S OHIO REVISED CODE ANNOTATED
TITLE XXIX. CRIMES--PROCEDURE
CHAPTER 2929. PENALTIES AND SENTENCING
PENALTIES FOR MURDER

Current through 1998 Portion of 122nd G.A.,
Files 188 to 237, apv. 1-4-1999.

2929.03 IMPOSING SENTENCE FOR A CAPITAL OFFENSE; PROCEDURES; PROOF OF RELEVANT FACTORS; ALTERNATIVE SENTENCES

(A) If the indictment or count in the indictment charging aggravated murder does not contain one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge of aggravated murder, the trial court shall impose sentence on the offender as follows:

(1) Except as provided in division (A)(2) of this section, the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(2) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, the trial court shall impose upon the offender a sentence of life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender was eighteen years of age or older at the time of the commission of the offense, if the matter of age was raised by the offender pursuant to section 2929.023 of the Revised Code, and whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard. The instruction to the jury shall include an instruction that a specification shall be proved beyond a reasonable doubt in order to support a guilty verdict on the specification, but the instruction shall not mention the penalty that may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C)(1) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, and regardless of whether the offender raised the matter of age pursuant to section 2929.023 of the Revised Code, the trial court shall impose sentence on the offender as follows:

(a) Except as provided in division (C)(1)(b) of this section, the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(b) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, the trial court shall impose upon the offender a sentence of life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(2)(a) If the indictment or count in the indictment contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code and if the offender is found guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be one of the following:

(i) Except as provided in division (C)(2)(a)(ii) of this section, the penalty to be imposed on the offender shall be death, life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(ii) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, the penalty to be imposed on the offender shall be death or life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(b) A penalty imposed pursuant to division (C)(2)(a)(i) or (ii) of this section shall be determined pursuant to divisions (D) and (E) of this section and shall be determined by one of the following:

(i) By the panel of three judges that tried the offender upon the offender's waiver of the right to trial by jury;

(ii) By the trial jury and the trial judge, if the offender was tried by jury.

(D)(1) Death may not be imposed as a penalty for aggravated murder if the offender raised the matter of age at trial pursuant to section 2929.023 of the Revised Code and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense. When death may be imposed as a penalty for aggravated murder, the court shall proceed under this division. When death may be imposed as a penalty, the court, upon the request of the defendant, shall require a pre-sentence investigation to be made and, upon the request of the defendant, shall require a mental examination to be made, and shall require reports of the investigation and of any mental examination submitted to the court, pursuant to section 2947.06 of the Revised Code. No statement made or information provided by a defendant in a mental examination or proceeding conducted pursuant to this division shall be disclosed to any person, except as provided in this division, or be used in evidence against the defendant on the issue of guilt in any retrial. A pre-sentence investigation or mental examination shall not be made except upon request of the defendant. Copies of any reports prepared under this division

shall be furnished to the court, to the trial jury if the offender was tried by a jury, to the prosecutor, and to the offender or the offender's counsel for use under this division. The court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, shall hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing, the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, and any other factors in mitigation of the imposition of the sentence of death, and shall hear the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender. The defendant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code and of any other factors in mitigation of the imposition of the sentence of death. If the offender chooses to make a statement, the offender is subject to cross- examination only if the offender consents to make the statement under oath or affirmation.

The defendant shall have the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death. The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.

(2) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted pursuant to division (D)(1) of this section, the trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to one of the following:

(a) Except as provided in division (D)(2)(b) of this section, to life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(b) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, to life imprisonment without parole.

If the trial jury recommends that the offender be sentenced to life imprisonment without parole, life imprisonment with parole eligibility after

serving twenty-five full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment, the court shall impose the sentence recommended by the jury upon the offender. If the sentence is a sentence of life imprisonment without parole imposed under division (D)(2)(b) of this section, the sentence shall be served pursuant to section 2971.03 of the Revised Code. If the trial jury recommends that the sentence of death be imposed upon the offender, the court shall proceed to impose sentence pursuant to division (D)(3) of this section.

(3) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(1) of this section, if, after receiving pursuant to division (D)(2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three judges unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender. Absent such a finding by the court or panel, the court or the panel shall impose one of the following sentences on the offender:

(a) Except as provided in division (D)(3)(b) of this section, one of the following:

(i) Life imprisonment without parole;

(ii) Life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(iii) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(b) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(E) If the offender raised the matter of age at trial pursuant to section 2929.023 of the Revised Code, was convicted of aggravated murder and one or more specifications of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court or the panel of three judges shall not impose a sentence of death on the offender. Instead, the court or panel shall impose one of the following sentences on the offender:

(1) Except as provided in division (E)(2) of this section, one of the following:

(a) Life imprisonment without parole;

(b) Life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(c) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(2) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that

are included in the indictment, count in the indictment, or information that charged the aggravated murder, life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(F) The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. The court or panel, when it imposes life imprisonment under division (D) of this section, shall state in a separate opinion its specific findings of which of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code it found to exist, what other mitigating factors it found to exist, what aggravating circumstances the offender was found guilty of committing, and why it could not find that these aggravating circumstances were sufficient to outweigh the mitigating factors. For cases in which a sentence of death is imposed for an offense committed before January 1, 1995, the court or panel shall file the opinion required to be prepared by this division with the clerk of the appropriate court of appeals and with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. For cases in which a sentence of death is imposed for an offense committed on or after January 1, 1995, the court or panel shall file the opinion required to be prepared by this division with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. The judgment in a case in which a sentencing hearing is held pursuant to this section is not final until the opinion is filed.

(G)(1) Whenever the court or a panel of three judges imposes a sentence of death for an offense committed before January 1, 1995, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the appellate court.

(2) Whenever the court or a panel of three judges imposes a sentence of death for an offense committed on or after January 1, 1995, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the supreme court.

CREDIT(S)

(1996 H 180, eff. 1-1-97; 1996 S 269, eff. 7-1-96; 1995 S 2, eff. 7-1- 96; 1995 S 4, eff. 9-21-95; 1981 S 1, eff. 10-19-81; 1972 H 511)

UNCODIFIED LAW

1996 H 180, § 4: See Uncodified Law under 2929.13.

HISTORICAL AND STATUTORY NOTES

Sup. R. **Rule 20**

BALDWIN'S OHIO REVISED CODE ANNOTATED
RULES OF SUPERINTENDENCE FOR THE COURTS OF OHIO

Current with amendments received through 1/17/1999

SUP R **20** APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS IN CAPITAL CASES-COURTS OF COMMON PLEAS

IV. PROCEDURES FOR COURT APPOINTMENTS OF COUNSEL

(D) Support Services. The appointing court shall provide appointed counsel, as required by Ohio law or the federal Constitution, federal statutes, and professional standards, with the investigator, mitigation specialists, mental health professional, and other forensic experts and other support services reasonably necessary or appropriate for counsel to prepare for and present an adequate defense at every stage of the proceedings including, but not limited to, determinations relevant to competency to stand trial, a not guilty by reason of insanity plea, cross-examination of expert witnesses called by the prosecution, disposition following conviction, and preparation for and presentation of mitigating evidence in the sentencing phase of the trial.

IX. EFFECTIVE DATE

(A) The effective date of this **rule** shall be October 1, 1987.

(B) The amendments to Section II(A)(5)(b), Section III(B)(2), and to the Subcommittee Comments following Section II of this **Rule** adopted by the **Supreme Court** of Ohio on June 28, 1989, shall be effective on July 1, 1989.

(C) The amendments to Sections I(A)(2), I(A)(3), I(B), and II, and the addition of Sections I(C) and IV, adopted by the **Supreme Court** of Ohio on December 11, 1990, shall be effective on January 1, 1991.

(D) The amendments to this **rule** adopted by the **Supreme Court** of Ohio on April 19, 1995, shall take effect on July 1, 1995.

CREDIT(S)

(Adopted eff. 7-1-97)

TENNESSEE

TN-CS (Tennessee Cases)
981 S.W.2d 166

STATE of Tennessee, Appellee,
v.
Paul Dennis REID, Appellant,
and
State of Tennessee, Appellee,
v.
Christopher Davis, Appellant.

Supreme Court of Tennessee,
at Nashville.

Nov. 23, 1998.

Defendants were charged with premeditated first-degree murder. The Criminal Court, John H. Gasaway, III, Cheryl Blackburn, and J. Randall Wyatt, JJ., Montgomery and Davidson Counties, ruled that the defense must provide pretrial notice to the state of intent to introduce evidence relating to mental condition as mitigation proof during the sentencing phase of the capital trial, and defendants appealed. The Court of Criminal Appeals upheld validity of pretrial notice requirement, and defendants appealed. The Supreme Court, Drowota, J., held that, as a matter of apparent first impression, capital defendant must file pretrial notice of intent to present expert testimony regarding mental condition as mitigation evidence at the sentencing phase of the trial.

Affirmed as modified.

DROWOTA, J.

We granted and consolidated the applications for permission to appeal filed on behalf of Paul Dennis Reid and Christopher Davis to consider the following three important questions of criminal procedure.

1. Whether a defendant must give pre-trial notice of the intent to introduce expert testimony of his or her mental condition as mitigation at the sentencing phase of a capital trial?
2. If so, whether, at the request of the State, the trial court may order a mental examination of the defendant by a mental health expert selected by the State?
3. If so, what procedures should be followed in connection with this notice and examination?

[1] For the reasons herein explained, we hold that a capital defendant must file pretrial notice of intent to present expert testimony regarding mental condition as mitigation evidence at the sentencing phase of the trial. Once such a notice is filed, the trial court, upon request of the State, may order the defendant to undergo a psychiatric evaluation by a mental health expert selected by the State. The defense will be afforded access to any expert reports prior to trial. The State will be afforded access to the reports only after a jury returns a verdict of guilty and the capital defendant confirms his or her intent to offer expert mental condition evidence in mitigation at the sentencing hearing. Accordingly, the decisions of the Court of Criminal Appeals are affirmed as modified.

BACKGROUND

Because this appeal involves questions of law, the relevant facts are undisputed. The defendant, Paul Dennis Reid is charged in Davidson County with two counts of premeditated first degree murder and two alternate counts of first degree felony murder. Reid is also charged in Montgomery County with two counts of first degree premeditated murder and two alternate counts of first degree felony murder for two separate killings. The defendant Christopher Davis is charged in Davidson County with two counts of premeditated first degree murder and two alternate counts of felony first degree murder. These three cases have been assigned to three different trial judges.

In each of these cases, the State has given notice of its intention to seek the death penalty, and in each of these cases, the trial judge has ruled that the defense must provide pretrial notice to the State of intent to introduce evidence relating to mental condition as mitigation proof during the sentencing phase of the capital trial. In addition, all ***169** three trial courts ruled that Reid and Davis must undergo a psychiatric evaluation by a mental health expert selected by the State once the notice is filed. Each trial judge entered an order delineating the procedure to govern the evaluation once the notice is filed. The orders differed in one primary respect: the procedure to be followed after completion of the mental evaluation.

The orders entered in the Davidson County cases provide for the report of the mental health expert to be delivered to the court once the evaluation is complete. The trial judge will then provide the report to defense counsel to allow each of the

defendants to decide, with the assistance of counsel, whether or not to proceed with the introduction of evidence of mental condition at the sentencing phase. If the defense elects to proceed with the introduction of mental condition evidence, the expert's report is given to the prosecution prior to trial. If, however, the defense elects to forego introduction of mental condition evidence, the State is not permitted to review the expert's report at all.

In contrast, the order entered by Judge Gasaway in Montgomery County provides for the report of the State selected expert, and the report of any defense mental health expert, to be filed under seal with the trial court before commencement of jury selection. The reports will be released only in the event the jury returns a verdict of guilty of first degree murder and the defendant confirms his intent to offer mental condition evidence at sentencing. If the defendant withdraws his previously filed notice of intent to offer such evidence, the reports will not be released.

Following entry of the orders, both the Davidson and Montgomery County trial courts allowed the defendants to seek interlocutory appeals. The Court of Criminal Appeals accepted review and, in separate decisions, upheld the validity of the pretrial notice requirement and expert mental evaluation imposed upon Reid and Davis. The intermediate court adopted the procedural guidelines delineated by the Montgomery County Circuit Court which limits access to any expert reports until the jury returns a verdict of guilty and the capital defendant confirms his intent to introduce expert mitigation proof of mental condition at the sentencing hearing.

From those decisions, Reid and Davis filed separate applications for permission to appeal to this Court, and on September 30, 1998, we granted the applications, consolidated the appeals, and set the cause for hearing on October 15, 1998. For the reasons that follow, we affirm as modified the decisions of the Court of Criminal Appeals.

ANALYSIS

A. Authority To Impose Requirements

In this Court, the defendants first argue that the trial courts had no legal authority to require a capital defendant either to provide pretrial notice of intent to offer mental condition evidence or to submit to an evaluation by a State selected mental health expert. According to the defendants Tenn. R.Crim. P Rule 12.2 is limited in application to expert mental condition evidence relevant to the determination of guilt or innocence. The defendants likewise argue that Tenn. R.Crim. P. 16 requires disclosure of an expert's report only if the report will be introduced by the defendant as evidence in chief at trial or if the report was prepared by a witness the defendant intends to call at trial and the report relates to the testimony of the witness.

While conceding that neither Rule 12.2 nor Rule 16 specifically refers to the sentencing phase of a capital trial, the State emphasizes that appropriate provisions of those Rules previously have been applied in the context of a capital sentencing proceeding. Where, as here, no rule precisely addresses the situation, the State argues that the trial courts have inherent power to adopt a procedure which is consistent in principle and spirit with existing rules of criminal procedure and with the statutory scheme governing capital sentencing proceedings.

Clearly no existing rule of criminal procedure precisely governs the issues in this appeal. While Rule 12.2 certainly is analogous, it specifically governs the notice and evaluation required when a defendant intends to introduce expert testimony of mental condition ***170** at the guilt phase of a trial. It does not specifically require the defendant in a capital case to give notice of his or her intent to introduce expert mental condition testimony at the sentencing phase. Likewise, Rule 16 is designed to govern reciprocal discovery prior to trial and does not address the various interests implicated by the issues in this appeal. [FN1] The inapplicability of these rules does not mandate the conclusion that the trial courts had no legal authority to impose notice, evaluation, and disclosure requirements.

FN1. By so stating, we do not intend to imply that Tenn. R.Crim. P. 16 never applies in a capital sentencing hearing. As the State points out, we have previously applied Rule 16 to issues arising in the context of a capital sentencing hearing. For example, in State v. Nichols, 877 S.W.2d 722, 729 (Tenn.1994), we affirmed a trial judge who ordered a defense psychologist to provide to the prosecution any interview notes which would relate to his testimony at the sentencing hearing. We stated, "when a psychologist or psychiatrist does not prepare a summary report, but instead relies on extensive memoranda to record not only observations and hypotheses but also evaluations, such records are discoverable under Rule 16(b)(1)(B)." Id. at 730. Likewise, in State v. Buck, 670 S.W.2d 600 (Tenn.1984), the State had failed to provide

certain materials and the names of certain witnesses to the defendant. On appeal, the defendant argued that the trial court should not have allowed the witnesses to testify because of the nondisclosure of the State. Although we based our decision on the content of the witnesses' testimony, we further observed that "the trial judge was ... also in error in implicitly sustaining the prosecution in its claim that Rule 16 and discovery rules were not applicable in the sentencing hearing." Id. at 606. Accordingly, when an existing rule of criminal procedure precisely addresses an issue, we apply the rule even though the issue arises in the context of a capital sentencing proceeding. See Tenn. R.Crim. P. 1 (listing several proceedings to which the Rules apply and stating in subsection (i) that the Rules apply "[i]n any other situation where the context clearly indicates applicability). However, no existing rule of criminal procedure precisely addresses the issues in this appeal.

[2] It is well settled that Tennessee courts have inherent power to make and enforce reasonable rules of procedure. Shettles v. State, 209 Tenn. 157, 161-62, 352 S.W.2d 1, 3 (1961); Brewer v. State, 187 Tenn. 396, 400, 215 S.W.2d 798, 800 (1948); Denton v. Woods, 86 Tenn. 37, 5 S.W. 489 (1887); State v. Johnson, 673 S.W.2d 877, 882 (Tenn.Crim.App.1984); Haynes v. McKenzie Memorial Hosp., 667 S.W.2d 497, 498 (Tenn.App.1984); Hull v. State, 543 S.W.2d 611, 612 (Tenn.Crim.App.1976). Indeed, the General Assembly has explicitly recognized this inherent power. For example, Tenn.Code Ann. § 16-3-407 (1994 Repl.), provides that "[e]ach of the other courts of this state may adopt additional or supplementary rules of practice and procedure not inconsistent with or in conflict with the rules prescribed by the supreme court." Moreover, Tenn. R.Crim. P. 57 recognizes that issues will arise during criminal trials for which "no procedure is specifically prescribed by rule" and provides that trial courts have the inherent power to "proceed in any lawful manner not inconsistent with these rules or with any applicable statute."

[3][4] Accordingly, we hold that when issues arise for which no procedure is otherwise specifically prescribed, trial courts in Tennessee have inherent power to adopt appropriate rules of procedure to address the issues. Rules adopted pursuant to this inherent power must be consistent with constitutional principles, statutory laws, and generally applicable rules of procedure. Indeed, when circumstances mandate the adoption of supplemental rules, trial courts should pattern such rules upon analogous generally applicable rules of procedure. Trial courts must also bear in mind that all procedural rules should be designed to provide for the just determination of every criminal proceeding, and to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay. See Tenn. R.Crim. P. 2. Applying these guiding principles, we affirm and adopt the notice and evaluation requirements fashioned by the trial courts in these capital cases.

B. Notice and Evaluation Requirements

[5][6] A capital defendant has a federal constitutional right to present mitigation evidence. Lockett v. Ohio, 438 U.S. 586, 604-05, 98 S.Ct. 2954, 2964-65, 57 L.Ed.2d 973 (1978); State v. Cazes, 875 S.W.2d 253, 266 (Tenn.1994). In accordance with that constitutional mandate, the Tennessee statute which governs capital sentencing proceedings *171 provides that evidence may be offered during the sentencing phase which tends to "establish or rebut any mitigating factors." Tenn.Code Ann. § 39-13-204(c) (1997 Repl.). Among those mitigating factors specifically enumerated in the statute are three which directly relate to a defendant's mental condition: (1) "[t]he murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;" (2) "[t]he defendant acted under extreme duress or under the substantial domination of another person;" (3) "[t]he capacity of the defendant to appreciate the wrongfulness of the defendant's conduct or to conform the defendant's conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected the defendant's judgment." Tenn.Code Ann. § 39-13-204(j)(2), (6) & (8) (1997 Repl.). In addition, the statute directs the jury to consider "[a]ny other mitigating factor which is raised by the evidence produced by either the prosecution or defense at either the guilt or sentencing hearing." Tenn.Code Ann. § 39-13-204(j)(9) (1997 Repl.). Clearly, a capital defendant has a constitutional and statutory right to present mitigation proof relating to his or her mental condition.

[7] Juxtaposed against a capital defendant's right to introduce a broad range of proof in mitigation is the

State's right to offer evidence to rebut the mitigating factors. Critical to any effective rebuttal of expert mitigation proof regarding mental condition is the State's ability to conduct an independent psychiatric evaluation of the defendant. As was aptly explained by a United States District Court:

> Psychiatry is far from an exact science because it does not rely primarily on the analysis of raw data. Instead, the basic tool of psychiatric study remains the personal interview, which requires rapport between the interviewer and the subject. The Government's expert cannot meaningfully address the defense expert's conclusions unless the Government's expert is given similar access to the basic tool of his or her area of expertise: an independent review with and examination of the defendant.

United States v. Haworth, 942 F.Supp. 1406, 1407-08 (D.N.M.1996) (internal citations and quotations omitted); see also United States v. Beckford, 962 F.Supp. 748, 758 (E.D.Va.1997). "If a defendant elects to present evidence of his mental condition as a reason why he should not be sentenced to death, the Government must be able to follow where he has led and introduce its own countervailing evidence." Haworth, 942 F.Supp. at 1408. Unless the State is allowed to conduct its own mental health examination, it may be deprived "of the only effective means it has of controverting [defense] proof on an issue that [the defendant] has interjected into the case". Estelle v. Smith, 451 U.S. 454, 465, 101 S.Ct. 1866, 1874, 68 L.Ed.2d 359 (1981); see also State v. Huskey, 964 S.W.2d 892, 897 (Tenn.1998) (quoting Estelle and holding that a defendant who intends to offer expert proof of insanity may be ordered to undergo an evaluation by a State selected psychiatric expert). Clearly, the State's ability to rebut a defendant's expert mitigation evidence relating to mental condition would be effectively precluded if the State is not afforded the opportunity to have the defendant evaluated by an independent mental health expert. [FN2] We agree with a statement made by the Florida Supreme Court when it addressed this issue: "[n]o truly objective tribunal can compel one side in a legal bout to abide by the Marquis of Queensberry's rules, while the other fights ungloved." Dillbeck v. State, 643 So.2d 1027, 1030 (Fla.1994); see also Fla. R.Crim. P. 3.202 (delineating notice, examination, and procedure governing expert testimony of mental mitigation during the sentencing phase of a capital trial). Accordingly, we conclude that an independent psychiatric examination is essential to afford the State its right to rebut expert defense proof of mental condition.

> FN2. We emphasize that our holding in this appeal relates only to expert proof of mental condition. The notice, evaluation, and disclosure requirements do not apply to lay person testimony.

In light of our conclusion, the necessity of requiring a capital defendant to provide pretrial notice of intent to offer expert mitigation *172 proof of mental condition becomes apparent. Our death penalty statute provides that the sentencing hearing "shall be conducted as soon as practicable before the same jury that determined guilt." Tenn.Code Ann. § 39-13-204(a) (1997 Repl.) (emphasis added). Serious difficulties for the defendant, the prosecution, and the judicial system would result if notice of a capital defendant's intent to present expert mitigation proof is deferred until the conclusion of the guilt phase of the trial. No doubt there would be a lengthy delay before commencement of the sentencing phase while the State's expert examined the defendant. During this time the jury would likely remain idly sequestered. Particularly troublesome is the very real possibility that evidence presented at the guilt phase, which usually is also relied upon at sentencing, would fade from the minds of the jurors. See Beckford, 962 F.Supp. at 762-63 (discussing the difficulties arising if a defendant is not required to provide pretrial notice of intent to introduce expert mitigation evidence of mental condition). Requiring a capital defendant to provide pretrial notice of intent to introduce expert mitigation proof relating to mental condition protects the State's right of rebuttal and eliminates unjustifiable delay.

[8] In addition, there are no constitutional principles which preclude the notice and evaluation conditions imposed by the trial courts in these cases. With respect to the constitutionality of pretrial notice requirements, Williams v. Florida, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970), is instructive. In that case, the Supreme Court rejected the contention that requiring a criminal defendant to give pretrial notice of intent to rely upon an alibi defense violated the Fifth Amendment. In so holding, the Supreme Court in Williams stated:

> Nothing in the Fifth Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense, any more than it entitles

him to await the jury's verdict on the State's case-in-chief before deciding whether or not to take the stand himself.

Id. at 85, 90 S.Ct. at 1898; see also Johnson, 673 S.W.2d at 882 (approving a rule which required the defendant to provide notice of intent to present an alibi defense). We likewise conclude that requiring capital defendants to provide pretrial notice of intent to present expert mitigation proof relating to mental condition does not violate the Fifth Amendment. Beckford, 962 F.Supp. at 761.

In two recent cases, we discussed the constitutionality of the psychiatric examination prescribed by Tenn. R.Crim. P. 12.2. See Huskey, 964 S.W.2d at 900; State v. Martin, 950 S.W.2d 20, 24 (Tenn.1997). With respect to the Fifth Amendment right against self-incrimination we stated:

> the court-ordered examination and the disclosure of examination material does not violate the defendant's right against self-incrimination, provided the admissibility of any statements made by the defendant during the examination, and any 'fruits' derived therefrom, is only for impeachment or rebuttal of evidence of mental condition introduced at trial by the defendant. Moreover, disclosure of the information from the examination is not limited by Rule 16 and does not depend on whether the defendant intends to use the information or witness involved in the Rule 12.2(c) examination.

Huskey, 964 at 900. We also held that an independent examination does not violate a defendant's Sixth Amendment right to counsel so long as the defendant is provided the assistance of counsel when the decision of whether or not to raise an insanity defense is made. Martin, 950 S.W.2d at 26.

[9][10][11] Though the evaluation and notice issues in this appeal relate to the sentencing phase of a capital trial rather than to the guilt-innocence determination, the controlling constitutional precepts remain the same. Beckford, 962 F.Supp. at 760. The Sixth Amendment is satisfied so long as a capital defendant is provided the assistance of counsel when he or she decides whether to introduce expert mitigation proof relating to mental condition at the sentencing phase. Once the decision is made to proceed with the introduction of such proof, the Fifth Amendment right against self- incrimination does not *173 preclude a court-ordered examination by a State selected mental health expert. Id. Disclosure of the examination material does not violate the defendant's right against self-incrimination, provided the admissibility of any statements made by the defendant during the examination, and any 'fruits' derived therefrom, is admitted only for impeachment or rebuttal of evidence of mental condition introduced by the defense at the sentencing phase of the trial. United States v. Hall, 152 F.3d 381, 398 (5th Cir.1998); see also Brown v. Butler, 876 F.2d 427, 430 (5th Cir.1989) (holding that the State could not introduce expert testimony based upon a previous psychological examination of the defendant where the defendant announced an intention to offer expert psychological evidence but never actually introduced the evidence); Beckford, 962 F.Supp. at 761. Accordingly, we conclude that requiring a capital defendant to submit to a psychiatric examination by a State selected mental health expert is constitutionally permissible.

C. Procedural Safeguards

As a final issue, we must set forth a procedural framework which both accommodates the State's right of rebuttal and safeguards a capital defendant's constitutional right against self-incrimination. The procedures adopted by the trial courts in these three capital cases are similar. The primary difference is the time at which the defense and State are provided access to the expert reports. Under the Davidson County orders, the reports are given to the State prior to trial. Under the Montgomery County order, which the Court of Criminal Appeals adopted, access to any expert reports is deferred until after the jury returns a verdict of guilty and the capital defendant confirms his intent to introduce expert mitigation proof at the sentencing hearing.

The State contends that it should be given access to the results of any independent psychiatric examination prior to trial. In our view, there are valid justifications for providing the State access to the report only after the jury has returned a verdict of guilty and a capital defendant confirms his or her intent to offer expert mitigation evidence relating to mental condition at the sentencing hearing. First, delaying access to the report advances interests of judicial economy by avoiding litigation as to whether particular pieces of evidence the State seeks to admit prior to the defense offering psychiatric evidence were derived from the State's psychiatric evaluation. Delaying access also forecloses the risk that the defendant's right against self-incrimination will be abridged by the State's inadvertent or intentional

introduction of the examination results or its fruits for purposes other than impeachment or rebuttal of expert mitigation evidence of mental condition introduced by the defense. Hall, 152 F.3d at 399.

On the other hand, these same concerns do not apply to the defense. In fact, providing the defense with access to any expert reports prior to trial would serve interests of judicial economy. For example, the defense will have sufficient time to review the reports, make an informed decision as to whether to introduce expert mental condition mitigation proof, and be prepared at the conclusion of the guilt phase of the trial to either confirm or withdraw the previously filed notice. If the defense confirms its previously filed notice, the State will then be given the reports and should have sufficient time to study the reports and prepare its rebuttal proof.

We therefore modify the decision of the Court of Criminal Appeals insofar as it foreclosed both the State and the defense from having access to expert reports until the jury has returned a verdict of guilty. We hold that the defense is entitled to have access to any expert reports prior to trial. The State will be afforded access to the reports only after a jury returns a verdict of guilty and the capital defendant confirms his or her intent to offer expert mental condition evidence in mitigation. In our view, this procedure both protects the State's right of rebuttal and safeguards the defendant's right against self-incrimination.

CONCLUSION

In summary, we hold that where, as here, issues arise for which no procedure is otherwise specifically prescribed, courts in Tennessee have inherent power to adopt appropriate ***174** rules of procedure. We approve the notice and examination requirements imposed by the trial courts in these cases. As previously stated, they are consistent with constitutional principles, statutory laws, and generally applicable rules of criminal procedure. In addition the notice and examination requirements, which closely parallel the analogous provisions of Rule 12.2, Tenn. R.Crim. P., ensure fairness and eliminate unjustifiable delay. With respect to the disclosure procedures, we affirm as modified the decisions of the Court of Criminal Appeals.

[12][13][14][15][16][17] Moreover, we adopt the notice, examination, and disclosure requirements approved in this appeal as the governing procedure in this State in every death penalty trial in which the capital defendant intends to introduce expert mitigation evidence relating to mental condition at the sentencing hearing of his or her trial. The specific procedure is set out below.

1. If a capital defendant intends to introduce expert mental condition testimony as mitigation at the sentencing hearing, he or she must file pretrial written notice of intent no later than an appropriate date set forth by the trial court. The notice shall include the name and professional qualifications of any mental condition professional who will testify and a brief, general summary of the topics to be addressed that is sufficient to permit the State to determine if an evaluation is necessary and, if so, the area in which its expert must be knowledgeable.

2. If a capital defendant files notice that he or she intends to introduce expert mental condition testimony at the sentencing hearing, the defendant shall, if requested by the State, be examined by a psychiatrist or other mental health professional selected by the State. The examination shall take place within a reasonable time frame set forth by the trial court. The State and defense will cooperate to provide the court-ordered professional with all necessary and relevant information. Said examination may be videotaped in accordance with the guidelines adopted in State v. Martin, 950 S.W.2d 20 (Tenn.1997). The report of that examination and the report of any psychiatric examination initiated by the defendant shall be filed under seal with the Court before the commencement of jury selection. The Court-appointed professional conducting the examination for the State shall not discuss his/her examination with anyone unless and until the results of the examination are released by the Court to counsel for the State following the guilt phase of the trial.

3. The results of any examination by the State expert and the defense expert shall be released to the defense prior to trial to enable the defendant, with the assistance of counsel, to determine whether or not to introduce expert mental condition testimony as mitigation at the sentencing hearing. The results of any examination shall be released to the State only in the event the jury returns a verdict of guilty of first degree murder and only after the capital defendant confirms his or her intent to offer expert mental condition evidence in mitigation at the penalty phase. After the return of a guilty verdict, the defendant shall file a pleading confirming or disavowing his or her intent to introduce expert mental condition testimony at a penalty phase. If the defendant withdraws the previously-tendered notice,

the results of any mental condition examinations concerning the defendant will not be released to the State. The reports of any examinations, whether by the State or defense experts, concerning the defendant shall be released to the State immediately after the filing of a pleading confirming the earlier notice. Even if the defendant confirms his or her intent to offer mental condition evidence, the defendant may withdraw the notice of intent to introduce expert mental condition proof at any time before actually presenting such evidence, and, in that event, neither the fact of notice, nor the results or reports of any mental examination, nor any facts disclosed only therein, will be admissible against the defendant.

ANDERSON, C.J., BIRCH, HOLDER and BARKER, JJ., concur.
END OF DOCUMENT

Tenn. R. Crim. P., Rule 12.2

WEST'S TENNESSEE RULES OF COURT
TENNESSEE RULES OF CRIMINAL PROCEDURE
IV. ARRAIGNMENT AND PREPARATION FOR TRIAL

Current with amendments received through 7/1/1998.

RULE 12.2 NOTICE OF INSANITY DEFENSE OR EXPERT TESTIMONY OF DEFENDANT'S MENTAL CONDITION

(a) Defense of Insanity. If a defendant intends to rely upon the defense of insanity at the time of the alleged crime, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the district attorney general in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this subdivision, insanity may not be raised as a defense. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(b) Expert Testimony of Defendant's Mental Condition. If a defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing upon the issue of his or her guilt, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the district attorney in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(c) Mental Examination of Defendant. In an appropriate case the court may, upon motion of the district attorney, order the defendant to submit to a mental examination by a psychiatrist or the other expert designated for this purpose in the order of the court. No statement made by the defendant in the course of any examination provided for by this rule, whether the examination be with or without the consent of the defendant, no testimony by the expert based upon such statement, and no other fruits of the statement shall be admitted in evidence against the defendant in any criminal proceeding except for impeachment purposes or on an issue respecting mental condition on which the defendant has introduced testimony.

(d) Failure to Comply. If there is a failure to give notice when required by subdivision (b) of this rule or to submit to an examination when ordered under subdivision (c) of this rule, the court may exclude the testimony of any expert witness offered by the defendant on the issue of the defendant's mental condition.

(e) Inadmissibility of Withdrawn Intention. Evidence of an intention as to which notice was given under subdivision (a) or (b), later withdrawn, is not admissible in any civil or criminal proceeding against the person who gave notice of the intention.

Committee Comment

Like Rule 12.1, Rule 12.2 is a part of the discovery package, and it conforms to the federal rule.

The burden is upon the defendant to give notice of any defense based upon mental condition, without a triggering request from the State.

TEXAS

Edward Lewis LAGRONE, Appellant,
v.
The STATE of Texas, Appellee.

No. 71731.

Court of Criminal Appeals of Texas,
En Banc.

Feb. 5, 1997.

Rehearing Denied April 9, 1997.

Defendant was convicted in the District Court, Tarrant County, Frank Douthitt, J., of three counts of capital murder, and was sentenced to death. On automatic appeal, the Court of Criminal Appeal, Keller, J., held that: (1) trial court did not abuse its discretion in restricting questioning of venire members; (2) trial court may order criminal defendant to submit to state- sponsored psychiatric exam on future dangerousness when defense introduces, or plans to introduce, its own future dangerousness expert testimony; (3) exclusion of defense counsel from independent examination did not violate right to counsel; (4) evidence of witness's inchoate drug use was not admissible for impeachment purposes; (5) denial of challenge for cause to juror was proper; (6) psychiatrist could testify as expert regarding future dangerousness of defendant in prison context; (7) reference to prison violence in closing argument was proper; and (8) improper reference to prison drug use during closing argument was harmless.

Affirmed.

Baird, J., concurred and filed opinion in which Meyers, J., joined.

Overstreet, J., concurred in part and concurred in judgment in part and filed opinion.

II.

In points of error five through eight, appellant contends that the trial court erred by ordering him to submit to a State psychiatric examination without the presence of defense counsel. Appellant's arguments fall into two discrete categories: (1) points of error five and six involve alleged violations of appellant's right against self-incrimination as contained in both the Fifth Amendment to the United States Constitution and Article I, § 10 of the Texas Constitution; and (2) points of error seven and eight assert that appellant's right to counsel under the Sixth Amendment to the United States Constitution and Article 1, § 10 of the Texas Constitution was violated by the exclusion of defense counsel from the State's psychiatric exam.

To dispose of these issues effectively, we must begin with a recitation of the factual circumstances applicable to these points of error. On March 15, 1993, appellant filed a motion seeking independent expert witnesses in the areas of psychiatry and psychology. In support of this motion, appellant alleged that his mental condition would be a significant factor during the punishment phase, and that he suffered from "serious mental disorders." The trial court granted appellant's motion by appointing Dr. Richard Schmitt as appellant's mental expert.

***610** In response, the State filed a subsequent motion requesting independent mental examination of appellant for purposes of rebuttal. The State's motion also requested that the court exclude the testimony of appellant's mental health expert if appellant failed to cooperate with the State's expert. After an extensive hearing, the trial court granted the State's motion by allowing Dr. Richard Coons to examine appellant, subject to several rather stringent restrictions. [FN6] On May 6, 1993, Dr. Coons attempted to examine appellant, but appellant refused to cooperate even after Dr. Coons suggested he consult with his attorney. Due to appellant's lack of cooperation, Dr. Coons was unable to reach a conclusion about appropriate punishment.

FN6. The restrictions were as follows:
1. State shall notify the defendant's counsel, in advance of the time and place of the examination. Defendant's counsel may not be present during the examination. The defendant may recess the interview and consult with counsel.
2. Dr. Coons shall not relate by any manner or means his conversations, findings, conclusions and opinions with any State prosecutors or agents. Dr. Coons shall reduce his findings, conclusions and opinions to writing and deliver the same to the Court for in-camera inspection.
3. The Court, after examination of Dr. Coons' report, will decide whether to release the ultimate conclusions only. If the Court determines the report to contain Brady material, it shall release that [material] to the attorneys.
4. The State may have Dr. Coons present in court if the defense presents a mental health expert to testify.
5. If the defense calls a mental health expert to testify, at that time, Dr. Coons' report shall be turned over to the State by the Court.

At trial, appellant presented Dr. Schmitt's expert testimony on the issue of future dangerousness--that appellant would not constitute a continuing threat to society. The State then attempted to rebut Dr. Schmitt's testimony regarding his psychological examination of appellant with Dr.Coons' testimony. Dr. Coons testified that he had attempted to evaluate appellant, but appellant had refused to cooperate. In order to rebut Dr. Schmitt's testimony, therefore, the State introduced Dr. Coons' opinion of the future dangerousness of a hypothetical individual who had committed acts consistent with the other evidence evinced during trial. Dr. Coons concluded that there was a probability that the hypothetical defendant would constitute a continuing threat to society.

A.

Appellant's fifth and sixth points of error attack the trial court's order directing the defendant to submit to an examination by the State's mental expert on two fronts: (1) the right against self-incrimination contained in the Fifth Amendment to the United States Constitution; and (2) the right against self-incrimination contained in Article I, § 10 of the Texas Constitution. Since our opinion in Soria v. State, 933 S.W.2d 46 (Tex.Cr.App.1996) most recently addressed the issue of whether a trial court can constitutionally compel a defendant to submit to an independent State mental exam, we will first look to Soria for guidance.

[3] In Soria, we expressly overruled this Court's plurality opinion in Bradford v. State, 873 S.W.2d 15 (Tex.Cr.App.1993)(plurality opinion) [FN7] by holding that:

> FN7. In Bradford, a plurality of this Court held that a trial court's order conditioning the admissibility of the defense expert's future dangerousness testimony on the defendant's submission to a state-sponsored mental examination was violative of the Fifth and Sixth Amendments. We expressly declined to follow Bradford in Soria. Soria, 933 S.W.2d at 59-60 n. 21.

> ... when the defendant initiates a psychiatric examination and based thereon presents psychiatric testimony on the issue of future dangerousness, the trial court may compel an examination of appellant by an expert of the State's or court's choosing and the State may present rebuttal testimony of that expert based upon his examination of the defendant; provided, however, that the rebuttal testimony is limited to the issues raised by the defense expert.

Soria, 933 S.W.2d at 58-59 (footnotes omitted). This holding was based upon the premise that "a defendant waives his Fifth Amendment rights to a limited extent by presenting psychiatric testimony on his behalf." Id. at 53. Indeed, we explained that the "introduction by the defense of psychiatric testimony based upon an examination of ***611** the defendant 'constitute[s] a waiver of the defendant's Fifth Amendment privilege in the same manner as would the defendant's election to testify at trial.' " Id. at 54 (quoting Battie v. Estelle, 655 F.2d 692, 701-02 (5th Cir.1981))(emphasis ours); see also Buchanan v. Kentucky, 483 U.S. 402, 422-23, 107 S.Ct. 2906, 2917-18, 97 L.Ed.2d 336 (1987) (concluding that when the defense requests a psychiatric evaluation or presents psychiatric evidence, the defendant has waived the Fifth Amendment privilege and that the prosecution may "at the very least" rebut the defense's presentation with evidence from the defense-sponsored psychiatric reports); Wilkens v. State, 847 S.W.2d 547, 551 (Tex.Cr.App.1992), cert. denied, 507 U.S. 1005, 113 S.Ct. 1646, 123 L.Ed.2d 268 (1993)(determining that raising the insanity defense and offering supporting evidence waives the defendant's Fifth Amendment rights as to the State's use of psychiatric rebuttal evidence); Hernandez v. State, 805 S.W.2d 409 (Tex.Cr.App.1990), cert denied, 500 U.S. 960, 111 S.Ct. 2275, 114 L.Ed.2d 726 (1991)(holding that criminal defendants "open the door" to state-sponsored rebuttal on issue of competency by presenting defense-sponsored expert testimony). Accordingly, our decision in Soria stands for the proposition that once a defendant has executed a limited waiver of the Fifth Amendment's protection by constructively testifying through an expert on the issue of future dangerousness, the trial court may order that defendant to submit to a state-sponsored future dangerousness examination. Soria, 933 S.W.2d at 58-60.

[4][5] After further consideration of the issue, however, we feel compelled to expand the scope of our rule in Soria to allow trial courts to order criminal defendants to submit to a state-sponsored psychiatric exam on future dangerousness when the defense introduces, or plans to introduce, its own future dangerousness expert testimony. Prohibiting the trial court from ordering a psychiatric exam until after the defense has actually presented his own expert testimony is bound to work against the State in almost every case. Indeed, we have already recognized

that a trial court cannot actually force the defendant to cooperate with the State's expert, and the sanction of limiting the testimony of further defense witnesses is virtually worthless since the defense has already had the benefit of their own expert's testimony. Soria, 933 S.W.2d at 58-60. Our sense of justice will not tolerate allowing criminal defendants to testify through the defense expert and then use the Fifth Amendment privilege against self-incrimination to shield themselves from cross- examination on the issues which they have put in dispute. Bradford, 873 S.W.2d at 26 (Campbell, J., dissenting); cf. Cantu v. State, 738 S.W.2d 249, 256 (Tex.Cr.App.1987) (finding no Fifth Amendment impediment to forcing criminal defendants to make the "very difficult choice" between claiming the immunity from prosecutorial examination provided by the right against self- incrimination and waiving the Fifth Amendment's self-incrimination protection by testifying on their own behalf). Therefore, "[t]he interest of the other party [the State] and the function of the courts of justice to ascertain the truth become relevant, and prevail in the balance of determining the scope and limits of the Fifth Amendment." United States v. Byers, 740 F.2d 1104, 1114 (D.C.Cir.1984) (quoting Brown v. United States, 356 U.S. 148, 155-56, 78 S.Ct. 622, 626-27, 2 L.Ed.2d 589).

We are fully aware that the defendant has not actually waived his Fifth Amendment rights until he has actually presented expert testimony on the issue of future dangerousness at trial. Because of the unique circumstances discussed above, however, we have decided that it is necessary to employ a sort of "legal fiction" in these cases which infers a limited waiver of the defendant's Fifth Amendment rights once he has indicated an intent to present future dangerousness testimony. See Giarratano v. Procunier, 891 F.2d 483, 488 (4th Cir.1989) (holding defendant's stated intention to introduce psychiatric testimony at sentencing enabled the State to introduce psychiatric testimony at sentencing based on a pretrial examination); see also Buchanan, 483 U.S. at 422-23, 107 S.Ct. at 2917-18 (stating that when a defendant "requests" a psychiatric evaluation, the State has the right to rebut with evidence from the reports prepared pursuant to the defense- *612 sponsored examination); Estelle v. Smith, 451 U.S. 454, 468, 101 S.Ct. 1866, 1876, 68 L.Ed.2d 359 (1981)(noting that a defendant "who neither initiates nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him in a capital proceeding"). Accordingly, we now hold that when the defense demonstrates the intent to put on future dangerousness expert testimony, trial courts may order defendants to submit to an independent, state-sponsored psychiatric exam prior to the actual presentation of the defense's expert testimony. [FN8]

> FN8. Because the defendant has not actually waived his Fifth Amendment protection prior to the presentation at trial of future dangerousness expert testimony, it is crucial for the trial court to protect the defendant's Fifth Amendment rights. Indeed, in this case, the trial court deserves commendation for its efforts in ensuring that the defendant's Fifth Amendment rights were protected to the greatest possible extent. Other courts would do well in the future, in fact, to follow the g u i d e l i n e s adhered to by the trial court in this case. See Note 6, supra (setting out the trial court's guidelines).

In light of our holding today, we find no violation of the defendant's Fifth Amendment rights. We also note that appellant has failed to provide us with any distinction or reason that the Texas Constitution provides greater protection than the Fifth Amendment. Consequently, it is not necessary for us to address the merits of appellant's sixth point of error. Appellant's fifth and sixth points of error are overruled.

B.

[6] Appellant's seventh and eighth points error, on the other hand, question the constitutional validity of excluding defense counsel from the State's psychiatric exam under the right to counsel guaranteed by the Sixth Amendment of the United States Constitution and Article I, § 10 of the Texas Constitution. As with the previous two points of error, appellant's contentions are groundless.

In Bennett v. State, 766 S.W.2d 227 (Tex.Cr.App.1989), we held that a defendant does not possess the right to have counsel present during a psychiatric examination under either the Fifth or Sixth Amendment. See Bennett v. State, 766 S.W.2d 227, 231 (Tex.Cr.App.), cert. denied, 492 U.S. 911, 109 S.Ct. 3229, 106 L.Ed.2d 578 (1989). Indeed, we reasoned that "[b]ecause of the intimate, personal and highly subjective nature of a psychiatric examination, the presence of a third party in a legal

or non- medical capacity would severely limit the efficacy of the examination." Id. Moreover, appellant has once again neglected to provide us with any rationale to support providing more stringent constitutional protection under Article I, § 10 of the Texas Constitution than that provided by the Sixth Amendment. Appellant's seventh and eighth points of error are accordingly overruled.

TX-CS (Texas Cases)
933 S.W.2d 46

Juan SORIA, Appellant,
v.
STATE of Texas, Appellee.

No. 69,679.

Court of Criminal Appeals of Texas.

Sept. 11, 1996.

Rehearing Denied Nov. 6, 1996.

Defendant was convicted in the District Court, Tarrant County, Joe Drago, III, J., of capital murder, and was sentenced to death. Defendant appealed. After defendant's conviction was affirmed, but his death sentence was reformed to life imprisonment, state moved for rehearing. The Court of Criminal Appeals, Maloney, J., held that: (1) evidence supported jury's affirmative answer as to future dangerousness special issue; (2) trial court did not violate Fifth Amendment by restricting testimony of defense expert at punishment phase; (3) voir dire examination of venireman was properly limited with respect to his feelings on whether intentional conduct would automatically satisfy requirement that conduct was committed with reasonable expectation that death would result; (4) venireperson's views regarding death penalty disqualified her; and (5) defendant's phrasing of mitigating circumstance questions on voir dire was improper.

State's motion sustained, trial court's judgment affirmed.

Mansfield, J., issued concurring opinion.

Clinton, J., dissented.

Baird, J., issued dissenting opinion in which Overstreet, J., joined.

Overstreet, J., issued dissenting opinion in which Baird, J., joined.

OPINION ON STATE'S MOTION FOR REHEARING

MALONEY, Judge.

Appellant was convicted of capital murder, the jury answered the special issues in the affirmative and the trial court assessed the death penalty. On original submission we affirmed appellant's conviction but reformed his sentence to life imprisonment based upon our holding that the evidence was insufficient to support an affirmative finding to the second special issue. Soria v. State, No. 69,679 slip op. at 6 (Tex.Crim.App. June 8, 1994)(op. on original submission)(per curiam)(unpublished). The State filed a motion for rehearing, contending the evidence was legally sufficient to support the finding on the second special issue. We granted the State's motion to reconsider this issue. The State's motion for rehearing is sustained.

II.

Our opinion on original submission addressed and disposed of all of appellant's points of error related to the guilt/innocence phase of trial. We adhere to our disposition of those points of error. Because we sustained appellant's first point of error on original submission and reformed his death sentence to a life sentence, we did not reach the remainder of appellant's points of error pertaining to the punishment phase of trial. We now turn to the remaining points of error. [FN5]

FN5. On original submission we addressed points of error 1, 3, 6, 7, 8, and 24-27. In this opinion we address point of error 1 on rehearing and points 2, 4, 5, 9-23 and 28.

[2][3] In his second point of error, appellant contends the trial court erred in restricting the testimony of a defense expert at the *52 punishment phase of trial, in violation of his Fifth Amendment rights. [FN6]

FN6. Appellant asserts a Sixth Amendment claim in his brief, but we decline to address that ground since he did not raise the Sixth Amendment at trial. At trial, appellant's objection was "[b]ased upon the Fifth Amendment and [sic] of the United States Constitution and based on the similar provision in the Texas Constitution." Since appellant's brief contains only three sentences in support of his Texas Constitutional claim, we view it as insufficiently briefed and decline to address it. Appellant also asserted at trial "the Fourteenth Amendment, providing that a defendant shall enjoy due process." Appellant mentions the Fourteenth Amendment in his brief, but provides no argument or authority in support thereof.

The State did not offer any psychiatric testimony on the issue of future dangerousness during its punishment case in chief. Appellant called psychiatrist Dr. James Grigson who testified that he had conducted a complete psychiatric examination of appellant and had formed the opinion that appellant "does not present a continuing threat to society. That he is not dangerous in the future." In rebuttal, the State called psychiatrist Dr. Richard Coons. Coons had not conducted a psychiatric evaluation of appellant because, although ordered by the trial court to submit to an evaluation by Coons, appellant was "not cooperative" with those efforts. [FN7] Rather, Coons testified on the basis of a hypothetical tracking the facts of the case that in his opinion there was a probability that appellant would constitute a continuing threat to society. Coons' testimony is described in Part I of this opinion. Appellant then sought to call Dr. E. Clay Griffith. Griffith had also conducted a psychiatric evaluation of appellant. The trial court ruled that due to appellant's refusal to cooperate with Coons' examination, Griffith would not be permitted to testify to anything based upon his personal examination of appellant. Griffith would be allowed to testify based upon a hypothetical. Appellant declined to call Griffith, but made a bill of exception.

FN7. It appears from the record that although appellant was presented to Coons for evaluation, he did not respond to Coons or otherwise answer Coons' questions. Coons testified as follows as to appellant's lack of cooperation:
Q. [The State] And, did you see the Defendant in this cause, Juan Soria?
A. [Coons] Yes, I did.
Q. All right. And did you attempt to examine him?
A. I did.
Q. Did you--tell me whether or not you attempted to conduct the psychiatric evaluation of him?
A. Yes, I did. I attempted to.
Q. Did you do so?
A. He was not cooperative.
Q. Well, when you say he was not cooperative, were you prevented from doing so?
A. Only by his action, he just did not cooperate.
Q. All right. Well, was it otherwise possible for you to conduct such evaluation in the absence of his cooperation?
A. In the absence of--his failure to cooperate, it was impossible for me to do it.

[4] The Fifth Amendment is implicated when a mental health expert testifies against the defendant based in part on communications made by the defendant during a court-ordered psychiatric examination. Estelle v. Smith, 451 U.S. 454, 462-63, 101 S.Ct. 1866, 1872-73, 68 L.Ed.2d 359

(1981). In Estelle v. Smith, the state offered at punishment the testimony of a psychiatrist (coincidentally, the same Dr. Grigson involved in the instant case) who had examined the defendant pretrial pursuant to a court order, for purposes of competency. Grigson testified that the defendant would be a continuing threat to society; this diagnosis rested largely upon statements made by the defendant during the pretrial examination. [FN8] Smith, 451 U.S. at 464, 101 S.Ct. at 1873-74. The testimony was held to violate the defendant's Fifth Amendment privileges since the defendant had not been informed of his right to remain silent and informed that any statements he made during the pretrial exam could be used against him in a sentencing proceeding:

> FN8. Responding to the State's argument that the Fifth Amendment was not implicated because the defendant's communications were nontestimonial, the Court stated:
> ... Dr. Grigson's diagnosis, as detailed in his testimony, was not based simply on his observation of respondent. Rather, Dr. Grigson drew his conclusions largely from respondent's account of the crime during their interview ... Dr. Grigson's prognosis as to future dangerousness rested on statements respondent made, and remarks he omitted, in reciting the details of the crime.
> Smith, 451 U.S. at 464, 101 S.Ct. at 1873-74.

*53 When Dr. Grigson went beyond simply reporting to the court on the issue of competence and testified for the prosecution at the penalty phase on the crucial issue of respondent's future dangerousness, his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting.

Id. at 467, 101 S.Ct. at 1875. [FN9] The Supreme Court emphasized the specific circumstances of that case:

> FN9. The Court also held that under the Sixth Amendment defense counsel must be given prior notice of a court-ordered psychiatric examination and given an opportunity to advise his client regarding the extent of his cooperation therewith.

> A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him in a capital sentencing proceeding. Because respondent did not voluntarily consent to the pretrial psychiatric examination after being informed of his right to remain silent and the possible use of his statements, the State could not rely on what he said to Dr. Grigson to establish his future dangerousness.

Id. at 468, 101 S.Ct. at 1876 (emphasis added). The Court further observed that "a different situation arises where a defendant intends to introduce psychiatric evidence at the penalty phase." Id. at 472, 101 S.Ct. at 1878.

The Supreme Court took the opportunity to address "a different situation" in Buchanan v. Kentucky, 483 U.S. 402, 107 S.Ct. 2906, 97 L.Ed.2d 336 (1987). There, the defendant raised an affirmative defense of extreme emotional disturbance at the guilt phase of trial. In support of his defense the defendant called a social worker who read from several psychological evaluations which had been conducted during involuntary incarcerations in a youth center and later in an institution for emotionally disturbed youths. Buchanan, 483 U.S. at 409, 107 S.Ct. at 2910. The State sought to cross- examine the social worker by having her read from another report based upon an examination of the defendant following his arrest for the murder at issue; this examination had been conducted pursuant to the joint motion of the State and the defense. Id. at 411, 107 S.Ct. at 2911. The defendant objected to the State's rebuttal use of this evaluation as violative of his Fifth Amendment rights. The Supreme Court rejected the defendant's claim:

> We recognized [in Smith], however, the 'distinct circumstances' of that case, 451 U.S., at 466, 101 S.Ct., at 1874--the trial judge had ordered, sua sponte, the psychiatric examination and Smith neither had asserted an insanity defense nor had offered psychiatric evidence at trial. We thus acknowledged that, in other situations, the State might have an interest in introducing psychiatric evidence to rebut petitioner's defense.... We further noted [in Smith]: "A criminal defendant who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding." [citation omitted] This statement logically leads to another proposition: if a defendant requests such an evaluation or presents psychiatric evidence, then, at the very least, the

prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution.

Id. at 422-23, 107 S.Ct. at 2917-18 (emphasis added). The Court noted that the psychiatric testimony offered by the State did not "describe [ ] any statements by petitioner dealing with the crimes for which he was charged." Id. at 423, 107 S.Ct. at 2918 (emphasis in original).

[5] Courts have viewed Buchanan as recognizing that a defendant "waives" his Fifth Amendment rights to a limited extent by presenting psychiatric testimony on his behalf. See, e.g., Schneider v. Lynaugh, 835 F.2d 570, 575-76 (5th Cir.)(referring to Buchanan as involving concept of "waiver," although acknowledging that Buchanan did *54 not use that term), cert. denied, 488 U.S. 831, 109 S.Ct. 87, 102 L.Ed.2d 63 (1988); Wilkens v. State, 847 S.W.2d 547 (Tex.Crim.App.1992), cert. denied, 507 U.S. 1005, 113 S.Ct. 1646, 123 L.Ed.2d 268 (1993). The notion of waiver has been explained by the Fifth Circuit as deriving from a defendant's "constructive" testimony: [FN10]

> FN10. The Supreme Court has acknowledged the Fifth Circuit's discussions in this respect and observed that "[l]anguage contained in Smith and our later decision in Buchanan v. Kentucky, 483 U.S. 402, 107 S.Ct. 2906, 97 L.Ed.2d 336 (1987), provides some support for the Fifth Circuit's discussion of waiver [in Battie]." Powell v. Texas, 492 U.S. 680, 684, 109 S.Ct. 3146, 3149, 106 L.Ed.2d 551 (1989).

> ... By introducing psychiatric testimony obtained by the defense from a psychiatric examination of the defendant, the defense constructively puts the defendant on the stand and therefore the defendant is subject to psychiatric examination by the State in the same manner.

Battie v. Estelle, 655 F.2d 692, 702 n. 22 (5th Cir.1981). In other words, introduction by the defense of psychiatric testimony based upon an examination of the defendant "constitute[s] a waiver of the defendant's fifth amendment privilege in the same manner as would the defendant's election to testify at trial." Id. at 701-702 (referring to its holding in United States v. Cohen, 530 F.2d 43 (5th Cir.)(emphasis added), cert. denied, 429 U.S. 855, 97 S.Ct. 149, 50 L.Ed.2d 130 (1976)).

In United States v. Byers, 740 F.2d 1104 (D.C.Cir.1984), the defendant claimed the government "forced from his lips (via [a] compelled [psychiatric] examination) the evidence to negate his defense of insanity and thereby proved, indirectly through rebuttal, that he was of the necessary mind to commit the crimes." Id. at 1109. Writing for the D.C. Circuit, then federal circuit Judge Scalia noted that virtually all other jurisdictions had addressed this issue and uniformly concluded that when a defendant raises the defense of insanity, the Fifth Amendment is not violated by a court-ordered psychiatric examination conducted by a psychiatrist of the court's or government's choosing, or by that expert's testimony on the issue of sanity. Id. at 1111. Judge Scalia discussed the various rationales relied upon in support of these holdings, concluding that the most sensible justification was the need to maintain a fair state-individual balance. Id. at 1113. This rationale is supported by the same principles that compel a defendant to undergo cross- examination once he elects to take the stand in his own behalf:

> Our judgment that these practical considerations of fair but effective criminal process affect the interpretation and application of the Fifth Amendment privilege against self-incrimination is supported by the long line of Supreme Court precedent holding that the defendant in a criminal or even civil prosecution may not take the stand in his own behalf and then refuse to consent to cross-examination. [citations omitted] The justification for this similarly "coerced" testimony is precisely that which we apply to the present case. As said [by the United States Supreme Court] in Brown[v. United States], a defendant
>
> cannot reasonably claim that the Fifth Amendment gives him not only this choice [whether to testify or not] but, if he elects to testify, an immunity from cross-examination on the matters he has himself put in dispute. It would make of the Fifth Amendment not only a humane safeguard against judicially coerced self-disclosure but a positive invitation to mutilate the truth a party offers to tell.... The interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination.
>
> 356 U.S. at 155-56, 78 S.Ct. at 626-27 (footnote & citation omitted).

Id. at 1114. The court thereupon held that "when a defendant raises the defense of insanity, he may

constitutionally be subjected to compulsory examination by court-appointed or government psychiatrists ... and when he introduces into evidence psychiatric testimony to support his insanity defense, testimony of those examining psychiatrists may *55 be received (on that issue) as well." Id. at 1115.

This Court has held that by raising an insanity defense at guilt and offering psychiatric evidence in support thereof, the defendant waives his Fifth Amendment rights as to the State's use of psychiatric evidence in rebuttal on that issue. [FN11] Wilkens v. State, 847 S.W.2d 547, 551 (Tex.Crim.App.1992), cert. denied, 507 U.S. 1005, 113 S.Ct. 1646, 123 L.Ed.2d 268 (1993)(recognizing Buchanan as controlling). We have also held that a defendant "opens the door" to the State's rebuttal use of psychiatric evidence at punishment when the defendant presents psychiatric evidence in his defense at punishment. In Hernandez v. State, 805 S.W.2d 409, 412 (Tex.Crim.App.1990), cert. denied, 500 U.S. 960, 111 S.Ct. 2275, 114 L.Ed.2d 726 (1991), a capital murder case, the defendant was examined pretrial by Dr. Sparks as to his competency, but was not given proper Miranda [FN12] warnings prior to the examination. He complained on appeal that the trial court violated his Fifth Amendment rights by allowing Sparks to testify for the State at punishment as to matters pertaining to that examination. Relying on the Supreme Court's limiting language in Smith and its holding in Buchanan, we rejected the defendant's claim:

> FN11. We further held, however, that the defendant's presentation of an insanity defense at guilt did not prevent him from asserting his Fifth Amendment rights against the State's presentation of psychiatric evidence as to the punishment issue of future dangerousness. Wilkens, 847 S.W.2d at 554.
>
> FN12. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Under Miranda, prior to custodial interrogation a suspect must be "warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." Id. at 444, 86 S.Ct. at 1612.

... the State elicited redirect testimony from Dr. Sparks concerning appellant's competency evaluation in response to appellant's introduction of psychiatric evidence on cross-examination. By introducing appellant's TDC psychiatric records and soliciting Dr. Sparks' opinion concerning those records, appellant "opened the door" to the State's use of the results of his competency exam for rebuttal purposes. Buchanan, supra, and cases cited above. By creating the impression that appellant may have been suffering from paranoid schizophrenia, appellant paved the way for the State to rebut that impression with psychiatric testimony tending to show that appellant was instead suffering from an anti-social personality disorder.

Hernandez, 805 S.W.2d at 412. We observed that while the psychiatric testimony at issue pertained to the defendant's mental status and was therefore "relevant to the issue of future dangerousness, [it] was not a direct assertion of an expert opinion concerning future dangerousness." [FN13] Id. at 412 n. 3.

> FN13. Sparks was specifically prohibited from expressing an opinion as to the defendant's future dangerousness. Hernandez, 805 S.W.2d at 412 n. 3. His testimony for the State concerned his diagnosis of appellant as exhibiting an anti-social personality disorder.

We see no reason why the principles set forth in Smith and Buchanan, and applied by this Court in Wilkens and Hernandez, should not apply at punishment with respect to the presentation of psychiatric testimony on the issue of future dangerousness. [FN14] See *56 Schneider v. Lynaugh, 835 F.2d 570, 576-77 (5th Cir.), cert. denied, 488 U.S. 831, 109 S.Ct. 87, 102 L.Ed.2d 63 (1988).

> FN14. While this Court is not bound by federal circuit courts of appeals in interpreting the United States Constitution, we often look to them for guidance and are sometimes persuaded by their reasoning. The Fifth and Fourth Circuits have applied the principles set forth in Buchanan to hold that a capital murder defendant is prevented from asserting his Fifth Amendment rights by offering psychiatric testimony at punishment on the issue of future dangerousness. See, e.g., Giarratano v. Procunier, 891 F.2d 483, 488 (4th Cir.1989)(holding defendant's stated intention to introduce psychiatric testimony at sentencing enabled State to introduce psychiatric testimony on issue of future dangerousness based on pretrial

examination, even though defendant had not been warned that statements made could be used against him at punishment); Schneider v. Lynaugh, 835 F.2d 570, 576-77 (5th Cir.), cert. denied, 488 U.S. 831, 109 S.Ct. 87, 102 L.Ed.2d 63 (1988); Williams v. Lynaugh, 809 F.2d 1063, 1068-69 (5th Cir.), cert. denied, 481 U.S. 1008, 107 S.Ct. 1635, 95 L.Ed.2d 207 (1987). In Schneider, supra, the defendant was evaluated pretrial at his request by a court-appointed psychiatrist (again, Dr. Grigson) to determine his competency and sanity. At punishment the defendant offered three witnesses--a drug abuse counselor, an employee in a rehabilitation program at the jail where the defendant was held, and a jail chaplain--who all testified that the defendant could be rehabilitated. The State rebutted by presenting Grigson's testimony that the defendant's past criminal behavior would continue and there was no chance that the defendant could be rehabilitated. The defendant claimed that the State's use of such testimony violated his Fifth Amendment rights since he had not been informed of those rights before Grigson's pretrial examination. The Fifth Circuit concluded that the case was governed by the principle established in Buchanan--that "a defendant who puts his mental state in issue w i t h
psychological evidence may not then use the Fifth Amendment to bar the State from rebutting in kind." Schneider, 835 F.2d at 575. The Court emphasized Buchanan's attempt to strike a "fair state-individual balance:"
It is unfair and improper to allow a defendant to introduce favorable psychological testimony and then prevent the prosecution from resorting to the most effective and in most instances the only means of rebuttal: other psychological testimony.
Id. at 576. Concluding that the defendant had put his mental state in issue by calling three expert witnesses who testified to his ability to be rehabilitated, the Court held that "the only effective means" available to the State for rebuttal was the presentation of independent psychological evidence. Id. at 577.

In testifying for appellant, Grigson described his examination of appellant as consisting of several parts, one of which involved talking to appellant about "what [appellant was] doing on or around or about the time of the alleged offense." [FN15] Grigson explained that appellant's expressed remorse, in contrast to the attitudes of most capital murder defendants, was part of the reason for his conclusion that appellant would not present a continuing threat to society:

FN15. Grigson described this portion of the examination:
Then, the fourth part of the psychiatric examination is called content of thought. Here you obtain historical information which includes birth and early development, educational history, service, occupational, marital, family, medical history. And then a real importance, when you have an individual that is charged with a criminal offense, is the ability of the individual to discuss what they were doing on or around or about the time of the alleged offense.
(emphasis added).

... [appellant] was very upset about what happened. He felt very guilty. He wished he could bring back the dead boy. He praised to God. He has remorse and guilt feelings which normally I don't encounter in these types of situations.... He has nightmares. Feels very badly about what he did. And primarily due to his reaction and then comparing it with others I have examined, it is my opinion that he does not present that continuing threat to society.

Grigson further explained that appellant's expressed insecurities led him to associate with the wrong friends:

... And then from an emotional standpoint, [appellant] feels insecurity as a male, which I think in part gets him into the wrong group, trying to feel more macho, if you will, more sure of himself. But basically, he is insecure with his masculinity.

When asked about appellant's prospects at rehabilitation, Grigson emphasized that appellant "is aware of what he did, so I don't think that he is ever going to go through that again."

On cross-examination Grigson stated that his knowledge of the offense was based primarily on what appellant had told him:

Q.... You have mentioned that you were aware of the events of Thursday, June the 27th, 1985?
A. Yes, sir.
Q. How did you become aware of those events?
A. From [appellant], what he told me.
Q. Okay. So, that the entire amount of information that you have in reference to Thursday's events are from [appellant], either directly or from his statement; is that correct?

A. Yes, sir, that is true.

Q. And I take it that you have based at least your knowledge of those events on his version of what he intended to do that Thursday; is that correct?

A. Yes, sir, I did.

Q. The same would be true, I take it, of his version of of [sic] the events that occurred *57 that Friday. You took it from his statement, didn't you?

A. Yes, sir, his confession and as well as what he told me, yes, sir.

On redirect, Grigson emphasized appellant's expressions of remorse as an indication that he would not be a future danger:

... his reaction to what happened causes him to be a whole lot less likely to ever do anything like this again in the future because of the pain, the regret, the remorse, what he has done to the boy's family, what happened to the boy, what he has done to his family, as well as what happened to himself.

By presenting Grigson's testimony as to appellant's remorse and other feelings appellant expressed to him concerning the offense, appellant constructively placed himself on the stand. Cf. Battie, supra; Byers, supra.

When a defendant takes the stand in his own defense, he "is subject to the same rules governing direct examination and cross-examination as any other witness." Bryan v. State, 837 S.W.2d 637, 643 (Tex.Crim.App.1992). He may be " 'contradicted, impeached, discredited, attacked, sustained, bolstered up, made to give evidence against himself, cross-examined as to new matter, and treated in every respect as any other witness testifying, except where there are overriding constitutional or statutory prohibitions.' " Id. We have recognized the tough choices facing a defendant when deciding whether to testify in his defense:

... a defendant has a very difficult choice to make: should he waive his right against self-incrimination on all relevant issues, knowing some unfavorable evidence might result from cross-examination; or should he retain that right and yet not put his version of some aspect of the case before the jury.... This difficult decision does not impose an impermissible burden upon the exercise to Fifth Amendment rights. No constitutional violation is presented by the fact of a difficult decision for a defendant.

Cantu v. State, 738 S.W.2d 249, 256 (Tex.Crim.App.), cert. denied, 484 U.S. 872, 108 S.Ct. 203, 98 L.Ed.2d 154 (1987).

[6] Appellant chose to present his version of the facts as they might impact his deathworthiness through Grigson's testimony. The State's only effective means of rebutting appellant's constructive testimony was by presenting independent psychiatric testimony. [FN16] See, e.g., Buchanan, supra; Byers; United States v. Vest, 905 F.Supp. 651, 653 (W.D.Mo.1995); Schneider, supra. We accordingly hold that when the defendant initiates a psychiatric examination and based thereon presents psychiatric testimony on the issue of future dangerousness, the trial court may compel an examination of appellant by an expert of the State's or court's choosing [FN17] and the State may present rebuttal *58 testimony of that expert based upon his examination of the defendant; provided, however, that the rebuttal testimony is limited to the issues raised by the defense expert. [FN18] See Williams v. Lynaugh, 809 F.2d 1063, 1068 (5th Cir.1987)(recognizing that when defendant introduces psychiatric evidence on critical issue he "waives" fifth amendment objections to state's use of psychiatric testimony provided state's evidence is "used solely in rebuttal and properly limited to the issue raised by the defense," citing Vardas v. Estelle, 715 F.2d 206 (5th Cir.1983)). We emphasize that the State's expert may only testify on the basis of statements made during such examination that were the "product of a rational intellect and a free will." [FN19] See Mincey v. Arizona, 437 U.S. 385, 397-98, 98 S.Ct. 2408, 2416, 57 L.Ed.2d 290 (1978)(while statements made by defendant in violation of Miranda are admissible against defendant for impeachment purposes, such statements must be "the product of a rational intellect and free will"). In other words, the statements must be voluntary.

FN16. In Byers, Justice Scalia rejected the contention that cross- examination of the defendant's expert would satisfy the necessary balance in this context:

That would perhaps be so if psychiatry were as exact a science as physics, so that, assuming the defense psychiatrist precisely described the data (consisting of his interview with the defendant), the error of his analysis could be demonstrated. It is, however, far from that. Ordinarily the only effective rebuttal of psychiatric opinion testimony is contradictory psychiatric opinion testimony; and for that purpose ... "the basic tool of psychiatric study remains the personal interview, which requires rapport between the interviewer and the subject."

Byers, 740 F.2d at 1114.

FN17. In Buchanan the rebuttal testimony offered by the State was based upon an examination conducted pursuant to the defendant's request; this was also the case in Wilkens and Hernandez. However, this fact does not bear upon our holding. Once a defendant constructively testifies in his own behalf, he is subject to "constructive" cross-examination by the State through examination by a court-appointed expert (of the State's or court's choosing).
We also recognize that in Bennett v. State, 742 S.W.2d 664, 671 (Tex.Crim.App.1987), we held that a trial court does not "have the authority to appoint a psychiatrist for the purpose of examining a defendant for evidence relating solely to his future dangerousness." That case is distinguishable from the facts presented in the instant case. The defendant in Bennett had not presented psychiatric evidence; the State sought to compel an exam for purposes of introducing direct testimony on the issue of future dangerousness, not rebuttal. In the instant case, appellant constructively testified by presenting psychiatric testimony based upon an examination of the defendant and the State sought to offer rebuttal evidence.

FN18. We are not asked to decide today whether a defendant is entitled to suppression at trial of statements made during a compelled examination. In the context of a sanity defense, federal rules provide that certain statements made by the defendant during the examination must be excluded. Fed. R.Crim. P. 12.2(c). Some federal courts have pointed to this safeguard in upholding compelled examinations. See Cohen, 530 F.2d at 47-48 (concluding that since statements about the offense could be suppressed, a rule forbidding compelled examinations would "prevent no threatened evil"). The Texas Code of Criminal Procedure provides for the exclusion at guilt of statements made by the defendant during a competency exam. Tex. Code Crim. Proc. Ann. art. 46.02 § 3(g); see also DeRusse v. State, 579 S.W.2d 224, 229 (Tex.Crim.App.1979)(article 46.03, pertaining to sanity examination does not contain prohibition against use of defendant's statements similar to prohibition found in article 46.02 § 3(g)).
We notice that in Buchanan, the rebuttal testimony did not "describe [ ] any statements [sic] by petitioner dealing with the crimes for which he was charged." Buchanan, 483 U.S. at 423, 107 S.Ct. at 2918 (emphasis in original). We are likewise not presented with that issue. Because appellant did not cooperate in the State's examination, no question is raised as to Coons' testimony regarding statements made by appellant during such examination and appellant makes no such claim as to Coons' brief observation of him or Coons' testimony as to appellant's lack of cooperation.

FN19. In Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971), the Supreme Court held that statements given in violation of Miranda could nevertheless be offered by the prosecution for purposes of impeaching the defendant's testimony, "provided of course that the trustworthiness of the evidence satisfies legal standards." Id. at 224, 91 S.Ct. at 645. The Court held that once petitioner chose to take the stand, "the shield provided by Miranda " did not protect him from being confronted with a prior inconsistent statement. Id. at 225-26, 91 S.Ct. at 645-46. In Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978), the Supreme Court held that the rule set forth in Harris requires that such statements be voluntarily made:
Statements made by a defendant in circumstances violating the strictures of Miranda v. Arizona, supra, are admissible for impeachment if their "trustworthiness ... satisfies legal standards." [citing Harris v. New York] But any criminal trial use against a defendant of his involuntary statement is a denial of due process of law, "even though there is ample evidence aside from the confession to support the conviction."
Mincey, 437 U.S. at 397-98, 98 S.Ct. at 2416. Due process mandates that statements given to law enforcement that are not the "product of a rational intellect and a free will" may not be used against a defendant at trial for any purpose. Id. at 398-402, 98 S.Ct. at 2416-19. The Supreme Court noted that it was "hard to imagine a situation less conducive to the exercise of 'a rational intellect and a free will' than Mincey's[:]"
[Mincey] had been seriously wounded just a few hours earlier, and had arrived at the hospital "depressed almost to the point of coma," according to his attending physician.

> Although he had received some treatment, his condition at the time of [the officer's] interrogation was still sufficiently serious that he was in the intensive care unit. He complained to the [interrogating officer] that the pain in his leg was "unbearable". He was evidently confused and unable to think clearly about the events of that afternoon or the circumstances of his interrogation, since some of his written answers were on their face not entirely coherent. Finally, while Mincey was being questioned he was lying on his back on a hospital bed, encumbered by tubes, needles, and breathing apparatus. He was, in short, "at the complete mercy" of [the officer], unable to escape or resist the thrust of [the officer's] interrogation.
> Id. at 398-99, 98 S.Ct. at 2416-17 (footnotes omitted).

Of course, no one can be literally forced to speak against their will, as demonstrated by appellant's refusal to cooperate with Coons ***59** despite the trial court's order. The question then is whether a court can impose sanctions due to a defendant's refusal to comply with a court-ordered examination.

In the context of a court-ordered sanity exam, exclusion of the defendant's expert testimony has been suggested as a sanction for the defendant's refusal to cooperate:

> ... [O]nce a defendant indicates his intention to invoke the insanity defense and present expert testimony on the issue, he may be ordered to submit to a psychiatric examination by psychiatrists available to testify for the government, and his refusal to talk to the State's psychiatrists may be sanctioned by the court at the least by exclusion of defendant's own experts' testimony on the insanity issue. [citations omitted] The necessary predicate of that position is that once the defendant indicates his intention to present expert testimony on the insanity issue, the privilege against self- incrimination does not thereafter protect him from being compelled to talk to the State's expert witnesses....

Karstetter v. Cardwell, 526 F.2d 1144, 1145 (9th Cir.1975)(emphasis added). A more extreme sanction is forfeiture of the defendant's right to assert his insanity defense altogether. See United States v. Leonard, 609 F.2d 1163, 1165 n. 3 (5th Cir.1980).

Limiting the testimony of the defendant's rebuttal expert to the same extent that the State's expert was limited due to the defendant's failure to cooperate is a fair and reasonable sanction. [FN20] Just as the defendant's Fifth Amendment rights no longer protect him from being ordered to submit to an examination in these circumstances, neither do they protect him from the trial court's ability to enforce such order. Cf. Karstetter, supra. The trial court did not abuse its discretion in ordering that Griffith be limited to testifying on the basis of a hypothetical.

> FN20. We emphasize that this case does not involve a question of limiting the testimony of a defense expert offered in the defense case in chief where the defendant has merely expressed an intention to introduce psychiatric evidence. Here, appellant has actually presented psychiatric testimony on his behalf, thereby constructively testifying. It is appellant's constructive testimony that gave rise to the waiver of his Fifth Amendment rights and ultimately the ability of the trial court to compel an examination and to enforce that order.

Appellant's second point of error is overruled. [FN21]

> FN21. We are aware of Bradford v. State, 873 S.W.2d 15, 20 (Tex.Crim.App.1993), cert. denied --- U.S. ----, 115 S.Ct. 311, 130 L.Ed.2d 274 (1994), in which a plurality of this Court held that the trial court's order making the admissibility of portions of the defense expert's testimony on future dangerousness contingent upon the defendant's submission to an examination as to that issue by the State's expert violated the defendant's Sixth Amendment right to effective assistance of counsel, and the admission of State's expert's testimony under these circumstances violated the defendant's Fifth Amendment right against self- incrimination. We decline to follow Bradford. The plurality in that decision recognized our opinion in Hernandez, supra, but distinguished that case on the ground that the experts there did not directly testify on the issue of future dangerousness. This distinction is not consistent with the basis of our opinion in Hernandez. Our opinion in that case was not predicated in any respect on the fact that the expert did not express a direct opinion on the issue of future dangerousness. Rather, our holding was predicated on the rationale underlying Buchanan, that
> By introducing appellant's TDC psychiatric records and soliciting Dr. Sparks' opinion concerning those records, appellant "opened the door" to the State's use of the results of his

competency exam for rebuttal purposes. Buchanan, supra, and cases cited above.

Hernandez, 805 S.W.2d at 412. We continue to follow the principles established in Buchanan in our holding today. See Wilkens, supra; Hernandez, supra.

Vernon's Ann.Texas C.C.P. Art. **37.071**

VERNON'S TEXAS STATUTES AND CODES ANNOTATED
CODE OF CRIMINAL PROCEDURE
PART I--CODE OF CRIMINAL PROCEDURE OF 1965
TRIAL AND ITS INCIDENTS
CHAPTER THIRTY-SEVEN--THE VERDICT

Art. **37.071.** Procedure in capital case

Sec. 1. If a defendant is found guilty in a capital felony case in which the state does not seek the death penalty, the judge shall sentence the defendant to life imprisonment.

Sec. 2. (a) If a defendant is tried for a capital offense in which the state seeks the death penalty, on a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court and, except as provided by Article 44.29(c) of this code, before the trial jury as soon as practicable. In the proceeding, evidence may be presented by the state and the defendant or the defendant's counsel as to any matter that the court deems relevant to sentence, including evidence of the defendant's background or character or the circumstances of the offense that mitigates against the imposition of the death penalty. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or the defendant's counsel shall be permitted to present argument for or against sentence of death. The court, the attorney representing the state, the defendant, or the defendant's counsel may not inform a juror or a prospective juror of the effect of a failure of a jury to agree on issues submitted under Subsection (c) or (e) of this article.

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(2) in cases in which the jury charge at the guilt or innocence stage permitted the jury to find the defendant guilty as a party under Sections 7.01 and 7.02, Penal Code, whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken.

(c) The state must prove each issue submitted under Subsection (b) of this article beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted under Subsection (b) of this Article.

(d) The court shall charge the jury that:

(1) in deliberating on the issues submitted under Subsection (b) of this article, it shall consider all evidence admitted at the guilt or innocence stage and the punishment stage, including evidence of the defendant's

background or character or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty;

(2) it may not answer any issue submitted under Subsection (b) of this article "yes" unless it agrees unanimously and it may not answer any issue "no" unless 10 or more jurors agree; and

(3) members of the jury need not agree on what particular evidence supports a negative answer to any issue submitted under Subsection (b) of this article.

(e) The court shall instruct the jury that if the jury returns an affirmative finding to each issue submitted under Subsection (b) of this article, it shall answer the following issue:

Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.

(f) The court shall charge the jury that in answering the issue submitted under Subsection (e) of this article, the jury:

(1) shall answer the issue "yes" or "no";

(2) may not answer the issue "no" unless it agrees unanimously and may not answer the issue "yes" unless 10 or more jurors agree;

(3) need not agree on what particular evidence supports an affirmative finding on the issue; and

(4) shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness.

(g) If the jury returns an affirmative finding on each issue submitted under Subsection (b) of this article and a negative finding on an issue submitted under Subsection (e) of this article, the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under Subsection (b) of this article or an affirmative finding on an issue submitted under Subsection (e) of this article or is unable to answer any issue submitted under Subsection (b) or (e) of this article, the court shall sentence the defendant to confinement in the institutional division of the Texas Department of Criminal Justice for life.

(h) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals.

(i) This article applies to the sentencing procedure in a capital case for an offense that is committed on or after September 1, 1991. For the purposes of this section, an offense is committed on or after September 1, 1991, if any element of that offense occurs on or after that date.

CREDIT(S)

1981 Main Volume

Added by Acts 1973, 63rd Leg., p. 1125, ch. 426, art. 3, § 1, eff. June 14, 1973.

1998 Electronic Pocket Part Update

VIRGINIA

Code 1950, § **19.2-264.3:1**

CODE OF VIRGINIA
TITLE 19.2. CRIMINAL PROCEDURE.
CHAPTER 15. TRIAL AND ITS INCIDENTS.
ARTICLE 4.1. TRIAL OF CAPITAL CASES.

§ **19.2-264.3:1** Expert assistance when defendant's mental condition relevant to capital sentencing.

A. Upon (i) motion of the attorney for a defendant charged with or convicted of capital murder and (ii) a finding by the court that the defendant is financially unable to pay for expert assistance, the court shall appoint one or more qualified mental health experts to evaluate the defendant and to assist the defense in the preparation and presentation of information concerning the defendant's history, character, or mental condition, including (i) whether the defendant acted under extreme mental or emotional disturbance at the time of the offense; (ii) whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was significantly impaired at the time of the offense; and (iii) whether there are any other factors in mitigation relating to the history or character of the defendant or the defendant's mental condition at the time of the offense. The mental health expert appointed pursuant to this section shall be (i) a psychiatrist, a clinical psychologist, or an individual with a doctorate degree in clinical psychology who has successfully completed forensic evaluation training as approved by the Commissioner of Mental Health, Mental Retardation and Substance Abuse Services and (ii) qualified by specialized training and experience to perform forensic evaluations. The defendant shall not be entitled to a mental health expert of the defendant's own choosing or to funds to employ such expert.

B. Evaluations performed pursuant to subsection A may be combined with evaluations performed pursuant to § 19.2-169.5 and shall be governed by subsections B and C of § 19.2-169.5.

C. The expert appointed pursuant to subsection A shall submit to the attorney for the defendant a report concerning the history and character of the defendant and the defendant's mental condition at the time of the offense. The report shall include the expert's opinion as to (i) whether the defendant acted under extreme mental or emotional disturbance at the time of the offense, (ii) whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was significantly impaired, and (iii) whether there are any other factors in mitigation relating to the history or character of the defendant or the defendant's mental condition at the time of the offense.

D. The report described in subsection C shall be sent solely to the attorney for the defendant and shall be protected by the attorney-client privilege.

However, the Commonwealth shall be given the report and the results of any other evaluation of the defendant's mental condition conducted relative to the sentencing proceeding and copies of psychiatric, psychological, medical or other records obtained during the course of such evaluation, after the attorney for the defendant gives notice of an intent to present psychiatric or psychological evidence in mitigation pursuant to subsection E.

E. In any case in which a defendant charged with capital murder intends, in the event of conviction, to present testimony of an expert witness to support a claim in mitigation relating to the defendant's history, character or mental condition, he or his attorney shall give notice in writing to the attorney for the Commonwealth, at least twenty-one days before trial, of his intention to present such testimony. In the event that such notice is not given and the defendant tenders testimony by an expert witness at the sentencing phase of the trial, then the court may, in its discretion, upon objection of the Commonwealth, either allow the Commonwealth a continuance or, under appropriate circumstances, bar the defendant from presenting such evidence.

F. 1. If the attorney for the defendant gives notice pursuant to subsection E and the Commonwealth thereafter seeks an evaluation concerning the existence or absence of mitigating circumstances relating to the defendant's mental condition at the time of the offense, the court shall appoint one or more qualified experts to perform such an evaluation. The court shall order the defendant to submit to such an evaluation, and advise the defendant on the record in court that a refusal to cooperate with the Commonwealth's expert could result in exclusion of the defendant's expert evidence. The qualification of the experts shall be governed by subsection A. The location of the evaluation shall be governed by subsection B of § 19.2-169.5. The attorney for the Commonwealth shall be responsible for providing the experts the information specified in subsection C of § 19.2-169.5. After performing their evaluation, the experts shall report their findings and opinions and provide copies of psychiatric, psychological, medical or other records obtained during the course of the evaluation to the attorneys for the Commonwealth and the defense.

2. If the court finds, after hearing evidence presented by the parties, out of the presence of the jury, that the defendant has refused to cooperate with an evaluation requested by the Commonwealth, the court may admit evidence of such refusal or, in the discretion of the court, bar the defendant from presenting his expert evidence.

G. No statement or disclosure by the defendant made during a competency evaluation performed pursuant to § 19.2-169.1, an evaluation performed pursuant to § 19.2-169.5 to determine sanity at the time of the offense, treatment provided pursuant to § 19.2-169.2 or § 19.2-169.6 or a capital sentencing evaluation performed pursuant to this section, and no evidence derived from any such statements or disclosures may be introduced against the defendant at the sentencing phase of a capital murder trial for the purpose of proving the aggravating circumstances specified in § 19.2-264.4. Such statements or disclosures shall be admissible in rebuttal only when relevant to issues in mitigation raised by the defense.

(1986, c. 535; 1987, c. 439; 1996, cc. 937, 980.)

NOTES, REFERENCES, AND ANNOTATIONS

The 1996 amendments. -- The 1996 amendments by cc. 937 and 980 are identical, and in subsection A, in the second sentence, deleted "licensed" following "a psychiatrist, a" and deleted "a licensed psychologist registered with the Board of Psychology with a specialty in clinical services" following "clinical psychologist."

Waiver of Fifth Amendment privilege. -- When a defendant has given notice that he intends to present evidence of his mental condition in the penalty phase of the trial, he waives his Fifth Amendment privilege against the introduction of psychiatric testimony by the prosecution. Savino v. Commonwealth, 239 Va. 534, 391 S.E.2d 276, cert. denied, 498 U.S. 882, 111 S. Ct. 229, 112 L. Ed. 2d 184 (1990).

The defendant waived his Fifth Amendment rights by requesting a psychiatric evaluation pursuant to this section. This section, both on its face and by operation, provided the defense with adequate notice of the waiver. Savino v. Murray, 82 F.3d 593 (4th Cir. 1996), cert. denied, -- U.S. --,117 S. Ct. 1, 135 L. Ed. 2d 1098 (1996).

Defendant's Sixth Amendment right to counsel was not violated, where he was on notice that, by virtue of this section, an examination would be conducted by the Commonwealth's expert in an effort to produce evidence against his interests. Savino v. Commonwealth, 239 Va. 534, 391 S.E.2d 276, cert. denied, 498 U.S. 882, 111 S. Ct. 229, 112 L. Ed. 2d 184 (1990).

Fact that defendant may not have received from appointed expert the opinion he wanted is completely immaterial. Defendant does not have a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. Put another way, defendant has no right to "shop around" at state expense until he finds a doctor who will give him the opinion he wants. Pruett v. Commonwealth, 232 Va. 266, 351 S.E.2d 1 (1986), cert. denied, 482 U.S. 931, 107 S. Ct. 3220, 96 L. Ed. 2d 706 (1987).

Opinion on future dangerousness permitted. -- This section differentiates between a defendant's statements made during psychiatric evaluation and an expert's opinion based upon such statements. Because this section does not preclude use of the opinion of the state's examiner for establishing an aggravating circumstance, an expert's opinion on future dangerousness is also permitted. Savino v. Murray, 82 F.3d 593 (4th Cir. 1996), cert. denied, -- U.S. --,117 S. Ct. 1, 135 L. Ed. 2d 1098 (1996).

Indigent defendant was not entitled to select his examining psychiatrist if the state was paying for the examination. Mackall v. Commonwealth, 236 Va. 240, 372 S.E.2d 759 (1988), cert. denied, 492 U.S. 925, 109 S. Ct. 3261, 106 L. Ed. 2d 607 (1989).

Indigent defendant was not entitled to a second psychiatric examination at state expense where the Commonwealth already had paid for his first examination. Mackall v. Commonwealth, 236 Va. 240, 372 S.E.2d 759 (1988), cert. denied, 492 U.S. 925, 109 S. Ct. 3261, 106 L. Ed. 2d 607 (1989).

Applied in Mu'Min v. Commonwealth, 239 Va. 433, 389 S.E.2d 886 (1990); Cardwell v. Netherland, 971 F. Supp. 997 (E.D. Va. 1997).

Code 1950, § **19.2-264.3:1**
VA ST § **19.2-264.3:1**
END OF DOCUMENT

FEDERAL LAW

Amendments received to 8-21-1998

Rule 12.2. Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition

(a) Defense of Insanity. If a defendant intends to rely upon the defense of insanity at the time of the alleged offense, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this subdivision, insanity may not be raised as a defense. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(b) Expert Testimony of Defendant's Mental Condition. If a defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing upon the issue of guilt, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(c) Mental Examination of Defendant. In an appropriate case the court may, upon motion of the attorney for the government, order the defendant to submit to an examination pursuant to 18 U.S.C. 4241 or 4242. No statement made by the defendant in the course of any examination provided for by this rule, whether the examination be with or without the consent of the defendant, no testimony by the expert based upon such statement, and no other fruits of the statement shall be admitted in evidence against the defendant in any criminal proceeding except on an issue respecting mental condition on which the defendant has introduced testimony.

(d) Failure To Comply. If there is a failure to give notice when required by subdivision (b) of this rule or to submit to an examination when ordered under subdivision (c) of this rule, the court may exclude the testimony of any expert witness offered by the defendant on the issue of the defendant's guilt.

(e) Inadmissibility of Withdrawn Intention. Evidence of an intention as to which notice was given under subdivision (a) or (b), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

CREDIT(S)

1986 Main Volume

(Added Apr. 22, 1974, eff. Dec. 1, 1975, and amended July 31, 1975, Pub.L. 94-64, § 3(14), 89 Stat. 373; Apr. 28, 1983, eff. Aug. 1, 1983; Oct. 12, 1984, Pub.L. 98-473, Title II, § 404, 98 Stat. 2067; Oct. 30, 1984, Pub.L. 98-596, § 11(a), (b), 98 Stat. 3138; Apr. 29, 1985, eff. Aug. 1, 1985.)

UNITED STATES of America, Plaintiff,
v.
Richard HAWORTH, et al., Defendants.

Criminal No. 95-0491 LH.

United States District Court,
D. New Mexico.

June 7, 1996.

Defendants were charged with various offenses arising from alleged marijuana distribution operation. On government's motion for notice of intent to introduce expert testimony of capital defendants' mental condition, the District Court, Hansen, J., held that government would be permitted independent psychological examinations of death-eligible defendants' mental condition during penalty phase of trial, for use in rebuttal of anticipated mitigation expert testimony during penalty phase.

Motion granted.

Motion to dismiss denied, 941 F.Supp. 1057.

Motions for severance granted, 168 F.R.D. 658.

Order issued regarding disclosure of medical records, 168 F.R.D. 660.

[1] CRIMINAL LAW ⚿981(2)
110k981(2)
Government would be permitted independent psychological examinations of death- eligible defendants' mental condition during penalty phase of trial, for use in rebuttal of anticipated mitigation expert testimony during penalty phase; government's statutory right to rebut information received at penalty phase would be sharply curtailed if examinations were not permitted, examinations were necessary for government's expert to meaningfully address defense expert's conclusions, examinations would not chill defendants' right to present evidence in mitigation, and examinations would not infringe on privilege against self- incrimination. U.S.C.A. Const.Amend. 5; Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(j), 21 U.S.C.A. § 848(j).

[2] CRIMINAL LAW ⚿1208.1(6)
110k1208.1(6)
If defendant elects to present evidence of his or her mental condition as reason why he or she should not be sentenced to death, government must be able to follow where defendant has led and introduce its own countervailing evidence.

[3] WITNESSES ⚿308
410k308
Interests of the other party and regard for function of courts of justice to ascertain truth become relevant, and prevail in balance of considerations determining scope and limits of privilege against self-incrimination. U.S.C.A. Const.Amend. 5.

***1407** Elizabeth Martinez and Robert Kimball, U.S. Attorney's Office, District of New Mexico, Albuquerque, NM, for Plaintiff.

Michael V. Davis, Marc H. Robert, Billy R. Blackburn, Paul J. Kennedy, Peter Schoenburg, Serapio L. Jaramillo, Floyd W. Lopez, Edward O. Bustamante, Roberto Albertorio, E. Justin Pennington, Albuquerque, NM, for Defendants.

ORDER GRANTING GOVERNMENT'S MOTION FOR NOTICE OF INTENT TO INTRODUCE EXPERT TESTIMONY OF CAPITAL DEFENDANTS' MENTAL CONDITION

HANSEN, District Judge.

THIS MATTER comes before the Court on the Government's Motion for Notice of Intent to Introduce Expert Testimony of Capital Defendants' Mental Condition, and for Court-Ordered Examination on Receipt of Notice (Docket No. 342). Having considered the parties' memoranda and oral arguments, the Court finds that the motion is well taken and will be granted.

[1] The Government anticipates that death-eligible defendants, Richard Haworth and Everett Spivey, if they are convicted, may introduce mitigation expert testimony regarding their mental condition during the penalty phase of trial. The Government argues that its only means of rebutting this evidence is by way of its own expert's mental examination of these defendants. Defendants respond by arguing that there is no statutory or other authority permitting the court to order an independent mental examination for the penalty phase of trial, and that such an independent examination may violate their Fifth Amendment privilege against self-incrimination.

Although Defendants are correct that there is no statute or rule expressly permitting a court to order an independent psychological examination for the government's use in rebuttal in the penalty phase, the applicable statutes provide indirect support for the Government's request in this case. Pursuant to 21

U.S.C. § 848(m), the defendant may introduce evidence of any mitigating factor, including the significant impairment of the defendant's capacity to appreciate the wrongfulness of his conduct. Such evidence would most likely be presented by an expert in psychology or psychiatry. The same statute, 21 U.S.C. § 848(j), states that the government is entitled to rebut "any information received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the ... mitigating ***1408** factors[.]" The Government's ability to rebut a defendant's evidence of mental condition would be sharply curtailed if it is not allowed to have the defendant examined by an independent mental health professional.

Defendant Haworth argued at the April 15, 1996, hearing that the Government may adequately rebut any expert's testimony if the Government has access to the defense expert's report. Thus, the Government's own expert may critique the defense expert's methods and conclusions without resort to an independent examination. The Court disagrees. Psychiatry is far from an exact science because it does not rely primarily on the analysis of raw data. Instead, "[t]he basic tool of psychiatric study remains the personal interview, which requires rapport between the interviewer and the subject." Rollerson v. United States, 343 F.2d 269, 274 (D.C.Cir.1964). The Government's expert cannot meaningfully address the defense expert's conclusions unless the Government's expert is given similar access to the "basic tool" of his or her area of expertise: an independent interview with and examination of the defendant.

[2] A court-ordered independent mental examination does not chill the defendants' virtually unfettered right to present any evidence in mitigation during the sentencing phase, as Defendants argue. Spivey's Opposition to Government's Motion for Notice of Intent to Introduce Expert Testimony of Capital Defendants' Mental Condition and For Court Ordered Mental Examination on Receipt of Such Notice ("Spivey's Opposition") at 5-6. Defendants continue to have free rein during the punishment trial. However, if a defendant elects to present evidence of his mental condition as a reason why he should not be sentenced to death, the Government "must be able to follow where he has led" and introduce its own countervailing evidence. United States v. Byers, 740 F.2d 1104, 1113 (D.C.Cir.1984).

Defendants further argue that a court-ordered independent psychological examination will infringe on their Fifth Amendment privilege against compelled self-incrimination, citing Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981). Spivey's Opposition at 8-9. However, the circumstance condemned in Estelle does not exist in the present case. In Estelle, during the capital penalty trial, the state introduced a psychiatrist's testimony that the defendant would be a continuing threat to society, evidence necessary to the imposition of the death penalty in Texas. Id. at 458-59, 101 S.Ct. at 1870-71. The constitutional difficulty arose because the evidence relied on by the psychiatrist came directly from the psychiatrist's pretrial examination of the defendant which had been ordered for the sole purpose of determining the defendant's competency to stand trial. Id. The Court held that the introduction of this evidence at the penalty trial violated the defendant's Fifth Amendment privilege against compelled self-incrimination, stating, "A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding." Id. at 468, 101 S.Ct. at 1876.

[3] The present circumstances may be distinguished from the situation in Estelle. The Government will not be entitled to a court-ordered independent mental examination unless and until the Defendants give notice that they intend to introduce psychiatric evidence at the penalty phase. In addition, the Government will not be permitted to introduce evidence obtained in the course of the independent psychiatric examination unless and until Defendants themselves introduce psychiatric testimony. To refuse the Government this opportunity to rebut Defendants' evidence would be analogous to refusing the government the chance to cross-examine a defendant after he has testified in his own behalf. As the Supreme Court said in Brown v. United States, 356 U.S. 148, 155-56, 78 S.Ct. 622, 627, 2 L.Ed.2d 589 (1958), "[t]he interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination." Nevertheless, the Court is mindful that the independent examination sought by the Government has the potential ***1409** for treading on the Defendants' Fifth Amendment rights, and the Court

will, therefore, impose strict limitations on the examination procedure employed. See, e.g., W.S. White, Government Psychiatric Examinations and the Death Penalty, 37 ARIZ.L.REV. 869 (1995).

The Court is aware that the timing of the court-ordered examination may be critical, both to the defense and the Government. In order for the defendants to prepare to meet the court-appointed expert's testimony, the expert's report should be made available to the defendants before the penalty phase, if any, begins. However, on the record before it, the Court is unable to anticipate how much time the Government will need to arrange for the court-ordered examination or how much time the defendants will need for evaluation of the expert's report. Therefore, if the defendants give notice of their intent to introduce a mental health expert's testimony at the penalty trial, the Court will ask the parties to submit their recommendations regarding the timing of the court-ordered examination, as well as the safeguards to be employed to protect the defendants' rights.

IT IS, THEREFORE, ORDERED that by August 1, 1996, Defendants Haworth and Spivey will file notice indicating whether they do or do not intend to introduce expert testimony at the penalty phase regarding their respective mental conditions. If either or both defendants intend to introduce such testimony, they will include in their notice the name and qualifications of the expert or experts they intend to call and a brief summary of each expert's conclusions; whereupon

1. The Court will require the parties to submit their recommendations regarding the expert to be appointed, the timing of the examination, and the safeguards to be implemented in the completion of the examination;

2. The Court will order an independent examination by a psychiatrist or psychologist;

3. The results of the court-ordered examination and any examination initiated by Defendants Haworth and Spivey will be filed under seal with the Court, and neither party will discuss the court-ordered examination with the court- appointed mental health professional;

4. If the jury reaches a verdict of guilty with respect to the capital crimes charged against either Defendant Haworth or Defendant Spivey, the results of any court-ordered examination will be released to the affected defendant and to the Government at the Court's discretion with respect to that defendant;

5. The Court will not permit the Government to introduce at the penalty phase any evidence obtained as a result of any court-ordered examination until the defendant who is the subject of the examination introduces evidence of his mental condition, and the Court, as it deems necessary, will impose additional limitations on the evidentiary use of the court-ordered examination; and,

6. If a defendant fails to provide notice or fails to participate in a court- ordered mental examination, that defendant may forfeit his right to introduce evidence of his mental condition at the penalty phase.

END OF DOCUMENT

UNITED STATES of America,
v.
Dean Anthony BECKFORD, Claude Gerald Dennis, Leonel Romeo Cazaco, and Richard Anthony Thomas.

Criminal Nos. 3:96CR66-01, 3:96CR66-05, 3:96CR66-06, and 3:96CR66-07.

United States District Court,
E.D. Virginia,

Richmond Division.

March 28, 1997.

In prosecution for intentional murder in furtherance of continuing criminal enterprise, in which the government had notified defendants of intent to seek death penalty, government filed motion for notice and reciprocal discovery of mental health defenses. The District Court, Payne, J., held that: (1) Rules of Criminal Procedure did not provide authority for notice and reciprocal discovery which government sought respecting penalty phase of trial; (2) district court had inherent authority for imposition of notice, examination and discovery of mental health conditions in death penalty phase; (3) subsection of such statute providing that the government shall be permitted to rebut any information received at the death penalty hearing provided statutory basis for court to assert its inherent authority; (4) need to strike balance between securing defendant's rights against compelled self-incrimination and affording government meaningful right of rebuttal on mental health issues is struck by requiring reasonably early notice by defendant of intent to rely on mental health or mental conditions in mitigation of death in penalty phase, requiring examination within reasonable time thereafter, and deferring release to the government of reports of both government's experts and defense experts until after finding of guilt and confirmation by defendant of intent to offer mental health evidence; (5) protection afforded by Fifth Amendment ceases when defendant indicates that he intends to introduce mental health evidence at penalty phase of capital case, and where that decision is made on advice of counsel, there is no infringement of the Sixth Amendment; (6) where defendant is required to give pretrial notice of intent to use mental health evidence at sentencing phase, statements made in court-ordered examination cannot constitutionally be used against defendant at guilt phase; (7) it is not appropriate to defer notice of examination after the guilt phase trial; (8) notice by defendant need not include nature of proffered mental condition or defect or date of onset; and (9) to require the defense to provide the government with any and all materials supplied to the defense expert that form the basis of expert's opinion would violate defendant's right to effective assistance of counsel.

Motion granted in part and denied in part.

MEMORANDUM OPINION

PAYNE, District Judge.

Defendants Dean Anthony Beckford, Claude Gerald Dennis, Leonel Romeo Cazaco, and Richard Anthony Thomas have been charged in the Superseding Indictment with intentional murder in furtherance of a Continuing Criminal Enterprise in violation of 21 U.S.C. § 848(e). Pursuant to 21 U.S.C. § 848(h), the Government has notified each defendant that it intends to seek a penalty of death in the event of conviction and has posited with specificity the statutory and non-statutory aggravating factors which it will seek to prove as the basis for imposition of the death penalty. This is, then, a capital case under Section 848(e).

The Government has filed a Motion For Notice and Reciprocal Discovery of Mental Health Defenses to be Raised at Either the Guilt or Penalty Phases of the Trial ("Government's Motion") Therein, the Government moves for entry of an order:

(1) requiring any defendant who intends to introduce evidence of his mental health or capacity at any phase of the trial to file a notice of intent by a date certain and therein to specify:

*752 (a) the nature of the proffered mental condition or defect and the date of its onset;

(b) the identity and qualifications of the mental health experts who will testify or whose opinions will be relied upon; and

(c) a summary of the diagnosis or diagnoses of said mental health experts and a summary of the basis for their opinions;

(2) requiring that any examination of the defendant undertaken by a defense expert, whether at government expense or otherwise, be properly recorded by videotape, audiotape, and/or stenography so that the Government and its experts may have adequate opportunity to evaluate the accuracy of said examination and prepare a rebuttal to the mental health evidence offered by the defendant;

(3) requiring any defendant who gives notice of intent to raise a mental health defense to submit to examination by an expert or experts of the Government's choosing;

(4) requiring the defense to provide the Government with any and all materials that form the basis of the defense expert's opinion; and

(5) ordering the defendants to comply with the reciprocal discovery obligations set forth in Federal Rules of Criminal Procedure 12.2 and 16(b) by a date certain set by this Court.

For the reasons set forth below, the Government's Motion is granted in part and denied in part.

BACKGROUND

The mental health and mental capacity of a capital defendant is relevant to a sentencing proceeding under 21 U.S.C. § 848 in several respects. First, at least three statutory mitigating factors may implicate the defendant's mental health or capacities, either at the time of the offense or at the time of sentencing. See, e.g. Section 848(m)(1) ("[t]he defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform conduct to the requirements of the law was significantly impaired"); Section 848(m)(7) ("[t]he defendant committed the offense under severe mental or emotional disturbance"); and Section 848(m)(10) ("[t]hat other factors in the defendant's background or character mitigate against imposition of the death sentence"). Second, Section 848(1) provides that "a sentence of death shall not be carried out upon a person who is mentally retarded." This provision constitutes a legal bar to imposition of capital punishment on a certain class of defendants based on mental status.

Thus, the controlling statute affords a death-eligible defendant several opportunities to rely on his mental health or condition to oppose imposition of the death penalty. Section 848 also explicitly provides that the Government "shall be permitted to rebut any information received at the hearing and shall be given a fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the ... mitigating factors ..." 21 U.S.C. § 848(j). [FN1]

> FN1. Under the statute, any one juror may find the existence of any mitigating factor by a preponderance of the evidence while the government must prove the existence of aggravating factors to the satisfaction of a unanimous jury beyond a reasonable doubt. 21 U.S.C. § 848(k).

The Government anticipates that, if Beckford, Dennis, Cazaco, and Thomas are convicted of capital charges, they will introduce expert testimony respecting their mental condition during the penalty phase of the trial to support reliance on some, or perhaps all, of the statutory mitigating factors summarized above. The Government also apprehends, based on statements made by counsel for Cazaco, that Thomas may raise the bar of Section 848(1). The Government asserts that it can meaningfully rebut this expected evidence only by offering the testimony of its experts after those experts are permitted to examine the defendants. Defendants respond that there is no statutory or other authority permitting a court to order an independent mental examination for the penalty phase of a capital trial, and that any such examination would violate the Fifth Amendment privilege against self-incrimination.

*753 DISCUSSION

The Government's Motion and the positions taken by the defendants raise several issues of significance. Resolution of those issues necessitates a careful assessment of the tension between 21 U.S.C. § 848 and the constitutional protections afforded the defendants by the Fifth Amendment and, to some extent, by the Sixth Amendment. Many of those issues have not been accorded extensive judicial consideration and none of them are the subject of controlling authority in the Fourth Circuit.

I. GUILT PHASE MENTAL HEALTH NOTICE, EXAMINATION AND DISCOVERY

The defendants recognize that Federal Rules of Criminal Procedure 12.2 and 16(b) impose discovery requirements on capital defendants with respect the presentation of mental health defenses at the guilt phase of the trial. See, Fed.R.Crim.P. 12.2, 16(b). Rules 12.2(a) and 12.2(b) require that defendants provide notice of their intention to present evidence of mental health illness or defect during the guilt phase of any criminal trial. If such a notice is given, a court may order a defendant to submit to an examination by a government expert. Fed.R.Crim.P. 12.2(c). The defendants further recognize the reciprocal discovery provisions of Rule 16(b)(1) relating to a defendant's guilt phase evidence and do not contest that those obligations extend to evidence respecting mental condition.

The timing of the defendants' reciprocal discovery is governed by Rule 12.2. That rule provides that, if a defendant intends at trial to rely on the defense of insanity at the time of the alleged offense or intends to introduce expert testimony relating to any other mental condition, he shall provide notice to the Government and the Court "within the time provided for the filing of pretrial motions or at such later time

as the Court may direct." Fed.R.Crim.P. 12.2(a); see also Fed.R.Crim.P. 12.2(b) (same). In this case, the Court set November 11, 1996 as the date upon which all pretrial motions "then knowable to counsel" were to be filed. [FN2] See Order, October 8, 1996 at 3. That Order also provided, however, that "[a]ny party may thereafter file a motion with supporting brief if the ground for such motion was not reasonably knowable on November 11, 1996 and upon a showing of good cause for the proposed late filing." Id. The Government's Motion has created the potential for misunderstanding this previous Order with respect to the deadlines set for the filing of pretrial motions.

> FN2. This date, of course, was not applicable to Defendant Beckford, who was not arraigned until December 23, 1996. On that date, however, by Order, the Court mandated that "[a]ll motions on behalf of the defendants shall be filed not later than January 22, 1997."

To date, no defendant has provided Rule 12.2 notice, and the time to do so has come and gone because the time for filing pretrial motions has expired, and the Court has not directed a later time for the filing of Rule 12.2 notice, nor has any defendant requested an extended time for filing such a notice. However, some confusion has been interjected into the proceedings because of the Government's request in its Motion that the Court "set a uniform deadline for all [defendants] for notice of any mental health defenses going to either guilt or sentence." Therefore, notwithstanding the Orders of October 8, 1996 and December 23, 1996, it is possible that defendants have been waiting for the resolution of the Government's Motion to determine whether they intend to rely on mental health defenses at the trial as well as at sentencing. Therefore, to afford the defendants a full opportunity to consider whether they will present mental health testimony at the guilt phase, the Court will allow the defendants to provide notice under Rule 12.2 not later than April 28, 1997.

II. PENALTY PHASE MENTAL HEALTH NOTICE, EXAMINATION AND DISCOVERY

A. THE LEGAL PRINCIPLES APPLICABLE TO NOTICE, EXAMINATION AND DISCOVERY IN THE DEATH PENALTY PHASE OF PROSECUTIONS UNDER 21 U.S.C. § 848.

The threshold questions are whether a defendant in a capital case under Section 848 ***754** can be required to give notice of his intent to introduce mental health testimony bearing on the determination of an appropriate penalty, and whether he may be subjected to a court-ordered examination and to reciprocal discovery obligations. The analysis of these issues implicates the Federal Rules of Criminal Procedure, the inherent judicial power to regulate the course of criminal cases, and the terms of 21 U.S.C. § 848(j), which confers the right of rebuttal upon the Government. And, of course, this assessment must be made against the backdrop of the constitutional strictures fixed by the Fifth and Sixth Amendments.

1. The Federal Rules of Criminal Procedure

[1][2][3] The Government concedes, as it must, that neither Fed.R.Crim.P. 12.2 nor 16(b)(1) applies explicitly to the penalty phase of the case. More importantly, the rather explicit language of both rules limits their application to the guilt phase of a trial. See, e.g. Fed.R.Crim.P. 12.2(b) ("If a defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing upon the issue of guilt ...") (emphasis added); Fed.R.Crim.P. 12.2(a) (respecting notice of the insanity defense at trial); Fed.R.Crim.P. 16(b)(1)(A) (respecting evidence "which the defendant intends to introduce as evidence in chief at the trial ") (emphasis added); Fed.R.Crim.P. 16(b)(1)(B) (same). [FN3] The plain language of the rules, therefore, cannot be read to provide authority for the notice and reciprocal discovery which the Government asks the Court to order respecting the penalty phase of the trial.

> FN3. The Government makes much of the fact that the words "case in chief" do not appear in subsection (b)(1)(C) of Rule 16. That subsection requires the defendant to "disclose to the government a written summary of testimony the. defendant intends to use under Rules 702, 703 and 705 of the Federal Rules of Evidence as evidence at trial. This summary must describe the opinions of the witnesses, the bases and reasons therefor, and the witness' qualifications." Fed.R.Crim.P. 16(b)(1)(C) (emphasis added). From that point of departure, the Government argues that, because that subsection says nothing about "case-in-chief" or "guilt," that part of Rule 16 applies to expert testimony the defendant intends to use at sentencing as well as at trial on the guilt issue.
>
> That interpretation of Rule 16(b)(1)(C) is unconvincing. First, under the terms of the federal death penalty statute, the Federal Rules of Evidence are inapplicable to sentencing

phase proceedings. See 21 U.S.C. 848(j) ("Any [ ] information relevant to such mitigating or aggravating factors may be presented by either the Government or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials, except that information may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.") (emphasis added). Thus, the reference in Rule 16(b)(1)(C) to "Rules 702, 703 and 705 of the Federal Rules of Evidence" in Fed.R.Crim.P. 16(b)(1)(C) cannot reasonably be construed to apply to a capital sentencing proceeding. Second, as explained above, Rule 16(b)(1), when read as a whole, applies only to the guilt phase of a prosecution, the omission of the phrase "case in chief" in one subsection of that Rule notwithstanding.

2. The Inherent Judicial Power

[4] The Government next asserts that the function of mental health issues which may be raised during the penalty phase of a capital prosecution is directly analogous to the function served by the insanity defense presented at the guilt phase of any trial and that, therefore, the analytical framework established by the Federal Rules provides the guiding principles to be applied concerning notice and reciprocal discovery in the penalty phase.

This, of course, is an argument that the authority to impose notice and reciprocal discovery is an inherent judicial power which need not be grounded in a specific statute or rule. It also is an assertion that such power, if it exists, should be exercised in exactly the same manner as prescribed by Rules 12.2 and Rule 16(b).

The first, and determinative, question is whether there is inherent judicial power to order notice and reciprocal discovery. Confronted with situations in which the Federal Rules of Criminal Procedure were not applicable, courts historically have invoked inherent judicial powers to address the general circumstances here presented and to craft appropriate solutions to them. For example, before the enactment of Fed.R.Crim.P. 12.2 in 1974, numerous courts, including the *755 Fourth Circuit, had recognized the existence of inherent judicial authority to order a defendant to give the Government notice of a psychiatric defense and to submit to examination by a Government expert. See, e.g., United States v. Albright, 388 F.2d 719, 722 (4th Cir.1968); Pope v. United States, 372 F.2d 710 (8th Cir.1967) (en banc), vacated and reversed on other grounds, 392 U.S. 651, 88 S.Ct. 2145, 20 L.Ed.2d 1317 (1968); Alexander v. United States, 380 F.2d 33 (8th Cir.1967); Winn v. United States, 270 F.2d 326 (D.C.Cir.1959), cert. denied, 365 U.S. 848, 81 S.Ct. 810, 5 L.Ed.2d 812 (1961).

In Albright, the Fourth Circuit explained that: "the principle seems established that a district court in a criminal case has inherent power to require a psychiatric examination of a defendant, where the defendant has pleaded insanity as a defense, submitted to examiners of his own choosing and presented testimony to support his defense.... We hold, therefore, that the district court had ample authority to order a defendant to submit to a psychiatric examination." 388 F.2d at 722-23. [FN4] Although Albright pre-dated Rule 12.2, the proposition for which it stands (that courts have the inherent authority to require notice and to order psychiatric examinations) has been affirmed by the Fourth Circuit since the promulgation of Rule 12.2. See, e.g. Gibson v. Zahradnick, 581 F.2d 75, 78 (4th Cir.1978) ("we held [in Albright] that a federal court had inherent authority to order a psychiatric examination and evaluation to assist in a determination of the defendant's mental and emotional condition"), cert. denied, 439 U.S. 996, 99 S.Ct. 597, 58 L.Ed.2d 669 (1978); United States v. Lewis, 53 F.3d 29, 35-36 n. 9 (4th Cir.1995) (district court did not err in ordering psychiatric examination in light of defendant's stated intent to rely upon claim of sub- normal intelligence in support of entrapment defense despite the technical inapplicability of Rule 12.2(b)). The Government urges the exercise of those inherent powers to craft penalty phase reciprocal discovery requirements similar to those specified in Rules 12.2 and 16(b)(1) for the guilt phase of the trial.

FN4. In Pope v. United States, a case which, like Albright, pre- dated the adoption of Rule 12.2, the Eighth Circuit, sitting en banc, also held that a district court possessed inherent authority to compel the defendant to submit to mental examination. Then-Judge Blackmun wrote for the unanimous Eighth Circuit:
It would be a strange situation, indeed, if, first, the government is to be compelled to afford the defense ample psychiatric service and evidence at government expense and, second, if the government is to have the burden of proof, and yet it is to be denied the

> opportunity to have its own corresponding and verifying examination, a step which perhaps is the most trustworthy means of attempting to meet that burden.
>
> We therefore specifically hold that by raising the issue of insanity, by submitting to psychiatric and psychologic examination by his own examiners, and by presenting evidence as to mental incompetency from the lips of the defendant and those examiners, the defense raised that issue for all purposes and that the government was appropriately granted leave to have the defendant examined by experts of its choice and to present their opinions in evidence.
>
> 388 F.2d at 720.

The defendants assert that those inherent powers were abrogated by promulgation of the Federal Rules of Criminal Procedure. Specifically, the defendants contend that, because the rules provide for notice, examination and discovery respecting the guilt phase but do not provide for notice, examination or discovery in the penalty phase, whatever inherent judicial powers existed before the promulgation of Rules 12.2 and 16 did not survive. That argument does not square with substantial decisional authority to the contrary.

Indeed, numerous courts, including the Fourth Circuit, have recognized that the discovery provisions in Rules 12.2 and 16(b) are not exclusive and do not supplant a district court's inherent authority to order discovery outside the rules. See, e.g. United States v. Fletcher, 74 F.3d 49, 54 (4th Cir.1996) (district court had authority to require defendant to produce witness list prior to trial); United States v. Kloepper, 725 F.Supp. 638, 640 (D.Mass.1989) (district court has inherent authority to order handwriting exemplars and fingerprints of defendant to be produced even though not specifically listed in Rule 16); United States v. Hearst, 412 F.Supp. 863, 870 (N.D.Cal.1975) (defendant ordered to give government notice and discovery of ***756** novel defense of "brainwashing" by a cult group despite the fact that it did not fall within the strict dictates of Rule 12.2); United States v. North, 708 F.Supp. 399, 401 (D.D.C.1988) (defendant ordered to produce to government pretrial classified documents upon which he intended to rely at trial); United States v. Bender, 331 F.Supp. 1074, 1075 (C.D.Cal.1971) ("It has long been held that the Federal Courts possess inherent authority to order discovery and inspection."); but see United States v. Akers, 945 F.Supp. 1442, 1446-49 (D.Colo.1996) (interpreting Rule 12.2(a) as mandating government examination of defendant only where defendant provides notice of reliance on the insanity defense as opposed to other evidence of mental condition) (citing United States v. Davis, 93 F.3d 1286 (6th Cir.1996) (same)).

The decision in United States v. Kloepper, 725 F.Supp. 638 (D.Mass.1989), is particularly instructive. In Kloepper, the defendant objected to a magistrate judge's order requiring the defendant to provide a handwriting exemplar and to submit to the taking of fingerprints and palmprints before trial. The defendant argued that courts were without the power to make such an order absent authority by statute or rule of court. The district court recognized that the order was "for production of a type of evidence not specifically described in the discovery provisions of Fed.R.Crim.P. 16." Id. at 640. Nonetheless, the district court affirmed the order based on the inherent power of the courts to require discovery in criminal cases, finding that:

> [P]rior to the first promulgation of the Criminal Rules in 1946, Federal criminal procedure in the District Courts grew out of the inherent powers of the Courts to develop their own procedure. The Federal Rules of Criminal Procedure were not designed to and do not entirely supplant this fundamental authority and residual power of the Court. It has long been held that the Federal Courts possess the inherent power to order discovery and inspection.

Id. (quoting United States v. Bender, 331 F.Supp. 1074, 1075 (C.D.Cal.1971)) (emphasis added); see also Id. ("to the extent that Rule 16 does not express a policy prohibiting discovery not explicitly authorized by the Rules, the court is free, either by local rule or by adjudication, to permit discovery on the basis of its inherent power.") (quoting United States v. Taylor, 25 F.R.D. 225, 228 (E.D.N.Y.1960)); Peek v. United States, 321 F.2d 934, 942 (9th Cir.1963) ("[Q]uite apart from Rules 16 and 17(c) the court possesses inherent authority to grant requests for production of material."). [FN5]

> FN5. Defendant Beckford cites United States v. Layton, 90 F.R.D. 520 (N.D.Cal.1981), for the proposition that pre-existing procedures simply do not survive contrary legislative codification. Id. at 522-23 (rejecting Government's theory of "inherent powers" to order discovery in the wake of new discovery rules).
>
> Beckford's argument, however, is contrary to the overwhelming weight of authority cited above. Moreover, Layton is readily

distinguishable from this case. In Layton, the Government sought discovery of taped conversations between the defendant and his privately retained psychiatrist. It was undisputed that neither side intended to call that psychiatrist at trial or attempt to introduce the tapes into evidence. The court held that this "non-evidentiary use of the tapes" was too slight a Government interest to require their production. Id. at 523. The Layton Court specifically noted that the purpose behind discovery of psychiatric information--preparation for cross-examination--was therefore not implicated by the Government's request. In this case, however, the Government seeks notice of the names of expert witnesses who will testify for the defense, their qualifications, and their written reports, as well as the opportunity to conduct its own examination. Clearly, this requested use is "evidentiary" as Layton used that term.

More importantly, the argument that judicial authority to address a circumstance presented in criminal cases exists only where a specific rule governs that circumstance runs counter to the fact that the Federal Rules of Criminal Procedure themselves explicitly recognize that the rules cannot cover every situation which may arise during the course of criminal cases. That is why Rule 57(b) provides that where no law or rule is directly applicable, "[a] judge may regulate practice in any manner consistent with federal law, these rules, and local rules of the district." Fed.R.Crim.P. 57(b). Hence, it seems rather clear that the inherent powers of the courts to fashion rules of discovery has been incorporated in the Rules by Fed.R.Crim.P. 57(b). *757 See United States v. Kloepper, 725 F.Supp. at 640; United States v. Bender, 331 F.Supp. at 1075. That view of Rule 57(b) is confirmed by the Advisory Committee Notes to the 1974 revision of Rule 16 which specifically explain: "The rule is intended to prescribe the minimum amount of discovery to which the parties are entitled. It is not intended to limit the judge's discretion to order broader discovery in appropriate cases." Advisory Committee Note to Rule 16, reprinted in 62 F.R.D. 271, 308 (1974). [FN6]

FN6. The penalty phase of a capital case, with the premium placed upon accuracy and fairness, would seem to be an "appropriate case" to require reciprocal discovery beyond the norm.

For the foregoing reasons, the inherent powers of district courts provide sufficient authority for the imposition of notice, examination and discovery of mental health conditions in the death penalty phase of a prosecution brought under Section 848. Of course, those powers must be exercised in a manner consistent with federal constitutional and statutory laws and their applicable rules of procedure.

3. The Terms of the Statute

[5] The statute under which this prosecution is pursued underscores that the district courts possess the inherent authority to order penalty phase discovery. For the following reasons, the Court finds, in 21 U.S.C. § 848(j), a statutory basis to assert its inherent authority to require notice of mitigating factors keyed to a capital defendant's mental health and to require examination of that defendant respecting mental health issues which he plans to present during the penalty phase.

[6] First, the analysis must begin with the fundamental premise that the scope of mitigation testimony that a defendant may present in a death penalty case is broad, and in accordance with the Eighth Amendment, can be curtailed only under limited circumstances. Lockett v. Ohio, 438 U.S. 586, 604-05, 98 S.Ct. 2954, 2964-65, 57 L.Ed.2d 973 (1978). Accordingly, the statute, 21 U.S.C. § 848(m), permits a defendant to introduce evidence of any mitigating factor, including significant impairment of the defendant's capacity to appreciate the wrongfulness of his conduct. [FN7]

FN7. Of course, the evidence must be related in some reasonable way to the facts of the case and it must have a basis in the evidence and the law.

Second, the statutory scheme in Section 848(e) (entitled "Death Penalty") establishes, for the conduct of the penalty phase of a capital trial, certain procedures which are unique to sentencing in capital cases. Those rules are dictated largely by the Supreme Court's interpretation of the Eighth Amendment, to which the statute is an obvious response.

However, the statute clearly does not purport to provide a complete guide to pre-trial issues in a capital case. The absence of such a comprehensive scheme points strongly to the conclusion that Congress left the control of the pre- trial aspects of capital cases (e.g. discovery matters) with the courts unless it specifically provided otherwise. [FN8]

FN8. Indeed, a serious constitutional issue may arise under Article III if the statute or the Federal Rules of Criminal Procedure are construed to abrogate the inherent judicial powers of the federal courts to the extent argued by the defendants. There is no need to consider that question here.

Third, another subsection of the statute, 21 U.S.C. § 848(j), clearly provides that the "government shall be permitted to rebut any information received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the mitigating factors." (emphasis added) The right of rebuttal must be considered in perspective of the provisions in Section 848(m)(1), (2) and (10), which permit mitigation based solely on mental health or mental condition. Mitigating evidence of that sort reasonably could be expected to be presented by an expert in psychology or psychiatry.

When these sections of the statute are construed together, it is rather clear that, at the very minimum, the Government must have access to the reports prepared by the defendants' mental health experts in order to rebut, in any reasonable sense of that term, the accuracy of the conclusions reached by *758 the experts. Indeed, the defendants do not seriously suggest otherwise. Moreover, as conceded by the defendants at oral argument, the Government also must be provided with some advance notice of a defendant's intent to rely on expert testimony at the penalty phase so that the Government may procure the attendance of its own expert to observe and evaluate the testimony of the defense experts.

It is at that point, however, where the defendants draw the line by arguing that the Government adequately can rebut any defense experts' testimony if the Government and its experts have access to the defense experts' report. That, say the defendants, would afford the Government's experts an adequate basis on which to offer a critique of the defense experts' methods and conclusions without resort to an independent examination.

The defendants' position misses the mark by a wide margin because it ignores the reality that the key to any effective rebuttal of a mental health defense depends on examination of the defendant, just as the key to presentation of an effective mental health mitigation case requires that the defendant's expert has examined the defendant. As the district court explained in United States v. Haworth:

> Psychiatry is far from an exact science because it does not rely primarily on the analysis of raw data. Instead, the basic tool of psychiatric study remains the personal interview, which requires rapport between the interviewer and the subject. The Government's expert cannot meaningfully address the defense expert's conclusions unless the Government's expert is given similar access to the 'basic tool' of his or her area of expertise: an independent review with and examination of the defendant.

942 F.Supp. 1406, 1407-08 (D.N.M.1996) (emphasis added) (internal citations and quotations omitted). The Fourth Circuit also has emphasized the value and importance of medical examination by experts:

> Not only to enable the government to carry its full load, but also to respect the inviolability of the human personality, the [mental] examination [of the defendant by government experts] here was indicated.... [T]he government, to meet its burden of proof, would have access to only three kinds of proof: cross-examination of defendant's experts, lay testimony, and testimony of government experts predicated upon courtroom observations and hypothetical questions. Medical science ... deems these poor and unsatisfactory substitutes for testimony based upon prolonged and intimate interviews between the psychiatrist: and the defendant. Half truths derived from these unsatisfactory substitutes do more to violate human personality than full disclosure, especially because there is always. the possibility that the psychiatrist who examines for the government and thus has full knowledge of a defendant, may corroborate his contention that he is legally insane.

United States v. Albright, 388 F.2d at 724-25 (emphasis added) (internal citations and quotations omitted) In perspective of these undeniable truths, it is clear that the Government's ability to rebut a defendant's evidence of mental condition would be sharply curtailed, if not entirely eviscerated, if notice of a mental health defense is not required and if, thereafter, the Government is not afforded the opportunity to have the defendant examined by an independent mental health expert.

In recognition of this fundamental principle, the only decisions which have addressed this precise issue in the context of a federal capital case have adopted some of the notice and discovery procedures the Government requests here. In United States v. Vest, 905 F.Supp. 651 (W.D.Mo.1995), three defendants were charged with capital offenses under 21 U.S.C. §

848(e). The Government made a motion for entry of an order: (1) requiring notice of intent to rely on mental health defenses at the penalty phase by a date certain; (2) permitting access to the defendants for examination by government experts; and (3) requiring production of reports prepared by defense experts. The district court imposed a notice deadline and required an examination by Government experts.

*759 The rationale for the decision in Vest was grounded on the conclusion that the Government's statutory right to rebut any mitigating evidence animated the necessity to require pre-trial notice of a mental capacity or mental health defense in the penalty phase as well as a mental examination because "the provision authorizing rebuttal is rendered meaningless," without notice of mental health defenses, access to defense expert reports, and examination of the defendant by government experts. Id. at 653. That condition is fully supported by the statute and by logic. [FN9]

FN9. The court, in Vest, also observed that: "[a]lthough Fed.R.Crim.P. 12.2(b), by its strict terms, applies only to the guilt phase of the trial, employing a similar process for the penalty phase would serve the dual purposes of promoting efficient and fair resolution of the issues at hand while preserving the defendants' Constitutional rights." Id. at 652. That statement is really beyond serious question, but it is not a grant of authority. Rather, it provides a common sense rationale to use Rule 12.2 as a guide for the exercise of such authority as is found to exist.

In United States v. Haworth, two defendants were death-eligible under Section 848(e). As to those defendants, the Government moved the Court to require the defendants to notice their intent to rely on mental health defenses at the penalty phase and, if such notice was given, to require the defendants to be examined by government experts. Although the district court noted, quite correctly, that "there is no statute or rule expressly permitting a court to order an independent psychological examination for the government's use," the court granted the Government's motion based on the right of rebuttal conferred by Section 848(j) which would be impermissibly "curtailed" without such notice and access to the defendant. Id. at 1408.

In response to that precedent, the defendants reassert their argument that, in 21 U.S.C. § 848, Congress provided "a comprehensive scheme for the trial and pretrial procedures applicable to capital cases." [FN10] The defendants correctly note that, while Section 848(h) expressly requires the Government to provide, "a reasonable time before trial or acceptance by the court of a plea of guilty," notice of its intention to seek the death penalty and of the aggravating factors which the Government will seek to prove as the basis for the death penalty, and while the statute specifically granted the Government the right to rebut the defendant's mitigating evidence, see 21 U.S.C. § 848(j), Congress did not statutorily require capital defendants to provide the notice sought by the Government. The defendants also cite Lorillard v. Pons, 434 U.S. 575, 582, 98 S.Ct. 866, 871, 55 L.Ed.2d 40 (1978), and Pittston Coal Group v. Sebben, 488 U.S. 105, 119, 109 S.Ct. 414, 422-23, 102 L.Ed.2d 408 (1988), for the proposition that where the legislature establishes a comprehensive scheme, the courts should assume that any omissions were intentional.

FN10. As discussed above, the defendants initially asserted that argument with respect to the alleged displacement of the court's inherent authority to order notice and discovery by the promulgation of the Federal Rules of Criminal Procedure.

In this context, the defendants' argument has some appeal, but it ultimately is unpersuasive. First, the terms of the statute here show clearly that it is not intended as a complete guide to pre-trial and trial procedure in capital cases. Therefore, the courts must, when appropriate, supplement the rather limited procedures set forth by Congress in the statute. Second, decisions such as Lorillard and Pittston are inapposite because both involved Congressional decisions to retain or to omit aspects of previously-existing complex regulatory schemes. See Lorillard, 434 U.S. at 580-81, 98 S.Ct. at 869-70 (Congress enacted new statutory scheme, the Age Discrimination in Employment Act, and specifically stated that the Act was to be enforced in accordance with the "powers, remedies, and procedures" of another statute); Pittston, 488 U.S. at 108-09, 113, 109 S.Ct. at 417-18, 419-20 (statutory administrative scheme for providing benefits to coal miners in which Congress mandated that certain regulations for ascertaining benefits not be more restrictive than those in place at a particular time). In this case, however, Congress did not incorporate, or make reference to, another death penalty statute in 21 U.S.C. § 848(e). If Congress had enacted a death

penalty statute before it passed Section 848(e) which contained a notice provision *760 for penalty phase defenses and then had chosen to omit that provision from Section 848, Lorillard and Pittston would be instructive. That, however, simply was not what happened here.

As explained in Vest: "[I]f a defendant elects to present mitigation testimony addressing his mental status, then the government is free to rebut such testimony." 905 F.Supp. at 653. And, as aptly put in Haworth, "[i]f a defendant elects to present evidence of his mental condition as a reason why he should not be sentenced to death, the Government must be able to follow where he has led and introduce its own countervailing evidence." 942 F.Supp. at 1408 (internal quotations and citations omitted) For, unless the Government is allowed to conduct its own mental health examination, it may be deprived "of the only effective means it has of controverting ... proof on an issue that [the defendant has chosen to] interject [ ] into the case." Estelle, 451 U.S. at 465, 101 S.Ct. at 1874.

Like the courts in Vest and Haworth, the Court here finds that the Government's statutory right of rebuttal provides implicit authority to require notice, examination and discovery on mental health issues and conditions in order to make that rebuttal right a meaningful one. Any other interpretation would effectively frustrate the statutory right afforded the Government by Congress. And, of course, that right is significant because the Government must prove death-eligibility to the satisfaction of all jurors beyond a reasonable doubt whereas the defendant need only convince one juror by a preponderance of the evidence that death is not an appropriate punishment. See supra note 1.

4. The Constitutional Considerations

The foregoing does not dispose of the issue because there are constitutional considerations which must be juxtaposed to the provisions of the Rules, the inherent judicial powers and the statutory terms which form the basis for the Government's positions. Indeed, the courts in Vest and Haworth recognized that "[r]equiring a defendant to undergo a psychiatric examination may, in some circumstances, infringe on a defendant's rights under the Fifth and Sixth Amendments." Vest, 905 F.Supp. at 653 (citing Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981)); see also Haworth, 942 F.Supp. at 1408-09. And, not surprisingly, Defendants Beckford, Dennis, Cazaco, and Thomas assert that a Government examination in this case would, in fact, violate their constitutional rights. They ground that argument in the teachings of Estelle v. Smith.

In Estelle, the Supreme Court held that a capital defendant's Fifth Amendment privilege is violated where a state requires him to undergo psychiatric evaluation and then uses his statements, demeanor, and the expert conclusions drawn therefrom at the penalty phase of the trial to demonstrate future dangerousness. In particular, the Court held that the prosecution cannot introduce psychiatric testimony at the penalty phase if the defendant was subjected to the mental health examination without waiving his Sixth Amendment right to counsel, and without being informed of his Miranda rights as required by the Fifth Amendment. 451 U.S. at 462, 101 S.Ct. at 1872-73.

The facts in Estelle are significant to the resolution of the defendants' arguments here because the defendant in Estelle did not introduce any psychiatric evidence at trial. Nor, had he expressed any intention to do so. Nonetheless, the trial court required him to undergo a mental health examination, and the state thereafter presented information garnered during that examination to persuade the jury to impose a death sentence, even though the defendant never offered any mental health evidence. Id. at 466, 101 S.Ct. at 1874-75. The Supreme Court found a violation of the Fifth Amendment and affirmed the issuance of a writ of habeas corpus for the reason that: "A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing hearing." Id. at 468, 101 S.Ct. at 1876.

In Buchanan v. Kentucky, 483 U.S. 402, 107 S.Ct. 2906, 97 L.Ed.2d 336 (1987), the Supreme Court considered application of the *761 rule in Estelle to a case in which the capital defendant, unlike Estelle, had placed his mental state at issue in defense of capital charges. There, the Court determined that, when a defendant "requests [a mental health] evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution." Id. at 422, 107 S.Ct. at 2917 (citations omitted). The Fourth Circuit recently has

explained the import of the Supreme Court's holding in Buchanan:

> When a defendant asserts a mental status defense and introduces psychiatric testimony in support of that defense, he may face rebuttal evidence from the prosecution taken from his own examination or he may be required to submit to an evaluation conducted by the prosecution's own expert. That defendant has no Fifth Amendment protection against the introduction of mental health evidence in rebuttal to the defense's psychiatric evidence. In essence, the defendant waives his right to remain silent ... by indicating that he intends to introduce psychiatric testimony.

Savino v. Murray, 82 F.3d 593, 604 (4th Cir.1996) (citing Buchanan, 483 U.S. at 422-23, 107 S.Ct. at 2917-18; Powell v. Texas, 492 U.S. 680, 684- 85, 109 S.Ct. 3146, 3149-50, 106 L.Ed.2d 551 (1989)) (emphasis added) (internal quotations omitted). The application of the principles established in Estelle, Buchanan and Savino to this case is set forth below.

B. THE COMPETING FACTORS AND THE BALANCE OF INTERESTS.

[7] The foregoing illustrates the need to strike a balance between securing a defendant's Fifth Amendment rights and affording the Government a meaningful right of rebuttal on mental health issues. As set forth below, that balance is best struck by: (1) requiring reasonably early notice by the defendants that they intend to rely on mental health or mental conditions in mitigation of death in the penalty phase; (2) requiring an examination within a reasonable time thereafter; and (3) deferring the release to the Government of the Government's expert reports and the defense expert reports until after a finding of guilt necessitates a decision by the defendants on how to proceed with the penalty phase. In this way, the defendant's rights are preserved, and the Government's rebuttal right is secured.

[8] Estelle, Buchanan and Savino teach that the protection afforded by the Fifth Amendment ceases when a defendant indicates that he intends to introduce mental health evidence in the penalty phase of a capital case. And, where a defendant makes that decision upon advice of counsel, there is certainly no infringement of the Sixth Amendment.

[9] Of course, under the Fifth Amendment, as applied in Estelle, "a defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing hearing." Estelle v. Smith, 451 U.S. at 468, 101 S.Ct. at 1876 (emphasis added). Therefore, a court cannot simply require a defendant to undergo psychiatric examination if his statements can be used against him in the penalty phase at the Government's own initiative. Estelle, however, does not prohibit the issuance of an order requiring a defendant to respond to the Government's psychiatrist or psychologist if the defendant's statements cannot be used against him at sentencing unless and until the defendant actually introduces mental health evidence in mitigation of the death penalty at that phase of the proceedings.

[10] Estelle, Buchanan and Savino are significant also because they do not instruct that either the Fifth Amendment or the Sixth Amendment is infringed by a requirement that a defendant declare his intent to present mental health evidence at a time certain in advance of trial. Nor has it ever been held that Fed.R.Crim.P. 12.2 is constitutionally infirm by requiring a pretrial deadline for notice of use of the insanity defense during the guilt phase. And, as explained above, the district courts have the inherent power *762 and the implicit statutorily-derived power to impose a pre-trial notice requirement.

In this regard, Williams v. Florida, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970), is instructive. In Williams, the Supreme Court rejected the argument that requiring a criminal defendant to give pretrial notice of alibi-- including the location claimed and the identification of supporting witnesses-- violated the Fifth Amendment.

The Supreme Court in Williams stated that:

> Nothing in the Fifth Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense, any more than it entitles him to await the jury's verdict on the State's case-in-chief before deciding whether or not to take the stand himself.

Williams, 399 U.S. at 85, 90 S.Ct. at 1898 (emphasis added). Therefore, the mere imposition of a pre-trial deadline for capital defendants to state their intention to offer evidence pertaining to mental health or mental condition does not violate the Fifth Amendment rights sought to be protected by the rule of Estelle.

[11] Even where the defendant is required to give pre-trial notice of his intent to use mental health evidence at the sentencing phase, however, the statements made in any Court-ordered examination cannot constitutionally be used against the defendant in the guilt phase. Therefore, it is essential that the

results of any Court-ordered examination which ensues such notice must not be available to the Government until after conclusion of the guilt phase. [FN11] In like fashion, disclosure of the defense expert reports also must be deferred until after guilt is determined. That, indeed, is the only way (other than adopting a rule that no examination can be required) to assure to a defendant the benefit of the Fifth Amendment as interpreted by Estelle, Buchanan and Savino.

> FN11. Making the report of the examination available to the prosecution before conclusion of the guilt phase would present the risk of inadvertent use and would lead to difficult problems respecting the source of prosecution evidence and questioning in the guilt phase.

That is not, however, the end of the matter because, even if the jury returns a verdict of guilty on a capital charge, a defendant might elect not to use evidence of mental health or condition for any number of reasons not readily ascertainable until all evidence in the guilt phase is presented and the verdict on all charges is known. [FN12] Hence, depending on the case, the actual line of constitutional demarcation for waiver of the Fifth Amendment may not be reached until after conclusion of the guilt phase.

> FN12. Also, in order to properly assess the evidence of the aggravating factors for risk of prejudice, see 21 U.S.C. § 848(j), the Court has required the Government to make a proffer of the evidence it intends to offer on those factors. The proffer will be made before conclusion of the guilt phase and knowledge of that proffer will be an important factor in the defendants' decision whether to offer mental health evidences in mitigation.

[12] To defer the notice requirement until then, however, presents serious difficulties for the defendant, the Government and the judicial system. If, at that point, the defendant for the first time discloses his intent to offer mental health evidence in mitigation, there would be a lengthy delay before the commencement of the sentencing phase while the Government experts examine the defendants. [FN13]

> FN13. The defendants argue that any Court-ordered examination should be held, if at all, only after the return of a guilty verdict. That suggestion, however, is not supported by the evidence offered at the hearing on this issue. The validity of a post-guilt phase examination of a capital defendant may be seriously questioned. At the hearing on this matter, the Government's expert, Dr. Thomas V. Ryan, opined that the results of a pre-trial examination would be significantly more reliable than those of an examination conducted after the return of a guilty verdict but before the completion of the penalty phase. Dr. Ryan testified that the results of a post-guilt examination would be significantly skewed by potential depression, tension, and anxiety on the part of a defendant who has been adjudged guilty and is thus only one step away from receiving the death penalty. Moreover, a defendant may arguably perceive a stronger motivation to malinger where the reality of facing the death penalty becomes more immediate.
> Dean Beckford's expert witness, Dr. Robert P. Hart, opined that a post- trial examination would be less problematic than anticipated by Dr. Ryan because clinical psychiatric tests often include measurements to take account of the subject's feelings of depression and anxiety. Dr. Hart agreed, however, that a post-trial test would not be more valid than one conducted pre-trial.

***763** To a jury which likely will have been sitting for several weeks on the guilt phase, the prospect of a lengthy delay before sentencing commences is fraught with difficulty. Most troublesome is the fact that evidence for the guilt phase, which usually is adopted at sentencing, will fade from the minds of the jurors; thus, content and context will be harder for the jurors to remember, and the relative roles played by the defendants will be harder for jurors to recall. This is prejudicial to the Government and the defendants equally.

Further, evidence offered only in the penalty phase will be more protracted because of the need to link it logically to the guilt phase issues. The greater the delay between phases, the greater is the need to re-establish, by testimony previously offered, the essential nexus between purely penalty phase evidence and the offenses to which it relates.

Moreover, because the same jury which determines guilt will determine the penalty, see 21 U.S.C. § 848(i)(1)(A), [FN14] delay between guilt and penalty phases increases the risk that a juror will fall ill or pass away or otherwise will become unavailable. Of course, that risk is present even if there is only a brief delay between the guilt and penalty phases.

But, that risk is materially increased by an extensive delay between the proceedings while the Government experts conduct mental examinations of the defendants. And, although the use of alternate jurors is possible, it is quite undesirable at that point in the case.

> FN14. 21 U.S.C. § 848(i)(1) provides that where a defendant's guilt is adjudged by a jury, any subsequent capital sentencing "hearing shall be conducted ... before the jury which determined the defendant's guilt" unless that jury has been discharged "for good cause." 21 U.S.C. § 848(i)(1)(A), (i)(1)(B)(iii).

A related consequence of the delay inherent in deferring the Government's examination until after the guilt phase is the increased difficulty in securing jurors in the first instance. The longer the expected duration of a case, the greater the risk that qualified jurors will be unable to serve. This, of course, works to the prejudice of the defendants, the Government and the judicial system.

For the foregoing reasons, it is essential to strike the appropriate balance between the constitutional rights of the defendants, the Government's rebuttal right, and the interests of the Court and the litigants in fairness and judicial efficiency. The requirements of pre-trial notice and pre-trial examination secure the Government's rebuttal right and ensure that extensive post-guilt phase delay does not compromise considerations of fundamental fairness to the litigants and of judicial efficiency. And, strict prohibition on the release to the Government of reports prepared by its experts and by the defense experts until after a finding of guilt preserves the defendants' constitutional rights.

C. THE PROCEDURES TO BE FOLLOWED.

As explained above, if a defendant elects, with the advice of counsel, to put his mental status into issue in the penalty phase, then he has waived his right to refrain from self-incrimination arising from a mental health examination, and there is no Fifth or Sixth Amendment concern. Nevertheless, courts must remain mindful that the notice and subsequent independent examination sought by the Government have the potential for treading on the defendants' Fifth and Sixth Amendment rights. Those rights can be appropriately secured, however, by the imposition of sufficient protections in the form of strict limitations on the examination and discovery procedures employed and the disclosure of any statements made by the defendant during the examination. The contours of the limitations which will be imposed in this case are set forth below.

[13] First, any defendant who wishes to introduce mental health testimony at the penalty phase must file written notice thereof not later than April 28, 1997. The notice shall include the name and professional qualifications of any mental health professional ***764** who will testify and a brief, general summary of the topics to be addressed that is sufficient to permit the Government to determine the area in which its expert must be versed. [FN15]

> FN15. The Government requests that the notice shall include "the nature of the proffered mental condition or defect and the date of its onset." That request is DENIED. Neither Vest nor Haworth required such notice by the defense. If the Government has the ability to have the defendant examined by its own expert, that expert can reach his own conclusions concerning the defendant's mental status. Moreover, while the Government is entitled to obtain a pre-trial examination, under this Order it is prohibited from learning of the results of that examination until after the jury returns a verdict of guilty with respect to the capital charges. Pre- trial notice of the precise mental condition and date of onset would contravene the effect of this strict limitation on the disclosure of the results of the Court-ordered examination. Nor must notice include "a summary of the basis for [the] opinions" of the defense mental health expert. This information, however, shall be part of the defense expert's report which will be filed under seal with the Court and be released only after the conclusion of the guilt phase, if the verdict requires a death penalty phase.

[14] If a defendant files a notice that he plans to introduce mental health testimony at the penalty phase, that defendant shall be examined by a psychiatrist or other mental health professional selected by the Government. The Government examination shall take place not later than May 13, 1997. The report of that examination and the expert report of any examination initiated by the defendant [FN16] shall be filed under seal with the Court before the commencement of jury selection.

> FN16. The Government's Motion is DENIED with respect to its request that the defense be ordered "to provide the government with any and all materials supplied to the defense expert

that form the basis of his or her opinion." An order of that scope would violate the defendants' Sixth Amendment right to effective assistance of counsel in that defense planning and strategy would necessarily be revealed through the production of "any and all materials supplied to the defense expert."

The Court-appointed mental health professional conducting the examination for the Government shall not discuss his examination with anyone unless and until the results of the examination are released to counsel for the Government and counsel for the defendant following the guilt phase of the trial.

[15] The results of any examination by the Government experts and the defense experts shall be released to the Government only in the event that the jury reaches a verdict of guilty on a capital charge as to that defendant, [FN17] and only after that defendant confirms his intent to offer mental health or mental condition evidence in mitigation.

FN17. It is important to note that under these directives, the Government will not learn anything from the Court-appointed examination until after guilt has been determined. Although it is well-settled that restrictions such as those of Fed.R.Crim.P. 12.2(c) (e.g., no use or derivative use of compelled examination except to rebut mental health defenses) satisfy the Fifth Amendment, in this case, where the Court-ordered examination will take place well before the start of the trial, the Fifth Amendment requires that the report of the Government's expert remain sealed until after the guilt phase.

To that end, not later than two days after the return of such a verdict, each defendant who previously had provided notice, pursuant to this Order, shall file a pleading confirming or disavowing his intent to introduce mental health testimony at the penalty phase. If, in that manner, any defendant withdraws his previously-tendered notice, the results of any mental health examinations concerning that defendant will not be released to the Government. The reports of any examinations (whether by the Government or defense expert) concerning a defendant who confirms his intent to introduce mental health testimony shall be released to the Government immediately after the filing of the pleading confirming the earlier notice. At the same time, the report of the Government's expert shall be released to counsel for the defendant.

Even if a defendant confirms his intent to offer mental health evidence, the defendant may withdraw a notice of intent to raise a mental health or mental health defense at any time before actually introducing evidence on it, and, in that event, neither the fact of notice, nor the results or reports of any mental examination, nor any facts disclosed ***765** only therein will be admissible against the defendant.

FAILURE OF ANY DEFENDANT TO PROVIDE NOTICE OR TO PARTICIPATE IN A COURT-ORDERED EXAMINATION OR TO CONFIRM HIS FIRST NOTICE SHALL RESULT IN FORFEITURE OF THE RIGHT TO PRESENT MENTAL HEALTH TESTIMONY AT TRIAL.

[16] These procedures will ensure that Government examinations of the defendants will be ordered only if a defendant provides notice of intent to use mental health or condition in mitigation. They also ensure that the results of examination will be disclosed, if, and only if, a defendant chooses to introduce testimony or other evidence relating to issues of his mental health at the capital sentencing hearing, thus preventing the Fifth and Sixth Amendment infringements prohibited by Estelle. Further, the jury will not be exposed to any mental health evidence unless the defendant first opens that door during the penalty phase. [FN18]

FN18. Defendant Beckford argues that it is the Government, not the defendants, who have put the defendants' mental status at issue by filing its Notice of Intent to Seek A Sentence Of Death pursuant to 21 U.S.C. § 848(h)(1), in that the Notice states the Government's intention of proving the non-statutory "future dangerousness" aggravator. Beckford asserts that the "future dangerousness" aggravator implicates mental health issues for two reasons: (1) the Government will attempt to prove that Beckford displayed a lack of remorse over the murders he is alleged to have committed; and (2) the Government will attempt to prove that Beckford has a low potential for rehabilitation.

Beckford's argument lacks merit. First, the Government has proffered that its evidence of "lack of remorse" and "low potential for rehabilitation" will consist solely of factual allegations; the Government will tender no expert evidence to establish the existence of this aggravator. Thus, the Government is not raising the issue of the defendants' mental health status at all. Moreover, the allegations of the Notice Of Intent put the defendants' mental condition at issue only to the same extent that any

> charging instrument does--it implicitly alleges that the defendant is sane in the sense that he knows right from wrong and understands the consequences of his actions. If the defense wishes to show at the penalty phase, however, that a defendant suffers from a psychological condition that prevents him from possessing the requisite level of mental health, that is a mitigating factor under 21 U.S.C. § 848(m) which a defendant has the burden to raise and prove by a preponderance of the evidence.

Based on the foregoing analysis, the Government's motion for a Court order requiring: (1) death-eligible defendants to provide notice of intent to raise a mental health defense at the penalty phase; (2) those defendants to submit to examination by an expert of the Government's choosing; and (3) the disclosure of expert reports is GRANTED IN PART. The remainder of the Government's motion is DENIED.

D. MEMORIALIZATION OF DEFENDANTS' MENTAL HEALTH EXAMINATIONS.

The Government also asks the Court to require that any examination of a capital defendant undertaken by a defense expert be either attended by a Government expert or properly recorded by videotape, audiotape, and/or stenography. The Government asserts that such memorialization is the "only way the Court can ensure that the government has a meaningful opportunity to rebut mitigation evidence as set forth in 21 U.S.C. § 848(j)." The Government would agree to reciprocal attendance or recording of any Court-ordered mental examination by its experts.

The Government cites no legal authority for its request that defense experts should conduct their examinations in this particular manner. And, it should be noted that neither the Vest Court nor the Haworth Court considered a similar request for recordation by the Government.

In support of its motion, however, the Government has submitted three affidavits from Dr. Ryan which describe in detail the dangers of multiple testing in the area of cognitive ability. According to Dr. Ryan, certain well- established memory and intelligence tests can only be performed once in any six month to one year period with any degree of accuracy. Additionally, the Government proffers that it has "consulted with several mental health professionals [who] uniformly indicated to the government that certain intelligence *766 tests can be administered to a person only once in any one-year period due to the 'practice' effect of the test." Thus, the Government apprehends that, after the defense examinations, which will precede the Government's examinations, no valid retest will be possible within a useful time frame.

The Government analogizes this situation, as a legal matter, to that where one party has access to evidence which will be destroyed or altered by some scientific test or procedure. Under such circumstances, it may be appropriate for the adverse party's experts to observe the testing or, at least, have the testing recorded for later examination by its experts. See, e.g. United States v. Beltempo, 675 F.2d 472, 479 (2nd Cir.1982), cert. denied, 457 U.S. 1135, 102 S.Ct. 2963, 73 L.Ed.2d 1353 (1982); United States v. Love, 482 F.2d 213, 220 (5th Cir.1973), cert. denied, 414 U.S. 1026, 94 S.Ct. 453, 38 L.Ed.2d 318 (1973).

In Dr. Ryan's opinion, simultaneous evaluation by one or more neutral experts chosen by the Court and/or agreeable to the parties is the best method to ascertain a subject's true mental condition. Absent any such agreement, [FN19] the next best method would be for each side to attend and observe the other side's evaluation and to have that evaluation memorialized by video and/or audio recording for later review. In that case, the Government suggests that its expert be allowed to observe any defense testing by two-way mirror and that the testing be videotaped.

> FN19. Indeed, in this case, the defendants object to the simultaneous examination by a neutral expert or experts.

The defendants object to the Government's proposed method of examination on Fifth Amendment grounds. They, therefore, oppose the Government's attendance at, or recordation of, examinations conducted by defense experts. Beckford also has submitted an affidavit from Dr. Hart who opines that there are "important advantages of having two rather than one neuropsychological evaluation of the defendant." Hart Aff'd ¶ 4. Although Dr. Hart acknowledges the potential danger of enhanced malingering and so-called "practice effects" skewing the results of a second examination, he asserts that certain neuropsychological tests are available to minimize the negative impact on subsequent evaluation. Moreover, Dr. Hart notes that: "In none of the cases in which I have been involved have the experts for the respective parties recorded the testing sessions and exchanged those tapes with the experts or attorneys for the opposing party in the litigation. I do not believe that [ ] represents the professional norm or that it is critical to the evaluative process."

Hart Aff'd ¶ 11. Dr. Ryan, the Government's expert, also acknowledges that the attendance and/or recordation suggested by the Government would be a novel procedure which has not been previously employed in the context of a capital prosecution.

At oral argument, the Government receded from its request for attendance at and the memorialization of, the examinations to be conducted by defense experts because the parties have stipulated that their respective expert witnesses likely will be able to agree, on an a-priori basis, on the designation of specific testing measures to be administered by each respective neuropsychologist in order to avoid test overlap and to minimize "practice effects." Moreover, the parties are considering Dr. Ryan's suggestion that data be shared between the experts so that multiple neuropsychological administrations of the same measures can be avoided. The Government is satisfied that, upon reaching such an agreement, recordation would be unnecessary.

For those reasons, the Government provisionally has withdrawn that part of its motion which seeks attendance at and memorialization of defense examinations. The Government is granted leave, however, to renew that part of its motion in the event that the parties' experts cannot reach a mutually agreeable testing protocol. The parties shall inform the Court not later than April 2, 1997 whether agreement has been reached and of its terms.

For the reasons set forth in this Memorandum Opinion, and to the extent herein articulated, the Government's Motion For Notice ***767** and Reciprocal Discovery of Mental Health Defenses to be Raised at Either the Guilt or Penalty Phases of the Trial is GRANTED IN PART and DENIED IN PART.

The Clerk is directed to send a copy of this Memorandum Opinion to all counsel of record.

It is so ORDERED.

END OF DOCUMENT

II-E-3

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Dave Schlueter, Reporter

RE: Rule 26: Taking Testimony From Remote Location

DATE: March 25, 1999

For the last several meetings the Committee has discussed an amendment to Rule 26 that would permit the court to receive testimony via remote transmission. At the Fall 1998 meeting in Maine, the Committee approved a draft I had prepared and asked me to finalize the amendment and Committee Note. Attached is the amendment and accompanying Committee Note. Also attached is a copy of *United States v. Gigante* where the Court of Appeals' approved the trial court's use of remote transmission of testimony in a criminal case. (The lower court's decision was included in the agenda book for the Committee's Fall 1998 meeting).

I recommend that the amendment not be forwarded to the Standing Committee at this time for publication and comment. Rather, it should be first forwarded to the Standing Committee's Style Subcommittee for their review and recommendations and then considered by the appropriate Style Subcommittee of this Committee.

Rule 26. Taking of Testimony

(a) IN GENERAL. In all trials the testimony of witnesses shall be taken ~~orally~~ in open court, unless otherwise provided an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court.

(b) TRANSMISSION OF TESTIMONY FROM DIFFERENT LOCATION. The court may authorize contemporaneous video presentation of testimony in open court from a different location if:

(i) the requesting party establishes compelling circumstances for such transmission;

(ii) appropriate safeguards for such transmission are used; and

(iii) the witness is unavailable within the meaning of Rule 804(a) of the Federal Rules of Evidence.

COMMITTEE NOTE

The amendment to Rule 26 is intended to permit a court to receive the video transmission of an absent witness if certain conditions are met. As currently written, Rule 26 indicates that normally only testimony given in open court will be considered, unless otherwise provided by the rules, an Act of Congress, or any other rule authorized by the Supreme Court. One of those exceptions is located in Rule 15, which provides that a party may present the deposition testimony of an "unavailable" witness. The amendment extends the logic underlying that exception to contemporaneous video testimony of an unavailable witness. The amendment generally parallels a similar provision in Federal Rule of Civil Procedure 43.

The Committee believed that permitting use of video transmission of testimony only in those instances where deposition testimony could be used is a prudent and measured step. A party against whom a deposition may be introduced at trial will normally have no basis for objecting if contemporaneous testimony is used instead. Indeed, the use of such transmitted testimony is in most regards the closest thing to having the witness actually in the court room. For example, the participants in the court room

can see for themselves the demeanor of the witness and hear any pauses in the testimony, matters which are not normally available in non-video deposition testimony. Although deposition testimony is normally taken with all counsel and parties present with the witness, those are not absolute requirements. *See, e.g., United States v. Salim*, 855 F.2d 944, 947-48 (2d Cir. 1988) (conviction affirmed where deposition testimony used although defendant and her counsel were not permitted in same room with witness, witness' lawyer answered some questions, lawyers were not permitted to question witness directly, and portions of proceedings were not transcribed verbatim.

The Committee recognized that there is a need for the trial court to impose appropriate safeguards and procedures, as required, to insure that the accuracy and quality of the transmission, the ability of any jurors to hear and view the testimony, and the ability of the judge, counsel, and the witness to hear and understand each other during questioning. *See, e.g., United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999).

Where the prosecution is presenting the contemporaneous transmission of a government witness, there may be a question or objection on grounds that the defendant's confrontation rights are being infringed. The Committee believes that including the requirement of "unavailability" as that term is defined in Federal Rule of Evidence, which permits use of certain deposition testimony, should normally insure that those rights are not infringed.

In deciding whether to permit contemporaneous transmission of the testimony of a government witness, the Supreme Court's decision in *Maryland v. Craig*, 497 U.S. 836 (1990) is instructive. In that case, the prosecution presented the testimony of a child sexual assault victim from another room by way of one-way closed circuit television. The Court outlined four elements which underlie Confrontation Clause issues: (1) physical presence; (2) the oath; (3) cross-examination; and (4) the opportunity for the trier-of-fact to observe the witness' demeanor. *Id.* at 847. The Court rejected the notion that a defendant's Confrontation Clause rights could be protected only if all four elements were present. In this case, the trial court had explicitly concluded that the procedure was necessary to protect the child witness, i.e., the witness was psychologically unavailable to testify in open court. The Court noted that any harm to the defendant resulting from the transmitted testimony was minor because the defendant received most of the protections contemplated by the Confrontation Clause, i.e., the witness was under oath, counsel could cross-examine the absent witness, and the jury could observe the demeanor of the witness. *See also United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999) (use of remote transmission of unavailable witness did not violate confrontation clause).

While the amendment is not limited to instances such as those encountered in *Craig*, it is limited to situations where the witness is unavailable for any of the reasons set out in Federal Rule of Evidence 804(a). Whether under the particular circumstances

proposed transmission will satisfy some, or all, of the four protective factors identified by the Supreme Court in *Craig,* is a decision left to the trial court.

UNITED STATES of America, Appellee,
v.
Vincent GIGANTE, also known as "Chin," Defendant-Appellant.

Docket No. 98-1001.

United States Court of Appeals,
Second Circuit.

Argued Oct. 20, 1998.

Decided Jan. 22, 1999.

Following jury trial, defendant was convicted in the United States District Court for the Eastern District of New York, Jack B. Weinstein, J., of violation of Racketeer Influenced and Corrupt Organizations Act (RICO), RICO conspiracy, conspiracy to murder, extortion conspiracy, and a labor payoff conspiracy, based on evidence including testimony of one witness via closed-circuit television, which District Court permitted, 971 F.Supp. 755. The District Court, 982 F.Supp. 140, later dismissed one count of conspiracy to murder. Defendant appealed. The Court of Appeals, John M. Walker, Jr., Circuit Judge, held that: (1) admission of ill witness's testimony via two-way, closed- circuit television from a remote location did not violate defendant's right of confrontation; (2) any errors in admitting statements under coconspirator exception to hearsay definition were harmless; and (3) finding that defendant was competent to stand trial was not clearly erroneous.

Affirmed.

[1] CRIMINAL LAW ⇐ 662.65
110k662.65
Admission of witness' testimony via two-way, closed-circuit television from a remote location did not violate defendant's Sixth Amendment right of confrontation, where witness was fatally ill and was part of witness protection program, and defendant was too ill to participate in distant deposition; testimony preserved salutary effects of in-court testimony, and testimony afforded greater protection of defendant's rights than would have been provided by pretrial deposition, which also would have been permissible under the circumstances. U.S.C.A. Const.Amend. 6; Fed.Rules Cr.Proc.Rules 2, 15, 57(b), 18 U.S.C.A.

[2] CRIMINAL LAW ⇐ 1158(4)
110k1158(4)
District court's factual finding that witness could not appear in court due to illness would be reviewed for clear error.

[3] CRIMINAL LAW ⇐ 662.1
110k662.1
The right to face-to-face confrontation of witnesses is not absolute. U.S.C.A. Const.Amend. 6.

[4] CRIMINAL LAW ⇐ 1137(1)
110k1137(1)
Defendant waived any claim of error that he was deprived of right of confrontation because witness, who testified via two-way, closed-circuit television, allegedly could not see defendant himself on television monitor, where defendant explicitly declined the option of being viewed by witness. U.S.C.A. Const.Amend. 6.

[5] CRIMINAL LAW ⇐ 543(1)
110k543(1)
Decision to permit admission of a deposition in lieu of trial testimony on ground that witness is unavailable rests within the sound discretion of the trial court, and will not be disturbed absent clear abuse of discretion. Fed.Rules Cr.Proc.Rule 15(a, e), 18 U.S.C.A.

[5] CRIMINAL LAW ⇐ 1153(1)
110k1153(1)
Decision to permit admission of a deposition in lieu of trial testimony on ground that witness is unavailable rests within the sound discretion of the trial court, and will not be disturbed absent clear abuse of discretion. Fed.Rules Cr.Proc.Rule 15(a, e), 18 U.S.C.A.

[6] CRIMINAL LAW ⇐ 627.2
110k627.2
The exceptional circumstances required to justify the deposition of a prospective witness are present if that witness' testimony is

material to the case and if the witness is unavailable to appear at trial. Fed.Rules Cr.Proc.Rule 15(a, e), 18 U.S.C.A.

[7] CRIMINAL LAW ⇐ 662.65
110k662.65
Although closed-circuit television should not be considered a commonplace substitute for in-court testimony by a witness, two-way closed-circuit television testimony does not necessarily violate the Sixth Amendment, and, upon a finding of exceptional circumstances, a trial court may allow a witness to testify via two-way closed-circuit television when this furthers the interest of justice. U.S.C.A. Const.Amend. 6.

[8] CRIMINAL LAW ⇐ 511.1(6.1)
110k511.1(6.1)
Although admission of coconspirator testimony, under exception to hearsay definition, could not be based solely on finding that there was general overriding conspiracy among various alleged organized crime groups, admission of statements suggesting defendant's involvement in specific conspiracies to murder two individuals was not clearly erroneous where defendant's involvement was corroborated by other evidence. Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

[9] CRIMINAL LAW ⇐ 427(5)
110k427(5)
To admit a statement under the coconspirator exception to the hearsay definition, a district court must find two factors by a preponderance of the evidence: first, that a conspiracy existed that included the defendant and the declarant, and, second, that the statement was made during the course of and in furtherance of that conspiracy. Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

[10] CRIMINAL LAW ⇐ 1158(4)
110k1158(4)
District court findings underlying admission of statement under coconspirator exception to the hearsay definition will not be disturbed unless they are clearly erroneous, and any improper admission of coconspirator testimony is subject to harmless error analysis. Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

[10] CRIMINAL LAW ⇐ 1169.7
110k1169.7
District court findings underlying admission of statement under coconspirator exception to the hearsay definition will not be disturbed unless they are clearly erroneous, and any improper admission of coconspirator testimony is subject to harmless error analysis. Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

[11] CRIMINAL LAW ⇐ 422(1)
110k422(1)
Conspiracy between the declarant and the defendant need not be identical to any conspiracy that is specifically charged in the indictment, to admit statement under coconspirator exception to hearsay definition. Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

[12] CRIMINAL LAW ⇐ 427(1)
110k427(1)
While hearsay statement itself may be considered in establishing the existence of the conspiracy, for purpose of admitting statement under coconspirator exception to hearsay definition, there must be some independent corroborating evidence of the defendant's participation in the conspiracy. Fed.Rules Evid.Rule 801(d)(2), 28 U.S.C.A.

[13] CRIMINAL LAW ⇐ 427(1)
110k427(1)
The identities of both the declarant and the witness who heard the hearsay evidence are nonhearsay evidence that may be considered in assessing the reliability of the statement and finding the existence of a conspiracy, for purpose of admitting statement under coconspirator exception to hearsay definition. Fed.Rules Evid.Rule 801(d)(2), 28 U.S.C.A.

[14] CRIMINAL LAW ⇐ 423(3)
110k423(3)
Statements made during the course and in furtherance of a conspiracy must be such as to prompt the listener to respond in a way that promotes or facilitates the carrying out of a criminal activity, for purpose of admitting statement under coconspirator exception to hearsay definition, which can include those

statements that provide reassurance, or seek to induce a coconspirator's assistance, or serve to foster trust and cohesiveness, or inform each other as to the progress or status of the conspiracy. Fed.Rules Evid.Rule 801(d)(2), 28 U.S.C.A.

[15] CRIMINAL LAW ⇐ 419(2.20)
110k419(2.20)
While idle chatter among conspirators does not satisfy the "in furtherance" requirement for admitting statement under coconspirator exception to hearsay definition, such statements may admissible as declarations against penal interest or under the state of mind hearsay exception. Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

[15] CRIMINAL LAW ⇐ 422(7)
110k422(7)
While idle chatter among conspirators does not satisfy the "in furtherance" requirement for admitting statement under coconspirator exception to hearsay definition, such statements may admissible as declarations against penal interest or under the state of mind hearsay exception. Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

[15] CRIMINAL LAW ⇐ 423(3)
110k423(3)
While idle chatter among conspirators does not satisfy the "in furtherance" requirement for admitting statement under coconspirator exception to hearsay definition, such statements may admissible as declarations against penal interest or under the state of mind hearsay exception. Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

[16] CONSPIRACY ⇐ 23.1
91k23.1
A conspiracy may involve only two or three individuals.

[17] CRIMINAL LAW ⇐ 427(1)
110k427(1)
Even in the context of organized crime, there is a limit to the proper use of the coconspirator exception to the hearsay definition to admit coconspirator testimony; the district court in each instance must find the existence of a specific criminal conspiracy beyond the general existence of the organized crime organization. Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

[18] CRIMINAL LAW ⇐ 427(5)
110k427(5)
When a conspiracy is charged under the Racketeer Influenced and Corrupt Organizations Act (RICO), the defendant must be linked to an individual predicate act by more than hearsay alone before a statement related to that act is admissible against the defendant under coconspirator exception to the hearsay definition. 18 U.S.C.A. § 1961 et seq.; Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

[19] CRIMINAL LAW ⇐ 1169.7
110k1169.7
Although statements of other individuals about alleged murder conspiracy in which defendant refused to get involved were not admissible under coconspirator exception to hearsay definition, in prosecution of defendant for other charged conspiracies, any error was harmless because some of statements would have been admissible on other grounds, and substantial direct and circumstantial evidence connected defendant to each of crimes for which he was convicted. Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

[20] CRIMINAL LAW ⇐ 1158(2)
110k1158(2)
Court of Appeals upholds a district court's finding of competence to stand trial unless that finding is clearly erroneous; under this highly deferential standard, where there are two permissible views of the evidence as to competency, the court's choice between them cannot be deemed clearly erroneous.

[21] CRIMINAL LAW ⇐ 625.15
110k625.15
Finding that defendant was competent to stand trial was not clearly erroneous, despite testimony of four psychiatrists that defendant was incompetent, in view of testimony of witnesses, who were allegedly former organized crime associates of defendant's, that defendant was forceful and active leader of organized crime family who had put on a

"crazy act" for many years in order to avoid apprehension by law enforcement, and fact that two of testifying psychiatrists later changed their opinions.

***78** Andrew Weissmann and Daniel Dorsky, Assistant United States Attorneys (Zachary W. Carter, United States Attorney, and David C. James and George A. Stamboulidis, Assistant United States Attorneys, E.D.N.Y., Brooklyn, N.Y., of counsel), for Appellee.

Steven R. Kartagener, New York, N.Y. (Michael A. Marinaccio, Culleton, Marinaccio & Foglia, White Plains, N.Y., on the brief), for Defendant- Appellant.

Before: OAKES and WALKER, Circuit Judges, and KNAPP, District Judge. [FN*]

FN* The Honorable Whitman Knapp, of the United States District Court for the Southern District of New York, sitting by designation.

JOHN M. WALKER, JR., Circuit Judge:

Defendant-appellant Vincent Gigante appeals from a judgment of conviction entered December 18, 1997, after a jury trial in the United States District Court for the Eastern District of New York (Jack B. Weinstein, Judge), convicting Gigante of racketeering in violation of the RICO statute, 18 U.S.C. § 1962(c); RICO conspiracy in violation of 18 U.S.C. § 1962(d); conspiracy to murder in violation of 18 U.S.C. § 1959(a)(5); an extortion conspiracy in violation of 18 U.S.C. § 1951; and a labor payoff conspiracy in violation of 18 U.S.C. § 371.

Gigante raises three challenges to his conviction. First, he contends that the district court violated his confrontation rights under the Sixth Amendment by allowing a government witness to testify via two-way closed-circuit television from a remote location. Second, he argues that the trial court improperly allowed testimony under the co-conspirator exception to the hearsay definition. Finally, Gigante argues that the district court erred in finding that he was competent to stand trial. For the reasons set forth below, we reject each of Gigante's arguments and affirm his conviction.

BACKGROUND

This case arises from the government's continuing efforts to thwart the criminal activity of La Cosa Nostra, also known as the Mafia. The New York Mafia is comprised of five organized crime families: the Bonnano, Colombo, Gambino, Lucchese and Genovese families, each spearheaded by a boss. See United States v. Orena, 32 F.3d 704, 708 (2d Cir.1994). The government asserted that Vincent Gigante was the boss of the Genovese family and supervised its criminal activity.

Gigante was charged with two major categories of crimes: murder and labor racketeering. The government alleged that Gigante was the ultimate authority behind the murders of many fellow members of the Mafia, which were generally intended to enforce the rules of the organization or to prevent cooperation with the authorities. The government also charged Gigante with conspiring to use extortion and kickbacks to effect the criminal infiltration of the window replacement industry in and around New York City. He followed a long line of other organized crime figures whom the government had already convicted for their participation in this "Windows" scheme. See, e.g., United States v. Amuso, 21 F.3d 1251, 1254 (2d Cir.1994) (describing progression of Windows prosecutions).

The government presented its case against Gigante in large part through the testimony of six former members of the Mafia who had become cooperating witnesses: Alphonso D'Arco, once the acting boss of the Lucchese ***79** family; Salvatore Gravano, the former Gambino family underboss; Peter Chiodo, who was a Lucchese captain; Phillip Leonetti and Gino Milano, past members of La Cosa Nostra in Philadelphia; and Peter Savino, a former associate of the Genovese family. The government also introduced a wealth of tapes recorded over many years of surveillance of Gigante and other Mafia figures, and supported this evidence with the testimony of law enforcement officers.

The cooperating witnesses testified at length about the structure and rules of La Cosa Nostra, described Gigante's place in the Mafia hierarchy, and detailed his efforts to hide his complicity through continuous public demonstrations of mental instability. The tapes and witnesses revealed Gigante's complicity in planning and approving murders within the Mafia and in assisting in the direction of the Windows extortion scheme.

The jury acquitted Gigante or failed to reach a verdict on all charges surrounding the murders of Jerry Pappa, Anthony Capongiro, Fred Salerno, John "Keys" Simone, Frank Sindone, Frank "Chickie" Narducci, Rocco "Rocky" Marinucci, and Enrico "Eddie" Carini. The jury found Gigante guilty of the more recent conspiracies to murder Peter Savino and John Gotti, although the court later dismissed the charge of conspiracy to murder Gotti as time-barred. See United States v. Gigante, 982 F.Supp. 140, 159 (E.D.N.Y.1997). Gigante was also convicted on all the extortion and labor payoff counts related to the Windows scheme. See id. at 177-81 (reprinting completed jury verdict sheet). Gigante was sentenced to twelve years in prison, five years of supervised release, and a fine of $1,250,000. This appeal followed.

DISCUSSION

I. The Use of Two-Way Closed-Circuit Television Testimony

[1] Gigante argues that the admission of Peter Savino's testimony via two- way, closed-circuit television testimony from a remote location violated his Sixth Amendment right "to be confronted with the witnesses against him." U.S. Const. amend. VI. Gigante maintains that no compelling government interest justified the deprivation of his constitutional right to a face-to- face confrontation with Savino.

Preliminarily, we note the government's argument that Gigante waived his right to confront Savino. The government asserts that by refusing to attend a deposition of Savino pursuant to Rule 15, Fed.R.Crim.P., Gigante waived his right to a face-to-face confrontation. More fundamentally, the government argues that Gigante waived his confrontation rights through his own misconduct, with protracted attempts to delay his own trial by feigning incompetence. We need not resolve these questions relating to possible waiver, however, because Gigante's claim fails on the merits: under the circumstances of this case, the procedures by which Savino testified did not violate Gigante's confrontation rights.

Peter Savino, a former associate of the Genovese crime family, was a crucial witness against Gigante, providing direct testimony of his involvement in the Windows scheme. As a cooperator with the government since 1987, Savino was a participant in the Federal Witness Protection Program. At the time of Gigante's trial in 1997, Savino was in the final stages of an inoperable, fatal cancer, and was under medical supervision at an undisclosed location.

The government made an application for an order allowing Savino to testify via closed-circuit television due to his illness and concomitant infirmity. Judge Weinstein held a hearing to determine whether Savino was able to travel to New York to testify at Gigante's trial. At this hearing, an emergency medicine physician employed by the Federal Witness Protection Program testified that he had examined Savino and that "it would be medically unsafe for [Savino] to travel to New York for testimony." Defense counsel cross- examined the government physician and then presented an oncologist of their own who testified that "it would not be life-threatening" for Savino to travel to New York.

[2] Judge Weinstein held in a published opinion that "[m]edical reports and testimony ***80** for the government and defendant fully supported the government's contention, by clear and convincing proof, that the witness could not appear in court." United States v. Gigante, 971 F.Supp. 755, 756 (E.D.N.Y.1997). Although Gigante attacks this determination, we review this factual finding for clear error. Judge Weinstein's holding was supported by

evidence in the record and was not clearly erroneous.

Because of Savino's illness, Judge Weinstein permitted him to testify via two- way, closed-circuit television, basing his decision upon his "inherent power" under Fed.R.Crim.P. 2 and 57(b) to structure a criminal trial in a just manner. Gigante, 971 F.Supp. at 758-59. During his testimony, Savino was visible on video screens in the courtroom to the jury, defense counsel, Judge Weinstein and Gigante. Savino could see and hear defense counsel and other courtroom participants on a video screen at his remote location.

Gigante's argument that this procedure deprived him of his right to confront Savino amounts to the argument that his Sixth Amendment right could only be preserved by a face-to-face confrontation with Savino in the same room. We disagree. While the use of remote, closed-circuit television testimony must be carefully circumscribed, Judge Weinstein's order in this case adequately protected Gigante's confrontation rights.

[3] The Supreme Court has declared that "the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." Coy v. Iowa, 487 U.S. 1012, 1016, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988). In Coy, the Court reversed the defendant's conviction for sexual assault after a 13-year-old alleged victim was permitted to testify out of sight of the defendant. See id. at 1022, 108 S.Ct. 2798. However, the right to face-to-face confrontation is not absolute; in Maryland v. Craig, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990), the Court held that one-way closed-circuit television testimony by a child witness in an abuse case may be permissible upon a case-specific finding of necessity. See id. at 857, 110 S.Ct. 3157.

The Supreme Court explained that "[t]he central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." Id. at 845, 110 S.Ct. 3157. The salutary effects of face-to-face confrontation include 1) the giving of testimony under oath; 2) the opportunity for cross-examination; 3) the ability of the fact-finder to observe demeanor evidence; and 4) the reduced risk that a witness will wrongfully implicate an innocent defendant when testifying in his presence. See id. at 845-46, 110 S.Ct. 3157.

[4] The closed-circuit television procedure utilized for Savino's testimony preserved all of these characteristics of in-court testimony: Savino was sworn; he was subject to full cross-examination; he testified in full view of the jury, court, and defense counsel; and Savino gave this testimony under the eye of Gigante himself. [FN1] Gigante forfeited none of the constitutional protections of confrontation.

> FN1. There is some dispute over whether Savino could see Gigante himself in the background of his monitor. However, it is clear that Judge Weinstein afforded defense counsel the opportunity to place Gigante's televised visage squarely before Savino (Mr. Culleton was to cross-examine Savino):
> THE COURT: Is this where you wish the camera--
> MR. CULLETON: Exactly. He can look at me and I'll be looking at him.
> THE COURT: You don't want him to look at the defendant?
> MR. CULLETON: Not necessary.
> THE COURT: And you don't want the defendant to look directly eye to eye?
> MR. CULLETON: We don't need it. Absolutely not, Judge.
> Gigante, having explicitly declined the option of being viewed by Savino, has waived any claim of error based on that deprivation.

In Craig, the Supreme Court indicated that confrontation rights "may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." Craig, 497 U.S. at 850, 110 S.Ct. 3157. Gigante ***81** seeks to hold the government to this standard, and challenges the government to articulate the important public policy that was furthered by Savino's testimony. However, the Supreme

Court crafted this standard to constrain the use of one-way closed- circuit television, whereby the witness could not possibly view the defendant. Because Judge Weinstein employed a two-way system that preserved the face-to- face confrontation celebrated by Coy, it is not necessary to enforce the Craig standard in this case.

A more profitable comparison can be made to the Rule 15 deposition, which under the Federal Rules may be employed "[w]henever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial." Fed.R.Crim.P. 15(a). That testimony may then be used at trial "as substantive evidence if the witness is unavailable." Fed.R.Crim.P. 15(e). Unavailability is defined by reference to Rule 804(a) of the Federal Rules of Evidence, which includes situations in which a witness "is unable to be present or to testify at the hearing because of ... physical or mental illness or infirmity." Fed.R.Evid. 804(a)(4).

[5][6] The decision to permit a deposition under Rule 15 "rests within the sound discretion of the trial court, and will not be disturbed absent clear abuse of discretion." United States v. Johnpoll, 739 F.2d 702, 708 (2d Cir.1984) (internal citations omitted). "It is well-settled that the 'exceptional circumstances' required to justify the deposition of a prospective witness are present if that witness's testimony is material to the case and if the witness is unavailable to appear at trial." Id. at 709. Under the circumstances of this case, Judge Weinstein could have admitted Savino's testimony pursuant to Rule 15 without offending the confrontation clause. See United States v. Salim, 855 F.2d 944, 954-55 (2d Cir.1988); Johnpoll, 739 F.2d at 710.

Judge Weinstein considered the utility of a Rule 15 deposition for preserving Savino's testimony, and noted that the government was "able to make the threshold showing entitling it to a [Rule 15] deposition." Gigante, 971 F.Supp. at 758. Had Judge Weinstein allowed a deposition, this would not have been an abuse of discretion, given the medical evidence of Savino's poor health. However, due to the joint exigencies of Savino's secret location and Gigante's own ill health and inability to travel, Judge Weinstein concluded that "deposing the witness is not appropriate," and that "contemporaneous testimony via closed circuit televising affords greater protection of [Gigante's] confrontation rights than would a deposition." Id. at 758-59.

We agree that the closed-circuit presentation of Savino's testimony afforded greater protection of Gigante's confrontation rights than would have been provided by a Rule 15 deposition. It forced Savino to testify before the jury, and allowed them to judge his credibility through his demeanor and comportment; under Rule 15 practice, the bare transcript of Savino's deposition could have been admitted, which would have precluded any visual assessment of his demeanor. Closed-circuit testimony also allowed Gigante's attorney to weigh the impact of Savino's direct testimony on the jury as he crafted a cross-examination.

[7] Closed-circuit television should not be considered a commonplace substitute for in-court testimony by a witness. There may well be intangible elements of the ordeal of testifying in a courtroom that are reduced or even eliminated by remote testimony. However, two-way closed-circuit television testimony does not necessarily violate the Sixth Amendment. Because this procedure may provide at least as great protection of confrontation rights as Rule 15, we decline to adopt a stricter standard for its use than the standard articulated by Rule 15. Upon a finding of exceptional circumstances, such as were found in this case, a trial court may allow a witness to testify via two-way closed-circuit television when this furthers the interest of justice.

The facts of Savino's fatal illness and participation in the Federal Witness Protection Program, coupled with Gigante's own inability to participate in a distant deposition, satisfy this exceptional circumstances requirement,*82 and Judge

Weinstein did not abuse his discretion by allowing Savino to testify in this manner. Savino's testimony did not deprive Gigante of his right to confront his accuser under the Sixth Amendment.

II. The Admission of Coconspirator Testimony

[8] Gigante contends that Judge Weinstein admitted substantial prejudicial testimony by misconstruing the proper scope of Fed.R.Evid. 801(d)(2)(E), which provides that "a statement is not hearsay if ... [it] is offered against a party and is ... a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Gigante argues that these evidentiary rulings constituted reversible error.

[9][10] To admit a statement under the coconspirator exception to the hearsay definition, a district court must find two factors by a preponderance of the evidence: first, that a conspiracy existed that included the defendant and the declarant; and second, that the statement was made during the course of and in furtherance of that conspiracy. See Orena, 32 F.3d at 711; United States v. Maldonado-Rivera, 922 F.2d 934, 958 (2d Cir.1990) (citing Bourjaily v. United States, 483 U.S. 171, 175, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987)). We will not disturb a district court's findings on these issues unless they are clearly erroneous. Moreover, any improper admission of coconspirator testimony is subject to harmless error analysis. See Orena, 32 F.3d at 711.

[11][12][13] The conspiracy between the declarant and the defendant need not be identical to any conspiracy that is specifically charged in the indictment. See id. at 713. In addition, while the hearsay statement itself may be considered in establishing the existence of the conspiracy, "there must be some independent corroborating evidence of the defendant's participation in the conspiracy." United States v. Tellier, 83 F.3d 578, 580 (2d Cir.1996); see also Fed.R.Evid. 801(d)(2). The identities of both the declarant and the witness who heard the hearsay evidence, however, are non-hearsay evidence that may be considered in assessing the reliability of the statement and finding the existence of a conspiracy. See Tellier, 83 F.3d at 580 n. 2; Fed.R.Evid. 801(d)(2) advisory committee's note to 1997 Amendment.

[14][15] As to the second requirement, statements made during the course and in furtherance of a conspiracy "must be such as to prompt the listener ... to respond in a way that promotes or facilitates the carrying out of a criminal activity." Maldonado-Rivera, 922 F.2d at 958. This can include those statements "that provide reassurance, or seek to induce a coconspirator's assistance, or serve to foster trust and cohesiveness, or inform each other as to the progress or status of the conspiracy." Id. at 959. In addition, while idle chatter among conspirators does not satisfy the "in furtherance" requirement of Rule 801(d)(2)(E), often these statements are admissible as declarations against penal interest or under the state of mind hearsay exception. See United States v. Paone, 782 F.2d 386, 390-91 (2d Cir.1986).

[16] A conspiracy may involve only two or three individuals. In the context of a RICO prosecution of organized criminals, however, the relevant conspiracy may grow quite large. For example, the Windows conspiracy, of which Gigante was a part, was a sprawling criminal enterprise involving both the Genovese and Colombo crime families and enveloping an entire industry. See United States v. Gigante, 39 F.3d 42, 44 (2d Cir.1994) (describing Windows scheme). The conspiratorial ingenuity of La Cosa Nostra expands the normal boundaries of a criminal enterprise, and Rule 801(d)(2)(E) must expand accordingly to encompass the full extent of the conspiracy.

[17][18] However, even in the context of organized crime, there is a limit to the proper use of Rule 801(d)(2)(E) to admit coconspirator testimony. The district court in each instance must find the existence of a specific criminal conspiracy beyond the general existence of the Mafia. And when a RICO conspiracy is charged, the defendant must be linked to an individual predicate act by more than hearsay

alone before a statement related to that act is admissible against *83 the defendant under Rule 801(d)(2)(E). See Tellier, 83 F.3d at 581.

Early in Gigante's trial, Judge Weinstein announced his finding that "there is a general overriding conspiracy among all of these alleged Mafia groups." He then admitted some evidence under Rule 801(d)(2)(E) based solely on this finding of a general conspiracy. This was error. The district court's rationale would allow the admission of any statement by any member of the Mafia regarding any criminal behavior of any other member of the Mafia. This is not to say that there can never be a conspiracy comprising many different Mafia families; however, it must be a conspiracy with some specific criminal goal in addition to a general conspiracy to be members of the Mafia. It is the unity of interests stemming from a specific shared criminal task that justifies Rule 801(d)(2)(E) in the first place--organized crime membership alone does not suffice.

Although we find that Judge Weinstein construed Rule 801(d)(2)(E) too broadly, many of the statements contested by Gigante were properly admitted. For example, Gigante contends that it was error to admit Alphonse D'Arco's testimony that Jimmy Ida (of the Genovese Family) told D'Arco that Gigante wanted him to help locate and murder Savino in Hawaii. Similarly, Gigante contests the district court's admission of D'Arco's testimony that Vittorio Amuso (his boss in the Lucchese family) told D'Arco that Gigante was aware of and approved of the plot to murder John Gotti. Gigante argues that there was no independent corroborating evidence of his involvement in a conspiracy to murder either Savino or Gotti. However, there was substantial corroborating evidence that could support findings by Judge Weinstein that Gigante was boss of the Genovese family, that the Genovese family was involved in the conspiracies to murder Savino and Gotti, and that Gigante, as boss, was necessarily involved in these conspiracies. The admission of these statements was not clearly erroneous.

[19] On other occasions, the district court erred in admitting evidence under Rule 801(d)(2)(E). Gigante argues that Judge Weinstein improperly admitted a tape recording of Gotti, Gravano and John D'Amato (street boss of a New Jersey family) discussing a conspiracy to murder Corky Vastola, and stating that they needed to secure Gigante's permission to utilize a particular person to kill Vastola. The evidence indicated that Gigante refused this permission. The discussions between Gotti, Gravano and D'Amato should have been excluded, because there was no evidence that Gigante ever joined in a conspiracy with those figures to murder Vastola. The government argues that these discussions reveal Gigante's role in a general process and network of criminal conspiracy and activity. However, these discussions were not "in furtherance of" a specific criminal purpose, and the fact that Gigante might have conspired with Gotti and Gravano to commit other crimes on other occasions is irrelevant.

Nonetheless, to the extent that these or any other statements were erroneously admitted under Rule 801(d)(2)(E), they did not "effect actual prejudice resulting in 'substantial and injurious effect or influence in determining the jury's verdict.' " Ayala v. Leonardo, 20 F.3d 83, 92 (2d Cir.1994) (quoting Kotteakos v. United States, 328 U.S. 750, 776, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)). Several admitted statements would have been properly admissible either as declarations against penal interest or under the state of mind exception to the hearsay rule. The jury acquitted Gigante on some of the charges against him, convicted him on other charges, and were unable to reach a verdict on still other allegations. This demonstrates that the jury was able to distinguish among the charges against Gigante and weigh the evidence on each separate count. There was substantial direct and circumstantial evidence connecting Gigante to each of the crimes for which he was convicted. Having considered all of Gigante's evidentiary arguments, we hold that any errors by the district court were harmless.

III. Competency to Stand Trial

[20] Gigante also challenges the trial court's determination that he was competent to stand trial. We uphold a district court's finding of competence unless that finding is ***84** clearly erroneous. See United States v. Morrison, 153 F.3d 34, 46 (2d Cir.1998). Under this highly deferential standard, " '[w]here there are two permissible views of the evidence as to competency, the court's choice between them cannot be deemed clearly erroneous.' " United States v. Nichols, 56 F.3d 403, 411 (2d Cir.1995) (quoting United States v. Villegas, 899 F.2d 1324, 1341 (2d Cir.1990)).

[21] Judge Weinstein was not the first judge to make a finding regarding Gigante's competency. Gigante's trial had been previously assigned to Judge Eugene Nickerson, who conducted the first hearings to determine whether Gigante was competent to stand trial. Four separate psychiatrists testified that Gigante was incompetent, although reservations were expressed that he might be malingering. See United States v. Gigante, 925 F.Supp. 967, 968 (E.D.N.Y.1996).

Judge Nickerson then received testimony from former members of the Mafia (many of whom later testified at Gigante's trial), and made the factual findings that "Gigante was a forceful and active leader of the Genovese family from at least 1970 on" and that Gigante had put on a "crazy act" for many years in order "to avoid apprehension by law enforcement." Id. at 976. After being presented with these findings, two of the examining psychiatrists changed their opinion, indicating that they now thought Gigante was malingering; one said Gigante was competent to stand trial, and the other said it was quite possible that Gigante was competent. The remaining psychiatrists held to their earlier findings of incompetence. See United States v. Gigante, 987 F.Supp. 143, 146 (E.D.N.Y.1996). Judge Nickerson found "the weight of medical opinion to show that Gigante is mentally competent to stand trial." Id. at 147.

When Gigante renewed his claim of incompetence due to Alzheimer's disease, Judge Nickerson recused himself, and the case was reassigned to Judge Weinstein. See Gigante, 982 F.Supp. at 146. Gigante presented new evidence of incompetence in the form of a Positron Emission Tomography (PET) scan of Gigante's brain and the results of a battery of tests designed to identify malingering. The defense experts who presented this evidence testified that Gigante was incompetent to be tried. The government then presented a witness who testified that it was possible that the results of these tests were due to the drugs Gigante was receiving. See id. at 147. Judge Weinstein held that Gigante was competent and ordered that the trial proceed. See id. at 148.

Judge Nickerson and Judge Weinstein, after conducting separate hearings, reached the identical conclusion that Gigante was malingering, and that he was competent to stand trial. This was a permissible conclusion in light of the expert testimony and extensive evidence of Gigante's attempts to elude prosecution, and we do not find it to be clearly erroneous.

CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed.

END OF DOCUMENT

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Rule 35(b); Discussion of Possible Amendment Regarding Defendant's Cooperation with Government**

DATE: **March 25, 1999**

Attached is correspondence from Judge Carnes concerning the Eleventh Circuit's decision in *United States v. Orozco*, 160 F.3d 1309 (11th Cir. 1998). In that case the court addressed a potential gap in Rule 35(b), i.e., whether a court may grant sentence relief to a defendant who has provided information to the government within one year of sentencing but the information is not actually useful to the government until much later. The court concluded that under the plain language of the Rule no relief could be granted, and that Congress should address this gap. Judge Carnes has highlighted some of the key language in the court's decision.

This matter is on the agenda for the April meeting in Washington.

United States Court of Appeals
For The Eleventh Circuit
15 LEE STREET
MONTGOMERY, ALABAMA 36104

ED CARNES
CIRCUIT JUDGE

TELEPHONE (334) 223-7132
FAX (334) 223-7676

March 15, 1999

Honorable W. Eugene Davis
Chairman, Criminal Rules Committee
556 Jefferson Street Suite 300
Lafayette, LA 70501

Re: Rule 35(b)

Dear Gene:

Enclosed is a copy of an opinion from a panel of my Court which points out a problem with Rule 35(b).

The problem arises when defendants provide information or evidence to the government before or within one year after the imposition of sentence, but the government's use of that information is delayed so that the substantial assistance motion is filed more than a year after sentencing. All three members of the Orozco panel agreed that as written Rule 35(b) does not permit a sentence reduction in that situation, but it should.

I ask that this matter be placed on the agenda of our next meeting for discussion.

Sincerely,

ED CARNES
United States Circuit Judge

EC:bb

c: Professor Dave Schlueter
Mr. John K. Rabiej

160 F.3d 1309
12 Fla. L. Weekly Fed. C 283
(Cite as: 160 F.3d 1309)

UNITED STATES of America, Plaintiff-Appellee,
v.
Alain OROZCO, a.k.a. Allan Jene Velasquez, Defendant-Appellant.

No. 97-8213.

United States Court of Appeals,
Eleventh Circuit.

Nov. 17, 1998.

More than four years after defendant was sentenced in connection with cocaine conspiracy, government moved for sentence reduction on ground that defendant provided information which was useful in convicting coconspirator, which information was known by defendant prior to sentencing, but which information was not useful to government until more than one year after defendant was sentenced. The United States District Court for the Northern District of Georgia, No. 1:90-CR-6-4-JOF, J. Owen Forrester, J., denied motion. Defendant appealed. The Court of Appeals, Birch, Circuit Judge, held that defendant was ineligible for sentence reduction.

Affirmed.

Hill, Senior Circuit Judge, issued concurring opinion.

Kravitch, Senior Circuit Judge, issued specially concurring opinion.

[1] CRIMINAL LAW ⚖1139
110k1139
A district judge's statutory interpretation and application are reviewed de novo.

[2] STATUTES ⚖217.4
361k217.4
Review of the legislative history is not necessary unless a statute is inescapably ambiguous.

[3] CRIMINAL LAW ⚖996(2)
110k996(2)
The time period in which the government may file a motion for reduction of sentence because of a defendant's subsequent, substantial assistance in the investigation or prosecution of another person is jurisdictional. Fed.Rules Cr.Proc.Rule 35(b), 18 U.S.C.A.

[4] CRIMINAL LAW ⚖996(2)
110k996(2)
Sentence is imposed, for purposes of filing motion for reduction of sentence, when sentencing order constitutes final, appealable order. Fed.Rules Cr.Proc.Rule 35(b), 18 U.S.C.A.

[5] CRIMINAL LAW ⚖996(1.1)
110k996(1.1)
Defendant, who was sentenced more than one year before he provided government with information that was useful in prosecution of coconspirator, was not eligible for sentence reduction on basis of such assistance, because defendant was aware of that information when he was sentenced and, in fact, had provided that same information to government before he was sentenced; fact that such information was not useful to government until more than one year after defendant was sentenced was irrelevant. Fed.Rules Cr.Proc.Rule 35(b), 18 U.S.C.A.

[6] CRIMINAL LAW ⚖996(1.1)
110k996(1.1)
Determining whether a motion for reduction of sentence will be filed is reserved to the government, which must ascertain what information the defendant has as well as the truthfulness and usefulness of this information. Fed.Rules Cr.Proc.Rule 35(b), 18 U.S.C.A.

[7] CRIMINAL LAW ⚖996(2)
110k996(2)
Provided that a motion for sentence reduction because of a defendant's subsequent, substantial assistance is filed within the jurisdictional time period, i.e., within a year of sentence imposition for information known to a convicted defendant during that time and more than a year after sentence imposition for new information unknown to the convicted defendant within a year of sentence imposition, the district judge has discretion to rule on the motion based upon the government's recommendation. Fed.Rules Cr.Proc.Rule 35(b), 18 U.S.C.A.

***1310** Howard J. Manchel, Atlanta, GA, for Defendant-Appellant.

Kent Alexander, U.S. Atty., James T. Martin, Asst. U.S. Atty., Atlanta, GA, for Plaintiff-Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

Before BIRCH, Circuit Judge, and HILL and KRAVITCH, Senior Circuit Judges.

BIRCH, Circuit Judge:

This case presents the issue of whether a district judge has jurisdiction under Federal Rule of Criminal Procedure 35(b) to grant a motion for reduction of sentence when information provided by a defendant is useful in convicting a coconspirator, but the assistance occurs more than one year after imposition of sentence and the information was known by the defendant prior to sentencing. The district judge determined that he was without jurisdiction to rule on this motion outside the prescribed time period. We affirm.

I. BACKGROUND

In December, 1989, defendant-appellant, Alain Orozco, was arrested for transporting cocaine from South Florida to Atlanta, Georgia. On July 9, 1990, he pled guilty in the Northern District of Georgia to conspiring to manufacture, distribute, and possess cocaine base and cocaine hydrochloride in violation of 21 U.S.C. § 846 and making a false statement to the Federal Bureau of Investigation to conceal his identity in violation of 18 U.S.C. § 1001. In an effort to have the government file a U.S.S.G. § 5K1.1 departure motion at sentencing, Orozco informed the government of his knowledge of the cocaine distribution operation in which he was involved. In addition to other information regarding the cocaine distribution conspiracy, Orozco identified Armando Rodriguez, a major cocaine distributor for whom he provided cocaine transportation services, and related details concerning their transactions. The government, however, concluded that Orozco was not entirely truthful and had minimized some information about the cocaine distribution operation. Additionally, the information that he supplied could not be used by the government against Orozco's four codefendants charged in the indictment or others that he named because of venue problems or lack of corroborating evidence.

Concluding that the information provided by Orozco prior to his sentencing was insufficient to qualify as substantial assistance, the government did not move for a reduction in his sentence under section 5K1.1. On November 16, 1990, Orozco was sentenced to 151 months of imprisonment for his role in the cocaine distribution conspiracy. This court affirmed his sentence. See United States v. Orozco, 964 F.2d 1146 (11th Cir.1992) (mem.).

Within a year of Orozco's sentencing, the government filed a preliminary motion under Rule 35(b) that advised the district judge that Orozco's cooperation had not been completed. The government requested the district judge not to rule on the motion until it was supplemented or withdrawn. When Orozco furnished no additional information, the government withdrew its preliminary Rule 35(b) motion. [FN1]

FN1. In her special concurrence, Judge Kravitch states "that the record is void of any information " to support the reason that the government withdrew its preliminary Rule 35(b) motion was because Orozco provided no further cooperation. United States v. Orozco, 160 F.3d 1309, 1318, n. 3 (11th Cir.1998) (Kravitch, J., concurring specially) (emphasis added). To the contrary, the record provides sufficient support for this statement. Within the time from his arrest on December 20, 1989, see R1- 7(A), until November, 1990, Orozco provided information regarding the extensive cocaine distribution conspiracy in which he had been involved to the government through various debriefings, see R1-107-1. At a debriefing on June 5, 1990, he identified Rodriguez as a cocaine supplier, the information about which this case is concerned. See R5-10. The information regarding Rodriguez, however, was not useful to the government at that time because Rodriguez was a fugitive. See id. at 7 (AUSA's explanation to the district judge at the hearing on the Rule 35 motion that information that is not usable does not qualify for substantial assistance). Orozco's plea agreement required him to cooperate fully with the government and to give "truthful testimony," R1-82(D)-1 ¶ 2(c), to obtain a downward departure at his sentencing under U.S.S.G. § 5K1.1, see id. at 2 ¶ 2(d). Thus, the information that Orozco provided to the government prior to his sentencing was with the hope of acquiring a § 5K1.1 motion for reduction in his sentence.

Orozco's attorney conceded, however, in a motion for downward departure filed on November 15, 1990, the day before Orozco's sentencing, that Orozco had minimized the amount of cocaine that he had transported, "refused until November 9, 1990 to admit he had other sources for cocaine than those originally named," R1-107-1, and "denied his family's role in illegal drug trafficking," id. Consequently, Orozco's "reluctance to be totally candid prevented the government from recommending that he be given credit for substantial assistance and led to his failure to be given credit for acceptance of responsibility." Id. at 2 (emphasis added). Thus, the AUSA did not make a § 5K1.1 motion at Orozco's sentencing on November 16, 1990.

Within a year of Orozco's sentencing, the AUSA in the Northern District of Georgia filed on November

14, 1991, the subject preliminary Rule 35(b) motion that states that Orozco's cooperation "is not complete at this time," R1-131(A)-2 ¶ 4, and that "Mr. Orozco has represented that he has information which may be of importance to the Federal Bureau of Investigation or other agencies," id. at 1 ¶ 1. Thus, the purpose of the government's filing the preliminary Rule 35(b) motion was "to preserve the jurisdiction of this Court to lower the sentences imposed and allow the defendant sufficient time to provide assistance which the United States may evaluate to determine whether such assistance is substantial" so that the government could file a Rule 35(b) motion for reduction in sentence should Orozco's cooperation be forthcoming and qualify as substantial assistance. Id. at 2 ¶ 3 (emphasis added). The preliminary motion was prospective, filed in anticipation of additional information from Orozco and before such purported assistance had been received or evaluated. Additionally, on November 13, 1991, the government filed Rule 35 motions for reduction in sentences for two of Orozco's codefendants, Miriam Ledesma and Haran Griffin, because of their substantial assistance to the government. See R1-129, 130.

On January 8, 1992, the district judge noticed a hearing on February 7, 1992, for the Rule 35 motions for Orozco, Ledesma, and Griffin. See R1-131(B). On February 4, 1992, the AUSA moved for a continuance of this hearing and stated the cooperation status of Orozco, Ledesma and Griffin. See R1-131(C). Therein, the AUSA explains that the government filed the preliminary Rule 35 motions "as the procedural device whereby the Court may consider a reduction of the previously imposed sentences after more than one year has passed from the date of sentencing." Id. at 1 ¶ 1. The AUSA then states the status of cooperation for each defendant. With respect to Orozco, the AUSA states that "[a]s of the filing of this continuance, Orozco has furnished no further cooperation, but will be a witness in an investigation which has not been identified." Id. at 1- 2 ¶ 3 (emphasis added). On March 31, 1992, the district judge, "having ... read and considered" the government's motion for continuance wherein, with respect to Orozco, the AUSA stated that Orozco had provided no further information since the filing of the government's preliminary Rule 35(b) motion, canceled the previously scheduled hearing on Orozco's Rule 35(b) motion and acknowledged that the government had withdrawn this motion. R1- 134. Judge Kravitch postulates that Orozco could have been a witness in a government investigation that was unidentified on February 4, 1992, but was conducted in less than eight weeks and declared unfruitful prior to March 31, 1992, when the government's withdrawal of its preliminary Rule 35(b) motion became effective. Orozco, 160 F.3d at 1318 n. 3 (Kravitch, J., concurring specially). While, after approximately a year of government debriefings of Orozco, an unidentified investigation referenced in the government's motion for continuance filed on February 4, 1992, more probably refers to a future prosecution of an unobtainable coconspirator, such as Rodriguez, who was a fugitive, we need not speculate at all.

The government's brief states that "[Orozco] had furnished no other cooperation since the preliminary Rule 35 motion had been filed" and cites the government's motion for continuance, which states that Orozco had provided no further assistance since the filing of the preliminary Rule 35(b) motion. Appellee's Brief at 4. Furthermore, the AUSA who signed the government's appellate brief as an officer of the court is the same AUSA and member of the Southeastern Drug Task Force who signed the original indictment, R1-7-4, the superceding indictment, id. 58-4, the plea agreement, id. 82(D)-4, the preliminary Rule 35(b) motion, id. 131(A)-3, and the Rule 35(b) motion pertaining to Orozco's assistance at the trial of Armando Rodriguez, filed on December 17, 1996, id. 152-3. In short, this AUSA has handled Orozco's case from investigation through this appeal and obviously knew what information Orozco provided and when he provided it. By signing the government's brief, the AUSA certified that the statements therein were supported by his knowledge and information. See United States v. Stevens, 510 F.2d 1101, 1106 n. 5 (5th Cir.1975) (recognizing that, aside from sworn affidavits, a government attorney who signs a document filed with a court is "acting as an officer of the court" and is "bound by the requirements of Rule 11, Federal Rules of Civil Procedure."). Thus, there is nothing whatsoever in the record to indicate that Orozco provided further assistance to the government from the time that the AUSA filed the preliminary Rule 35(b) motion on November 14, 1991, until that motion was withdrawn by the government effective March 31, 1992. Moreover, Orozco has not contradicted the government's factual relation of his cooperation by representing otherwise.

*1312 In 1996, the United States Attorney for the Northern District of Florida learned that Orozco had information that could assist the government in its prosecution of Rodriguez, who had been indicted for distributing cocaine after being a fugitive for five years before his arrest. [FN2] At Rodriguez's trial in May, 1996, over four years after Orozco's sentence became final, Orozco testified that Rodriguez supplied him with five kilograms of cocaine, which he brought to Atlanta. Additionally, he corroborated the testimonies of earlier government witnesses. Orozco's testimony was the same evidence that he had provided in 1990 to Federal Bureau of Investigation and Drug Enforcement Administration agents. Because of his assistance, the Florida Assistant United

States Attorney recommended to the Georgia Assistant United States Attorney ("AUSA") that a Rule 35(b) motion be filed for Orozco. In the government's motion for reduction of sentence, filed on December 17, 1996, in the Northern District of Georgia, the AUSA explained that the information upon which the motion was based was known to Orozco at his sentencing but that the government could not use the information until more than one year after Orozco had been sentenced. [FN3] In the motion, the AUSA advised that "Orozco appeared and testified with the understanding that no guarantee was made as to any sentence reduction" and that, "because this motion is made more than one year after imposition of sentence," the district judge must determine whether he "has jurisdiction to consider this motion and grant any reduction of the previously imposed sentence." R1-152-2.

FN2. Rodriguez negotiated a guilty plea that he subsequently withdrew and proceeded to trial; he was convicted.

FN3. Pursuant to Rule 35(b), the Georgia AUSA asked the district judge to reduce Orozco's sentence from 151 to 115 months. See R1-152-3.

The same district judge in the Northern District of Georgia who had sentenced Orozco conducted a hearing on the government's Rule 35(b) motion on January 30, 1997. The AUSA informed the district judge that, when Orozco was prosecuted and debriefed in 1990, he had related information concerning Rodriguez. Because Rodriguez could not be located, Orozco's information could not be used to prosecute him at that time. Thus, the government did not file a motion to reduce Orozco's sentence for substantial assistance.

In response to the district judge's inquiry about the terms of Orozco's plea agreement, the AUSA advised that the agreement did not require that the government file a Rule 35(b) motion but stated that the government would inform the district judge and file a section 5K1.1 motion if Orozco provided substantial assistance prior to his sentencing. Absent his being able to order the government to file a Rule 35(b) motion pursuant to the terms of the plea agreement, the district judge concluded that he was without jurisdiction under the rule to consider a Rule 35(b) motion for substantial assistance at that time. [FN4] Orozco appeals this ruling.

FN4. Concerning his jurisdiction to rule on the government's Rule 35(b) motion, the district judge decided that he lacked jurisdiction: "And I'm going to rule that I lack jurisdiction based on the fact that [Orozco] gave the information, the government did not in the one-year period of time consider it to be substantial[ ]. It only became substantial when it became practically useful." R5-15. Nevertheless, the district judge commented that "[t]he case cries out for relief. If it were discretionary, I would do something. I understand it is jurisdictional." Id. at 12.

II. DISCUSSION

[1][2] In this appeal, we must decide whether the district judge correctly determined that he did not have jurisdiction to consider a Rule 35(b) motion for reduction of sentence, when Orozco provided information known to him prior to his sentencing but that information was not useful in prosecuting Rodriguez until over a year after imposition of Orozco's sentence. We review a district *1313 judge's statutory interpretation and application de novo. See United States v. Grigsby, 111 F.3d 806, 816 (11th Cir.1997). When a statute has been duly enacted and the language is plain, " 'the sole function of the courts is to enforce it according to its terms.' " Central Trust Co. v. Official Creditors' Comm. of Geiger Enters., Inc., 454 U.S. 354, 359-60, 102 S.Ct. 695, 698, 70 L.Ed.2d 542 (1982) (per curiam) (quoting Caminetti v. United States, 242 U.S. 470, 485, 37 S.Ct. 192, 194, 61 L.Ed. 442 (1917)). "Review of the legislative history is not necessary unless a statute is inescapably ambiguous." Solis-Ramirez v. United States Dept. of Justice, 758 F.2d 1426, 1430 (11th Cir.1985) (per curiam); see United States v. Rush, 874 F.2d 1513, 1514 (11th Cir.1989) (recognizing that legislative history is not used to create ambiguity where statutory language is clear).

[3][4] Federal Rule of Criminal Procedure 35(b) provides:

REDUCTION OF SENTENCE FOR CHANGED CIRCUMSTANCES. The court, on motion of the Government made within one year after the imposition of the sentence, may reduce a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense, in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code. The court may consider a government motion to reduce a sentence made one year or more after imposition of the sentence where the defendant's substantial

assistance involves information or evidence not known by the defendant until one year or more after imposition of sentence. The court's authority to reduce a sentence under this subsection includes the authority to reduce such sentence to a level below that established by statute as a minimum sentence.

18 U.S.C. app. Fed.R.Crim.P. 35(b) (1994) (emphasis added). Our court previously has held that the time period stated within the rule for the government to file a Rule 35(b) motion is jurisdictional. See In re United States, 898 F.2d 1485, 1486 (11th Cir.1990) (per curiam) (citing United States v. Addonizio, 442 U.S. 178, 189, 99 S.Ct. 2235, 2242-43, 60 L.Ed.2d 805 (1979)); United States v. Rice, 671 F.2d 455, 459 (11th Cir.1982). [FN5] We also have determined that "sentence is imposed for the purposes of Rule 35(b) when the sentencing order constitutes a final, appealable order," which signifies the commencement of the running of the specified time period. In re United States, 898 F.2d at 1487. Additionally, we have clarified the "temporal framework" involved with the government's acknowledging a convicted defendant's substantial assistance prior to sentencing in a section 5K1.1 motion at sentencing and the government's rewarding a convicted defendant's substantial assistance to the government after sentencing with a Rule 35(b) motion. [FN6] See United States v. Alvarez, 115 F.3d 839, 842 (11th Cir.1997); United States v. Howard, 902 F.2d 894, 896 (11th Cir.1990).

FN5. We acknowledge that these cases were decided under prior versions of Rule 35(b) and that they state different time periods for the government's filing a Rule 35(b) motion after imposition of sentence. Nevertheless, we apply our precedential rationale regarding the jurisdictional nature of this operative time period to the current version of Rule 35(b). See United States v. Lopez, 26 F.3d 512, 522 (5th Cir.1994) (stating that the seven days from imposition of sentence within which the district court can correct technical errors is "jurisdictional" under Federal Rule of Criminal Procedure 35(c), which was added to Rule 35 with the 1991 amendment that also revised Rule 35(b), which we review in this case).

FN6. Rule 35(b) "provides the only avenue for reduction of a legally imposed federal prison sentence," United States v. Gangi, 45 F.3d 28, 30 (2d Cir.1995), while 28 U.S.C. § 2255 and Federal Rule of Criminal Procedure 35(a) permit a district court to correct an illegal sentence at any time.

[5] Prior to the current version of Rule 35(b), the time period within which a Rule 35(b) motion requesting a sentence reduction for post- sentencing assistance could be filed was limited to the specified time period stated in Rule 35(b) from the date on which the convicted defendant's sentence became final. [FN7] The current version, resulting from the 1991 *1314 amendment to Rule 35, restricts the time period within which the government may file a Rule 35(b) motion to "one year after the imposition of the sentence" but extends the time period within which the government may file a Rule 35(b) motion to "one year or more after imposition of the sentence" through the qualification or exception when the convicted defendant provides substantial assistance, consisting of "information or evidence" unknown "by the defendant until one year or more after imposition of sentence." 18 U.S.C. app. Fed.R.Crim.P. 35(b) (1994). Our sole inquiry in this appeal is to decide whether the district court had jurisdiction to rule on the government's Rule 35(b) motion to reduce Orozco's sentence following his assistance in the prosecution of Rodriguez in 1996.

FN7. The time period within which the government may file a Rule 35(b) motion from the date that a sentence is final has been expanded by amendments. See 18 U.S.C. app. Fed.R.Crim.P. 35 (1964) (60 days); 18 U.S.C. app. Fed.R.Crim.P. 35 (1970) (120 days); 18 U.S.C. app. Fed.R.Crim.P. (1994) (one year).

Because Orozco's assistance in the prosecution of Rodriguez and the consequent filing of the Rule 35(b) motion in 1996 were outside the one-year limitation after the imposition of his sentence, he argues the applicability of the exception in Rule 35(b). He represents that the rule allows a motion for reduction of sentence to be filed after the one-year period when a convicted defendant's assistance does not become useful to the government until a year or more after sentence imposition. Thus, he argues that the information regarding Rodriguez that he provided to the government in 1990 should make him eligible for a reduction in his sentence under Rule 35(b) as of the time in 1996 that it became useful to the government in convicting Rodriguez.

Addressing the current version of Rule 35(b), as amended in 1991, the Fourth and Seventh Circuits have interpreted the rule literally. See United States v. Carey, 120 F.3d 509 (4th Cir.1997), cert. denied, --- U.S. ----, 118 S.Ct. 1062, 140 L.Ed.2d 122 (1998); United States v. McDowell, 117 F.3d 974 (7th Cir.1997). In Carey, the Fourth Circuit

recognized the policy considerations involved in the one-year limitation on the government's filing a Rule 35(b) motion: "ending the sentence negotiation process," "finalizing the length of a defendant's sentence," providing convicted defendants with incentive promptly to disclose all of their knowledge concerning unlawful conduct "regardless of whether they appreciate its value to the government," and preventing sentence manipulation whereby convicted defendants could return to the government years after sentencing with outdated or fabricated information regarding criminal activity. Carey, 120 F.3d at 511, 512. Applicable to this case, that court determined that "if substantial assistance forming the basis of a downward departure motion involves information or evidence that the defendant knew within the one-year period after his sentencing, he is not entitled to have the one-year limitation relaxed." Id. at 511.

The Carey court also confronted the same argument presented by Orozco that the Advisory Committee Note to Rule 35(b) relaxes the one-year limitation period to encompass the situation where a defendant's assistance was not useful until the one-year period from sentence imposition had expired. [FN8] See id. at 512. In rejecting this argument, the Fourth Circuit explained:

> FN8. The portion of the 1991 Advisory Committee Notes to the current version of Rule 35(b) that the Carey court addressed and that Orozco argues to us states as follows:
>
> The [1991] amendment [to Rule 35(b)] also recognizes that there may be those cases where the defendant's assistance or cooperation may not occur until after one year has elapsed. For example, the defendant may not have obtained information useful to the government until after the time limit had passed. In those instances the trial court in its discretion may consider what would otherwise be an untimely motion if the government establishes that the cooperation could not have been furnished within the one-year time limit. In deciding whether to consider an untimely motion, the court may, for example, consider whether the assistance was provided as early as possible.
>
> 18 U.S.C. app. Fed.R.Crim.P. 35(b) (1994)(Advisory Comm. Notes for 1991 Amend.).

[T]he Advisory Committee Note is not the law; [Rule 35(b)] is.... [I]f the Advisory Committee Note can be read in two ways, we must read it, if we consult it at all, in a manner that makes it consistent with the language of the rule itself, and if the rule and the note conflict, the rule must govern. Because the rule on the issue before us is unambiguous, we need not even consult the note to determine the rule's meaning.

The rule unambiguously provides that the one-year limitation may be relaxed only where the information provided by the defendant was "not known by the defendant *1315 until one year or more after the imposition of sentence." This language does not allow for an interpretation that the one-year period may be relaxed when the information was known during the one-year period but that the cooperation could not have been provided until more than one year, for whatever reason.

Id. at 512-13 (citation omitted). [FN9] See Fed.R.Crim.P. 45(b) ("[T]he court may not extend the time for taking any action under Rule[ ] ... 35, except to the extent and under the conditions stated in [it].").

> FN9. We note that the First Circuit stands alone in using the 1991 Advisory Committee notes to render a broad interpretation of " 'not known' " with reference to a defendant's knowledge a year or more after sentence imposition, as stated in the current version of Rule 35(b). United States v. Morales, 52 F.3d 7, 8 (1st Cir.1995) (quoting Fed.R.Crim.P. 35(b)). Eschewing a literal interpretation of Rule 35(b), that court held that a defendant cannot be said to " 'know' " information useful to the government "until becoming aware of its value, or being specifically asked," although the defendant in that case did not acquire the information until a year or more after her sentencing. Id. In addition to our disagreement with the First Circuit's expansive interpretation of Rule 35(b), we note that the Morales defendant did not substantially cooperate with the government pursuant to a supplemental plea agreement until several years after her sentencing, whereas Orozco reiterated at Rodriguez's trial in 1996 information that he had given the government prior to his sentencing in 1990.

In McDowell, the Seventh Circuit recognized that the jurisdictional, one-year provision for a Rule 35(b) motion is distinct from other jurisdictional deadlines because it is "qualified by the exception for 'information or evidence not known by the defendant until one year or more after imposition of sentence.' " McDowell, 117 F.3d at 979 (quoting Fed.R.Crim.P. 35(b)). Since the government's filing Rule 35(b) motions within a year of sentencing is "a constraint upon the court's authority to grant such motions," cases in which this exception is invoked require a district judge "to conduct an inquiry, beyond a perusal of the docket sheet" to determine if he has "authority to grant a Rule 35(b) motion." Id. For the exception

to the jurisdictional, one-year rule to become effective for the government's filing a Rule 35(b) motion, the Seventh Circuit concluded that the district judge must be convinced that the convicted defendant acquired information or evidence not known until a year or more after sentencing. That court reasoned that "[b]ecause only the government now may file Rule 35(b) motions, an interpretation of the Rule that permitted the government to 'waive' the time limit would render the deadline ineffectual." McDowell, 117 F.3d at 979.

[6][7] While Orozco is ineligible jurisdictionally from application of the one-year limitation period from sentence imposition in Rule 35(b), we conclude that he also is ineligible factually under the plain terms of the exception to the rule. It is undisputed that Orozco did not provide information or evidence in the prosecution of Rodriguez that was unknown to him during the one-year time limitation following the imposition of his sentence. He reiterated at Rodriguez's trial in 1996 the same information that he had given the government in 1990 before his sentencing. The current version of Rule 35(b) concerning assistance provided by a convicted defendant more than a year after imposition of his sentence focuses on the character of the information provided by the defendant, new disclosures, and not the usefulness of that information to the government. See United States v. Mitchell, 964 F.2d 454, 461 (5th Cir.1992) (per curiam) (recognizing that, in the usual case, "no information or evidence comes to light more than one year after imposition of sentence").

With the hope of reducing their sentences, convicted defendants provide a variety of information to the government. [FN10] Determining whether a motion for reduction of sentence will be filed is reserved to the government, which must ascertain what information the defendant has as well as the truthfulness and *1316 usefulness of this information before deciding whether it is appropriate to file a section 5K1.1 motion at sentencing or a Rule 35(b) motion for a convicted defendant thereafter. See Wade v. United States, 504 U.S. 181, 185, 112 S.Ct. 1840, 1843, 118 L.Ed.2d 524 (1992) (acknowledging "that in both [18 U.S.C.] § 3553(e) and § 5K1.1 the condition limiting the court's authority gives the Government a power, not a duty, to file a motion when a defendant has substantially assisted"); United States v. Forney, 9 F.3d 1492, 1501 (11th Cir.1993) (noting that "courts are precluded from intruding into prosecutorial discretion" regarding substantial assistance motions). "The substantial assistance regime is not a spoils system designed simply to reward a cooperative defendant; it is designed to benefit the government in its prosecution efforts." United States v. White, 71 F.3d 920, 924 (D.C.Cir.1995). Provided that a Rule 35(b) motion is filed within the jurisdictional time period, within a year of sentence imposition for information known to a convicted defendant during that time and more than a year after sentence imposition for new information unknown to the convicted defendant within a year of sentence imposition, the district judge has discretion to rule on the motion based upon the government's recommendation. See United States v. Griffin, 17 F.3d 269, 270 (8th Cir.1994) ("The decision to grant or deny a Rule 35(b) motion is entirely within the discretion of the district court.").

FN10. "[T]he substantial assistance business is inherently risky. When a defendant first decides to cooperate there is no guarantee that the government will ultimately deem his assistance 'substantial.' " United States v. White, 71 F.3d 920, 927 (D.C.Cir.1995). See United States v. Francois, 889 F.2d 1341, 1345 (4th Cir.1989) (noting that the government's decision not to file a substantial assistance motion under either section 5K1.1 or Rule 35(b) "does not deprive the defendant of any constitutional rights ... because there is no constitutional right to availability of a substantial assistance provision to reduce a criminal sentence.").

There is no evidence of bad faith on the part of the government in this case. [FN11] That is, the government did not acquire Orozco's information concerning Rodriguez and deliberately refrain from using that information until the one-year time limitation from imposition of his sentence had passed so that the motion would be barred jurisdictionally. Instead, after receiving Orozco's information regarding Rodriguez in 1990, the AUSA in the Northern District of Georgia determined that this information in conjunction with other information that Orozco provided prior to his sentencing was not useful. Therefore, the government did not file a section 5K1.1 motion and subsequently withdrew its preliminary Rule 35(b) motion when Orozco supplied no additional information within a year after imposition of his sentence. Thereafter, the prosecution of Rodriguez, who had been a fugitive for five years, commenced in the Northern District of Florida. Orozco was contacted by the government, and he testified at Rodriguez's trial. His testimony was the same information that he had imparted in the Northern District of Georgia in 1990, nothing more. [FN12]

FN11. We have observed "that not only is the government the best determiner of a defendant's assistance, but also that it has great incentive to perform this evaluation accurately.... [T]he government has no reason to refuse to make substantial assistance motions when appropriate, since it is dependant upon future defendants' cooperation." Forney, 9 F.3d at 1502 n. 4.

FN12. In testifying at Rodriguez's trial, Orozco did precisely what he agreed to do in his plea agreement: "The defendant [Orozco] will voluntarily appear without subpoena or other legal process at any proceeding where his testimony is desired by the Government and will give truthful testimony." R1-82(D)-2 at ¶ c. We additionally note that, based on his previous information given to the government, Orozco could have been subpoenaed to testify to this information at Rodriguez's trial.

Since Orozco merely repeated the same information known to him when he talked with the government before his sentencing, he is not eligible for a Rule 35(b) motion under the exception for information that is not known by the convicted defendant until more than a one-year period after sentence imposition. Congress has enacted several revisions of Rule 35(b) and, thus, has shown attentiveness to changing the specific terms of this rule. We are not at liberty to add terms or posit an interpretation that differs from the explicit language of Rule 35(b), particularly when we can decide this case within the plain terms of the rule. [FN13] See *1317 Illinois v. Abbott & Assocs., Inc., 460 U.S. 557, 572, 103 S.Ct. 1356, 1364, 75 L.Ed.2d 281 (1983) (recognizing that federal courts are not authorized "to add specific language that Congress did not include in a carefully considered statute"); Carey, 120 F.3d at 512 ("Whether we agree with all of the policy considerations or whether [Rule 35(b)] effectively addresses them, we are bound to apply the rule in the manner in which it is written.").

FN13. Although we do not believe that the explicit terms of Rule 35(b) permit us to accord relief to Orozco, we agree with the district judge that this case demonstrates a factual situation that Congress should consider when it next contemplates revision of this rule. That is, we hope that Congress will address the apparent unforeseen situation presented in this case where a convicted defendant provides information to the government prior to the expiration of the jurisdictional, one-year period from sentence imposition, but that information does not become useful to the government until more than a year after sentence imposition. In making the Rule 35(b) motion, the government determined that it was warranted but also recognized the jurisdictional impediment of Rule 35(b).

III. CONCLUSION

In this appeal, Orozco contends that the district judge should have granted the government's Rule 35(b) motion and reduced his sentence based on his testimony in Rodriguez's trial over four years after imposition of Orozco's sentence. Because Orozco repeated information to prosecutors in the Northern District of Florida that he previously had disclosed to prosecutors in the Northern District of Georgia before his sentencing and did not relate information acquired a year or more after his sentence imposition, the district judge concluded that he was without jurisdiction to consider the Rule 35(b) motion. For the reasons explained herein, we conclude that the district judge did not have jurisdiction to consider the Rule 35(b) motion. Accordingly, we AFFIRM the ruling of the district judge.

HILL, Senior Circuit Judge, concurring:

The facts of this case illustrate the near impossibility of codifying that which ought to be left to judicial discretion. The Executive, charged with seeing to the faithful execution of the law, has concluded that Orozco ought to have the benefit of his cooperation. He had fully, and promptly, cooperated, but the government only belatedly appreciated the value of his cooperation. The Executive's opponent, Orozco, obviously feels that he should have this benefit. The district judge that heard the original case as well as this petition would grant the relief. As I take it (footnote 13), we, also, would grant it.

But the draftsman of this rule, trying to anticipate future situations, succeeded in anticipating all except the one that obtains. [FN1] So, Orozco, entitled to release under the views of all interested parties, remains in penal servitude and all that we can do is suggest that the Congress, in its own good time, attempt by further codification to see that it does not happen to someone else. We ought to do better than this.

FN1. The product of this rule is like unto the estate planning attorney who has diligently prepared a will with so many provisos that it anticipates every conceivable situation except the one actually existing at his client's death.

KRAVITCH, Senior Circuit Judge, concurring specially:

I agree with the majority that Rule 35(b) is drafted so narrowly that it must be read to preclude jurisdiction in this case. I write separately, however, to emphasize that this result contradicts Congress's purpose in providing for discretionary sentence reductions if the defendant immediately provides the government with information that assists the government substantially in prosecuting other criminals. Rule 35, as written, discourages minor participants in large criminal operations from divulging key information about their cohorts, knowing that the government may choose or may be forced to wait to use the information until the time limit for any possible sentence reduction has passed.

As other courts that have considered Rule 35(b) have noted, the purpose of the rule is to encourage defendants immediately to provide full disclosure about criminal operations of which they have knowledge. See United States v. Morales, 52 F.3d 7, 8 (1st Cir.1995) ("Manifestly, the purpose for denying value to retained knowledge is to induce immediate full disclosure."); United States v. Carey, 120 F.3d 509, 512 (4th Cir.1997), cert. denied, --- U.S. ----, 118 S.Ct. 1062, 140 L.Ed.2d 122 (1998) ("The one-year limitation also provides an incentive to defendants to come forward promptly with all that they know about illegal conduct, regardless of whether they appreciate its value to the government."). The Advisory Committee Notes to the 1991 amendment to Rule 35(b) ("the Notes") also emphasize that timely cooperation by the *1318 defendant, rather than timely use of the information by the government, is the focus of the new rule. [FN1] That the language of the rule itself fails to carry out this obvious and important policy manifests an urgent need for Congress to reconsider Rule 35.

FN1. The Notes describe one of the problems with the old rule, which the 1991 amendment was intended to correct:

"[Under the old rule], the trial court was required to rule on the government's motion to reduce a defendant's sentence within one year after imposition of the sentence. This caused problems, however, in situations where the defendant's assistance could not be fully assessed in time to make a timely motion which could be ruled upon before one year had elapsed.... [The amendment] should benefit both the government and the defendant and will permit completion of the defendant's anticipated cooperation with the government."

18 U.S.C. app. Fed.R.Crim.P. 35(b) (Advisory Comm. Notes for 1991 Amend.).

The Notes also address the portion of the amendment that allows a district court to exercise jurisdiction over a Rule 35(b) motion made outside the one-year time limit: "In deciding whether to consider an untimely motion, the court may, for example, consider whether the assistance was provided as early as possible." Id.

The predicament in which the defendant here finds himself powerfully illustrates the gap that Congress has created in Rule 35(b). The defendant was arrested on drug charges in 1989 at the age of nineteen; he subsequently entered a guilty plea and was sentenced to 151 months in prison. Well within the one-year time period prescribed by Congress, [FN2] the defendant provided extensive information about the criminal operation in which he was involved, including information about Armando Rodriguez, a major cocaine distributor who was a fugitive at the time. The government initially filed a Rule 35(b) motion with respect to the defendant but requested that the district court delay its ruling on the motion. Ultimately, the government withdrew that motion. [FN3] It is undisputed that in 1996, when Rodriguez finally had been apprehended and indicted and was being tried, the defendant voluntarily served as a government witness and testified to the same information he had provided the government several years before. In the government's judgment, this testimony assisted it substantially in the prosecution of Rodriguez, as evidenced by the government's decision to bring the motion to reduce the defendant's sentence that is at issue in this case. This court is bound by Rule 35(b), however, and thus must reject the government's attempt to carry out the purpose of the rule.

FN2. It is not clear from the record exactly when the defendant disclosed this information to the government. It appears, however, that the disclosure may have been made as early as the day the defendant was arrested.

FN3. The majority seems to infer that the government withdrew the original Rule 35(b) motion because the defendant stopped cooperating. Although the point does not affect our holding, I note that the record is void of any information to support that conclusion, and even the government--upon whose brief the court independently relies to substantiate its characterization of the facts--does not urge such an inference. The original Rule 35(b) motion, filed within the one-year time limit, requested that the district court hold the motion until the government could "appropriately investigate the matter which the defendant will disclosed [sic]." R1-131(1), at ¶ 5. The motion stated that "[t]he cooperation which the

defendant provides, in all likelihood, will involve the need for extensive investigative measures ... and therefore, is not complete at this time." Id., ¶ 4. A few months later, the government requested that the district court again delay the hearing on the Rule 35(b) motion, stating that the defendant "ha[d] furnished no further cooperation, but [would] be a witness in an investigation which [had] not been identified." R1-131(2), at ¶ 3. Less than two months later, the government withdrew the Rule 35(b) motion without explanation. In presuming that the defendant stopped cooperating, the majority ignores the plausible inference from this record that the government withdrew the Rule 35(b) motion because its investigation did not prove fruitful and it therefore was unable at that time to use the information provided by the defendant in any concrete way.

It is unfortunate that the language of this rule precludes the implementation of the very policy it was written to support. It is particularly unfortunate for the defendant here, whose case, as the district court noted, "cries out for relief."

END OF DOCUMENT

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Rule 43; Proposal to Permit Defendant to Appear at Court Proceedings Through Teleconferencing**

DATE: **March 24, 1999**

Attached are materials relating to a proposal to permit a defendant to make an appearance before the court via teleconferencing. As you will see from those materials, this issue has been before the Committee, off and on, for over seven years. The issue resulted in a proposed amendment to Rules 10 and 43 be published for comment. Those amendments would have permitted teleconferencing for an arraignment where the defendant waived a personal appearance. That proposed change was driven in large part by the Bureau of Prisons which was interested in reducing costs and security risks associated with transporting prisoners long distances for what in most cases was only a brief appearance. The issue was tabled in 1994, however, with the thought that several on-going FJC pilot programs might assist the Committee in deciding the best way to proceed.

Last year Judge Biery (W.D. Texas) wrote to Judge Stotler recommending that the Criminal Rules (in particular Rule 5) be amended to permit initial appearances and arraignments to be conducted through teleconferencing. As noted in the agenda book for the Fall 1998 meeting, although this particular proposal focuses on Rule 5, an amendment would certainly be required in Rule 43 as well. That might be a better place to start with any amendments concerning teleconferencing--which might eventually involve arraignments, pleas, sentencing, and other court proceedings.

As a result of the Committee's discussion and interest in the issue, Judge Davis appointed a subcommittee consisting of Judge Roll and Mr. Jackson to study the issue and report to the Committee.

The subcommittee's report is attached. At this point, they do not offer any recommended changes to any of the Rules.

The question before the Committee is whether to pursue this issue further. If there is interest in amending any of the Rules to provide for teleconferencing, it would be better to move forward — earlier rather than later — with any substantive amendments to Rules that are now being restyled. For example, style changes to Rule 5 (the subject of Judge Biery's proposal) will be discussed at the upcoming April meeting. Style amendments to Rule 10 will be discussed at the Committee's June 1999 meeting.

United States District Court
District of Arizona
The James A. Walsh Courthouse
44 E. Broadway
Tucson, Arizona 85701-1719

John M. Roll
District Judge

520-620-7144

March 18, 1999

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

Re: Advisory Committee on Criminal Rules

Dear ~~Professor Schlueter~~ David,

Attached is a cover letter, a memorandum prepared by my law clerk regarding teleconferencing criminal justice proceedings, Federal Rules of Criminal Procedure 10 and 43, and two circuit court opinions. Judge Davis suggested that I provide you with these materials for distribution to the Committee. Should you have any questions or comments, please call.

Best Wishes,

JOHN M. ROLL
District Court Judge

JMR:cp

cc: Judge Davis (cover letter only)

Enclosures (6)

M E M O

TO: Advisory Committee on Criminal Rules

FROM: Judge John M. Roll and Darryl W. Jackson, Esquire

RE: Proposal to Permit Defendant to Appear Before Initial Appearances and Arraignments Via Teleconferencing

DATE: March 16, 1999

Attached is a memorandum prepared by Judge Roll's law clerk regarding teleconferencing criminal judicial proceedings.

As the memo indicates, the only two circuit courts to consider teleconferencing criminal proceedings have concluded that the Federal Rules of Criminal Procedure currently preclude the practice. United States v. Navarro, ____ F.3d ____ 1999 WL 118338 (5th Cir. 1999) (sentencings); Valenzuela-Gonzalez v. United States District Court, 915 F.2d 1276 (9th Cir. 1990) (arraignments)

The Fifth and Ninth Circuits have identified Fed.R.Crim.P. 43(a) (presence of the defendant) as an impediment to teleconferencing hearings and the Ninth Circuit has indicated that Rule 10 (arraignment "in open court") is also an obstacle.

No court, federal or state, has ruled that teleconferencing an arraignment or sentencing is unconstitutional.

Attachments: Memorandum
Fed.R.Crim.P.10
Fed.R.Crim.P.43(a)
United States v. Navarro
Valenzuela-Gonzalez v. U.S. District Court

JMR:kh

MEMORANDUM

TO: Judge Roll

FROM: Chris Price, Law Clerk

DATE: March 15, 1999

RE: Video-conferencing Arraignments

Overview

Closed-circuit television for arraignments began in the late 1970s. Thereafter, in 1982, Dade County, Florida adopted video-conferencing for arraignments in misdemeanor cases. Such systems have become increasingly popular. Informal estimates indicate that between 160 and 200 systems were in operation in U.S. jurisdictions as of 1994. See Frederic I. Lederer, Technology Comes to the Courtroom, And ..., 43 Emory L.J. 1095, 1102 (Summer 1994).

Professor Lederer provides the following description of the process:

> Remote arraignments have the defendant in jail, ordinarily in a special room designated for the purpose. The judge and prosecution in the courtroom; depending on the jurisdiction and counsel's personal choice, defense counsel may either be in the courtroom or at the jail with the client. The arraignment is accomplished by live two-way television. The television can be as basic as a two-camera system, with one camera at each location, or

> as sophisticated as ... [a] six-camera system, which shows the defendant every aspect of the courtroom.

Id.

Despite the increasing use of video-conferencing by state courts, the federal system has not seen the wide-spread use of video arraignments. Although there are few federal decisions regarding the use of video-conferencing in court, circuit courts have interpreted the Federal Rules of Criminal Procedure as requiring a defendant's actual presence in the courtroom.

Federal Law

Two federal circuit courts have addressed the use of video-conferencing in criminal proceedings. First, the Ninth Circuit found that arraignments could not be conducted via video-conference. See Valenzuela-Gonzalez v. United States District Court, 915 F.2d 1276 (9th Cir. 1990). Thereafter, the Fifth Circuit concluded that sentencing hearings could not be conducted via video-conference. See United States v. Navarro, __ F.3d __, 1999 WL 118338 (5th Cir. 1999).

In June 1990, the District of Arizona issued General Order No. 190, establishing a pilot program which allowed judges and magistrates to use closed-circuit television or video-conferencing

to conduct arraignments.[1] In an appeal by a defendant who had been arraigned using this procedure, the Ninth Circuit found that using video-conferencing for defendants' appearances at arraignments violated Federal Rules of Criminal Procedure 10 and 43. See Valenzuela-Gonzalez, 915 F.2d at 1276.

Fed.R.Crim.P. 10 provides that "[a]rraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to the defendant the substance of the charge and calling on the defendant to plead thereto." In Valenzuela-Gonzalez, the Ninth Circuit placed particular importance on Rule 10's requirement that the arraignment take place in "open court." 915 F.2d at 1280-81.

Fed.R.Crim.P. 43(a) states that "[t]he defendant shall be present at the arraignment, at the time of plea, at every stage of

---

[1] General Order No. 190 stated:

> IT IS ORDERED that for a period of one year from the date of filing of this Order, in the discretion of any district judge or magistrate of the District of Arizona, initial appearances and arraignments of pretrial detainees may be conducted by video-conferencing. The attorney for the defendants may elect to be present by video with the defendant or may appear personally in the hearing room at the District Courthouse. A defendant having his initial appearance before a federal magistrate may be taken before such magistrate by video when authorized by that judicial offer.

the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule." In Valenzuela-Gonzalez, the Ninth Circuit stated that the defendant was not present, for purposes of Rule 43(a), because he appeared by closed-circuit television. 915 F.2d at 1280. The Ninth Circuit concluded "that [Rules 10 and 43(a)] together require that the district court must arraign the accused face-to-face with the accused physically present in the courtroom." Id.

The Ninth Circuit did not address the Fifth and Sixth Amendment constitutional challenges to video-conferencing, but noted that there was no due process right to an arraignment, and that the Sixth Amendment right to confrontation was not implicated because there were no witnesses. Id. Significantly, the Ninth Circuit stated, "[a]bsent a determination by Congress that closed-circuit television may satisfy the presence requirement of the rules, we are not free to ignore the clear instructions of Rules 10 and 43." Id. at 1281.

In United States v. Navarro, 1999 WL 118338, at *1, the Fifth Circuit vacated United States v. Edmondson, 10 F. Supp.2d 651, 653 (E.D. Tex. 1998), which had upheld a sentencing hearing conducted via video-conference. In so ruling, a divided panel of the Fifth

Circuit followed the lead of the Ninth Circuit in Valenzuela-Gonzalez, finding that "[Fed.R.Crim.P.] 43, as written, requires the defendant's physical presence in court during sentencing." Navarro, 1999 WL 118338, at *6.

The Fifth Circuit did not directly address the constitutionality of sentencing via video-conferencing, but noted that Rule 43 protected defendants' confrontation and due process rights. Id. at *8. Importantly, however, the Fifth Circuit concluded its opinion by quoting the Ninth Circuit: "'Absent a determination by Congress that closed-circuit television may satisfy the presence requirement of the rules, [we are] not free to ignore the clear instructions of Rule [] ...43.'" Id. (quoting Valenzuela-Gonzalez, 915 F.2d at 1281.). Accordingly, Valenzuela-Gonzalez and Navarro demonstrate that the principle impediments to video-conferencing are found within the Federal Rules of Criminal Procedure. Neither circuit found that the use of video-conferencing to conduct the proceeding involved was unconstitutional.[2]

Federal courts have also considered challenges to the use of

---

[2] However, in Navarro, the Fifth Circuit observed that as to stages of trial, "[v]ideo conferencing would seemingly violate a defendant's Confrontation Clause rights...." Id. at *8.

video-conferencing in civil proceedings.[3]

State Law

a. Authority for Video-conferencing

At least 23 states have adopted the use of video-conferencing for arraignment appearances.[4] Hawaii is one of the states to recently amend its rules to allow video-conferencing for the arraignment of defendants.[5]

---

[3] See, e.g., United States v. Baker, 45 F.3d 837, 847 (4th Cir. 1995) (respondent's due process rights were not violated by use of video-conferencing during civil commitment hearing); Edwards v. Logan, __ F. Supp.2d __, 1999 WL 92891 (W.D. Va. 1999) (section 1983 jury trial conducted entirely by video-conference was proper because plaintiff would be "virtually present at his trial and will have the ability to confront witnesses, address the jury, and participate fully").

[4] The following states have authorized video-conferencing for arraignments by statute or rule: Alabama (Ala. Code § 15-26-1); Alaska (Alaska Crim. R. 38.2); Arizona (Ariz.R.Crim.P. 14.2); California (Cal. Penal Code § 977); Delaware (Del.Super.Ct.Crim.R. 10); Florida (Fla.R.Crim.P. 3.160); Hawaii (Haw.R.Crim.P. 10); Idaho (Idaho Ct. R. 43.1); Illinois (Ill. St. Ch. 725 § 5/106D-1); Iowa (I.C.A. § 813.2, Rule 25); Kansas (Kan. Stat. Ann. § 22-3205); Louisiana (La. Code Crim. Proc. art. 230.1); Michigan (Mich. Comp. Laws § 767.37a); Missouri (Mo. Rev. Stat. § 561.031); Montana (Mont. Code Ann. § 46-12-201); Nevada (Nev. Rev. Stat. § 178.388); New Mexico (N.M.R.Crim.P. 5-303); North Carolina (N.C. Gen. Stat. § 15A-941); Oregon (Or. Rev. St. § 135.030); Tennessee (Tenn. Code Ann. § 40-14-316); Virginia (Va. Code Ann. § 19.2-3.1); Washington (Wa.R.G.R. 19); and Wisconsin (Wisc. Stat. § 970.01).

[5] Haw.R.Crim.P. 10.

In 1996, Hawaii Chief Justice Moon stated:

> [A]pproximately 39% of all defendants in the First Circuit [of Hawaii] were arraigned or processed via audio-visual linkup.... The results show that savings in overtime costs, along with more effective and efficient utilization of court, correctional, and security personnel were achieved.... [C]ase processing time has been reduced by at least 50 percent, and because of decreased staff demands on the Department of Public Safety (DPS), the DPS has saved 2,400 hours of staff time, which translates to $45,000 annually.

Hon. Ronald T.Y. Moon, 1995 State of the Judiciary Address, Haw. B.J. 25, at 28 (Jan. 1996).

State court opinions that have struck down video-conferencing have rested on a lack of statutory authorization for such procedures. See R.R. v. Protesy, 629 So.2d 1059 (Fla. Ct. App. 1994) (use of video-conference for juvenile detention hearing violated Florida Rule of Juvenile Procedure 8.100(a)).[6] See also Jacobs v. State, 567 So.2d 16, 17 (Fla. Ct. App. 1990) (use of audiovisual equipment for sentencing was error because it was not authorized by the Florida Rules of Criminal Procedure).

---

[6] Shortly after this ruling, judges in Florida's fifth, ninth, thirteenth, seventeenth, and nineteenth circuits petitioned the Florida Supreme Court to amend the Rules of Juvenile Procedure to allow juveniles to attend detention hearings via audiovideo device. See Amendment to Florida Rule of Juvenile Procedure 8.100(a), 667 So.2d 195 (Fla. 1996). In response, the Florida Supreme Court authorized "the chief judge in each of the above circuits to institute a one-year pilot program that will allow juveniles to attend detention hearings via audiovideo device. Id. at 197.

b. Arraignments

Challenges to the constitutionality of video-conference arraignment statutes in state courts have been unsuccessful. See, e.g., Larose v. Superintendent, Hollsorough County Correction Admin., 702 A.2d 326, 329-30 (N.H. 1997) (arraignments and bail hearings conducted by video-conferences did not violate petitioners' due process rights); State v. Phillips, 656 N.E.2d 643, 665 (Ohio 1995) (closed-circuit television arraignment is "constitutionally adequate"); Commonwealth v. Terbieniec, 408 A.2d 1120, 1124 (Pa. Super. Ct. 1979) ("no unconstitutional prejudice inherent in appellant's arraignment" utilizing closed-circuit television).

c. Other Proceedings

State courts have also upheld the use of video-conferencing for entry of pleas, Scott v. State, 618 So.2d 1386, 1388 (Fla. Ct. App. 1993) ("For constitutional purposes, this audio-video hookup may well be the legal equivalent of physical presence."), bail hearings, Larose, 720 A.2d at 326, and post-conviction relief hearings, Guinan v. State, 769 S.W.2d 427 (Mo. 1989) (use of closed-circuit television for post-conviction relief hearing did not violate defendant's confrontation, equal protection, due process, or effective representation rights).

d. Procedures Regarding Video-conferences

There are variations, however, among the state rules regarding video-conferencing. Some states allow arraignments to be conducted by video only if the defendant agrees, see, e.g., Cal. Penal Code § 977 ("If the accused agrees, the initial court appearance, arraignment, and plea may be by video."), while others place the matter in the discretion of the court. See, e.g., Ala. Code § 15-26-1 ("[A]t the discretion of the court, the [arraignment] proceeding may be conducted by an audio-visual communication device.").

Some jurisdictions simply allow their courts to adopt rules providing for video arraignment, see, e.g., La.C.Crim.P. art. 551 ("The court may, by local rule, provide for the defendant's appearance at the arraignment and the entry of his plea by way of simultaneous transmission through audio-visual electronic equipment."), while other statutes detail the types of procedures that must be followed. See, e.g., Mont. Code. Ann. § 46-12-201 ("The audio-video communication must operate so that the defendant and the judge can see each other simultaneously and converse with each other and so that the defendant and his counsel, if any, can communicate privately.").

Furthermore, some states restrict the use of video-

conferencing to noncapital cases, see, e.g., N.C. Gen. Stat. § 15A-941, and a few states restrict the use of video-conferences to misdemeanor proceedings. See, e.g., Or. Rev. St. § 135.030(2).

Summary

The use of video-conferencing to conduct arraignments has dramatically increased. At least 23 states have adopted statutes or rules permitting the use of such systems. The Ninth and Fifth Circuits, however, have interpreted Fed.R.Civ.P. 43(a) as requiring a defendant's physical presence in the courtroom during criminal proceedings.

In light of these decisions, before video arraignments are permissible in the federal courts, amendment of the Federal Rules of Criminal Procedure may be necessary. See Valenzuela-Gonzalez, 915 F.2d at 1281; Navarro, 1999 WL 118338, at *12. No federal or state court has found that video arraignments are unconstitutional. In fact, the state courts that have addressed the constitutionality of video arraignments have affirmed their use.

TEXT

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

Amendments received to 8-21-1998

Rule 10. Arraignment

TEXT
Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to the defendant the substance of the charge and calling on the defendant to plead thereto. The defendant shall be given a copy of the indictment or information before being called upon to plead.

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

Amendments received to 8-21-1998

Rule 43. Presence of the Defendant

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

(b) Continued Presence Not Required. The further progress of the trial to and including the return of the verdict, and the imposition of sentence, will not be prevented and the defendant will be considered to have waived the right to be present whenever a defendant, initially present at trial, or having pleaded guilty or nolo contendere,

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

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

(3) after being warned by the court that disruptive conduct will cause the removal of the defendant from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom.

(c) Presence Not Required. A defendant need not be present:

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

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

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

(4) when the proceeding involves a correction of sentence under Rule 35.

UNITED STATES of America, Plaintiff-Appellee,

v.

Salvador Vargas NAVARRO; Samuel Pasqual Edmondson, Defendants-Appellants.

No. 97-41162.

United States Court of Appeals,

Fifth Circuit.

March 8, 1999.

Defendants were convicted in the United States District Court for the Eastern District of Texas, Richard A. Schell, Chief Judge, of possession of and conspiracy to possess methamphetamine with intent to distribute. The District Court, 10 F.Supp.2d 651, also overruled one defendant's objection to sentencing via video conference. Defendants appealed. The Court of Appeals, Emilio M. Garza, Circuit Judge, held that sentencing by video conference violated rule requiring presence at sentencing. In opinion by Politz, Circuit Judge, the Court of Appeals held that: (1) voluntary consent to search of vehicle cured any earlier illegal detention; (2) driver's consent to search the entire vehicle included a passenger's luggage; (3) evidence of cocaine and methamphetamine found at conspirator's residence in another state after alleged conclusion of the conspiracy was relevant; and (4) this evidence was not

subject to rule on admissibility of evidence of other crimes, wrongs, or acts.

Convictions affirmed; sentences of one defendant vacated; remanded.

Politz, Circuit Judge, dissented in part and filed opinion.

William Reid Wittliff, Dallas, TX, H. S. Garcia, Asst. U.S. Atty., Sherman, TX, Traci Lynne Kenner, Asst. U.S. Atty., Tyler, TX, Terri Lynn Hagan, Plano, TX, for Plaintiff-Appellee.

Gregory A. Waldron, Amy R. Blalock, Tyler, TX, for Navarro.

Thomas Scott Smith, Sherman, TX, for Edmondson.

Appeals from the United States District Court for the Eastern District of Texas.

Before POLITZ, EMILIO M. GARZA and STEWART, Circuit Judges.

POLITZ, Circuit Judge: [FN*]

***1** Samuel Pasqual Edmondson and Salvador Vargas Navarro appeal their convictions for conspiracy to possess methamphetamine with intent to distribute, in violation of 21 U.S.C. § 846 and 18 U.S.C. § 2, and for possession thereof with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. For the reasons assigned, we affirm all convictions and the sentences of Navarro, but vacate and remand for the resentencing of Edmondson.

BACKGROUND

At about 2:00 a.m. on a morning in September 1996, a Sherman, Texas police officer stopped a car for failing to maintain a single lane. Edmondson was

driving the car, and Navarro and Guadalupe Plascencia Lopez were passengers. The officer asked Edmondson for

his license and proof of insurance. Edmondson, obviously nervous, provided title and proof of insurance, but stated that he did not have a driver's license, giving the officer his Arkansas photo identification instead. Edmondson was instructed to step to the rear of the car and the officer wrote warning citations for his failure to maintain a single lane and for driving without a license.

While writing the warnings, the officer questioned Edmondson about his occupation, the purpose of the trip, and the owner of the vehicle. Conflicting responses aroused the officer's suspicions and he asked Edmondson whether there were drugs in the car. Edmondson stated that there were none and that the officer could look if he wanted. The officer then returned to the car and questioned Navarro and Lopez whose responses conflicted with those of Edmondson. In addition, Navarro repeatedly asserted that he did not speak English although he conversed at length in English with the officer.

The officer then returned to Edmondson, gave him the citations and his documents, asked again whether there were drugs in the car, then asked Edmondson if he would sign a consent to search form. Edmondson first demurred, then appeared to read the form thoroughly, and signed same.

A search of the car revealed methamphetamine in a brown duffle bag on the back seat of the vehicle on which Navarro had been leaning. Edmondson, Navarro, and

Lopez were arrested and subsequently released on bond. All three were indicted. Edmondson was returned to jail. Navarro was arrested in Arkansas four months later as the result of a vehicle stop for speeding. Julie Ferguson, Navarro's girlfriend, was driving and Navarro was a passenger. After discovering the outstanding warrant for Navarro's arrest, Navarro and Ferguson were removed from the vehicle and handcuffed. At this time, Ferguson informed the officer about drugs at her house that belonged to Navarro. Ferguson escorted the Arkansas police to her home, which she shared with Navarro, and gave written and verbal consent for a search of the premises which revealed guns, but no drugs. Ferguson directed the officers, however, to a henhouse in the backyard where she advised that Navarro had buried drugs. The officers checked and discovered cocaine and methamphetamine.

*2 Both Navarro and Edmondson unsuccessfully moved to suppress evidence of the drugs obtained during the search of the vehicle. At trial, Ferguson testified about Navarro's drug activities and the government presented the evidence found in Arkansas. The jury found Navarro and Edmondson guilty of both counts.

Defendants were sentenced by video conferencing. The district judge, Chief Judge Richard Schell, was in Beaumont, Texas; the prosecutor and the defendants and their attorneys were in court in Sherman, Texas, approximately 300 miles distant. Navarro consented to the sentencing by video conference; Edmondson

objected to same. The judge orally overruled Edmondson's objection, later assigning written reasons. [FN1]

In the sentencing guidelines computation Navarro received an increase of two levels for possession of firearms during the offense and four levels for his leadership role in the drug scheme. Edmondson was sentenced to life in prison and Navarro was sentenced to 360 months. Both timely appealed.

ANALYSIS

[1] Navarro and Edmondson challenge their convictions on several grounds. Both contend that the district court erred in denying their motions to suppress evidence obtained as a result of the search of the vehicle and bag and that the district court erred in admitting evidence of the drug trafficking discovered in Arkansas. Navarro maintains that the evidence was insufficient to support his convictions. Edmondson contends that the district court improperly determined that certain evidence submitted in camera was not discoverable under Brady v. Maryland. [FN2] He also challenges his sentencing by video conferencing as violative of Rules 32 and 43 of the Federal Rules of Criminal Procedure. Finally, Navarro contends that the district court erred in increasing his base offense level for possession of a firearm and for his leadership role in the offense. [FN3]

I

[2] In reviewing the denial of a motion to suppress, we employ a two-tiered

standard, examining the factual findings of the district court for clear error, and its ultimate conclusion as to the constitutionality of the law enforcement actions de novo. [FN4]

Navarro maintains that the district court erred in denying his motion to suppress, claiming that Edmondson had neither actual nor apparent authority to consent to the search of his bag. Specifically, Navarro insists that Edmondson's consent to the search of the vehicle did not extend to his bag. [FN5]

Edmondson also challenges the denial of the motion to suppress, contending that his continued detention at the vehicle after the officer told him he was free to leave was illegal. Thus, Edmondson maintains that, under Florida v. Royer, [FN6] his subsequent consent to search was tainted by the illegal detention and was invalid. [FN7]

[3] A consensual search is a well-settled exception to the search warrant requirement. [FN8] In determining whether a search based upon consent is valid, the government must prove that the search was voluntary and that the defendant consented to the search or consent was obtained from a third party with the ability to give valid consent. [FN9]

*3 [4] In determining whether a consent to search is voluntary, we review several factors, no one of which is dispositive. These factors include:

(1) the voluntariness of the defendant's custodial status; (2) the presence

of coercive police procedures; (3) the extent and level of the defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse to consent; (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found. [FN10]

The district court found that the consent to search was voluntary. Our review of the record persuades that there is no error in this finding.

[5] We then inquire whether, in light of the fact that Edmondson voluntarily consented to the search of the vehicle, his consent cured any earlier ostensibly illegal detention. Under our precedent, a voluntary consent to search cures any error that may have occurred with respect to detention. [FN11] Thus, assuming for this purpose that Edmondson's continued detention at his car was in fact illegal, under Kelley and Shabazz, this illegality would not taint an otherwise voluntary consensual search.

[6] We also conclude that, as the district court found, Edmondson had the ability to consent to the search of the vehicle. Further, we conclude that, according to the consent form, he gave a general consent to search the entire vehicle, including the luggage contained therein. There is no indication in the instant case, as there was in Jaras, that Edmondson advised that the luggage in the vehicle was not his. Also, unlike Jaras, the bag containing drugs was not located in the trunk, but was in plain view on the back seat of the car. Further, neither Edmondson nor Navarro objected to the officer's search of the

bag. Thus, we must conclude and hold that Edmondson's consent included the consent to search the bag found to contain drugs and that the holding in Jaras does not prohibit the officer's search of that bag. We perceive no error in the district court's denial of the motion to suppress.

II

Navarro and Edmondson also contend that the district court erred in admitting evidence of drug trafficking discovered in Arkansas in January 1997. Navarro insists that this evidence was irrelevant and prejudicial because it was outside the scope of the conspiracy alleged in the indictment and thus misled the jury. The indictment alleged that the conspiracy concluded on or about September 24, 1996. Navarro contends that if the government wanted to use the January 1997 Arkansas evidence, it should have obtained a superseding indictment.

Edmondson also contends that the Arkansas evidence was irrelevant because it was outside the scope of the conspiracy. Further, Edmondson maintains that the evidence was admitted improperly under Federal Rule of

Evidence 404(b). In this regard, he asserts that the district court erred by not making findings under United States v. Beechum, [FN12] and by not giving a limiting instruction. Edmondson contends that these errors require either reversal or remand.

*4 Evidentiary rulings, including those involving 404(b) evidence, are

reviewed under an abuse of discretion standard. [FN13] When no objection is made at the time of trial, we may examine only for plain error. [FN14]

[7] We first consider whether the Arkansas evidence was irrelevant and unduly prejudicial by being outside the scope of the conspiracy. Navarro cites our recent decision in United States v. Brito [FN15] for the proposition that the Arkansas evidence should have been excluded as being outside the scope of the conspiracy. In Brito, we held that evidence of a small-user quantity of marihuana found after the indictment alleged the conspiracy had ended was "irrelevant, extraneous offense evidence" and that its admission was error. [FN16] We also concluded, however, that its admission was harmless because the government did not refer to the evidence in its closing argument and because the jury was instructed that the defendants were not on trial for acts not alleged in the indictment. [FN17]

In the instant case, we conclude that the Arkansas drug evidence was not "irrelevant, extraneous offense evidence," even though it was discovered after the conspiracy allegedly ended. In Brito, we determined the evidence was irrelevant not only because of the time frame involved, but also because of the small quantity of marihuana that was introduced, compared to the charges of large-scale distribution for which the defendants were on trial.

By contrast, the Arkansas evidence presented in the instant case demonstrated the structure of the drug organization, as well as the continuing contact

between Edmondson and Navarro. For example, the testimony by Ferguson concerning the Arkansas activities reflected that the drugs seized in the initial traffic stop were a cost of business and that, after the arrest, the group found a new route for drug deliveries and continued distributing drugs from the trailer in Arkansas. Thus, although we remain aware of the danger of irrelevancy when introducing evidence obtained after the scope of the conspiracy has allegedly ended, the evidence in this case was indeed highly probative. We accordingly find no error in the district court's admission of the evidence.

[8] We must next decide whether the evidence of drug trafficking obtained in Arkansas falls under the rubric of Rule 404(b) and, if so, whether the district court committed error in failing to make Beechum findings or to give a limiting instruction. [FN18] Navarro and Edmondson did not request a limiting instruction and, therefore, this assignment of error may be reviewed only for plain error. [FN19]

At the threshold the district court must determine whether the proposed evidence is extrinsic, making applicable Rule 404(b). If this is found, the court must then decide whether the extrinsic evidence is relevant to a trait other than the defendant's character, and whether the evidence has probative value that is not substantially outweighed by its undue prejudice. [FN20] A failure to make these required "Beechum findings" on the record requires

remand unless the probative value and prejudice of the evidence are readily apparent from the record and there is a substantial certainty that the ruling was correct. [FN21]

*5 [9] We find that Beechum and Rule 404(b) are inapplicable to the Arkansas evidence because this evidence was intrinsic, rather than extrinsic, in nature. "Evidence that is 'inextricably intertwined' with the evidence used to prove the crime charged is not 'extrinsic' evidence under Rule 404(b). Such evidence is considered 'intrinsic' and is admissible 'so that the jury may evaluate all the circumstances under which the defendant acted.' " [FN22] As noted, the evidence of drug operations and organization in Arkansas demonstrated the continuing nature of the organization, the structure of the organization, and the continuing contact between Edmondson, Navarro, and

Ferguson. Such evidence was "inextricably intertwined" with the evidence used to prove the charges of possession and conspiracy of methamphetamine. Accordingly, because Beechum findings or other determinations of 404(b) admissibility were not required for this intrinsic evidence, [FN23] there was no error in the district court's failure to make same. We further find no plain error in the lack of a limiting instruction for this evidence.

III

Navarro next contends that the evidence was insufficient to support his conviction for drug conspiracy and possession of methamphetamine with intent to

distribute. We review a claim of insufficiency of the evidence narrowly and affirm if a rational trier of fact could have found that the evidence established the essential elements of guilt beyond a reasonable doubt. [FN24] The evidence is viewed in the light most favorable to the jury's verdict, with all reasonable inferences rendered in favor of that verdict. [FN25]

[10] Navarro first contends that there was insufficient evidence of possession of a controlled substance with intent to distribute because there was no testimony that the bag containing narcotics actually belonged to him. He submits that the government did not link the bag containing methamphetamine to him because there were two other people in the car. In addition, he asserts that there was insufficient evidence to convict on the conspiracy count because there was no evidence that he entered into an agreement with anyone to possess methamphetamine.

The government counters that there was sufficient evidence of possession because Navarro, the only passenger in the backseat of the vehicle, was leaning against the bag containing the drugs. The government also points out that Navarro was charged with aiding and abetting possession with intent to distribute, which requires proof of association, participation, and action to help the activity succeed. [FN26] The testimony of Julie Ferguson and other documentary evidence, the government suggests, establishes possession or aiding and abetting possession on behalf of Navarro. As to the conspiracy conviction,

the government contends that there was sufficient evidence to infer an agreement to violate the narcotics law, which is all that is required to sustain a conviction for this crime.

***6** We conclude that, viewing the evidence in a light most favorable to the jury's verdict, there was sufficient evidence that Navarro either owned the bag containing the narcotics or aided and abetted possession with intent to distribute the drugs. Further, we conclude that there was sufficient circumstantial evidence with which a rational trier of fact could have found Navarro guilty of the drug conspiracy. We must therefore deny Navarro's claim for relief on this basis.

IV

Edmondson next contends that certain discovery materials submitted to the district court under seal might be disclosable under Brady v. Maryland or Giglio v. United States. [FN27] Under Brady, the prosecution must disclose evidence favorable to the accused upon request where the evidence is material to guilt or punishment. [FN28] Further, under Giglio, when the reliability of a witness is determinative of guilt or innocence, evidence affecting credibility of that witness falls within Brady's rule. [FN29] A review of the evidence submitted under seal and the district court's order denying discovery of this evidence persuades that there was no error in the district court's decisions thereon.

V

[11] Navarro appeals the district court's imposition of the 360 month sentence, claiming that the two-level enhancement for possession of a weapon pursuant to USSG § 2D1.1(b)(1) was erroneous because there was no

nexus between the offense of conviction and the gun. Navarro also contends that the four-level upward adjustment for his leadership role under USSG § 3B1.1(a) was unlawful because the record fails to establish that level of his involvement in the drug activities. We review the district court's enhancement for possession of a firearm and for a leadership role for clear error as they are factual determinations. [FN30]

[12] Section 2D1.1(b)(1) of the Sentencing Guidelines provides a two- level enhancement for possession of a firearm "unless it is clearly improbable that the weapon was connected with the offense." [FN31] The district court found that the firearms were connected with the drug offense because they were located in the house on the Arkansas premises from which Navarro conducted drug activity, the same premises on which the drugs were buried. This finding was not in clear error.

Section 3B1.1(a) of the Sentencing Guidelines provides that a four-level adjustment can occur if "the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." In making this determination, the application note to this section directs the

court to consider the following factors: "the exercise of decision making authority, the nature of the participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others." [FN32]

*7 [13] Navarro insists that the sentence enhancement was in error because he exercised no control over his codefendants and because there were no coordinated drug activities between the defendants. The district court found that Julie Ferguson's testimony at trial, detailing Navarro's organization of various drug activities, was sufficient to warrant the enhancement for a leadership role. We find no error in this finding.

Therefore, for the foregoing reasons, the convictions of Navarro and Edmondson and the sentences of Navarro are AFFIRMED.

VI

[14] We concur in every aspect of Judge Politz's opinion except with respect to his view on Rule 43 expressed in his dissent and, accordingly, we write separately to explain why Rule 43, as written, requires the defendant's physical presence in court during sentencing. Although we are sympathetic to the concerns expressed by Judge Politz, this issue should be left to the drafters of the Rules--Congress and the Supreme Court--to amend the Rules to

address those concerns.

At sentencing, Edmondson refused to sign a Waiver of Rights and Consent to Proceed by Video-Conference, and he objected that he wanted to be sentenced in person. The district court overruled the objection, conducted the sentencing by video conferencing, and sentenced Edmondson to life incarceration on each of the two counts. Edmondson argues on appeal that the court erred because video sentencing contravenes the plain language and purposes of Rules 32 and 43. The Government argues that video conferencing satisfies the language of Rules 32 and 43. The Government also argues that video conferencing is widely used, that it is beneficial because it increases productivity by reducing travel time, and that it is less costly and more safe than transporting prisoners.

We review a district court's interpretation of the Rules de novo. See United States v. Dean, 100 F.3d 19, 20 (5th Cir.1996). Rule 43 provides for the "Presence of a Defendant":

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

(b) Continued Presence Not Required. The further progress of the trial to and including the return of the verdict, and the imposition of sentence, will not

Page 38

(Cite as: 1999 WL 118338, *7 (5th Cir.(Tex.)))

be prevented and the defendant will be considered to have waived the right to be present whenever a defendant, initially present at trial, or having pleaded guilty or nolo contendere,

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

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

(3) after being warned by the court that disruptive conduct will cause the removal of the defendant from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom.

***8** (c) Presence Not Required. A defendant need not be present:

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

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

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

(4) when the proceeding involves a correction of sentence under Rule 35.

Page 39

(Cite as: 1999 WL 118338, *8 (5th Cir.(Tex.)))

FED. R. CRIM. P. 43. The first step in interpreting the Rule is to consider the plain, ordinary meaning of the language of the Rule. See United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241, 109 S.Ct. 1026, 1030, 103 L.Ed.2d 290 (1989). The definition of "presence" in Black's Law Dictionary is:

> Act, fact, or state of being in a certain place and not elsewhere, or within sight or call, at hand, or in some place that is being thought of. The existence of a person in a particular place at a given time particularly with reference to some act done there and then.

BLACK'S LAW DICTIONARY 1065 (5th ed.1979) (emphasis added). The whole dictionary definition suggests that the common-sense meaning of "presence" is physical existence in the same place as whatever act is done there. The Webster's definition suggests a similar meaning. The Webster's Third New International Dictionary defines "presence" as:

> The fact or condition of being present: the state of being in one place and not elsewhere: the condition of being within sight or call, at hand, or in a place being thought of: the fact of being in company, attendance or association: the state of being in front of or in the same place as someone or something.

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1793 (1981). This dictionary defines "present" as:

> [B]eing in one place and not elsewhere: being within reach, sight, or call or

Page 40

(Cite as: 1999 WL 118338, *8 (5th Cir.(Tex.)))

within contemplated limits: being in view or at hand: being before, beside, with, or in the same place as someone or something.

Id. Although the dissent emphasizes the phrase "within sight or call," the common-sense understanding of the definition is that a person must be in the same place as others in order to be present. The plain import of the definitions is that a person must be in existence at a certain place in order to be "present," which is not satisfied by video conferencing.

In addition to the bare meaning of the words, we also consider the context of the words in Rule 43. " '[T]he meaning of statutory language, plain or not, depends on context.' " Bailey v. United States, 516 U.S. 137, 145, 116 S.Ct. 501, 506, 133 L.Ed.2d 472 (1995) (citations omitted). Rule 43(a) requires a defendant's "presence" not only at sentencing, but at all stages of trial. The rights protected by Rule 43 include the defendant's constitutional Confrontation Clause and Due Process rights, and the common law right to be present. See, e.g., United States v. Gregorio, 497 F.2d 1253, 1258 (4th Cir.1974) (explaining scope of Rule 43 protection). Although there is no Confrontation Clause right at sentencing, this right is applicable to the other stages of trial. See Lindh v. Murphy,

96 F.3d 856, 870 (7th Cir.1996) (stating no Confrontation Clause right at sentencing), rev'd on other grounds, 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). The Supreme Court has interpreted the Confrontation Clause, with certain exceptions, to

Page 41

(Cite as: 1999 WL 118338, *8 (5th Cir.(Tex.)))

guarantee a defendant a face-to-face meeting with witnesses appearing before the trier of fact. See Maryland v. Craig, 497 U.S. 836, 849, 110 S.Ct. 3157, 3165, 111 L.Ed.2d 666 (1990). Video conferencing would seemingly violate a defendant's Confrontation Clause rights at those other stages of trial. The scope of the protection offered by Rule 43 is broader than that offered by the Constitution, and so the term "present" suggests a physical existence in the same location as the judge. This means that, for the purposes of sentencing, a defendant must be at the same location as the judge to be "present." See Brown v. Gardner, 513 U.S. 115, 118, 115 S.Ct. 552, 555, 130 L.Ed.2d 462 (1994) ("there is a presumption that a given term is used to mean the same thing throughout a statute"). Considering the context of the term "present" in Rule 43(a) indicates that a defendant must physically be in the courtroom.

***9** The context of the rest of Rule 43 supports the interpretation that "presence" means a defendant's physical presence in court. The language of 43(b) is instructive to the meaning of "presence" in 43(a), because 43(b) defines the situations in which a defendant waives the right to be present. Rule 43(b) states that "the defendant will be considered to have waived the right to be present whenever a defendant, initially present at trial, ... after being warned by the court that disruptive conduct will cause the removal of the defendant from the courtroom, persists in conduct which is such as to justify

Page 42

(Cite as: 1999 WL 118338, *9 (5th Cir.(Tex.)))

exclusion from the courtroom." The words "initially present" indicate that the defendant is physically in the courtroom, and may be removed or excluded "from the courtroom" for certain behavior. It would be inconsistent for the word "present" to mean "in sight" in (a), as the dissent suggests, and for the word to mean physically present in the courtroom, which is the import of the language in (b). This inconsistency indicates that the term "present," as it is used in the Rule, must mean physical existence at the same place. The context of the Rule negates the dissent's reading of "presence."

The dissent attempts to bolster its conclusion by reference to Rule 2. We do not believe that Rule 2 can aid our construction of Rule 43 in this instance. Rule 2 instructs that:

> These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

FED. R. CRIM. P. 2. The context of Rule 43 indicates, as explained above, that the term "presence" requires physical presence. Although Rule 2 is a rule of statutory construction, Rule 2 does not require that a Rule be construed in contravention of its clear language. [FN33]

Reference to the Advisory Committee Notes to Rule 43 bolsters the contextual interpretation of the meaning of "presence." The Advisory Committee

Page 43

(Cite as: 1999 WL 118338, *9 (5th Cir.(Tex.)))

Notes are instructive on the drafters' intent in promulgating the federal rules. See Williamson v. United States, 512 U.S. 594, 614-15, 114 S.Ct. 2431, 2442, 129 L.Ed.2d 476 (1994) (Kennedy, J., concurring) (listing cases taking Advisory Committee Notes as authoritative evidence of intent). The Notes suggest that the drafters of the Rule used "present" to mean physically being in the courtroom. When Rule 43 was adopted, it was meant to codify the right to be personally present. The Notes from the 1944 adoption state:

> The first sentence of the rule setting forth the necessity of the defendant's presence at arraignment and trial is a restatement of existing law. Lewis v. United States, 146 U.S. 370, 13 S.Ct. 136, 36 L.Ed. 1011 (1892); Diaz v. United States, 223 U.S. 442, 455, 32 S.Ct. 250, 56 L.Ed. 500 (1912).

***10** FED. R. CRIM. P. 43, advisory committee's note. The Supreme Court in Lewis equated the right to be

present with "the right to be personally present," and repeatedly discussed whether the defendant was "personally present in court." Lewis, 146 U.S. at 372-73, 13 S.Ct. at 137. The intent to restate the law in Lewis suggests that the use of the word "present" connotes personal presence.

Other Advisory Committee Notes from the 1944 adoption support this interpretation. The Notes that relate to the current version of Rule 43(c)(2) state:

The fourth sentence of the rule, empowering the court in its discretion, with

the defendant's written consent, to conduct proceedings in misdemeanor cases in defendant's absence adopts a practice prevailing in some districts comprising very large areas. In such districts appearance in court may require considerable travel, resulting in expense and hardship not commensurate with the gravity of the charge, if a minor infraction is involved and a small fine is eventually imposed. The rule, which is in the interest of defendants in such situations, leaves it discretionary with the court to permit defendants in misdemeanor cases to absent themselves and, if so, to determine in what types of misdemeanors and to what extent.

FED. R. CRIM. P. 43, advisory committee notes. The Note indicates that the drafters of the Rules were aware that moving prisoners to the courthouse will often cause delay and expense in large geographic areas. Providing that a defendant's "presence [is] not required" for misdemeanor cases indicates that the drafters believed that for such cases, the practicalities outweighed a defendant's need to be physically present. FED. R. CRIM. P. 43(c)(2). Given the drafters' creation of an exception to the presence requirement where the practicalities favor such an exception, courts should be reluctant to create other exceptions based on similar practical considerations.

Additionally, the Notes to the 1974 Amendment, which explain the language of current Rule 43(b)(3), suggest that a defendant is not present if teleconferencing is used:

> The concurring opinion of Mr. Justice Brennan [in Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970)] stresses that the trial judge should make a reasonable effort to enable an excluded defendant "to communicate with his attorney and, if possible, to keep apprised [sic] of the progress of the trial." 397 U.S. at 351, 90 S.Ct. 1057, 25 L.Ed.2d 353. The Federal Judicial Center is presently engaged in experimenting with closed circuit television in courtrooms. The experience gained from these experiments may make closed circuit television readily available in federal courtrooms through which an excluded defendant would be able to hear and observe the trial.

*11 FED. R. CRIM. P. 43, advisory committee's note. The Note indicates that closed-circuit television does not enable a defendant to be "present" under (a), but rather may be used when "continued presence [is] not required" under (b)(3). This implies that the drafters would believe that a defendant is not "present" when video conferencing is used for sentencing.

The interpretation of Rule 43 can also be aided by comparing the Rule with other rules of procedure. The language of Rule 43 may be compared with the language in Federal Rule of Civil Procedure 43(a) ("Civil Rule 43(a)"), which allows for video conferencing. Civil Rule 43(a) provides:

> In every trial, the testimony of witnesses shall be taken in open court ... The court may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by

contemporaneous transmission from a different location.

FED. R. CIV. P. 43(a). The Advisory Committee Notes for the 1996 amendments to Civil Rule 43(a) explain:

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

* * *

Other possible justifications for remote transmission must be approached cautiously.

FED. R. CIV. P. 43, advisory committee notes. The Note indicates a clear preference for live in-court testimony. Based on the Note, it is unlikely that the drafters of the Rules would agree that a person is "present" for the purposes of Criminal Rule 43 because that person is on a video screen. Civil Rule 43 also indicates that, where the drafters believe that video conferencing is appropriate, the drafters will make provision in the Rules for the use of the technology.

The Notes to Civil Rule 43 emphasize the importance of presenting testimony

in court. The importance of in-court proceedings certainly does not diminish in the context of a criminal trial. There is a gravity to the sentencing process because the defendant will be deprived, possibly indefinitely, of his liberty. Sentencing a defendant by video conferencing creates the risk of a disconnect that can occur because "[t]he immediacy of a living person is lost." Stoner v. Sowders, 997 F.2d 209, 213 (6th Cir.1993) (considering whether video depositions are as good as live testimony). "In the most important affairs of life, people approach each other in person, and television is no substitute for direct personal contact. Video tape is still a picture, not a life. " Id. In light of the value of face-to-face sentencing, we find the logic in the Notes to Civil Rule 43 to be equally applicable to Criminal Rule 43--i.e., transmission cannot be justified by showing that it is inconvenient for the defendant to attend the sentencing.

***12** We conclude that sentencing a defendant by video conferencing does not comply with Rule 43 because the defendant is not "present." We refrain from interpreting Rule 43 in a matter at odds with the clear import of the language of Rule 43 and the Advisory Committee Notes. [FN34] "Absent a determination by Congress that closed circuit television may satisfy the presence requirement of the rules, [we are] not free to ignore the clear instructions of Rule[ ] ... 43." Valenzuela-Gonzalez v. United States Dist. Court, 915 F.2d 1276, 1281 (9th Cir.1990).

For the foregoing reasons the sentences of Edmondson are VACATED and the matter is REMANDED for his sentencing consistent herewith.

DISSENTING OPINION

POLITZ, Circuit Judge, dissenting as to Part VI:

In an issue of first impression requiring de novo review, [FN1] Edmondson contends that the district court's use of sentencing by video conferencing violated Rules 32 and 43 of the Federal Rules of Criminal Procedure.

Rule 32 requires that the court "address the defendant personally" at the imposition of sentence. [FN2] Rule 43 also provides as follows:

> (a) Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule. [FN3]

There are certain exceptions in Rule 43 to the presence requirement, none of which are applicable here. [FN4]

Edmondson contends that by sentencing him via video conferencing that the district judge did not address him "personally," in violation of Rule 32. He also maintains that because he appeared by video he was not "present" at the sentence, as required by Rule 43(a). He relies on Valenzuela-Gonzalez v. United States Dist. Ct. for Dist. of Arizona [FN5] for this second proposition. In Valenzuela-Gonzalez, the Ninth Circuit held that arraignment by video

violated Rules 10 and 43 of the Federal Rules of Criminal Procedure. [FN6] Edmondson contends that video

sentencing, like video arraignment, violates the Federal Rules.

The government, in response, asserts that Edmondson and the district judge were essentially in the same location because they were able to see and hear each other clearly and because Edmondson was able to confer fully with his counsel, who was physically present with him in Sherman, Texas. The government also notes the importance of the use of video sentencing, including expedience in concluding the sentencing process, and the obvious very significant savings of judicial resources and the direct and indirect expenses thus avoided by the court, government, and defense.

In determining whether the Federal Rules of Criminal Procedure were violated, I am persuaded that we should first examine the language of the Rules, giving that language its plain, common-sense meaning [FN7] and construing the language to secure procedural simplicity and eliminate unjustifiable expense and delay. [FN8] In so doing, we should note that no court has yet addressed this precise issue. "Presence," as required by Rule 43, is defined in Black's Law Dictionary as an "[a]ct, fact, or state of being in a certain place and not elsewhere, or within sight or call, at hand, or in some place that is being thought of." Black's Law Dictionary 1183 (6th ed.1990) (emphasis added). See

also Webster's Third New International Dictionary 1793 (1976) (defining "presence" as "the condition of being within sight or call, at hand, or in a place being thought of"). [FN9]

***13** Notwithstanding the foregoing meaning of "presence," reflecting that a defendant is "present" when "within sight or call," I am aware of contrary interpretations suggesting that "present" requires physical presence in a location. For example, besides the "within sight or call" definition, dictionaries also define "presence" and "present" as connoting physical existence in a place. [FN10] Further, I am aware that "presence," as used in other parts of Rule 43 [FN11] and as discussed in the advisory committee notes, [FN12] suggests physical presence. These sources would apply the aspect of the "presence" definition indicating physical presence in a location. Presence, however, is not limited solely to physical existence. As the alternate definitions state, presence can also be accomplished by being "within sight or call." Although the physical existence definition is certainly a sustainable position, giving appropriate effect to the clear intent of Rule 2 mandating a just determination in criminal proceedings and directing us to construe the Rules so as to eliminate unjustifiable expense and delay, requires that I conclude that the more appropriate view of "presence" includes the "within sight or call" aspect of the definition. I am persuaded that we should

give it that meaning herein. Having said this, I am fully aware of the force of the majority's reasoning. I feel compelled by prudence, however, to read the Rules so as to give the district courts a critically needed flexibility herein.

Considering next the meaning of being "personally" addressed, I find that the right of presence at sentencing in Rule 43 and the right of allocution in Rule 32 are related and often have been combined. [FN13] The common law right of allocution permitted the defendant to personally ask the court for leniency and to have that request considered by the court in sentencing. [FN14] Further, the dictionary defines "personally" as "in person." [FN15] It therefore appears that the requirement in Rule 32(c)(3)(C) that the court "address the defendant personally" at sentencing means that the district judge, and not someone else, speak directly to the defendant. I perceive nothing inherent in the meaning of "personally" or "in person" that mandates a face-to- face encounter; rather, there need only be a personal one-on-one interaction between the judge and the defendant.

Turning to the case at bar, I would reject Edmondson's contention that Valenzuela-Gonzalez prohibits the use of sentencing by video conferencing. In one portion of the opinion, our sister circuit colleagues stated that Rule 10 and Rule 43 "together" required the district court to conduct arraignments with the defendant physically present in the courtroom. [FN16]

DISSENTING OPINION

Later in the opinion, they stated that "arraignment by closed circuit television does not constitute substantial compliance with either Rule 10 or Rule 43." [FN17] They also expressed concerns about sentencing.

***14** I appreciate our sister circuit colleagues' concerns, but decline to accept their conclusion. It is my perception that Valenzuela-Gonzalez fails to recognize the alternative meaning of presence, focusing exclusively on the physical presence notion. Further, although our colleagues found that video arraignment violated provisions of both Rule 10 and Rule 43, the "open court" language so dominant there presents no issue in the case before us. [FN18] Finally, I cannot agree with their conclusion, persuaded that it does not properly acknowledge and apply the simplicity and expedience mandate of Rule 2.

Having considered the meaning of the Rules 32(c)(3)(C) and 43(a), I am persuaded beyond peradventure that Edmondson was "personally" addressed and "present" at his sentence as required by those rules. The room in Beaumont where the judge was located and the video conference room in Sherman where Edmondson, his attorney, and the Assistant United States Attorney were located, contain identical equipment. Each room had a camera and two 33-inch television monitors that could be set to either a full or split screen view. One monitor gave almost a full view of the room in Sherman, including the tables at which

DISSENTING OPINION

the parties were located. The second monitor in each conference room gave a full view of the district judge. Microphones were located next to the parties and the video operator could focus in more closely on anyone speaking.

Using this technology, Chief Judge Schell was able to communicate clearly with Edmondson and the other parties in the Sherman conference room. He was able to see the parties and ask the defendants and their attorneys questions. The attorneys and the defendants likewise were able to see and respond to the judge. The judge was able to interact with and observe the demeanor and body language of the defendants through real-time video communication. [FN19] This interaction in the video conference results in far superior observation of demeanor for credibility assessments than judges and juries experience when observing a witness who is testifying by video deposition, a practice that long has been accepted by the courts.

Edmondson also could not have been more "personally" addressed had he been standing a few feet in front of the judge in Beaumont, Texas. The judge, and not another person, was able to speak directly to the defendant, and not another person, in a one-on-one interaction and exchange, thus satisfying the requirements of Rule 32. Similarly, although he was not physically located in front of the judge, Edmondson was also "present" for the imposition of sentence because he was "within sight or call," was "at hand," and was able to

DISSENTING OPINION

participate directly in the proceeding both with the court and his attorney. [FN20]

The disposition I would reach today would give the required regard to the practical necessities involved herein. The round trip from Beaumont to Sherman, Texas is 630 miles. Sentencings by video conference manifestly would save significant time and travel expenses of the judge and the judicial staff, other court personnel, prosecutors and defense counsel, and their staffs. I am also sensitive to the reality that video conferences make possible more prompt sentencing. [FN21] As I have noted, Rule 2 of the Federal Rules of Criminal Procedure aptly states: "[t]hese rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." It is my view that we should recognize that face-to-face sentencing for each and every case is a preference that we no longer should insist on. [FN22]

***15** Accordingly, I would conclude and hold that Rules 32 and 43 of the Federal Rules of Criminal Procedure

were not violated when Edmondson was sentenced utilizing the video conference technology. [FN23]

FN* Judge Politz announced the judgment of the court and delivered the

opinion as to Parts I through V. Judge Emilio M. Garza delivered an opinion as to Part VI, joined by Judge Stewart, to which Judge Politz dissents.

FN1. United States v. Edmondson, 10 F.Supp.2d 651 (E.D.Tex.1998).

FN2. 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

FN3. In letters pursuant to 5th Cir. R. 28.4, Edmondson and Navarro have raised the issue of United States v. Singleton, 144 F.3d 1343 (10th Cir.1998), op. vacated, rehearing en banc pending, id. (10th Cir. July 10, 1998). In Singleton, a panel of the Tenth Circuit found that a plea agreement offering a witness leniency in exchange for testimony violated 18 U.S.C. § 201(c)(2), the federal bribery statute. Defendants contend that the pretrial diversion agreement the United States entered into with Julie Ferguson might also violate § 201(c)(2). Because we have recently rejected Singleton's rationale, we find this claim to be without merit. United States v. Haese, 162 F.3d 359, 366-67 (5th Cir.1998); United States v. Webster, 162 F.3d 308, 357-58 (5th Cir.1998).

FN4. United States v. Chavez-Villarreal, 3 F.3d 124 (5th Cir.1993).

FN5. Navarro cites to United States v. Jaras, 86 F.3d 383 (5th Cir.1996) for this proposition. In Jaras, this court held that a defendant's consent to search the car did not include consent to search a passenger's suitcase found in the trunk. In that case, the defendant told the police that the suitcase belonged to the passenger. Id. at 389.

FN6. 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) (plurality opinion).

FN7. Edmondson does not allege that the initial traffic stop was invalid.

FN8. United States v. Tompkins, 130 F.3d 117 (5th Cir.1997), cert. denied, --- U.S. ----, 118 S.Ct. 1335, 140 L.Ed.2d 495 (1998).

FN9. United States v. Jenkins, 46 F.3d 447 (5th Cir.1995).

FN10. Id. at 121 (quoting United States v. Olivier-Becerril, 861 F.2d 424, 426 (5th Cir.1988) (citations omitted)).

FN11. United States v. Kelley, 981 F.2d 1464 (5th Cir.1993); United States v. Shabazz, 993 F.2d 431 (5th Cir.1993).

FN12. 582 F.2d 898 (5th Cir.1978).

FN13. United States v. Walker, 148 F.3d 518 (5th Cir.1998).

FN14. Fed.R.Crim.P. 52(b).

FN15. 136 F.3d 397 (5th Cir.), cert. denied, --- U.S. ----, 118 S.Ct. 2389, 141 L.Ed.2d 754 (1998).

FN16. Id. at 413.

FN17. Id.

FN18. Rule 404(b) of the Federal Rules of Evidence provides in pertinent part as follows:
Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It

may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident....
Fed.R.Crim.P. 404(b).

FN19. See Fed.R.Crim.P. 52(b).

FN20. Beechum, 582 F.2d at 911.

FN21. United States v. Robinson, 700 F.2d 205 (5th Cir.1983); see also United States v. Zabaneh, 837 F.2d 1249 (5th Cir.1988).

FN22. United States v. Royal, 972 F.2d 643, 647 (5th Cir.1992) (citations omitted) (quoting United States v. Randall, 887 F.2d 1262, 1268 (5th Cir.1989)).

FN23. United States v. Coleman, 78 F.3d 154 (5th Cir.1996).

FN24. United States v. Mmahat, 106 F.3d 89 (5th Cir.1997), cert. denied, --- U.S. ----, 118 S.Ct. 200, 139 L.Ed.2d 138 (1997).

FN25. Id.

FN26. United States v. Pedroza, 78 F.3d 179 (5th Cir.1996).

FN27. 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972)

FN28. Brady, 373 U.S. at 87, 83 S.Ct. 1194.

FN29. Giglio, 405 U.S. at 154-55, 92 S.Ct. 763.

FN30. United States v. Buchanan, 70 F.3d 818 (5th Cir.1995), cert. denied, 517 U.S. 1114, 116 S.Ct. 1340, 134 L.Ed.2d 490 (1996); United States v. Menesses, 962 F.2d 420 (5th Cir.1992).

FN31. United States v. Villarreal, 920 F.2d 1218, 1221 (5th Cir.1991).

FN32. USSG § 3B1.1, comment. (n.4).

FN33. The dissent suggests that the "practical necessities" require video

conferencing. We are sympathetic to the expense and delay incurred by transporting prisoners, however, the decision whether this expense and delay is "justifiable" is the type of decision that should be considered by the drafters of the Rules.

FN34. We determine that sentencing by video conference violates Rule 43, and therefore we do not address whether it also violates Rule 32.

FN1. In re Taylor, 132 F.3d 256 (5th Cir.1998).

FN2. Fed.R.Crim.P. 32(c)(3)(C).

FN3. The scope of Rule 43 is much broader than normal due process protections, United States v. Gordon, 829 F.2d 119 (D.C.Cir.1987), and encompasses the common law concept that after an indictment is handed down, "nothing shall be done in the absence of the prisoner." Id. at 124 n. 4 (quoting Lewis v. United States, 146 U.S. 370, 372, 13 S.Ct. 136, 36 L.Ed. 1011 (1892)).

FN4. For example, a defendant's presence is not required for

organizational defendants, for minor crimes, for conferences solely on questions of law, or for correction of sentences under Rule 35. Fed.R.Crim.P. 43(c). Defendants may also be excused from court proceedings by voluntarily excusing themselves either through disruption or choice. Fed.R.Crim.P. 43(b).

FN5. 915 F.2d 1276 (9th Cir.1990).

FN6. Rule 10 provides that "[a]rraignment shall be conducted in open court." Fed.R.Crim.P. 10.

FN7. United States v. Ron Pair Enters., Inc., 489 U.S. 235, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989).

FN8. See Fed.R.Crim.P. 2.

FN9. The district court noted that many cases invalidating proceedings under Rule 43 involved situations in which defendants were physically absent from the proceedings and were not participating in any manner. See, e.g., United States v. Rodriguez, 23 F.3d 919 (5th Cir.1994).

FN10. See Black's Law Dictionary 1183 (6th ed.1990) (also defining "presence" as the "existence of a person in a particular place at a given time particularly with reference to some act done there and then"); Webster's Third New International Dictionary 1793 (1976) (defining "present" as "being in one place and not elsewhere").

FN11. An exception to a defendant's presence in Rule 43(b) allows the defendant to be removed "from the courtroom" after being "initially present," suggesting that the defendant is to be physically present in the courtroom unless an exception applies.

FN12. For example, the notes to the 1974 Amendment imply that closed- circuit television would not enable a defendant to be present, as do the notes to the 1944 Adoption, which expressly do not require a defendant's presence for misdemeanor cases because of the travel and hardship involved. See also Fed.R.Civ.P. 43(c) (reflecting a decision to allow live video testimony for "good cause shown" in civil cases).

FN13. United States v. Moree, 928 F.2d 654 (5th Cir.1991).

FN14. Green v. United States, 365 U.S. 301, 81 S.Ct. 653, 5 L.Ed.2d 670 (1961).

FN15. Webster's Collegiate Dictionary 867 (10th ed.1994).

FN16. Valenzuela-Gonzalez, 915 F.2d at 1280.

FN17. Id. at 1281 (emphasis added).

FN18. I note that although the public was able to be present in both the Beaumont and Sherman conference rooms the record seems to indicate that the Sherman conference room is of such size as to have possibly excluded family members of defendants or other observers in the past. At such time as video conferencing may be allowed, we should encourage district courts, in order to make full use of this technology and to avoid possible problems with public exclusion, to use video conferencing in facilities where the public can have full access, such as existing courtrooms.

FN19. But cf. United States v. Reynolds, 44 M.J. 726 (Army

Ct.Crim.App.1996) (prohibiting use of a pre-trial proceeding by telephone under a military rule "very similar" to Rule 43 because the parties would not be able to see and observe each other).

FN20. In so holding, I recognize the potential for concern if defense counsel was not present with the defendant at sentencing, but instead was either in the courtroom with the judge or at another location by video link. The risk exists that effective and secret privileged communications, and possibly zealous and adequate representation of the client, might not occur if defense counsel were at a different location than the defendant. See Fredric I. Lederer, Technology Comes to the Courtroom, and ..., 43 Emory L.J. 1095, 1106-07 (1994). I emphasize that nothing in the disposition I propose endorses sentencing by video conferencing where the defense attorney is not personally present with the defendant.

FN21. It has long been noted that both the government and the defendant have an interest in the prompt resolution of criminal charges. Ecker v. Scott, 69 F.3d 69 (5th Cir.1995); see United States v. Hughey, 147 F.3d 423, 432 (5th Cir.1998) (noting the "general interest in prompt and efficient administration of justice").

FN22. I am keenly aware of the concern that such procedures might be viewed with some discomfort. I underscore that defendants and judges would still be able to "look each other in the eyes." I am also confident that the individualized attention district judges have traditionally displayed in sentencing defendants would continue, whether that attention comes via video conferencing or in face-to-face encounters.

FN23. If my view had prevailed, I would emphasize that it addresses only the sentencing proceeding. This decision approving sentencing via video conferencing would be buttressed in this case because there was no testimony by

witnesses. We necessarily would have to reserve for another day any confrontation clause issue which such witnesses might occasion or which might arise at other phases of the criminal process.

END OF DOCUMENT

Citation
915 F.2d 1276
59 USLW 2232
▷

Found Document

Rank 1 of 1

Database
CTA

David VALENZUELA-GONZALEZ, Petitioner,
v.
UNITED STATES DISTRICT COURT FOR the DISTRICT OF ARIZONA, Respondent,
United States of America, Real Party in Interest.
No. 90-70350.
United States Court of Appeals,
Ninth Circuit.
Submitted July 27, 1990. [FN*]

FN* The panel finds this case appropriate for submission without oral argument pursuant to Ninth Circuit Rule 34-4 and Fed.R.App.P. 34(a).

Decided Sept. 27, 1990.

Defendant petitioned for writ of mandamus vacating order of the United States District Court, District of Arizona, Paul G. Rosenblatt, J., that his arraignment be conducted by closed-circuit television. The Court of Appeals, Beezer, Circuit Judge, held that arraignment by closed-circuit television would violate rules of criminal procedure.
Writ granted.

*1277 Robert McWhirter, Asst. Federal Public Defender, Phoenix, Ariz., for petitioner.
Janet L. Patterson, Asst. U.S. Atty., Phoenix, Ariz., for respondent.
Petition for Writ of Mandamus to the United States District Court for the District of Arizona.

Before NELSON, REINHARDT and BEEZER, Circuit Judges.

BEEZER, Circuit Judge:
Valenzuela-Gonzalez petitions for a writ of mandamus vacating the district court's order that his arraignment be conducted by closed circuit television. We grant the writ and vacate the order of the district court.

I

Valenzuela-Gonzalez is a federal prisoner who was arrested in May, 1990. Upon his arrest, he appeared before a federal magistrate of the District of Arizona, who scheduled his arraignment for July, 1990. His trial was set for August, 1990.
In June, 1990, the United States District Court for the District of Arizona issued its General Order No. 190, [FN1] amending the local rules to allow arraignment by closed circuit television. [FN2] Shortly thereafter, the magistrate ordered that Valenzuela-Gonzalez's arraignment be conducted by

closed circuit television.

FN1. General Order No. 190, entered June 22, 1990, provides:
IT IS ORDERED that for a period of one year from the date of filing of this Order, in the discretion of any district judge

or magistrate of the District of Arizona, initial appearances and arraignments of pretrial detainees may be conducted by video-conferencing. The attorney for the defendant may elect to be present by video with the defendant or may appear personally in the hearing room at the District Courthouse. A defendant having his initial appearance before a federal magistrate may be taken before such magistrate by video when authorized by that judicial officer.

FN2. This procedure has been instituted under a pilot project of the Federal Bureau of Prisons, Arizona District, Phoenix Division. Under the procedure, arraignment is conducted while the detainee remains in prison. Communication is established between the prisoner and the district court by a sophisticated video-teleconferencing or closed circuit television system with several voice-activated cameras and monitors in the courthouse and the federal prison. The system is designed to allow public viewing as well as confidential attorney-client conferences. It is augmented by fax machines for transmitting documents. See United States District Court, District of

Arizona, Video Court Proceedings Committee Report and Recommendations (September, 1987).

Two days before his scheduled arraignment, Valenzuela-Gonzalez moved the district court for an order requiring that his arraignment be conducted in person. The district court heard the motion on an expedited basis on the day the arraignment was scheduled. The district court ruled that arraignment by means of audiovisual interactive technology did not violate the fifth or sixth amendments or Fed.R.Crim.P. 43. [FN3] Valenzuela-Gonzalez immediately sought an order staying the district court's order, which we granted the next day. He now ***1278** petitions for a writ of mandamus vacating the district court's order in this case.

FN3. The district court stated orally:
The issue specifically is ... does an arraignment conducted before the magistrate, where the defendant is present by means of audiovisual interactive technology, for the purpose of entering a not guilty plea, constitute a violation of Rule 43, F.R. Criminal Procedures, or the Fifth and Sixth Amendments of the United States Constitution.
And this Court rules that review of the record and the arguments presented clearly show that there are no violations. And the motion is denied.

Reporter's Transcript of Proceedings at 50, United States v. Valenzuela- Gonzalez, No. CR-90-243-PHX-PGR (D.Ariz. July 18, 1990).

This petition came on for hearing before us on July 27, 1990. We issued our order granting the writ and vacating the district court's order on July 27, 1990. [FN4] This opinion follows.

FN4. Our order of July 27, 1990, reads, in pertinent part:
The district court is directed to arraign petitioner face to face with the petitioner physically present in the courtroom. See Fed.R.Crim.P. 43.

II

We must first determine whether we have jurisdiction to issue the writ that is requested. Under the All Writs Act, 28 U.S.C. § 1651(a), [FN5] we unquestionably have the power to issue, in our discretion, a writ of mandamus in this case. Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 25, 63 S.Ct. 938, 941, 87 L.Ed. 1185 (1943); United States v. Harper, 729 F.2d 1216, 1221 (9th Cir.1984). We must nevertheless determine whether mandamus is a proper remedy here.

FN5. 28 U.S.C. § 1651(a) provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law.

The government first argues that we lack jurisdiction to vacate General Order No. 190 because it was not entered in a case involving the specific petitioner before us. Valenzuela-Gonzalez does not contest this argument. We need not reach it in any event, for Valenzuela-Gonzalez has not requested us to review General Order No. 190. He requests only that we vacate the district court's order in his case. Without accepting the government's argument, therefore, we review the district court's order only to the extent it concerns Valenzuela- Gonzalez.

[1] The government next argues that we lack jurisdiction to issue a writ of mandamus vacating the order concerning Valenzuela-Gonzalez because his arraignment has not yet taken place. Because the harm complained of has not yet occurred, the government contends, "nothing has occurred that the defense can object to." Furthermore, the government suggests that we cannot review the district court's decision until we know that "the arraignment would in fact proceed the way the court anticipated." Absent these two circumstances, the government argues, our opinion would be merely advisory in violation of Article III of the United States Constitution. Aetna Life Ins. Co. v.

Haworth, 300 U.S. 227, 239-41, 57 S.Ct. 461, 463-64, 81 L.Ed. 617 (1937).

[2] We disagree. First, we may easily evaluate the proposed arraignment procedure, since Valenzuela-Gonzalez's two codefendants have already been arraigned under the exact procedures challenged by Valenzuela-Gonzalez. Our evaluation of the scheme as it affects Valenzuela-Gonzalez is not contingent upon any uncertain event that might not occur. Thomas v. Union Carbide, 473 U.S. 568, 580-81, 105 S.Ct. 3325, 3332-33, 87 L.Ed.2d 409 (1985). Second, the standards for granting a writ of mandamus do not require that the challenged order be carried out before the writ can issue. See, e.g., Schlagenhauf v. Holden, 379 U.S. 104, 111, 85 S.Ct. 234, 238, 13 L.Ed.2d 152 (1964) (excessively oppressive discovery order); Admiral Ins. Co. v. United States Dist. Court, 881 F.2d 1486, 1491 (9th Cir.1989) (assertion of absolute privilege to discovery order). But for our stay, the harm Valenzuela-Gonzalez complains of is imminent. We conclude that the district court's order satisfies the "case or controversy" requirement of Article III.

[3][4] The government concedes that the petition for writ of mandamus is otherwise an appropriate procedure for reviewing the order challenged here. We agree. The writ of mandamus is an extraordinary remedy reserved for situations where a trial court has exceeded its authority. Kerr v. United States, 426 U.S. 394, 402, 96 S.Ct. 2119, 2123, 48 L.Ed.2d 725 (1976); Bauman v. United States, 557 F.2d 650, 654-55 (9th Cir.1977). We have adopted five guidelines

for determining if a writ of mandamus should issue:

***1279** (1) The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires.

(2) The petitioner will be damaged or prejudiced in a way not correctable on appeal.

(3) The district court's order is clearly erroneous as a matter of law.

(4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules.

(5) The district court's order raises new and important problems, or issues of law of first impression.

In re Allen, 896 F.2d 416, 419-20 (9th Cir.1990) (quoting Bauman, 557 F.2d at 654-55). No single factor is determinative, Bauman, 557 F.2d at 655, and all five factors need not be satisfied at once. In re Cement Antitrust Litigation, 688 F.2d 1297, 1301 (9th Cir.1982), aff'd mem. sub nom. Arizona v. United States Dist. Court, 459 U.S. 1191, 103 S.Ct. 1173, 75 L.Ed.2d 425 (1983).

[5][6] Mandamus is particularly appropriate when we are called upon to determine the construction of a federal

procedural rule in a new context. Schlagenhauf, 379 U.S. at 111, 85 S.Ct. at 238 (Fed.R.Civ.P. 35); La Buy v. Howes Leather Co., 352 U.S. 249, 251, 77 S.Ct. 309, 311, 1 L.Ed.2d 290 (1957) (Fed.R.Civ.P. 53); United States v. Lasker, 481 F.2d 229, 235-36

(2d Cir.1973) (Fed.R.Crim.P. 48), cert. denied, 415 U.S. 975, 94 S.Ct. 1560, 39 L.Ed.2d 871 (1974). Such a situation presents the rare case where both the fourth and fifth Bauman factors are satisfied: we are presented with a novel question of law that is simultaneously likely to be "oft- repeated." Bauman, 557 F.2d at 655; see Harper, 729 F.2d at 1222. In addition, the first Bauman factor is satisfied here: since Valenzuela- Gonzalez's notice of appeal has not been certified for interlocutory appeal under 28 U.S.C. § 1292(b), he has no adequate means to obtain review. We conclude that a petition for writ of mandamus is an appropriate method for reviewing the district court's order. [FN6]

FN6. We therefore exercise our power
to determine all the issues presented by the writ of mandamus ... and to formulate the necessary guidelines in this area.... This is not to say, however, that, following the setting of guidelines in this opinion, any future allegation that the district court was in error in applying these guidelines to a particular case makes mandamus an appropriate remedy. The writ of mandamus is not to be used when 'the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction.'
Schlagenhauf, 379 U.S. at 111-12, 85 S.Ct. at 238-40 (quoting Parr v.

United States, 351 U.S. 513, 520, 76 S.Ct. 912, 917, 100 L.Ed. 1377 (1956)). Readiness to issue the writ may defeat the intent of Congress to reserve for appellate review only final judgments. Kerr, 426 U.S. at 403, 96 S.Ct. at 2124.

We determine de novo whether the writ should issue. Seattle Times v. United States Dist. Court, 845 F.2d 1513, 1515 (9th Cir.1988). Before the writ may issue, we must be "firmly convinced that the district court has erred," id., and that the petitioner's right to the writ is "clear and indisputable." Kerr, 426 U.S. at 403, 96 S.Ct. at 2124.

III

Valenzuela-Gonzalez argues first that the district court's order must be vacated because it violates his rights under the fifth and sixth amendments to the United States Constitution. The Supreme Court has long recognized that the accused has a right to be present at all critical stages of the proceeding against him. Kentucky v. Stincer, 482 U.S. 730, 744-45, 107 S.Ct. 2658, 2666-67, 96 L.Ed.2d 631 (1987); Snyder v. Massachusetts, 291 U.S. 97, 105- 06, 54 S.Ct. 330, 332-33, 78 L.Ed. 674 (1934); United States v. Lewis, 146 U.S. 370, 372, 13 S.Ct. 136, 137, 36 L.Ed. 1011 (1892). Arraignment, "far from a mere formalism," is a stage important enough to entitle the accused to the presence of counsel. Kirby v. Illinois, 406 U.S. 682, 689-90, 92 S.Ct.

1877, 1882-83, 32 L.Ed.2d 411 (1972); Coleman v. Alabama, 399 U.S. 1, 7, 90 S.Ct. 1999, 2002, 26 L.Ed.2d 387 (1970); Powell v. Alabama, 287 U.S. 45, 57, 53 S.Ct. 55, 59, 77 L.Ed. 158 (1932).

***1280** Nevertheless, whether the fifth and sixth amendments prohibit the use of closed circuit television at an otherwise proper arraignment is not immediately apparent. Arraignment is not a procedure required by the due process clause of the fifth amendment. Garland v. Washington, 232 U.S. 642, 645, 34 S.Ct. 456, 457, 58 L.Ed. 772 (1914); United States v. Coffman, 567 F.2d 960 (10th Cir.1977). The sixth amendment right to confront witnesses is not implicated, since there are no witnesses. Snyder, 291 U.S. at 107, 54 S.Ct. at 332. Moreover, the Supreme Court has held that closed circuit television may satisfy the confrontation clause in limited circumstances. Maryland v. Craig, 497 U.S. 836, 110 S.Ct. 3157, 3170, 111 L.Ed.2d 666 (1990). [FN7]

FN7. The use of closed circuit television for taking testimony of child witnesses has been approved by the Supreme Court. Maryland v. Craig, 110 S.Ct. at 3170. So long as the teleconferencing procedure is "functionally equivalent to that accorded live, in-person testimony," it will satisfy constitutional requirements. Id. at 3166. Approval of the procedure is dependent, however, on the state's making an adequate showing

of necessity. Id. at 3169.

[7] We need not resolve this question, however, for the presence of the defendant at arraignment is required under two federal rules of criminal procedure, Fed.R.Crim.P. 10 [FN8] and Fed.R.Crim.P. 43(a). [FN9] The protection of these rules is broader than the constitution provides. United States v. Gordon, 829 F.2d 119, 123-24 (D.C.Cir.1987); United States v. Christopher, 700 F.2d 1253, 1261-62 (9th Cir.), cert. denied, 461 U.S. 960, 103 S.Ct. 2436, 77 L.Ed.2d 1321 (1983). It is the rule in this circuit that although arraignment may not be required, conducting an arraignment in the defendant's absence violates the plain instruction of the rule. [FN10] Id. at 1262. There is simply "no provision for arraignment in the defendant's absence." Id.

FN8. Fed.R.Crim.P. 10, "Arraignment," provides:
Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to the defendant the substance of the charge and calling on the defendant to plead thereto. The defendant shall be given a copy of the indictment or information before being called upon to plead.

FN9. Fed.R.Crim.P. 43, "Presence of the Defendant," provides:
(a) Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.
An exception is provided for misdemeanors. Fed.R.Crim.P. 43(c)(2).

FN10. A defendant may waive, in writing, the right to appear in person at arraignment. Christopher, 700 F.2d at 1262. But see In re United States, 784 F.2d 1062, 1063 (11th Cir.1986) (no waiver absent good cause).

Similarly, there is no provision for arraignment by closed circuit television. Under Rule 43, the defendant must be present at arraignment. Under Rule 10, the arraignment must take place in open court. We hold that these rules together require that the district court must arraign the accused face-to-face with the accused physically present in the courtroom.

[8][9] The government urges that the federal rules of criminal procedure are to be construed broadly under Fed.R.Crim.P. 2. [FN11] We recognize that substantial compliance with the "open court" requirement of Rule 10 may satisfy the rule. Sweeney v. United States, 408 F.2d 121 (9th Cir.1969); see also Fed.R.Crim.P. 10, advisory committee notes ("mere technical

irregularity" does not warrant reversal). Moreover, the right to be present under Rule 43 is not absolute. United States v. Gagnon, 470 U.S. 522, 529, 105 S.Ct. 1482, 1485, 84 L.Ed.2d 486 (1985) (in camera conference); Illinois v. Allen, 397 U.S. 337, 343, 90 S.Ct. 1057, 1060, 25 L.Ed.2d 353 (1970) (unruly behavior at trial). Violations of Rule 43 are subject to the harmless error rule of Rule 52(a). United States v. Rogers, 422 U.S. 35, 40, 95 S.Ct. 2091, 2095, 45 L.Ed.2d 1 (1975); United States v. Kupau, 781 F.2d 740, 743 (9th Cir.), cert. denied, 479 U.S. 823, 107 S.Ct. 93, 93 L.Ed.2d 45 (1986).

FN11. Fed.R.Crim.P. 2 provides:
These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

*1281 The District of Columbia Circuit has held that under certain circumstances, closed circuit television may satisfy the presence requirement of Rule 43, if the procedure is considered necessary by the court. See United States v. Washington, 705 F.2d 489, 497 n. 4 (D.C.Cir.1983) (per curiam) (unruly behavior at voir dire). The government, however, does not

argue that the procedure is necessary as opposed to convenient here. Absent such a showing, we hold that arraignment by closed circuit television does not constitute substantial compliance with either Rule 10 or Rule 43. Several states, including Arizona, [FN12] have adopted rules allowing the use of closed circuit television for arraignments, with the approval of their state courts. See, e.g., Commonwealth of Pennsylvania v. Terebieniec, 268 Pa.Super. 511, 408 A.2d 1120, 1123-24 (1979) (noting no "circus atmosphere" or unconstitutional prejudice). [FN13] But one state court, examining statutes not explicitly authorizing the procedure, did not approve its use. See State ex rel. Turner v. Kinder, 740 S.W.2d 654, 656 (Mo.1987) (en banc). After the state legislature amended the statute, the court gave its approval. See Guinan v. State, 769 S.W.2d 427, 430 (Mo.) (en banc), cert. denied, 493 U.S. 900, 110 S.Ct. 259, 107 L.Ed.2d 208 (1989).

FN12. Ariz.R.Crim.P. 14.2 provides:
The defendant shall be arraigned personally before the trial court or by video telephone.

FN13. At least one commentator has noted that, far from being prejudicial, the procedure can be beneficial to defendants, since it avoids the need to be kept in a "holding cell" awaiting arraignment and allows greater focus

by the judge. See Note, The Use of Closed Circuit Television for Conducting Misdemeanor Arraignments in Dade County, Florida, 38 U.Miami L.Rev. 657, 672 (1984).

"Strong reasons" support Federal Rules 10 and 43. In re United States, 784 F.2d 1062, 1063 (11th Cir.1986). Their purpose is to ensure, at a minimum, that the defendant has a copy of the indictment, "know[s] what he is accused of and [is] able adequately to defend himself." United States v. Romero, 640 F.2d 1014, 1015 (9th Cir.1981). "Without the presence of the defendant, the court cannot know with certainty that the defendant has been apprised of the proceedings." In re United States, 784 F.2d at 1063. [FN14] Moreover, Rule 43 requires that the defendant be present at all stages of the trial, the plea and sentencing. Allowing the use of closed circuit television at arraignment without Valenzuela-Gonzalez's consent would amount to our tacit approval of its use at these other stages of the criminal proceeding as well.

FN14. To the extent the plea process is involved, the presence of the defendant may become even more important. Some district courts allow only pleas of not guilty to be entered at arraignment. See M. Hermann, Rules of Criminal Procedure for the United States District Courts 91-92 (1990).

This is the procedure anticipated in the District of Arizona. See Transcript, supra, n. 3. Acceptance of a guilty plea at arraignment would raise questions concerning the requirements of Fed.R.Crim.P. 11, which we do not reach here.

Absent a determination by Congress that closed circuit television may satisfy the presence requirement of the rules, we are not free to ignore the clear instructions of Rules 10 and 43. We have held in other contexts that

strict compliance with federal rules of criminal procedure is required. See United States v. Fernandez-Angulo, 897 F.2d 1514, 1516-17 (9th Cir.1990) (en banc) (Fed.R.Crim.P. 32). We see no reason to reach a different conclusion here. So long as Congress has chosen to provide those persons accused of federal crimes with the right to be arraigned in open court, we hold that the plain language of the rules must be followed.

IV

Arraignment by closed circuit television constitutes a violation of Federal Rules of Criminal Procedure 10 and 43. The petitioner's right to a writ of mandamus is clear and indisputable. The writ of mandamus shall issue and the district court shall vacate the order requiring arraignment of Valenzuela- Gonzalez by closed circuit television.

WRIT GRANTED.

END OF DOCUMENT

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

March 23, 1999
Via Fax

MEMORANDUM TO JUDGE W. EUGENE DAVIS

SUBJECT: *Videoconferencing of Sentencing Proceedings*

I reviewed our videoconferencing records and located the attached documents. The original request by the Bureau of Prisons was aimed only at pretrial proceedings, including arraignments. All ensuing committee discussions referred solely to pretrial proceedings.

At its October 1992 meeting the committee rejected by a vote of 5 to 4 proposed amendments that would have authorized the use of videoconferencing under Rules 10 and 43 without the consent of a defendant. At the following meeting, the committee approved amendments for publication that required the consent of the defendant — after defeating again by a vote of 7 to 6 a motion to amend Rule 10 without requiring the defendant's consent.

Proposed amendments to Rules 10 and 43, which required the defendant's consent, were published in 1993 for comment. The American Bar Association and the National Association of Criminal Defense Lawyers opposed the proposal. In addition, the Committee on Defender Services objected to the amendments and requested that further action be deferred until the completion of several videoconferencing pilot projects sponsored by the Federal Judicial Center. The projects have been stymied by lack of participation.

At its October 1998 meeting, the Criminal Rules Committee considered proposed amendments to Rules 10 and 43, which would permit the defendant to waive the right to be present at these proceedings. The amendments will be on the committee's agenda at its April meeting. Also Judge Roll's subcommittee on videoconferencing will present a report at the meeting.

John K. Rabiej

Attachments

cc: Professor David A. Schlueter (with attach.)

L. RALPH MECHAM
DIRECTOR

CLARENCE A. LEE, JR.
ASSOCIATE DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
CHIEF, RULES COMMITTEE
SUPPORT OFFICE

September 22, 1995

MEMORANDUM TO: Honorable D. Lowell Jensen
Professor David A. Schlueter

FROM: Paul Zingg, Attorney, Office of Judges Programs

SUBJECT: Videoconferencing in Criminal Proceedings

Several videoconferencing pilot programs are currently operating in the federal courts. John Rabiej has asked that I provide the status of the civil and criminal programs, and a summary of the advisory committee's actions regarding the proposal to amend criminal rules 10 and 43 to allow videoconferencing during arraignments and other pretrial proceedings.

Advisory Committee's Action on Criminal Rules 10 and 43

October 1992. The advisory committee reviewed a proposal from the Bureau of Prisons to provide for videoconferencing of arraignments. Judge Hodges noted that a similar proposal had been reviewed by the advisory committee and rejected at an earlier meeting. The committee voted 5 to 4 against a proposal to amend rule 10 to allow videoconferencing (without a consent provision). Judge Hodges then appointed a subcommittee to study whether to amend rules 10 and 43 to allow experimental videoconferencing with the defendant's consent.

April 1993. The subcommittee (Judge Keenan, Judge Crow, Mr. Marek, Mr. Doar, and Prof. Saltzburg) reported its discussions to the advisory committee and proposed amendments to rules 10 and 43 to allow videoconferencing when the defendant has waived the right to be physically present in court. The committee subsequently approved amendments to rule 10 (by a vote of 10 to 3) and to rule 43 (by a vote of 9 to 3 with one abstention).

October 1993. Proposed amendments to Rules 10 and 43 were circulated for public comment.

April 1994. The American Bar Association and the National Association of Criminal Defense Lawyers opposed the proposals. Two witnesses from the Federal Defender's office in North Carolina Eastern also opposed the proposals in testimony before the committee. The Bureau of Prisons and the U.S. Marshals Service supported the proposed amendments. Judge Diamond, Chairman of the Defender Services Committee, raised several objections and requested deferral pending completion of an ongoing videoconferencing pilot program. The committee voted 10 to 0 to defer any further action on rule 10, based primarily on Judge Diamond's request. It also voted to delete the videoconferencing provisions from other proposed amendments to rule 43 (in absentia sentencing).

Criminal Pilot Program

The Bureau of Prisons and the U.S. Marshals Service are funding two criminal videoconferencing projects in the Eastern District of Pennsylvania and Puerto Rico. The two districts are utilizing the technology in criminal pretrial proceedings, including arraignments. The projects have been hampered, however, by an unwillingness of the participants to consent to participate and a belief by some judges that the use of the technology is of questionable legality. Reportedly, the Bureau of Prisons and the Marshals Service are frustrated with the limited use of the technology, and are considering removing its equipment from Puerto Rico.

The District of Puerto Rico installed videoconferencing technology in the courtroom of one of its magistrate judges. The judge has used the system for several arraignments with the consent of each defendant. Most defendants are not consenting to the use of the technology, however, under advice of counsel.

The Eastern District of Pennsylvania has used its videoconferencing system on five occasions during the first two months after its installation in June 1995. Four occasions involved conferences between defense counsel and their clients; the fifth instance involved an interview of a defendant by the U.S. probation office. Under rules adopted by the court, the presiding judge must approve the use of the technology and receive the consent of the defendant and counsel to use videoconferencing in certain pretrial proceedings. The court has approved the following types of hearings for inclusion in the project:

- Bail Applications
- Appointment of counsel
- Rule 40 transfer
- Requests for substitute counsel
- Speedy Trial Act colloquies
- Discovery motions
- Continuance motions
- Other proceedings where the court wants to determine if the defendant understands the request submitted by counsel

After a request for assistance, the Federal Judicial Center agreed to assist the Bureau of Prisons and the Marshals Service in monitoring the projects and coordinating their research with the Court Administration Committee's civil projects so that similar information is obtained by each study. The Center will provide its evaluation to the Criminal Rules Committee upon completion of the project, and can be prepared to give a status report at the committee's meeting next month.

Three Judicial Conference Committees are interested in the criminal videoconferencing pilot projects in addition to the Court Administration Committee and the rules committees - the Defender Services Committee, the Criminal Law Committee, and the Automation and Technology Committee. The Federal Judicial Center has agreed to keep each committee and their staffs apprised of their progress in reviewing the criminal pilot projects.

Civil Pilot Programs

The Court Administration and Case Management Committee recently received a one year extension for three programs that have used videoconferencing in prisoner civil rights cases (Louisiana Middle, Missouri Western, and Texas Eastern). In addition, the committee has been authorized to expand the civil prisoner program to five additional districts. The committee is also evaluating a program in the bankruptcy court in the Western District of Texas to use videoconferencing to conduct bankruptcy proceedings between the district's Austin and Midland facilities.

The Committee studied a project in the Eastern District of North Carolina that allowed videoconferencing of competency hearings from the federal corrections facility at Butner for a one day period. Judge Britt issued an opinion upholding the legality of the use of the technology in a civil competency hearing. That opinion has been upheld by the 4th Circuit Court of Appeals. The Bureau of Prisons is considering whether to install equipment permanently in the district.

The Court Administration and Case Management Committee intends to submit a report and recommendations on its videoconferencing study to the Judicial Conference in March 1996. The committee reported to the Conference this month that the preliminary results from the pilot programs are "promising":

> *The courts are very pleased with the security and scheduling benefits achieved by videoconferencing prisoner civil rights hearings. A preliminary assessment of expenses incurred in two of the pilot courts indicates that videoconferencing technology can reduce the courts' on-going monthly costs for conducting such hearings. Prior to the availability of videoconferencing*

equipment, magistrate judges and court staff in both districts traveled to state correctional facilities, expending substantial productive travel time and incurring travel costs.

The Committee will review the final results of its study at its December 1995 meeting.

Related Issue - Civil Rule 43

This week, the Judicial Conference approved proposed amendments to Civil Rule 43 for transmission to the Supreme Court that would permit a witness to testify by "contemporaneous transmission" (e.g., video transmission) from a different location.

After the public comment period, the Advisory Committee on Civil Rules narrowed the proposal to allow contemporaneous transmission only on a showing of good cause in compelling circumstances. In its report to the Conference explaining the change, the committee emphasized the importance of the presence of the witness in court to encourage truthfulness, as well as the opportunity for face-to-face evaluation of demeanor. The committee also noted concerns that the absence of the physical presence of opposing counsel during the witness' testimony could lead to abuses, including improper coaching outside the view of the camera.

authorities and nothing would happen in the case. Mr. Pauley responded that the defendant's interests would be protected by *Riverside*'s requirements of a prompt appearance before a magistrate to determine if probable cause exists for pretrial confinement.

In the ensuing discussion, the Committee noted a variety of potential problems with amending Rule 5 to meet the UFAP problem. Judge Keeton noted that it might be easier to simply amend the statute to permit federal authorities to arrest a state defendant without relying upon a separate, rarely prosecuted, substantive federal crime. Several members raised the issue of jurisdiction to arrest a UFAP defendant and the most appropriate forum for complying with Rule 5. Judge Hodges thereafter appointed a subcommittee consisting of Judge Jensen (Chair), Judge Schlesinger, Magistrate Judge Crigler, Mr. Karas, and Mr. Pauley, to consider the proposed amendment and report to the Committee at its next meeting. No vote was taken on the motion to amend.

2. Rules 10 and 43, In Absentia Arraignments.

Judge Hodges provided a brief overview of a proposal from the Federal Bureau of Prisons to provide for teleconferencing arraignments and recognized the presence of Mr. Phillip S. Wise from the Bureau who would be available to answer questions from the Committee. He noted that the gist of the proposal was to provide some contact between the defendant, counsel, and the court without the necessity of the defendant's actual appearance before the court.

Judge Jensen moved to amend Rules 10 and 43 to provide for teleconferencing of arraignments. Mr. Pauley seconded the motion.

Judge Hodges observed that the proposal had been previously considered and rejected by the Committee and Mr. Marek questioned whether the proposed amendments would be limited to arraignments. Mr. Wise answered that the Bureau's preference would be that as many pretrial proceedings as possible, e.g., pretrial detention hearings, be covered. He further explained the two-way technology used in some state courts; the defendant can see the judge and the witness box and the judge can see the defendant. The defense counsel may or may not be with the defendant. Professor Saltzburg indicated that although he favored teleconferencing for arraignment, he would be opposed to such a procedure wherever evidence would be considered.

Mr. Marek expressed concern that the amendment would lead to a slippery slope and that he opposed any

teleconferencing, even for arraignments. He noted that there was a false assumption that nothing happens at an arraignment; the defendant should see the dynamics of the situation. There are significant issues to be decided at pretrial sessions, such as setting bail and determining competency of the defendant. He noted that although the Bureau of Prisons might save money by not transporting defendants to court, the court would incur additional expenses in terms of equipment and operating costs. In his view, the proponents had not made a case for overriding the important interests associated with personal appearances.

Judge Hodges indicated that it might be beneficial to treat Rules 10 and 43 separately and raised the question of whether it would make a difference if the defendant had the option of deciding to waive a personal appearance. Mr. Marek indicated that the right should not be waivable and Mr. Karas added that if a waiver provision were added, only those who could afford counsel, would appear.

A brief discussion ensued on the problems associated with prison overcrowding and the logistical problems associated with transporting defendants to court, especially in larger metropolitan areas. Judge Jensen noted that even in such areas of congestion, there is no authority under the rules for experimenting.

On a vote to amend Rule 10 to provide for teleconferencing of arraignments, the motion was defeated by a vote if five to four with one abstention. Judge Jensen thereafter withdrew his motion concerning a similar amendment to Rule 43; Mr. Pauley consented to the withdrawal.

The Committee then engaged in a brief discussion on the possibility of providing for some experimentation with teleconferencing. Mr. Eldridge indicated that it might be difficult to devise any pilot programs but would be more than willing to work with the Committee. Following a straw poll of the Committee, Judge Hodges appointed a subcommittee consisting of Judge Keenan (Chair), Judge Crow, Mr. Doar, Mr. Marek, and Professor Saltzburg. The subcommittee was directed to study the issue of amending Rules 10 and 43 to provide for experimental teleconferencing where the defendant has consented to such.

3. Rule 11, Advising Defendant of Impact of Negotiated Factual Stipulations.

Judge Hodges briefly introduced the topic of advising a defendant who is entering a guilty plea of the impact of a negotiated factual stipulation. He noted that the issue had

Mr. Pauley moved that Rule 5 be amended to provide that persons arrested for violating 18 U.S.C. § 1073 (UFAP) may be turned over to appropriate state or local authorities provided that the Government promptly moves, in the district in which the warrant was issued, to dismiss the complaint. Professor Saltzburg seconded the motion.

Judge Jensen indicated that he favored the motion but Mr. Karas spoke against the proposal noting that a person charged with UFAP might be placed in custody indefinitely without the benefit of appearing before a magistrate. Mr. Pauley expressed the view that the federal system should not provide a backstop for state criminal justice problems or procedures. And Mr. Marek responded that the federal system is involved if a UFAP charge has been filed. The Committee ultimately voted 11 to 2 to make the proposed changes and forward them to the Standing Committee with a recommendation to publish the amended rule for comment by the bench and bar.

2. Rules 10 and 43: In Absentia Appearances

Judge Hodges provided a brief background to the proposal to permit use of video technology to arraign defendants, not present in court. He noted that at the Committee's Seattle meeting he had appointed a subcommittee composed of Judge Keenan (Chair), Judge Crow, Mr. Doar, Mr. Marek, and Professor Saltzburg to study the issue and report back to the Committee. Judge Keenan indicated that the subcommittee had studied the issue and believed that the Rules should be amended. He then moved that Rules 10 and 43 be changed to permit use of teleconferencing technology where the defendant waives the right to be physically present in court. Mr. Doar seconded the motion.

Mr. McCabe of the Administrative Office, informed the Committee that at its Spring 1993 meeting, the Judicial Conference had approved a pilot teleconferencing program in the Eastern District of North Carolina for competency hearings where the defendant is not present in court. Judge Davis questioned whether a defendant would really be waiving the right to be present and Judge Keenan indicated that the waiver provision was a major compromise within the subcommittee's consideration of the issue.

Mr. Karas opposed the rule changes, stating that he viewed the amendments as one more step down the slippery slope. He noted that the waivers will come from those defendants with appointed counsel and that Arizona had scrapped a similar program of video arraignments. Mr. Marek also opposed the amendments. He was concerned that there

would be inevitable questions whether the defendant actually waived appearance in court, adding that defendants often do not fully grasp the significance of initial appearances. He joined Mr. Karas in questioning the wisdom of starting down the path of video teleconferencing.

Judge Marovich indicated that the amendment sends the message that arraignments are not that important and Mr. Wilson questioned the practical problems of defense counsel effectively communicating with a client who may not be present in court with counsel.

After some additional discussion the original motion was withdrawn and replaced with a motion to forward the proposed amendment without provision for waiver.

Mr. Marek expressed greater concern for the new proposal and Professor Saltzburg indicated that the proposal would squeeze the humanity out of the justice system. He noted that there was something fundamental about bringing defendants forward and putting them before a judge. Concerning the waiver provision, he stated that that issue could be addressed in the Committee Note. Additional comments by Judge Hodges, Mr. Marek, and Mr. Wilson focused on the problems of counsel being present with the defendant. Judge Crow commented that there might be a problem with the definition of arraignment, which is covered in Rule 10. But Rule 43 might not be as limited. Judge Marovich indicated that if teleconferencing were limited to only arraignments, it might not be as objectionable.

Judge Keenan indicated that perhaps the best way to proceed would be to treat Rule 10 separately and go forward with that rule alone. On a vote whether to amend Rule 10 without a waiver provision, the motion failed by a vote of 6 to 7. Judge Keenan thereafter moved that Rule 10 be amended to permit video teleconferencing if the defendant waived personal appearance. Professor Saltzburg seconded the motion which carried by a vote of 10 to 3.

Turning to Rule 43, Judge Jensen noted that the issue of waiver would also be a key point in any change to the rule. Mr. Marek expressed concern that any counsel who recommended that a defendant waive personal appearance might be guilty of ineffective assistance of counsel.

Judge Keenan moved that Rule 43 be amended to permit teleconferencing of pretrial sessions if the defendant waives personal appearance. Judge Crow seconded the motion which carried by a vote of 9 to 3 with one abstention.

2. Rule 29(b), Delayed Ruling on Judgment of Acquittal;
3. Rule 32, Sentence and Judgment; and
4. Rule 40(d), Conditional Release of Probationer

C. Rules Approved by the Standing Committee for Public Comment

The Committee was also informed that comments had been received on amendments which had been approved for public comment by the Standing Committee at its June 1993 meeting.

1. Rule 5(a), Initial Appearance Before the Magistrate; Exception for UFAP Defendants

The Reporter summarized the few comments received on the proposed amendment to Rule 5, which would create an exception for the prompt appearance requirement in those cases where the defendant is charged only with the offense of unlawful flight to avoid prosecution. One commentator raised the question of whether there should be a cross-reference to the proposed amendment in Rule 40 as well and another commentator writing on behalf of the American Bar Association indicated that the proposed amendment was in conflict with Section 10-4.1 of the ABA Standards for Criminal Justice. The proposed amendment was endorsed by the National Association of Criminal Defense Lawyers. Following brief discussion of the comments, Professor Saltzburg moved that the amendment be forwarded without change to the Standing Committee. Mr. Pauley seconded the motion, which carried by a vote of 9 to 2.

Mr. Pauley moved that Rule 40 be amended to reflect a cross-reference to the change in Rule 5 and Professor Saltzburg seconded the motion. The motion carried by a vote of 9 to 0 with two abstentions.

2. Rule 10, Arraignment; Video Teleconferencing.

The Reporter and Chair informed the Committee that several written comments had been received on the proposed amendment to Rule 10 which would permit arraignments by video teleconferencing, with the consent of the defendant. The American Bar Association and National Association of Criminal Defense Lawyers were opposed to the proposal, as were two witnesses who had appeared before the Committee. The Committee was also informed that Judge Diamond of the Committee on Defender Services had requested deferral of action on the proposed amendment pending completion of a pilot program on use of video teleconferencing technology in

federal courts. The United States Marshals Service expressed strong support for the amendment.

Observing that the amendment would dehumanize the trial, Professor Saltzburg moved that the Committee withdraw the amendment from further consideration. Mr. Karas seconded the motion. Several of the members of the Committee expressed concern about the fact that permitting video arraignments would probably simply shift the costs and time associated with transporting the defendant to the courthouse to the defense counsel, who would in all likelihood feel compelled to stand with his or her client. Mr. Pauley noted that approximately 80 percent of the defendants would opt to remain in the penal institution rather than being transported to court for an arraignment and that there are legitimate security concerns in moving defendants to and from court. Judge Marovich echoed that point. Judge Dowd questioned the mechanics of obtaining a waiver from the defendant and Mr. Karas expressed concern about starting down the slippery slope of permitting trial of defendants in absentia. Following additional discussion about the role of arraignments and the question of possible pilot programs which might address the Committee's concerns, Professor Saltzburg modified his motion to reflect that the Committee would defer the proposed amendment to the Committee's Spring 1995 meeting, after completion of those pilot programs. The motion to defer carried by a vote of 10 to 0 with 1 abstention.

3. Rule 43, Presence of Defendant; Video Teleconferencing

In light of the Committee's action on Rule 10, Professor Saltzburg moved that Rule 43 be approved and forwarded to the Standing Committee with the provision permitting video teleconferencing deleted. Judge Davis seconded the motion.

Mr. Pauley briefly addressed the issue of in absentia sentencing and noted that United States Attorneys have reported problems with fugitivity. He also noted a possible ambiguity in the proposed revision of Rule 43(b) and suggested language which would make it clear that in absentia proceedings may be conducted after jeopardy has attached by entry of a plea of guilty or nolo contendere. The Committee agreed with his suggestion and in a brief discussion concluded that Mr. Pauley's suggested language did not require additional public comment. The motion carried by a vote of 9 to 1 with one member abstaining.

USES OF VIDEOCONFERENCING IN THE JUDICIARY

Court Proceedings

Videoconferencing technology is being used for a variety of purposes in appellate, district and bankruptcy courts. Although originally deployed for use in prisoner matters to enhance security and reduce costs associated with travel, the technology is now being widely used both for other types of judicial proceedings and for administrative purposes. To date, there are more than eighty-five federal court sites equipped with videoconferencing.

The Judicial Conference of the United States (JCUS-MAR 96, p.14) has authorized use of the technology in prisoner civil pretrial proceedings. However, there is no judiciary-wide policy endorsing or prohibiting the use of videoconferencing in other types of judicial proceedings. Its use is subject to case law and rules considerations and the appropriateness of its use in specific proceedings is determined by judges.

In addition to the judiciary's program supporting district court use of videoconferencing for prisoner proceedings, courts have found other means of acquiring videoconferencing or are sharing the use of equipment with other court units. The judiciary is currently developing an implementation plan for courtroom technology that will include videoconferencing and will result in a broader availability of funding, particularly for new courthouses and those undergoing major renovation. Additional efforts undertaken by the judiciary to support videoconferencing include the development of a judiciary-wide procurement vehicle to simplify the purchase of equipment as well as ongoing research into this rapidly evolving technology.

Appellate Courts

In the appellate court environment, videoconferencing can be used between remote locations for oral arguments, rehearings en banc, settlement conferences, and Rule 34(f) decisions on the briefs. Travel time and costs can be saved by counsel, parties, settlement attorneys, and judges. These savings especially can be compelling in circuits that include widely dispersed geographic locations. In some circumstances, the savings realized accrue to court users rather than directly to the judiciary.

Currently, the Second and Tenth circuits are using videoconferencing for remote participation in oral arguments by attorneys, and in certain circumstances, by judges. More than 200 oral arguments have been heard by the Second Circuit through the use of videoconferencing. The use of this technology is also being explored by the Third, Fourth and Ninth circuits.

Issues of consent and fairness are less likely to arise with videoconferencing in the appellate court than in the district court. The purpose of an appellate hearing is to argue the law rather than to present evidence. Unless appearing pro se, parties do not take part in appellate court arguments. Arguments or settlement conferences are conducted by the attorneys. Moreover, the absence of witness testimony eliminates credibility concerns. In addition, appellate arguments do not include document production making it unnecessary to view

documents by camera. Legal briefs prepared by the attorneys are provided to the court in advance of the hearing. The smaller number of participants in appellate arguments and settlement conferences simplifies operational considerations in the use of videoconferencing equipment by reducing the required number of camera and monitor locations. Whether the degree of intimacy lost by videoconferencing is outweighed by savings in travel time and costs will depend on the particular circumstances of counsel and parties and the nature of the case. Judges, counsel, and parties may not be willing to opt for the use of videoconferencing when they perceive the case to be complex or critical. Issues of fairness may also preclude one counsel from arguing from a remote location while opposing counsel appears in the courtroom.

Videoconferencing offers benefits to appellate courts in the conduct of motions proceedings, Rule 34(f) decisions on the briefs, or other conferences by appellate panels. A majority of appellate cases are settled prior to argument. Videoconferencing offers savings in travel-related costs to circuit court staff attorneys, counsel, and parties when used in settlement conferences. In some circuits, where motions proceedings are routinely handled by teleconferencing, videoconferencing offers a qualitative enhancement without recourse to travel. When judges are widely separated geographically, videoconferencing offers a means of reducing non-productive travel time, reducing direct travel costs, and simplifying the scheduling of proceedings. However, the use of videoconferencing to replace face-to-face meetings may not be suitable to some circuit judges and may be contrary to accepted practices in some circuits.

District Courts

Videoconferencing is used in some state and local courts to conduct all or part of various criminal proceedings. In the federal courts, the use of videoconferencing to conduct certain types of criminal proceedings, such as arraignments and sentencing hearings, is the subject of evolving caselaw. However, videoconferencing is being used by some federal courts, with consent of the parties, for these types of proceedings. The technology is being broadly used for civil matters, particularly for preliminary hearings in prisoner civil rights complaints. At present, more than forty-five district courts are using videoconferencing for proceedings and administrative matters.

In March 1996, the Judicial Conference authorized funding for the use of videoconferencing in prisoner civil rights pretrial proceedings to district courts meeting certain caseload and related criteria based on the success of its pilot program in that area. Accordingly, the Administrative Office established the Prisoner Civil Rights Videoconferencing Project to provide a funding for equipment and assistance to courts in implementing videoconferencing programs. At present, thirty-five district courts are participating in the project with more than eighty-five separate videoconferencing sites. Participation in the project includes the requirement that costs of the program are shared with the participating state, local or federal prison authorities since not all of the benefits of using the technology accrue solely to the judiciary. While videoconferencing under this program has been used primarily to conduct prisoner civil pretrial matters, many courts have expanded its use to include other proceedings as deemed appropriate by judges, including witness testimony in trials. Courts are also using the

technology very broadly for administrative and training functions between divisional offices.

The Judicial Conference pilot program on videoconferencing in prisoner civil pretrial proceedings found that its use in this specific category of proceedings can result in significant savings in personnel costs from reduced travel time and travel costs. In some circumstances, the reduction in personnel hours expended by judges and court personnel in non-productive travel time offers measurable evidence of benefit to the court. The court can also realize significant, if less measurable, benefits from the elimination of security risks to judicial officers, court staff, and the public associated with the transport of prisoners. These security risks also include the risk of exposure to communicable diseases. State or federal prison authorities and the United States Marshals Service also recognize considerable efficiencies and costs savings through the use of videoconferencing.

Some district courts with a large number of prisoner cases found that their ability to schedule and move cases more speedily and more efficiently was enhanced by the use of videoconferencing. This was especially significant in districts where the judge and court staff previously traveled to correctional facilities to conduct pretrial hearings. It was suggested that the use of videoconferencing may improve an inmate's chance of having a hearing scheduled before a judicial officer because of the elimination of numerous scheduling difficulties and security concerns. There are, however, concerns about the fairness of videoconferencing to the parties appearing before a judge or presenting their arguments without benefit of the judge's physical presence in the hearing room. While the judges participating in the pilot felt that videoconferencing provided a fair hearing format for prisoner/plaintiffs, such concerns are likely to continue to be raised.

In 1996 the President signed into law legislation that included the Prison Litigation Reform Act. That legislation includes the requirement that federal courts "to the extent practicable," conduct prison condition pretrial proceedings "in which the prisoner's participation is required or permitted" by telephone, videoconference, or other telecommunications technology, without removing the petitioner from the prison facility. While this legislative language imposes no mandatory requirement on the courts, it certainly establishes the congressional desire that prisoners remain at the prison for pretrial civil rights proceedings.

With regard to the use of videoconferencing in civil trials, Federal Rule of Civil Procedure 43 was recently amended, effective December 1, 1996, to permit testimony at trial to be made by contemporaneous transmission from a remote location, but only "for good cause shown in compelling circumstances and upon appropriate safeguards."

Other uses of videoconferencing in district courts include pretrial and parole interviews between prisoners and pretrial services or parole officers, as well as attorney-client consultations. The Bureau of Prisons and the United States Marshals Service are conducting videoconferencing of some pretrial criminal proceedings (with the approval of the court and the consent of the parties) in the Eastern District of Pennsylvania. Usage, however, has been minimal because of

the consent requirement. Videoconferencing is also being used for criminal pretrial matters in the District of Oregon under a program supported by the United States Marshals Service. Videoconferencing of attorney-client consultations is also employed in the District of Hawaii to allow attorneys located in Hawaii to consult with their clients incarcerated in correctional facilities on the west coast under a program supported by the state bar association.

Bankruptcy Courts

The use of videoconferencing in bankruptcy courts for non-trial proceedings offers cost savings and efficiencies in a less controversial environment than in district courts, particularly in view of the numerous hearings that are required under federal bankruptcy law. More than fifteen bankruptcy courts are routinely using videoconferencing to conduct evidentiary and non-evidentiary proceedings between remote locations, saving time in travel and direct travel costs for court personnel and the bar, and allowing hearings to be scheduled more promptly and frequently in court locations without a resident bankruptcy judge. One court found that purchase of a videoconferencing system precluded the need to construct additional court space, representing a substantial savings in potential construction costs and recurring space costs.

Under a pilot conducted by the Judicial Conference, the United States Bankruptcy Court for the Western District of Texas pioneered the use of videoconferencing to conduct hearings between divisional locations four hundred miles apart. The technology resulted in savings to the court in travel costs and in the reduction of non-productive travel time. The court also found that it considerably enhanced flexibility in the scheduling of proceedings. While the bankruptcy judge prefers to hold proceedings involving complex contested matters in person, in at least one instance such a proceeding was successfully conducted by videoconferencing when last minute weather complications prevented the judge from flying to the courthouse the attorneys and parties already assembled at the remote site.

For reasons similar to those discussed above with regard to appellate courts, relating to geographic location of the judges and difficulties in scheduling, the use of videoconferencing may be well suited to proceedings before Bankruptcy Appellate Panels. These panels have become more common due to the requirements of recent legislation.

Access to Videoconferencing

It should be noted that the use of videoconferencing by federal courts does not require all participants to purchase videoconferencing equipment. Counsel, parties, and the courts can rent use of videoconferencing facilities by the hour from a variety of sources, such as "Kinko's," a national office services franchise. Equipment can also be leased on a short term basis for use in specific proceedings, although this is currently an expensive option. In some instances state or local governments and bar associations have access to videoconferencing facilities and videoconferencing networks which can be shared with federal courts. Both the United States Marshals Service and the Federal Bureau of Prisons have videoconferencing programs in

operation at numerous locations and have frequently cooperated with the federal judiciary in conducting proceedings by videoconferencing. In addition, a national videoconferencing network is being implemented by the United States Department of Justice in all United States Attorneys' offices.

Videoconferencing is an evolving technology that offers many potential uses to the federal courts. However, videoconferencing does not "replace" the physical presence of a judge. It is a tool that can, in certain compelling circumstances, enhance and supplement the services that the court provides to the public. The use of videoconferencing in judicial proceedings will continue to be conditioned by concerns for fairness to litigants consistent with the requirements set forth in statute and rules.

Prepared by the Administrative Office of the United States Courts
October 22, 1998

VIDEOCONFERENCING

a. Current Use of Videoconferencing

Federal courts continue to experiment with the use of videoconferencing for judicial proceedings and other court business. Thirty-four district courts are now participating in the Prisoner Civil Rights Videoconferencing Project, many with multiple videoconference sites within the district. Funding for seven new sites or the expansion of existing sites will be available in FY 1999. Eight additional courts are also purchasing and using videoconference equipment with funding from the Electronic Courtroom Project[1], which is also providing additional funds to many of the courts participating in the Prisoner Civil Rights Videoconferencing Project.[2]

Federal courts are now using videoconferencing extensively for prisoner pretrial matters and occasionally for inmate witness testimony in prisoner hearings and trials, with the plaintiff located at the courthouse. Although it appears that no federal courts regularly conduct criminal preliminary proceedings by videoconference, at least one judge has found that videoconferencing provides a preferable alternative for conducting sentencing proceedings. That judge reported, in conjunction with the electronic courtroom project, that, rather than monthly travel to another

---

[1] The Electronic Courtroom Project is the judiciary's multi-year study of the use of four courtroom technologies: videoconferencing, video evidence presentation, electronic court-reporting methods such as real-time stenography, and courtroom access to electronic applications and databases.

[2] A list of those courts participating in the Electronic Courtroom Project and the Prisoner Civil Rights Videoconferencing Project is attached.

location to conduct sentencing hearings for fifty to sixty defendants, videoconferencing allows more frequent sentencing proceedings with fewer defendants at each hearing. The defendants consent to the use of videoconferencing in writing and on the record at the proceeding.

Some courts, particularly those in the Fifth Circuit, the most active circuit in the use of videoconferencing, have reported benefits from increasing the use of videoconferencing for administrative matters such as meetings and training. Appellate court use of videoconferencing is also expanding. Currently, the Second and Tenth Circuits use videoconferencing for appellate arguments. The Fifth and Ninth Circuits are considering such use.

State courts continue to lead in the use of videoconferencing for judicial proceedings, however, with statutes and rules providing for the use of videoconferencing for criminal proceedings in many states.

b. Proposed Amendments to the Federal Rules of Criminal Procedure

Current proposed amendments to the Federal Rules of Criminal Procedure present possibilities for expanding the use of videoconferencing in federal criminal proceedings.

In 1993, following the decision in Valenzuela-Gonzales v. United States, 915 F.2d 1276 (9th Cir. 1990), holding that Federal Rules of Criminal Procedure 10 and 43, read together, preclude the use of videoconference arraignments, the Advisory Committee on Criminal Rules proposed amendments specifically providing for videoconferencing of criminal pretrial proceedings, including arraignments. Following opposition to the amendments by the Defender Services Committee the Advisory Committee deferred consideration of the proposed amendments.

At its April 1998 meeting, the Advisory Committee considered a proposal to amend

Federal Rules of Criminal Procedure 10 and 43 to authorize a defendant to waive the right to be present at the arraignment altogether, if the defendant waives his or her right of personal appearance in writing and if the court accepts the waiver. It approved the proposed amendments, which do not directly address videoconferencing, but deferred publication of the proposed amendments for comments until a later date.

At its April 1998 meeting, the Advisory Committee also considered a proposed amendment to Criminal Rule 26 to permit taking witness testimony by remote contemporaneous video transmission in certain circumstances. The Committee deferred consideration of this amendment to allow further time for research into the Confrontation Clause issues that are implicated. Approval of the proposed amendment would signify a cautious but significant step toward expanding the use of videoconferencing in federal criminal proceedings.

Staff will continue to gather information and apprise the Committee on the use of videoconferencing in the courts.

CALL FOR COMMENT ON

PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE

FEDERAL RULES OF APPELLATE PROCEDURE

FEDERAL RULES OF BANKRUPTCY PROCEDURE

FEDERAL RULES OF CIVIL PROCEDURE

FEDERAL RULES OF CRIMINAL PROCEDURE

AND THE

FEDERAL RULES OF EVIDENCE

Public hearings will be held on the amendments to:
Appellate Rules in Denver, Colorado on March 14, 1994;
Bankruptcy Rules in Washington, D.C. on March 25, 1994;
Civil Rules in Dallas, Texas on April 6, 1994;
Criminal Rules in Los Angeles, California on April 4, 1994;
Evidence Rules in New York, New York on May 9, 1994.

COMMITTEE ON RULES OF PRACTICE
AND PROCEDURE

OF THE

JUDICIAL CONFERENCE OF THE
UNITED STATES

OCTOBER 1993

function of approving prosecutions may not be delegated.

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

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

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

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

Rule 10. Arraignment

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

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

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

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

COMMITTEE NOTE

Read together, Rules 10 and 43 require the defendant to be present in court for the arraignment. *See, e.g., Valenzuela-Gonzales v. United States*, 915 F.2d 1276, 1280 (9th Cir. 1990)(Rules 10 and 43 are broader in protection than the Constitution). The amendment to Rule 10, in addition to several stylistic changes, creates an exception to

that rule and provides that the court may permit arraignments through video teleconferencing if the defendant waives the right to be present in court. Similar amendments have also been made to Rule 43 to cover other pretrial sessions.

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

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

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

Rule 43. Presence of the Defendant

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

(b) CONTINUED PRESENCE NOT REQUIRED. The further progress of the trial to and including the return of the verdict, and the imposition of sentence,

will ~~shall~~ not be prevented and the defendant will ~~shall~~ be considered to have waived the right to be present whenever a defendant, initially present at trial,

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

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

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

as to justify exclusion from the courtroom.

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

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

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

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

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

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

COMMITTEE NOTE

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

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

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

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

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

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

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

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

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

Although the Committee did not attempt to further define the term "pretrial sessions," the rule could logically extend to sessions such as Rule 5 proceedings, arraignments (as specifically provided for in the amendment to Rule 10), preliminary examinations under Rule 5.1, competency hearings, pretrial conferences, and motions hearings not already within the purview of

subdivision (c)(3). The Committee does not contemplate that the amendment would extend to guilty plea inquiries under Rule 11(c).

Rule 53. Regulation of Conduct in the Court Room

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

COMMITTEE NOTE

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

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

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

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

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

for the public supports opening of courts to audio and camera coverage).

Rule 57. Rules by District Courts

(a) IN GENERAL.

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

(2) A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose

rights because of a negligent failure to comply with the requirement.

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

(c) EFFECTIVE DATE AND NOTICE. A local rule so adopted shall take effect upon the date specified by the district court and shall remain in effect unless amended by the district court or abrogated by the judicial council of the

circuit in which the district is located. Copies of the rules and amendments so made by any district court ~~shall~~ must upon their promulgation be furnished to the judicial council and the Administrative Office of the United States Courts and ~~shall~~ must be made available to the public. ~~In all cases not provided for by rule, the district judges and magistrate judges may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act.~~

COMMITTEE NOTE

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

The amendment also requires that the numbering of local rules conform with any numbering system that may be prescribed by the Judicial Conference. Lack of uniform

numbering might create unnecessary traps for counsel and litigants. A uniform number system would make it easier for an increasingly national bar to locate a local rule that applies to a particular procedural issue.

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

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

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

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

Rule 59. Effective Date; Technical Amendments

(a) These rules take effect on the day which is 3 months subsequent to the

adjournment of the first regular session of the 79th Congress, but if that day is prior to September 1, 1945, then they take effect on September 1, 1945. They govern all criminal proceedings thereafter commenced and so far as just and practicable all proceedings then pending.

(b) The Judicial Conference of the United States may amend these rules to correct errors in spelling, cross-references, or typography, or to make technical changes needed to conform these rules to statutory changes.

COMMITTEE NOTE

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

PRELIMINARY DRAFT
OF PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF EVIDENCE*

Rule 1102. Technical and Conforming Amendments

(a) Amendments to the Federal Rules of Evidence may be made as provided in section 2072 of title 28 of the United States Code.

(b) The Judicial Conference of the United States may amend these rules to correct errors in spelling, cross-references, or typography, or to make technical changes needed to conform these rules to statutory changes.

COMMITTEE NOTE

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

---

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

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Dave Schlueter, Reporter

RE: Rule 49; Proposed Amendments Regarding Electronic Filing

DATE: March 26, 1999

Following discussions at recent meetings of the Technology Subcommittee of the Standing Committee, the other Advisory Committees have begun discussions on possible amendments to their respective rules concerning use of electronic means to effect service and/or filings. The Criminal Rule counterpart is found in Rule 49. Other Rules, such as Rule 45 (dealing with the computation of time, especially the three-day provision in 45(e)) may also be affected. Because Rule 49 currently requires service, etc. in the "manner provided in civil actions," the Criminal Rules Committee has generally not been involved in the past in actually drafting any proposed changes.

Attached are materials that provide helpful information on the various issues raised during the discussions.

There seems to be some movement to adopting uniform language in all of the appropriate procedural rules. Thus, the Committee should probably make its views known now, especially if it disagrees with the drafts being developed. Given the Committee's current focus on restyling, however, any actual substantive changes to the Criminal Rules on the subject of electronic filing might wait until the affected Rules are reviewed by the respective Style Subcommittees.

This item will be on the agenda for the April meeting.

HOFSTRA UNIVERSITY

SCHOOL OF LAW
FACULTY

3/24/99

March 24, 1999

John K. Rabiej
Chief, Rules Committee Support Office
Administrative Office of the
United States Courts
Washington, D.C. 20544

Re: Electronic Service

Dear John:

On March 19th, the Advisory Committee on Bankruptcy Rules considered Professor Cooper's drafts of proposed amendments to Civil Rules 5(b), 6(e) (including the 3 alternatives listed), 77(d), and 4(d). The Committee reached a consensus on the following:

1. The Committee supports the substance of the proposed amendments to Rule 5(b). Service by electronic means, or by any other means, should be permitted on consent of the person served. To avoid any ambiguity as to whether consent is required for electronic service, the Committee prefers the language suggested by Professor Capra in Rule 5(b)(2)(D) ("... any other means, including electronic means, consented to ..."). Another style suggestion: Rule 5(b)(2) should begin with the phrase: "Service under Rule 5(a) is made by:" (instead of "Rule 5(a) service is made by"). This phrasing would be consistent with the phrasing of Rule 5(b)(1).

2. The Committee supports the proposed amendments to Rule 6(e), extending the 3-day "mail rule" to service by electronic or other means. If these proposed amendments are presented to the Standing Committee, the Bankruptcy Rules Committee would propose similar amendments to Bankruptcy Rule 9006(f). In drafting the Rule 9006(f) amendments, the Committee prefers specific cross-references to Civil Rule 5(b) to the extent possible. Since service by mail is available in bankruptcy proceedings other than in situations when service is made under Rule 5(b), it will be necessary for Rule 9006(f) to retain the language "by mail" (instead of merely cross-referencing to Rule 5(b)). But cross-references to Rule 5(b)(2)(C) and (D) could be used. In response the Committee's views, I prepared the following proposed amendments to Rule 9006(f):

Rule 9006. Time

(f) *Additional Time after Service by Mail or Under Rule 5(b)(2)(C) or (D), F.R. Civ. P.* When there is a right or requirement to do some act or undertake some proceedings within a prescribed period after service of a notice or other paper and the notice or paper other than process is served by mail or under Rule 5(b)(2)(C) or (D), F.R. Civ. P., three days shall be added to the prescribed period.

COMMITTEE NOTE

Rule 5(b), F.R. Civ. P., which is made applicable to adversary proceedings by Rule 7005, is being restyled and amended to authorize service by electronic means -- or any other means not otherwise authorized under Rule 5(b) -- if consent is obtained from the person served. The amendment to Rule 9006(f) is intended to extend the three-day "mail rule" to service under Rule 5(b)(2)(D), including service by electronic means. The three-day rule also will apply to service under Rule 5(b)(2)(C), F.R. Civ. P., when the person served has no known address and the paper is served by leaving a copy with the clerk of the court. This amendment conforms to the amendment to Rule 6(e), F.R. Civ. P.

3. The Committee supports the proposed amendments to Civil Rule 77(d). If the package of proposed amendments on electronic service, including the amendments to Rule 77(d), go forward to the Standing Committee, the following amendments to Bankruptcy Rule 9022 could also be proposed:

Rule 9022. Notice of Judgment or Order

(a) *Judgment or Order of Bankruptcy Judge.* Immediately on the entry of a judgment or order the clerk shall serve a notice of the entry ~~by mail~~ in the manner provided ~~by Rule 7005~~ in Rule 5(b), F. R. Civ. P., on the contesting parties and on other entities as the court directs. Unless the case is a chapter 9 municipality case, the clerk shall forthwith transmit to the United States trustee a copy of the judgment or order. Service of the notice shall be noted in the docket. Lack of notice of the entry does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 8002.

(b) *Judgment or Order of District Judge.* Notice of a judgment or order entered by a district judge is governed by Rule 77(d) F.R. Civ. P. Unless the case is a chapter 9 municipality case, the clerk shall forthwith transmit to the United States trustee a copy of a judgment or order entered by a district judge.

COMMITTEE NOTE

Rule 5(b), F.R. Civ. P., which is made applicable to adversary proceedings by Rule 7005, is being restyled and amended to authorize service by electronic means -- or any other means not otherwise authorized under Rule 5(b) -- if consent is obtained from the person served. The amendment to Rule 9022(a) authorizes the clerk to serve notice of entry of a judgment or order by electronic means if the person served consents, or to use any other means of service authorized under Rule 5(b), including service by mail. This amendment conforms to the amendments made to Rule 77(d), F.R. Civ. P.

4. The Committee opposes the drafted amendments to Civil Rule 4(d). Requests for waiver of service should not be permitted by electronic means at this time.

As Professor Cooper mentioned in his memorandum, the Bankruptcy Rules Committee published proposed amendments to Rules 9013 and 9014 in August, 1998, providing for electronic service as part of a comprehensive package of amendments on motion practice. At its March 18-19 meeting, the Bankruptcy Rules Committee decided that it would not present these amendments to the Standing Committee in June, but will continue to study them next year.

The Bankruptcy Rules Committee did not express a preference regarding the timing of the electronic service proposals. But if the Civil Rules Committee will be presenting to the Standing Committee the proposed amendments to Rules 5(b), 6(e), and 77(d), with a request for publication this summer, the proposed amendments to Bankruptcy Rules 9006(f) and 9022 should be published at the same time.

Please circulate this letter to the reporters of the other advisory committees as soon as possible, to the members of the Subcommittee on Technology, and to anyone else as you think appropriate.

Sincerely,

Alan N. Resnick
Reporter
Advisory Committee on Bankruptcy Rules

MEMORANDUM

DATE: March 10, 1999

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 99-03

All of the rules of practice and procedure — appellate, bankruptcy, civil, and criminal — include almost identically worded provisions authorizing the promulgation of local rules that permit electronic *filing*. *See* Fed. R. App. P. 25(a)(2)(D); Fed. R. Bankr. P. 5005(a)(2), 7005(e), 8008(a); Fed. R. Civ. P. 5(e); Fed. R. Crim. P. 49(d). In FRAP, the electronic filing provision is found in FRAP 25(a)(2)(D):

> (D) **Electronic Filing.** A court of appeals may by local rule permit papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.

Even before these rules took effect, a few district courts and bankruptcy courts had begun experimenting with electronic case filing ("ECF"). Following enactment of the ECF rules in 1996,

Conference to identify the legal, policy, and technical issues that would need to be addressed before ECF could be implemented on a nationwide basis.[1]

The prototype courts have, for the most part, had positive experiences with electronic *filing*, and they are anxious to move to the next step: electronic *service*. At present, such service is not authorized by any of the rules of practice and procedure (although a proposed amendment to the bankruptcy rules would permit bankruptcy judges to authorize certain notices to be served by electronic means). Rather than ask each of the advisory committees to work independently on electronic service rules, the Standing Committee directed Prof. Edward Cooper, the Reporter to the Advisory Committee on Civil Rules, to draft electronic service provisions for the civil rules. The Standing Committee's intent is that, after satisfactory language regarding electronic filing is found for the civil rules, that language can be incorporated into the appellate, bankruptcy, and criminal rules.

Prof. Cooper presented alternative proposals for amending the civil rules at a February 1999 meeting of the Subcommittee on Technology. (The reporters to the advisory committees also attended the meeting.) After considerable discussion, the Subcommittee made a few tentative decisions, and Prof. Cooper agreed to draft amendments implementing those decisions. Prof. Cooper's draft amendments are attached. All of the advisory committees are being asked to review the draft amendments during their spring 1999 meetings and to share their views on the draft amendments at the June 1999 meeting of the Standing Committee. The Subcommittee on

---

[1]Unfortunately, no *appellate* court has yet agreed to serve as a prototype, and thus this advisory committee is not benefitting from the ECF Initiative as much as the advisory committees on the bankruptcy, civil, and criminal rules. Judge Garwood has asked the Administrative Office to advise us regarding what might be done to encourage the creation of at least a couple prototype appellate courts.

Technology hopes that the Standing Committee will be able to publish proposed amendments to the civil rules in August and that, after reviewing the comments, the Standing Committee will be able to approve amendments next year. Once language satisfactory to the Standing Committee emerges, the other advisory committees will be asked to use that language in drafting electronic service amendments to their own rules.

As you will see, Prof. Cooper's draft amendments are accompanied by considerable explanation. It may nevertheless be helpful if I highlight some of the tentative decisions that were made by the Subcommittee on Technology at the February 1999 meeting:

1. The Subcommittee decided that parties should have the option to use or not to use electronic service. Thus, under the draft amendments, electronic service cannot be imposed upon an unwilling party. However, if the parties agree to electronic service, a district court may not, by local rule, forbid electronic service to be used.

2. Although the Subcommittee did not want to permit district courts to *block* the use of electronic service by consenting parties, the Subcommittee recognized that the district courts must be free to use local rules to *regulate* such service. A number of difficult questions are likely to arise after parties begin serving each other electronically, and it is important that district courts have the flexibility to address those problems. For example, questions may arise concerning the scope of consent to electronic service. In theory, a party could agree to electronic service of a particular paper, or all papers in a particular case, or all papers in all cases — pending and future — filed by or against that party in that district. A local rule might provide that a party (or attorney) may file a general consent with the court, authorizing electronic service upon her in all

matters filed in that court. Local rules might also address whether and how consent to electronic service might be withdrawn.

I should note that the authority of courts to use local rules to regulate electronic service is not as clear in Prof. Cooper's draft amendments as it might be. The amendments themselves say nothing about local rules (with the exception of local rules permitting service by the clerk instead of by the parties, discussed below). Similarly, the Committee Note mentions local rulemaking only in connection with regulating the "means of *consent*" to electronic service; it says nothing about using local rules to regulate other aspects of electronic service.

3. Under the draft amendments, only "Rule 5" service may be made electronically; "Rule 4" service must continue to be made manually. Roughly speaking, Rule 4 (and Rule 4.1) service is the service that commences a lawsuit — that is, the service of "process" (the summons and complaint) — while Rule 5 service is essentially all of the service that occurs thereafter (e.g., service of answers, discovery requests, and motions). The Subcommittee was nervous about permitting electronic service of the summons and complaint.[2]

4. Under draft FRCP 5(b)(2)(D), service is authorized by "electronic or any other means" consented to by the parties. The phrase "any other means" appears to refer primarily to Federal Express and other third-party commercial carriers. Although inclusion of the words "electronic or" is, strictly speaking, unnecessary (as electronic service would presumably fall within "any

---

[2]FRCP 4(d) permits a plaintiff to request certain defendants to waive formal service of the summons and complaint. The rules specifically state that such a request "shall be in writing," FRCP 4(d)(2)(A), and "shall be dispatched through first-class mail," FRCP 4(d)(2)(B). The Subcommittee decided that FRCP 4(d) requests should continue to be in writing, but I see that Prof. Cooper, on his own initiative, has provided a draft amendment to FRCP 4(d) that would permit such requests to be made electronically.

other means"), the Subcommittee wanted the rule specifically to mention electronic service in the hope of encouraging parties to use it. I should note that FRAP 25(c) already provides that "[s]ervice may be personal, by mail, or by third-party commercial carrier for delivery within 3 calendar days." In other words, FRAP already seems to authorize all likely modes of service other than electronic.

5. The Subcommittee struggled with the question of when electronic service will be deemed complete. The Subcommittee rejected a proposal that electronic service be deemed complete upon "receipt" because it is too vague (Is an electronic message "received" when it has reached the server of the recipient but not yet been downloaded to the recipient's personal computer? Is the message "received" when it has been downloaded to the recipient's personal computer but not yet opened by the recipient?) and manipulable (Can a party avoid service by keeping his computer turned off?). The Subcommittee also rejected a proposal that electronic service be deemed complete when the sender receives "confirmation" that his message has been received. Some e-mail programs do not confirm the receipt of messages, while others do. Also, any confirmation rule would be subject to manipulation.

The Subcommittee eventually decided that electronic service should be deemed complete upon "transmission" — roughly speaking, when the sender hits the "send" button on his computer and launches the message on its way through cyberspace. The transmission rule closely parallels the "mailbox" rule of FRCP 5(b), under which service by mail is deemed complete "upon mailing." (A similar rule appears in FRAP 25(c), which states that "[s]ervice by mail or by commercial carrier is complete on mailing or delivery to the carrier.")

6. The Subcommittee considered the question of whether the "three day" rule of FRCP 6(e) should apply to electronic service. FRCP 6(e) currently provides:

> **(e) Additional Time After Service by Mail.** Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, 3 days shall be added to the prescribed period.

After much discussion, the Subcommittee decided that FRCP 6(e) should be redrafted so that three days are added to the prescribed period whenever service is made by *any* means — including electronic — other than personal service.[3] At first glance, it may seem strange to apply the three day rule to electronic service, which is instantaneous. But electronic service is not instantaneous as a practical matter if it is made at 8:00 p.m. on a Friday night and the recipient does not turn on her computer until 9:00 a.m. Monday morning.

7. Finally, the Subcommittee discussed the fact that, before long, it may make sense to require the clerk, rather than the parties, to serve all papers filed with the court. Software is apparently being developed that would permit the clerk, with a touch of a button, to serve an electronically filed paper on all parties. Under the draft amendment, a district court could, by local rule, authorize service by the clerk instead of by the parties. (For a circuit court to have the same authority, we would need to propose an amendment to FRAP 25(b), which presently requires party service of all papers unless FRAP expressly assigns the responsibility to the clerk.)

---

[3]If this amendment is adopted, FRCP 6(e) will closely parallel FRAP 26(c), which adds "3 calendar days" to deadlines that begin to run upon service of a paper "unless the paper is delivered on the date of service stated in the proof of service."

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

March 17, 1999

MEMORANDUM TO ADVISORY COMMITTEE ON APPELLATE RULES

SUBJECT: *Revised Agenda Item*

As mentioned earlier in the accompanying memorandum, Professor Edward H. Cooper was asked to prepare a draft rule amendment that would authorize service by electronic means. The original draft was circulated among the committee reporters for comment The attached agenda item on "Electronic Service: Civil Rules 5(b), 77(d)" includes revisions that account for comments submitted by the committee reporters. It was sent by Professor Cooper after Professor Schiltz had prepared the agenda material contained in this book, which refers to the original Cooper draft item. The major points made in the original version remain intact. Most of the revisions in the Cooper updated draft add possible alternatives suggested by the reporters for the consideration of the committees.

John K. Rabiej

Attachment

Electronic Service: Civil Rules 5(b), 77(d)

The Standing Committee Subcommittee on Technology has explored electronic service. This proposal to amend Civil Rule 5(b) grows out of Technology Subcommittee discussions. The proposal has been informally reviewed by the Advisory Committees for , with the thought that . It would be possible to recommend this proposal for publication in August if . These notes provide a brief summary of the background experience with electronic filing under Civil Rule 5(d) and a proposal that restyles present Rule 5(b) and adds a provision for electronic service.

Experience with Electronic Case Filing is gradually accumulating in the wake of the 1996 Rule 5(e) amendment authorizing local rules that permit papers to be filed, signed, or verified by electronic means. The basis of experience is in some ways narrow. Only a few courts are involved, including four district courts participating in a prototype program. The complaint is initially filed by traditional means; only when the case is later selected for electronic filing does the clerk "back-file" the complaint in the electronic record. Cases are individually selected for electronic filing, and consent of the parties is required. These limits suggest caution in seeking to extrapolate lessons for more general application. Nonetheless, the experience of those who engage in electronic filing is just what might be hoped: it is faster, more reliable, and less expensive. Still greater benefits can flow from electronic service. The benefits are likely to be greatest for small offices and for districts that are geographically broad. There is growing pressure to authorize development of electronic service. The lead has been taken by the Bankruptcy Rules Committee. Proposed amendments to Bankruptcy Rule 9013(c), published for comment in August, 1998, deal with "Application for an order." It provides that: "Service shall be made in the manner provided in Rule 7004 for service of a summons, but the court by local rule may permit the notice to be served by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes." A similar provision is included in the proposed amendments to Bankruptcy Rule 9014.

The first choice to be made, once the concept of electronic service is embraced, is how far to push it. For the moment, it seems safest to allow electronic service only with the consent of the person to be served. This limitation need not be a severe restraint. If the advantages of electronic service are as substantial as the enthusiasts believe, consent is apt to be given by an increasing number of parties and attorneys. The time to abandon the consent requirement will come as modern technology is developed still further and adopted more universally. Detailed provisions for implementing the consent requirement could be incorporated in the national rule. Among the questions that have been suggested are whether advance consent is required, whether consent can be sought in the process of making electronic service, whether failure to object to electronic service implies consent, and so on. The attached draft, however, does not include provisions for these questions. It has seemed better to avoid the risk of fossilizing specific details that would be difficult to adjust through the Enabling Act process. The draft Note suggests that local rules might address these questions.

A second choice is whether to authorize electronic service for the summons and complaint under Rule 4 and "other process" under Rule 4.1. Experience with electronic filing provides very little guidance for these situations. The Technology Subcommittee has agreed that the first step should be limited to service of papers that do not qualify as "process." Rule 5 is to be the sole focus in the Civil Rules, with comparable provisions in the Appellate and Criminal Rules. Bankruptcy Rules may be developed in more adventurous ways. Bankruptcy practice is not easily divided between "process" and other papers, and it has traditionally moved ahead of the other

rules in developing the benefits of advancing technology.

The task of excluding service under Rules 4 and 4.1 from Rule 5(b) is not quite as easy as it may seem. Exposition of the drafting issues is best supported by setting out the full text of present subdivisions 5(a) and 5(b).

Rule 5(a) provides:

> **(a) Service: When Required.** Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.
>
> In an action begun by seizure of property, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim, or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

Rule 5(b) is set out with superscripts designating the parts of the new draft that incorporate the present provisions:

> **(b) Same: How Made.** [5(b)(1)] Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court. [5(b)(2)] Service upon the attorney or upon a party shall be made by [5(b)(2)(A)] delivering a copy to the attorney or party [5(b)(2)(B)] or by mailing it to the attorney or party at the attorney's or party's last known address or, [5(b)(2)(C)] if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: [5(b)(2)(A)(i)] handing it to the attorney or to the party; or[5(b)(2)(A)(ii)] leaving it at the attorney's or party's office with a clerk or other in person in charge thereof; or, if there is no one in charge, leaving it at a conspicuous place therein; or, [5(b)(2)(A)(iii)] if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. [5(b)(2)(B)] Service by mail is complete upon mailing.

Rule 5(a) begins by excepting service "as otherwise provided by these rules." Separate service provisions appear in at least Rule 45(b) (subpoenas); 71A(d)(3) (notice in condemnation

proceeding); and 77(d) (notice by the clerk of the entry of an order or judgment). There may be other exceptions as well. Despite the formidable catch-all "every written notice * * * and similar paper" category at the end, at least one court has held that a trial brief is not included in the Rule 5(a) categories, see 4A C. Wright & A. Miller, Federal Practice & Procedure: Civil 2d, § 1143 p. 415. The puzzle of Rule 5(a) is important not in its own terms, however, but only as a challenge for drafting Rule 5(b).

Rule 5(b) does not now indicate whether it covers all service, only service of items covered by Rule 5(a), or some intermediate category. If it is limited to Rule 5(a), it is only by the catch-line ("Same: How Made") that we know it. The puzzle is aggravated by the first sentence, which refers only to service on an attorney, but is sweeping: "Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney * * * ." That language should cover, at the least, the clerk's service of notice of an order or judgment under Rule 77(d). It has been held, however, that Rule 45(b) requires service of a subpoena on the party, not the party's lawyer, see 9A Wright & Miller, § 2454, p. 24. This minor inconsistency should be addressed. More important, it is difficult to believe that Rule 5(b) supersedes the service provisions of Rules 4 and 4.1 whenever a party is represented by an attorney before the action is commenced, when an order of civil commitment is served, or the like. Rule 71A(d)(3), further, requires service in accord with Rule 4, and if — as seems probable — Rules 4 and 4.1 are impliedly excluded from the Rule 5(b) provision for serving an attorney, Rule 71A(d)(3) also should be excluded. These problems should be addressed in revising Rule 5(b), if only to define clearly the new provision for electronic service.

These problems with the first sentence of Rule 5(b) flow into the next sentence, which tells how service is made upon the attorney or a party. This sentence does not expressly invoke the first sentence reference to any service required by these rules. This is the point where it is necessary to draft in terms that clearly exclude service under Rules 4, 4.1, 45(b), and 71A(d)(3). (It is proposed below that Rule 77(d) be amended to incorporate revised Rule 5(b), so that the clerk can make service of orders and judgments by electronic means.)

The draft that follows addresses these questions by limiting the "service on the attorney" provision to service under Rules 5(a) and 77(d). This drafting deserves further study. The general service provisions are limited to Rule 5(a) service; the Rule 77(d) proposal simply incorporates Rule 5(b).

Although the immediate impetus arises from the desire to extend electronic filing to electronic service, it has seemed best to allow other means of service as well. Proposed Rule 5(b)(2)(D) includes any means consented to by the person served.

Electronic service raises questions that parallel the present Rule 5(b) provision that "[s]ervice by mail is complete upon mailing." The Technology Subcommittee concluded that it is better to follow this analogy for electronic service. Administrative Office staff active with electronic case filing believe that the best word to use is "transmit" or "transmission." Difficulties arise because the lack of a universal electronic mail system leaves it impossible, at times, to

provide an electronic confirmation that the message has been delivered. There also was concern that a person anxious to avoid service might close down its machinery, so as to obtain a de facto extension of time if service were made effective on receipt. A different drafting difficulty arises from the choice to include nonelectronic means of service. It is somewhat awkward to think of transmitting an envelope to an express service. The draft resolves this problem by making service complete on delivering the paper to the agency designated to make delivery. This language may be clear, but it is not aesthetically pleasing. The draft also includes an illustration of the alternative choice to make email service effective only on receipt.

The choice to make service effective on transmission or delivering the paper to the agency designated to make delivery raises the Rule 6(e) question of additional time. Even electronic means of communication may fail to achieve instantaneous communication. And even an instantly delivered facsimile or email message may arrive on a Saturday, Sunday, or other time when the recipient is not keeping watch. The Technology Subcommittee concluded that it is better to expand Rule 6(e) to allow an additional three days whenever service is made by means other than physical delivery. The draft incorporates this decision; alternatives are sketched with the draft.

A final question is whether responsibility for serving papers filed with the court should continue to fall on the parties. The next generation of filing software may enable courts to effect automatic service on all parties of any paper filed with the court. At least for cases in which all parties have consented to electronic service, it seems desirable to authorize experiments with service by the court. The final sentence of proposed Rule 5(d) would do this; authorization by local rule is required as a means of protecting unwilling courts against litigant requests.

Draft Rule 5(b)

(b) Making Service.

(1) Service under Rules 5(a) and 77(d) on a party represented by an attorney is made on the attorney unless the court orders service on the party.

(2) Rule 5(a) service is made by:

(A) Delivering a copy to the person served by:

(i) handing it to the person;

(ii) leaving it at the person's office with a clerk or other person in charge, or if no one is in charge leaving it in a conspicuous place in the office; or

(iii) if the person has no office or the office is closed, leaving it at the person's dwelling house or usual place of abode with someone of suitable age and discretion [then] residing there

(B) Mailing a copy to the last known address of the person served. Service by mail is complete on mailing.

(C) If the person served has no known address, leaving a copy with the clerk of the court.

(D) Delivering a copy by [electronic or any other means]{any other means, including electronic means,}[1] consented to by the person served. Service by electronic means is complete on [transmission]{receipt by the person served}[2]; service by other consented means is complete when the person

---

[1] Two votes have been expressed on the alternative choices. Professor Capra prefers "other means, including electronic means, consented to" because it defeats any argument that consent is not required for electronic means. Gene Lafitte, Chair of the Technology Subcommittee, prefers "electronic or any other means consented to."

[2] The first draft made service complete on receipt. This approach eliminates any need to provide extra time to act in response, see Rule 6(e). It also puts the risk of transmission on the party who wishes to rely on electronic service. It leaves the party effecting service in some uncertainty, since present technical advice is that it is not always possible to ensure delivery of an electronic "receipt" across different electronic mail delivery services. The consensus at the technology subcommittee meeting favored completion on dispatch by the party making electronic service. Technical advisers in the Administrative Office suggested "transmission" as the best single word to convey this idea.

making service delivers the copy to the agency designated to make delivery. If authorized by local rule, the court may make service [on behalf of a party][3] under this subparagraph (D).

Committee Note

Rule 5(b) is restyled.

Rule 5(b)(1) makes it clear that the former provision for service on a party's attorney applies only to service made under Rules 5(a) and 77(d). Service under Rules 4, 4.1, 45(b), and 71A(d)(3) — as well as rules that invoke those rules — must be made as provided in those rules.

Paragraphs (A), (B), and (C) of Rule 5(b)(2) carry forward the method-of-service provisions of former Rule 5(b).

Paragraph (D) of Rule 5(b)(2) is new. It authorizes service by electronic means or any other means, but only if consent is obtained from the person served. Early experience with electronic filing as authorized by Rule 5(d) is positive, supporting service by electronic means as well. Consent is required, however, because it is not yet possible to assume universal entry into the world of electronic communication. It is anticipated that the benefits of electronic service will become so apparent that in time consent will readily be given by parties and attorneys. Local rules may be adopted to describe the means of consent, including provisions that enable lawyers and parties who regularly engage in litigation to file general consents for all actions. Paragraph (D) also authorizes service by nonelectronic means such as commercial carriers. The Rule 5(b)(2)(B) provision making mail service complete on mailing is extended in Paragraph (D) to make service by electronic means complete on transmission; transmission is effected when the sender does the last act that must be performed by the sender. Service by other agencies is complete on delivery to the designated agency.

Finally, Paragraph (D) authorizes adoption of local rules providing for service by the court. Electronic case filing systems will include the capacity to make service by the court's transmission of all documents filed in the case. It may prove most efficient to establish an environment in which a party can file with the court, knowing that the court will automatically serve the filed paper on all other parties. Because service is under Paragraph (D), consent must be obtained from the persons served.

The expansion of authorized means of service is supported by the amendment of Rule 6(e). The additional three days for acting after service by mail are allowed for service by mail, by leaving a copy with the clerk of the court, or by electronic or other means.

---

[3] This phrase, or some equivalent phrase, might be inserted to indicate that the court is acting in place of the party that is required to make service. It does not seem to interfere with the incorporation of Rule 5(b) as proposed for Rule 77(d).

Rule 6(e)

(e) Additional Time After Service ~~by Mail~~ under Rule 5(b)(2)(B), (C), or (D). Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party ~~by mail~~ under Rule 5(b)(2)(B), (C), or (D), 3 days shall be added to the prescribed period.

Committee Note

The additional three days provided by Rule 6(e) is extended to the means of service authorized by the new paragraph (D) added to Rule 5(b), including — with the consent of the person served — service by electronic or other means. The three-day addition is provided as well for service on a person with no known address by leaving a copy with the clerk of the court.

Alternative 1

Do not change Rule 6(e). Electronic service is the speediest means available. Federal Express and other means also are likely to be speedier than the mails. Service by any of these means requires consent of the party to be served; consent should be given only if the party is prepared to monitor the addresses permitted for service.

Alternative 2

If additional time is provided for everything but "personal service" under Rule 5(b)(2)(A), there is an unreasoned distinction. Eliminate Rule 6(e), rather than add 3 days to every response-time period in the rules.

Alternative 3

(e) Additional Time After Service by Mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail or by a means permitted only with the consent of the party served, 3 days shall be added to the prescribed period.

This alternative was suggested by Alan N. Resnick as language that could be adopted by Bankruptcy Rule 9006(f). The Bankruptcy Rules do not adopt Civil Rule 6(e), and cannot effectively incorporate Civil Rule 5(b) by cross-reference. The proposed language could be adopted verbatim in Bankruptcy Rule 9006(f), effecting a clear parallel between the two sets of rules.

Rule 77(d)

(d) Notice of Orders or Judgments. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry ~~by mail~~ in the manner provided for in Rule 5(b) upon each party * * * . Any party may in addition serve a notice of such entry in the manner provided in Rule 5(b) for the service of papers.

Committee Note

Rule 77(d) is amended to reflect changes in Rule 5(b). A few courts have experimented with serving Rule 77(d) notices by electronic means on parties who consent to this procedure. The success of these experiments warrants express authorization. Because service is made in the manner provided in Rule 5(b), party consent is required for service by electronic or other means described in Rule 5(b)(2)(D). The same provision is made for a party who wishes to ensure actual communication of the Rule 77(d) notice by also serving notice. As with Rule 5(b), local rules may establish detailed procedures for giving consent.

Add-on: Electronic Request to Waive Rule 4 Service

Rule 4(d) requires that a request to waive service of process be made in writing. We may want to think about allowing the request to be made by electronic means. This change would be a first and very limited stop on the road to service of summons and complaint by electronic means. The Technology Subcommittee did not think it necessary to address this question in conjunction with electronic service. Two difficulties are apparent: providing assurance of actual receipt, and providing a clear means of response. A simple but probably inadequate approach would revise Rule 4(d)(2) by making a few additions:

* * * The notice and request

(A) shall be in writing or electronic form and shall be addressed directly to the defendant, if an individual, or else to an officer or managing or general agent (or other agent authorized by appointment of law to receive service of process) of a defendant subject to service under subdivision (h);

(B) shall be dispatched through first-class mail, electronic means, or other reliable means;

(C) shall be accompanied by a copy of the complaint and shall identify the court in which it has been filed;

(D, E, F): Unchanged; and

(G) shall, if made in writing, provide the defendant with an extra copy of the notice and request; as well as a prepaid means of compliance in writing. * * *

IMPLICATIONS OF ELECTRONIC CASE FILING FOR THE FEDERAL RULES

INTRODUCTION

This memorandum describes some of the implications that filing court cases and documents electronically may have for the federal rules of procedure. It briefly discusses the context in which the courts are moving toward use of electronic case files and their reasons for doing so. Using examples drawn from the courts currently experimenting with electronic filing, this memo will describe, mainly from the litigator's perspective, how electronic filing can operate and how it relates to the federal rules of procedure. It will also highlight some related issues that may be of interest to the Rules Committees.

BACKGROUND

There is little question that the world in general, and American society in particular, is moving toward increasing use of electronic communications. Not only are growing numbers of Americans using e-mail and the Internet, but most attorneys are also at a minimum using computerized word processing to prepare legal documents. Courts, both federal and state, increasingly rely on computer technology to speed and improve their operations. Although court need for storage space and ready access to records may be among the driving forces for these efforts,[1] automated systems have many other advantages for court administrators and judges. For example, the amount of time spent moving and duplicating documents within the court, as well as providing copies to the public, could be reduced if documents were readily available in electronic form. Judges and their staff, who already have access to electronic research materials, docket sheets, and some case management information, could also access the case files themselves, with the text searching and copying opportunities such electronic access can bring.

As part of the judiciary's transition toward increased automation of court operations, the Judicial Conference Committee on Automation and Technology developed the Electronic Case Files (ECF) initiative.[2] The ECF initiative is a part of a broader Automation Committee effort to

---

[1]For example, Ohio Northern, one of courts testing a prototype electronic case filing system, was motivated at least in part by the need to handle huge numbers of documents in asbestos litigation pending there.

[2]The ECF initiative includes (1) a project to replace the courts' present automated case management systems (ICMS, etc.) over the next few years with automated systems that perform the necessary case management functions and include electronic filing and case file capability that courts can implement at their discretion; and (2) ongoing efforts to study and resolve various legal, policy, and technical issues that arise in conjunction with electronic filing, e.g., privacy concerns, possible rules changes, questions involving the use of court personnel and other resources, and associated "cultural" issues. As part of the ECF initiative, the Administrative Office has produced a number of documents detailing a variety of aspects of the transition to electronic case file systems. See, e.g., *Electronic Case Files in the Federal Courts: A Preliminary Examination of Goals, Issues, and the Road Ahead, Discussion Draft* (March 1997); Staff paper for the Technology Subcommittee entitled Status of Electronic Filing in the Federal Courts -- Potential Issues and Topics (June 1998).

reduce the federal courts' primary reliance on paper as the medium for creating, storing and retrieving information. Alongside this initiative, nine courts (four district and five bankruptcy courts) are testing prototype ECF systems developed in conjunction with the Administrative Office, and other courts are either testing or at least considering similar prototype systems of their own design.[3]

The ECF prototypes (and other court-based experiments) are testing and refining various ways that electronic filing might operate in the federal courts and how it might mesh with electronic docketing and case management systems.[4] These experiments are not necessarily precise models for future expansion. Rather, the hope is that the judiciary will be able to draw from this early experience, taking advantage of successes and learning from both things that work and those that do not work as planned.

As presently set up, the ECF prototypes generally allow attorneys to file documents in certain cases by sending them over the Internet from their offices to the relevant courts, where the documents are filed, acknowledged, and automatically docketed.[5] These experimental programs currently permit pleadings (except civil complaints), motions, and some (but not all) accompanying documents to be filed in electronic form. The prototypes, which are evolving as they go, vary among themselves in a number of ways. Although this memo is not a detailed description of how the ECF prototypes operate, some specifics will be used as examples and described more fully as part of the discussion below. It is important to keep in mind that future electronic filing systems may or may not follow these models.

ECF systems clearly have implications for the federal rules of procedure. Those rules, developed beginning in the 1930s, and still largely hewing to their original structure, were naturally designed with paper in mind. Although some issues raised by electronic filing may have parallels in the paper world, others do not. This memo will discuss the extent to which the continued and expanding use of electronic filing in the federal courts may require adjustments to the existing rules.

---

[3]The prototype courts are: New York Eastern; Ohio Northern; Missouri Western; Oregon; New York Southern (bankr.); Virginia Eastern (bankr.); Georgia Northern (bankr.); Arizona (bankr.); and California Southern (bankr.). The District of New Mexico has developed an Advanced Court Engineering (ACE) system that has been in use in civil cases in the district court for over a year, and is now being extended to cases in the bankruptcy court. The Court of Appeals for the Second Circuit is currently exploring possible use of electronic filing in its appellate proceedings.

The experience so far is that use of electronic filing in the prototype bankruptcy courts has generally been heavier than in the district courts.

[4]The ECF programs also provide capability to provide electronic notice, as well as expanded case file access.

[5]In at least some courts, documents can be filed on diskette and/or court personnel convert paper filings into electronically imaged form.

RULES ACTIVITY SO FAR

Electronic filing of documents in federal court may take place only to the extent that it is permitted under the applicable rules of procedure. In 1996, as a first step in the transition from all-paper systems, and in recognition of the need for local experimentation during that time, the federal rules were amended to provide that:

> A court may by local rule permit papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.[6]

Thus, the federal rules of procedure currently offer considerable flexibility to individual courts that want to implement electronic case filing systems, by allowing them to use local rules to address relevant procedural issues. It should be noted that the amendment quoted above addresses filing documents with the court, but it does not provide authority to alter the manner of service, either of the original process or of subsequently-filed documents. Although the Judicial Conference has not issued any technical standards, the Committee on Automation and Technology has approved non-binding technical standards and guidelines.

In addition, amendments to the Federal Rules of Bankruptcy Procedure that would permit electronic service of certain types of documents are currently under consideration.[7]

The courts now testing prototype ECF systems have in some instances issued local rules specifically authorizing electronic filing, although many are instead using general orders to establish (and in some cases modify) the actual procedures.[8] In many cases, these have been supplemented with detailed "user guides" or "user manuals" that focus on the technical aspects of electronic filing.

Although this structure appears to be working for the prototype courts, the Rules Committees will need to consider whether this "localized" model is the most appropriate as increasing numbers of federal courts make the transition to electronic systems. The appropriate

---

[6]FED. R. CIV. P. 5(e); see also FED. R. CRIM. P. 49(d); FED. R. APP. P.25(a)(2)(D); cf. FED.R. BANKR. P. 5005(a)(2), 7005(e), 8008(a).

[7]Proposed FED. R. BANKR. P 9013(c), currently out for public comment, provides that "the court by local rule may permit the notice to be served by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes." See also FED. R. BANKR. P 9014(c)(2)(identical language).

[8]See attached charts that summarize the local rules and procedures for the courts testing the AO-developed prototype and the District of New Mexico.

scope and timing of action on issues discussed below should be the subject of further consideration. In the short term, the Rules Committees should consider amending the relevant rules to allow electronic service. These questions will be discussed in more detail below.

LITIGATION IN THE ELECTRONIC WORLD

The next sections of this memo follow a hypothetical piece of litigation through an electronic filing process, noting some of the rules issues as it goes along. The discussion will be largely from an attorney's point of view, since attorneys are the primary users of the federal rules of procedure. As appropriate, however, issues relevant to judges and court staff will also be noted. This is intended not to be an exhaustive discussion of every possible issue, but rather to highlight the fact that the federal rules of procedure do come into play in some different ways in electronic and paper systems. It is useful to keep in mind that issues arising from electronic filing of documents often have parallels in the paper system, some of which issues are and some of which are not addressed in the rules.

I. Do all courts have electronic filing systems?

No. Although the 1996 amendments to the federal rules authorize courts to issue rules permitting electronic filing, at present, only a limited number of courts have done so and are set up to receive electronically filed documents.[9] Five bankruptcy courts and five district courts presently offer some sort of electronic filing.

A. Which cases are potentially eligible for electronic filing?

For courts with the technical capability to accept electronic filings, any or all types of cases could be deemed eligible to use the system. As courts first begin using ECF systems, however, electronic filing might well be limited by rule or practice to certain categories or types of cases. Judges might encourage certain cases or types of cases to use electronic filing. Or, courts could rely on parties to make the decisions among themselves.

All the courts testing prototype systems have initially limited the types of cases eligible to participate in the experiment, although actual practice is evolving beyond those limitations. Although a prototype is now being developed for use in criminal cases, none of the district courts currently permits electronic filing in criminal cases. Some bankruptcy prototype courts limit electronic filing to certain types of cases (e.g., Chapter 11 proceedings); in others, it is left to the judge's discretion on a case-by-case basis. Some prototype courts are urging particular types of cases into their ECF system, either by general order or on a case-specific basis. For example, Ohio Northern's general order mentions civil rights and intellectual property cases as an initial

[9]The 1996 amendments also authorize courts to permit filing by facsimile. This memo, however, focuses on systems that provide documents in electronic form.

focus, although the practice has not followed this suggestion. Judges in New York Eastern have urged a large number of student loan collection cases into the ECF system. In Missouri Western, the court retains discretion. In New Mexico, all court orders are now included in the ECF system, but any party may choose whether to file a given document in a case electronically.

Rules issues: *Should case eligibility for electronic filing be addressed by rule?*
If so, should categories of cases be limited?
Should selection criteria be set out?
Should parties' consent be a criterion?
How much discretion should there be, and who (court or parties) should exercise it?

B. Are there other limitations on ECF participation?

Most prototype courts limit electronic filing to members of the court bar. Few allow electronic filing in pro se cases. In the future, arrangements might be devised to allow pro se litigants to file electronically, using computer terminals in the courthouse or at other remote locations. Issues relating to prisoner cases will need to be considered, and some standards or limits on filing and docketing might need to be developed.

Rules issues: *Are there issues that should be addressed by rules?*

C. At what stage of the case may documents be filed electronically?

The federal rules in their present form authorize electronic filing of documents (but not electronic service). The rule language quoted above (at note 6) would appear to authorize electronic filing of a complaint or other initiating document, as well as subsequent papers. It does, however, leave some unanswered questions relating to filing complaints electronically; for example, questions relating to effecting personal service, payment of filing fees, and who is authorized to file electronically. (See further discussion in section IV below.)

Since none of the district courts testing prototype systems currently permits electronic filing of a complaint or electronic service of process, complaints are still filed "conventionally." Most of the local rules and orders do not address the issue of when a case can or should enter the electronic filing system. Several prototype courts currently use the initial case management or "Rule 16" scheduling conference to discuss whether ECF is appropriate for a particular case. In other courts, parties may use electronic filing whenever they are all willing to participate and the court approves.

Many of the bankruptcy prototype courts do provide for electronic filing of bankruptcy petitions. Since petitions need not be "served" for the purpose of obtaining jurisdiction on anyone, issues of personal service do not arise.

Because the initial pleading generally may not be filed electronically, courts are providing that the complaint, and any other documents previously filed in paper form, are to be "back-filed" electronically in cases put into the ECF process.

Rules issues: *Should courts be encouraged to permit electronic filing of complaints or other initiating documents?*
How would courts handle situations where one or more parties is not equipped (or willing) to file electronically?
How could and should personal service be accomplished electronically (see discussion below, section IV)?
At what stage in the litigation should decisions on ECF participation be made?
Should use of electronic filing be included in the issues set out in Fed. R. Civ. P. 16 and corresponding sections in other rules?

D. Is participation in ECF programs mandatory?

Courts have historically relied on paper-based records. They are, however, beginning to enter into a transition period. The key is how to manage that transition. Electronic case filing could be made universally mandatory, courts or the rules could require it in certain types of cases, it could be subject to agreement among the parties, or individual parties could make the decision for themselves without regard to whether other parties are filing electronically. If electronic filing were to be made mandatory, the issue of how to provide for those without their own access to the means to file electronically would have to be addressed.

Participation is voluntary in all the district court prototype programs. In many courts, all parties have to consent to participation. In the District of New Mexico, the court accepts electronic filing from single parties. In the bankruptcy courts, participation is voluntary, although the Southern District of New York has persuaded the bar to file electronically in all Chapter 11 cases.

Although paper-based and electronic filing systems will likely co-exist for a considerable time, courts will most likely at some time in the future choose to move to an electronic system for most if not all types of cases. Requiring litigants to participate in electronic filing would probably speed the transition. On the other hand, mandatory participation would impose a burden on those not prepared to use it.

Rule issues: *To what extent should the scope of participation in electronic filing be addressed in rules?*
Should courts be authorized to require parties to participate in electronic filing? Should it be dependent on a finding that parties are capable of doing so?

II. What is needed to participate in electronic case filing programs?

As a practical matter, participating in an electronic case filing system requires certain hardware and software. The 1996 federal rules amendments authorize electronic filing subject to "technical standards, if any, that the Judicial Conference of the United States establishes." Although the Automation Committee has approved technical guidelines that recommend compliance with certain standards, they are not mandatory, and the Judicial Conference has not been asked to endorse them.

Obviously, technology is not static. It is not possible to predict exactly what hardware and software will be used over time.

The ECF prototypes are designed to let attorneys use "off-the-shelf" and readily available hardware and software to the extent possible. The prototypes all are based on using the Internet to transmit documents electronically from law offices to the court (and vice-versa in some situations). The technological options over the long term are hard to predict.

A. What kind of hardware is needed?

Participation in the prototype ECF programs generally requires a sufficiently powerful computer and a modem (for Internet access). Depending on what kinds of documents a user may want to file, and whether they are available in electronic form, a scanner may be necessary.

B. What kind of software is needed?

Documents are prepared on a basic word-processing program. Because the prototypes all are requiring filed documents to be converted into a particular format (called PDF (portable document format)) before they can be transmitted to the court, the software necessary to do that conversion must be purchased -- Adobe Acrobat PDF Writer is the currently-used software. The software for reading documents in PDF format, Adobe Acrobat Reader, can be downloaded free from the Internet. Because the Internet is used to transmit documents to the court, a connection through an Internet Service Provider (ISP) is needed. An Internet browser is usually available at no charge from the ISP, but users need to check to make sure it is one that is compatible with the court's program. Because certain notices are being transmitted over e-mail, an e-mail address (usually available through the ISP) is needed.

C. How can users learn how the system works?

All the ECF prototype courts provide training and education. They all have user guides or other instructional materials to help users understand how the process works. In addition, most have a "training" site as part of their court websites that offers potential users a fairly quick and straightforward opportunity to practice before they actually try to file a document. Some courts also have help lines, and all are currently providing some type of hands-on training.

D. Does it cost anything to participate?

None of the prototype courts is currently imposing any user or other ECF-specific fees, although this may change in light of the Judicial Conference's recently adopted policy on fees for Internet access.[10]

Normal document filing fees remain applicable. Because ECF programs involve filing documents without appearing at the courthouse, courts have to develop ways to get fees paid. Some prototypes, mostly in bankruptcy courts, have arranged for prior authorization of credit card charges, but others do not presently permit electronic filing of documents where fees are concurrently required (see discussion above). None currently provides for electronic payment by credit card.

Rules issues: Are there any issues that need to be addressed by rule?

E. What about document security issues?

At least two separate issues are involved here: (a) making sure that only people with the proper authorization are filing electronically; and (b) being able to detect any alteration to filed documents.

The prototype courts are providing approved users unique passwords and identifications, which must be used to enter documents into the system. (See discussion below (section V(D)) about signatures and verifications.) Users are warned not to share those numbers, since documents filed with those passwords and IDs are assumed to be authorized.

Courts also have to be concerned about post-filing alterations (by "hackers" or others). Document security is a widely applicable concern for users of Internet technology, and is being considered in a broad range of contexts.

All prototypes are attaching a unique electronic document identification to each filed document. Any change to that document will automatically change that ID, so that tampering can be detected.

III. What rules and other procedures apply in ECF cases?

As noted above, national rules (e.g., Fed. R. Civ. P. 5(e)) authorize local rules to deal with local electronic filing programs. Individual prototype courts have issued local rules, often in conjunction with general orders, to address the specifics of their programs. In addition, many

---

[10]In September, 1998, the Judicial Conference approved an "Internet PACER fee" of $.07 per page for PACER information obtained through a federal judiciary website.

have issued user guides to help explain the program. For the most part, these rules and procedures are available on the individual court's web site, and can be downloaded.

However, as more courts offer or use electronic filing systems, and as more experience develops, a more uniform set of procedures may be preferable. Some combination of national and local rules is one alternative, particularly if individual courts or circuits retain discretion to decide when, and in what manner, electronic filing is permitted.[11] (See discussion below in section XI.)

Rules issues: *Should rules relating to electronic filing be part of a national rule, be dealt with in local rules, or be a combination?*
If national rules are developed, should provisions applying to electronic filing be incorporated into the appropriate existing rules, or should they be put together into one rule?
Should any rule continue to contain express authorization for the Judicial Conference to issue technical standards?

IV. How is a complaint or other initiating document filed and served electronically?

As noted above (section I(C)), the rules authorize electronic filing of any document (including a complaint), but do not currently authorize electronic service of process or of other documents. Courts could thus permit parties to file initiating documents with the court electronically. This raises issues of whether the plaintiff should be the one to decide whether a case will be part of the ECF system, fee issues, as well as issues relating to court control over the bar, e.g., who is authorized to file a case at all. Electronic service of process raises additional technical and due process issues, including whether the defendant or other parties can or ought to be required to accept electronic service of process, how electronic service of process would actually occur, how receipt could be verified, and separately, whether proof of service could be filed electronically.

As also noted above, none of the prototype district courts currently permits filing or serving the complaint in a civil case electronically. For cases that are ultimately put into the ECF system, the prototype courts require previously filed documents (including the complaint) to be "back-filed" electronically, so that the electronic case file is complete.

In the bankruptcy court prototypes, petitions may be filed electronically in some courts. These do not raise "service of process" issues.

---

[11]Another relevant factor is the extent to which electronic filing is expected ultimately to completely replace paper files, as opposed to having parallel systems.

Rules issues (filing of complaint) (Fed.R. Civ. P. 5, Fed. R. Crim. P. 49, Fed. R. App. P. 25):
Should the rules treat the electronic filing of the complaint or other initiating documents differently from filing any other paper?
What if the other party consents?
How do fee payment issues get resolved?

Rules issues (service of process) (Civil Rule 4):
Should electronic service of process be authorized in Civil Rule 4?
How could receipt be ensured and verified?
Could companies be required to designate "electronic agents"?
Even if actual electronic service of process were not authorized, could proof of service be filed electronically?
Should there be a difference in the way service is handled under Civil Rules 4 and 5? See also Fed. R. Crim. P. 5, 9. See also section V(F), below.

V. How are documents actually filed in an ECF case?

The procedure for filing depends on how a particular court has set up its ECF program. It is likely that electronic filing systems will evolve over time, as technology changes and improves.

For the courts currently testing prototype systems, a document has to be in a specific format the court can accept. Prototype courts are currently requiring electronically filed documents to be in a specific electronic format, called "portable document format" or PDF. Thus, the document would first be created in the usual way on a word processor. Commercially available special software (such as Adobe Acrobat PDF Writer) is needed to convert the document to PDF. Once the document is in this format, a filer goes to the court's web site and follows the instructions. (As noted above, most of the courts have training sites that let users try out the system in advance.) Part of the instructions involve creating the docket entry. The last step involves attaching the document to be filed (in PDF form) and sending it off to the court.[12]

Most of the prototype courts' rules or orders specifically provide that electronically-filed documents are considered "filed" or "docketed."

Rules issues: The rules authorizes electronic filing if permitted by local rule. Is this sufficient?
Should a national rule address specific issues?
Does the rule need to be explicit about when a document is deemed filed?

[12]As noted above, some courts permit documents to be filed on disk.

A. How does the filing get docketed?

An advantage of electronic filing systems is that the docket entry can be prepared by the filer as part of the document transmission process, thus reducing the burden on the clerk of court. However, the clerk's role in monitoring the quality of docket entries needs to be considered.

The prototype court systems are designed so that the docket entry is prepared by the attorney as part of the filing process, using an approved list. The electronically filed document gets docketed automatically at the time it is filed.

The clerk of court in a prototype court therefore does not have to prepare a docket entry for documents filed electronically. Although the prototypes provide that the documents are considered docketed at the time they are electronically filed, some of the prototypes specifically provide that the clerk retains the ability to review and modify the docket entry as appropriate.[13]

Rules issues: *Are any rule changes needed to address docketing issues?*
Should attorneys expressly be given the authority to prepare docket entries?
When should an electronically filed document be deemed docketed?
Should documents intended for filing be "lodged" subject to clerks' determination that an entry is appropriate for docketing?
Should certain categories of cases (e.g., pro se cases) be treated differently?

B. Can electronic filing be acknowledged by the court?

Prototype courts provide an automatic computerized acknowledgment, which is the functional equivalent to a date-stamped paper copy of the filing obtained from the clerk.

C. How are technological glitches and format problems handled?

As with paper systems, technological or other glitches do occasionally occur. This may prevent documents from being filed in a timely way. Provision may need to be made for problems (e.g., failures with the court's computer system, Internet problems, ISP problems) that prevent documents from being filed (or perhaps retrieved). Other types of technical problems also need to be addressed; for example, documents that are "filed" but cannot be read, because they are in the wrong format or for other reasons.

Many of the prototype courts provide that documents that cannot be timely filed because of technical failures may be filed the next day. Some sort of affidavit, other evidence of attempts to file, and/or notice to the clerk of the problem is required. Documents are then filed and backdated.

---

[13]Initial experience suggests that the error rate in lawyer-prepared docket entries has been quite low.

Only one of the prototypes' rules addresses the question of a document timely filed but in an unreadable format. In that court, the document may be re-transmitted within 24 hours of discovery of the problem.

Rules issues: *How, if at all, should the rules address failure to file timely because of technological glitches?*
Should it matter what type of problem it is (Internet congestion or other problems, court system problem, attorney office problem)?
What remedy, if any, would be appropriate?
Current rules (e.g., Fed. R. Civ. P. 5(e) and Fed. R. Crim. P. 49(a)(4)), preclude the clerk from refusing the filing of a document just because it is not in "proper form." Should there be a different rule if the electronically "filed" document is unreadable?

D. How does the court (or clerk) know who actually filed the document?

Because electronic documents cannot be "signed" in the traditional way, various technologies exist or are being developed that are capable of injecting a unique "signature" into a document. This raises a variety of complex issues, which are being considered in a wide range of other contexts.

The rules currently require signatures for several different purposes, including as an indication that a document was filed by someone entitled to file it, as verification of the truth of the contents (e.g., for affidavits), and for Civil Rule 11 certifications.

Prototype courts are issuing unique passwords and IDs for ECF system users. They treat use of those as equivalent to a signature. Thus, users are warned not to share the passwords with others.

Rules issues: *What kinds of signature requirements should exist?*
Do they need to be the same for Fed. R. Civ. P. 11(a), 11(b), Fed. R. Bankr. P. 9011, and affidavits and other documents signed under oath?
What kind of authentication should be considered adequate?

E. How are signatures of third parties handled?

Documents sometimes must be signed by someone other that the person filing the document (e.g., affidavits) or by multiple parties (e.g., stipulations). Since current digital signature technology does not provide for transmitting "signatures" of third parties, some sort of alternative process is necessary. For example, each signing party could file the document separately, or the non-filing parties could file separate endorsements. Where a signer, e.g., a client or other third party, does not have a password into the electronic filing system, signed paper versions could be required to be maintained.

Many of the prototype courts require non-filing party-signatories to a document to file an electronic endorsement. However, most of the prototypes also ask that the filing party keep a paper original with all signatures on file. A similar process is used for documents requiring client or other third-party signatures.

In a few bankruptcy courts, a signed original of a bankruptcy petition must be filed with the clerk. In others, the original need only be retained by the party.

Rules issues: *What kind of authentication should be required for documents with multiple signatures or signatures of others than the filing attorney?*
What kinds of other record copies should be required and/or retained?

F. How are electronically filed documents served on other parties?

The federal rules require mail or personal service of filed documents. There is currently no authorization for electronic service. Most of the prototype courts operate on the parties' consent to accept electronic service.[14]

Were electronic service to be authorized, a variety of implementation mechanisms are available. These might include requiring the filing party to electronically transmit a copy of the document to each party, permitting electronic notice of filing to constitute service if it includes a "hyperlink" providing direct electronic access to the document being filed, or permitting electronic notice of filing to constitute service with the recipient then expected to go to the court's website to access the document. Another alternative is for the court itself to transmit notice of the filing automatically to all parties (with or without a hyperlink or the document itself attached). Provision must also be made for certificates of service.

The prototype courts vary on what kind of electronic notice and transmission of documents parties consenting to "electronic service" must receive. In some, sending another party notice by e-mail that a document has been filed is adequate service; the receiving party then must retrieve the document from the court's website. In some prototypes, a hyperlink (and thus direct access) to the document will soon be provided along with the notice of filing. For some, the whole package must be sent electronically. Several prototypes specifically provide for electronic filing of certificates of service; otherwise the assumption is that certificates of service are filed like other papers (either as part of the filing in question or separately).

Some of the prototype courts provide automatic e-mail notice that a document has been filed to all parties (and in some cases, to any member of the public interested in receiving such notice). This raises the question whether the court could or should ultimately take responsibility for service of documents.

---

[14]In bankruptcy and in most district court prototypes, participation in electronic filing programs requires agreeing to accept electronic service and notice.

In some of the prototypes, parties are also required to provide paper copies of filings to the presiding judge.

Rules issues: *The rules currently contain no authorization for electronic service of documents. The only basis on which it is being done is by consent of parties. Does it need to be authorized by national or local rule?*
Should there be different procedures for service of the complaint (e.g., Civil Rule 4) or other initiating document and for service of subsequently filed documents (e.g., Civil Rule 5)? (See discussion above, section IV.)
Who should have responsibility for service?
What needs to be sent (only a notice of filing, or the underlying document itself)?
What kind of proof or certification of service would be required?
What kind of verification of actual receipt, if any, might be required?

G. Are there any changes needed to the applicable filing deadlines or time computation rules when documents are electronically filed?

Electronic filing (and service) have the potential to be virtually instantaneous. Occasionally, however, problems with Internet access, court or private computer systems being out of service, or other technical problems can affect how quickly documents are transmitted. This raises questions about how to treat electronically filed documents for the purposes of deadlines and time computations. Electronic filing could be treated as service by mail (i.e., allowing three extra days), as needing no extra time, or as something else. In addition, because documents can be electronically filed from a remote location, time zone issues might even come into play.

A few of the prototype courts have made adjustments to the rules governing computations of time; in one court, one additional day is added for the purposes of Fed. R. Civ. P. 6(e); in another, electronic service is treated as service by mail, and the three-day addition remains in effect. Prototype systems use the time at the court where the document is being filed as controlling.

Rules issues: *Should the fact that electronic transmission of documents can be virtually instantaneous have an impact on the amount of time allowed in the rules for various actions?*
If yes, what provision might be necessary in Fed. R. Civ. P. 6, Fed. R. Crim. P. 45, Fed. R. App. P. 26 and/or Fed. R. Bankr. P. 9006(f) to address technological glitches?

H. How are exhibits or other attachments filed?

Exhibits and attachments may or may not be available in electronic form. If they are in (or can be converted through imaging or scanning into) electronic form, they generally can be filed along with the underlying document. If not, some sort of separate filing would have to be

permitted. On the other hand, technology permits a broad range of information to be presented electronically, including video and audio information.

In a few prototype courts, there are some limits on the size of documents that can be filed over the Internet. Larger documents in electronic form may be filed on disk in some prototypes. Documents that are not in electronic form, and cannot be converted, are filed conventionally in most prototypes. In at least one prototype court, an electronic "notice of manual filing" is required if the document is filed conventionally.

From the perspective of the clerk of court, non-electronic filings in cases where much of the case is in electronic form will require additional handling.

Rules issues: *Are rules needed to address this? Would this always remain a local rule question?*

I. How are documents handled that are (or may be) subject to a sealing or other protective order?

Because electronically filed documents are potentially readily and very publicly accessible, provision needs to be made for filing of documents that the court has put under seal, as well as for documents that a party seeks to, but has not yet been authorized to, put under seal. For the former, non-electronic filing might be permitted, and/or the document could be filed on disk for use in a non-public database. For the latter (e.g., motions to seal), the motion itself might be filed electronically, with provision made to keep the potentially sealed document out of the electronic database until the court has ruled.

The prototype courts prohibit electronic filing of documents that are to be filed under seal. Several courts provide that a motion to seal and any court order authorizing filing under seal are to be filed electronically. (See further discussion below, section X(C).)

Rules issues: *No rule currently governs documents under seal. Should special provision be made for electronic filing of documents filed under seal?*
Should such documents be filed electronically but with a mechanism to block public access?
How should documents not yet subject to a sealing order be handled?

J. How are discovery documents handled?

Most discovery documents are not currently filed with the court, unless a judge orders it; a proposed rule amendment would formalize this practice.[15] None of the prototype courts is

[15]Proposed FED. R. CIV. P. 5(d), currently out for public comment, would provide that discovery requests and material are not to be filed with the court except as used in the proceeding itself or by court order.

accepting electronic filing of discovery documents, except as ordered by a judge or to the extent that particular documents are filed as attachments or exhibits.

The prototypes also do not address parties' ability to exchange discovery material among themselves electronically.

Rules issues: *Should the courts accept electronic filing or lodging of discovery?*
Is there any reason why the courts should serve as conduits for electronic exchange of discovery?
Should the rules address electronic exchange of discovery material among parties?

VI. What are the ECF implications for the trial?

Trial exhibits, trial transcripts and other documents become part of the record during a trial. Should they become part of the electronic case file? [16]

A. Can trial exhibits be filed electronically?

Trial exhibits entered into evidence during the proceedings could be "filed" into the record either during the trial itself or subsequently, depending on the types of facilities available in the courtroom. Even prior to trial, proposed exhibits could be "lodged" with the court electronically. Exhibits could be available on CD-ROM. To the extent that exhibits involve items that are not available in electronic form, and cannot be scanned (or otherwise imaged into electronic form), more traditional forms of filing would be necessary. These issues could be addressed at the final pre-trial conference.

One of the prototype courts provides that trial exhibits admitted into the record can be placed into the electronic filing system. Some of the prototypes allow electronic filing of some trial-related documents (e.g., witness and exhibit lists), but do not address the electronic filing of trial exhibits. One requires conventional filing. Others do not address trial issues at all.

Rules issues: *Should the rules address whether trial exhibits can be filed electronically?*
Should they address issues of whether trial exhibits should be part of the case file or docket?

B. Does the trial transcript become part of the electronic file?

Court reporters are increasingly making transcripts available in electronic form after the hearing. In some cases, the transcripts are even being electronically displayed during the hearing.

---

[16]Some similar issues will arise with respect to other documents relating to proceedings but not part of the record, such as arrest warrants.

Should transcripts be included in the electronic case file? Should they be publicly available? Should they automatically be available for the record on appeal? What is the impact on court reporters?

28 U.S.C. § 753(b) provides that the transcript of a court proceeding (in at least note form) is to be filed with the clerk and made part of the public record. This suggests that an electronic version could be put into the electronic docket.

One prototype court provides that transcripts are to be filed conventionally. None of the other prototypes addresses this issue.

Rules issue: *Does the fact that this is a statutory rather than a rules provision affect whether a rule should address issues relating to transcripts?*
Should this be addressed, if at all, by national rule?

VII. Are court orders and decisions part of the electronic record?

Court orders, judgments and other decisions can readily be made a part of an electronic case file system, since the documents are generally prepared in chambers on computer. Notice of such documents could be provided to parties electronically, as could copies of the documents themselves. Current rules require service of orders and judgments by mail.

Court orders and judgments for ECF cases in prototype courts are generally available as part of the electronic file. In most prototype courts, the rules provide that the court can give electronic notice of court orders and decisions, although the rules do not specifically state how the documents are accessed (e.g., by hyperlink, by accessing the court electronic file). It appears that prototypes are relying on the consent of the parties to overcome the continuing requirement of service by mail.

Courts may want to think about the implications for the distinctions between published and unpublished opinions.

Rules issues: *Do the service rules (Fed. R. Civ. P. 77(d); Fed. R. Crim. P. 49(c); Fed. R. App. P. 45(c); Fed. R. Bankr. P. 9022) for court orders and judgments need to be altered?*

VIII. How does electronic filing in the lower court affect an appeal?

Having the trial court record in electronic form has implications for the courts of appeals. To the extent that appellate courts accept the record in electronic form, transfer could be easy and quick. The record could be forwarded electronically from the lower court, or the appellate court could access or extract the information it needs directly from the trial court site. In situations

where the appellate court does not accept electronic files, the lower court or the parties would have to arrange for creating paper copies of the files for appeal purposes.[17]

Clerks of the courts of appeals and bankruptcy courts are currently required to serve notices of appeals by mail. See Fed. R. App. P. 3(d); Fed. R. Bankr. P. 8004.

There are currently no electronic filing experiments at the appellate court level, although the Administrative Office and at least one court are in the process of developing prototype systems. A few courts of appeals are accepting briefs in electronic form on disk. One of the prototype courts states in its order that it will provide either a paper or an electronic copy of the record, as requested by the appellate court.

Rules issues: *Should there be any change in where and how an appeal is initiated? (Appeals are currently initiated in district court so that the court can certify the record.)*
Should provisions for service of notices of appeals be amended?
How should record certification and labeling be handled?
How should record transmission be handled (if at all)?

IX. Is the official record in electronic or paper form?

The official record of a proceeding currently is derived from records in paper form. Should this be different for cases where the documents have been maintained in electronic form? Is a dual system feasible, and if so, for how long? How should issues relating to those without access to electronic technology be handled?

The District of New Mexico provides that for electronically filed documents, "the official document of record is the electronic document stored in the Court's data base." Other prototypes do not address the issue directly, indicating only that an electronically filed document is considered "filed" or "docketed."

Rules issues: *Is this a rules issue at all? See Fed. R. App. P. 10; Fed. R. Bankr. P. 8006.*

X. What other implications does electronic document filing have?

The existence of court case records in electronic form will have impacts on and implications for a variety of other rules-related matters. A few of those will be discussed below.

---

[17]Similar issues would arise with respect to appeals to the Supreme Court.

A. How will record retention be handled?

Until such time (if ever) that the courts have a totally electronic system, there will be questions about retaining paper copies of documents. During a transition period (and perhaps more long-term than that), what paper records should be retained, by whom, and for how long? The questions about length and form of retention will also arise for records in electronic form.[18] Unless and until there is a widely accepted method of transmitting signatures electronically, paper copies of documents with original signatures will probably need to be kept. They could be retained by the parties or by the courts.

As noted above (section IX), long-term answers to these questions will depend on the form in which the official record is determined to be kept.

Most of the prototypes require that paper copies of all electronically transmitted documents be retained by attorneys. Others require retention of paper versions of some documents (e.g., documents that were converted to electronic form via scanning, documents containing multiple signatures or signatures other than that of the filer).

Rules issues: *Who (clerks, parties) should be required to retain records, in what form and for how long?*
To what extent should this be addressed in rules?

B. How might electronic filing affect retention of other documents that might be used as evidence?

A wide variety of documents, prepared by government entities, businesses and others, are routinely entered into court records as exhibits and trial evidence. To the extent that the original documents are kept in electronic form, submitted versions (in electronic or written form) need to be authenticated. Authentication is also an issue where documents are converted from paper into electronic form. Decisions about the admissibility of official and other documents in court proceedings may well affect the routine document preparation and archiving practices of government entities and others.

None of the prototypes address these issues.

Rules issues: This is both an evidence issue (e.g., Fed. R. Evid. 902,1002-1005) and a question of procedure (see, e.g., Fed. R. Civ. P. 44).
How will documents (not pleadings) be authenticated when they are maintained in electronic form (i.e., when the creator of the document creates and stores it electronically), or when they are converted from paper to electronic form for submission?

---

[18]Archiving requirements also come into play.

C. How might the existence of electronic case files affect access to those files?

Electronic documents have the potential to be easily accessible. In fact, this is generally considered to be one of their great advantages. They can be accessed from remote locations, and by more than one person at a time. Thus, a document in an electronic court file could be available at any time to anyone. This raises issues of what ought to be available, and to whom.

A court could make the entire electronic file available over the Internet, including all docket entries, party filings, and court actions. It could make subsets of the file available to different groups (e.g., court employees, parties, the public). For example, the docket sheets could be available to the public, with the party filings available only to parties. The court could permit public access to the entire electronic case file, or it could limit public electronic access to certain types of documents (e.g., ones that implicate privacy issues, such as medical records, tax returns, other very personal information), even though they are not subject to seal.

Most of the prototype courts are permitting public access to the entire electronic case file (party filings and court decisions). Some are permitting public access to the docket sheet, but limiting access to the underlying documents to registered ECF system users (and court employees).

Rules issues: *Is the scope of electronic access an issue that should be addressed in rules at all, given that rules do not govern the paper analog?*
Should access be broad, or more limited?
Should electronic access be co-extensive with what would be available at the courthouse, or do the privacy or other implications of potential unlimited access suggest that some additional limitations should be put on electronic access?
Should the rules address changes in what is actually filed by parties?

XI. What are the next steps?

This paper has sought to raise at least some of the rules issues that derive from use of electronic case filing. In addition to the substance of how those issues should be handled in specific rules, there are the threshold questions that need to be addressed:

(1) Should the national rules be amended to address the range of specific issues, should they be handled through local rules, or should there be some sort of combination?
(2) If the issues are handled at the national level, when should that happen? Is the time ripe to consider amendments to the national rules? Should all issues relating to electronic filing be addressed at one time?
(3) Should amendments addressing electronic filing be included as part of the various rules addressing the issue in the non-electronic context, or should they be put together in one rule addressing electronic filing?
(4) Should a model local rule be developed?

There are pros and cons to various approaches. A national rule promotes uniform practice across the country, and it is the direction that the Judicial Conference (and many others) believe is the best way to approach rules generally.[19] Particularly since technology eliminates some kinds of geographical barriers, a national rule may be appropriate. On the other hand, electronic filing is still in its relative infancy, and practice has certainly not gelled around a particular approach. It may not yet be appropriate to discourage local experimentation. Even if the ultimate goal is a national rule, the current approach of Rule 5 -- authorizing local rules -- may be the best approach for the present.

In the short term, the Civil Rule 5 authorization of local rules for electronic filing seems to be adequate to support current use. But, electronic service (Civil Rule 5 and perhaps Rule 4 service) should be addressed. Service issues are generally being handled in the prototype courts by consent. A provision in the federal rules allowing local rules to authorize electronic service (of pleadings and perhaps of process), would probably be sufficient as an interim measure to allow electronic filing programs to go forward. On the other hand, a national rule similar to the proposed amendments to Bankruptcy Rules 9013(c) and 901(c), specifically authorizing electronic service, might be appropriate.

A model local rule, perhaps containing various options, might also be helpful to courts that want to experiment with electronic filing. Such a model might help promote some consistency, or might be a way to test various approaches.

The Committee ought also to begin considering how and when to address the range of other rules discussed above. A preliminary list of rules potentially affected by electronic filing is attached.

CONCLUSION

The development of electronic case filing systems for federal court litigation has implications for the federal rules of procedure. The rules currently authorize local rules to permit electronic filing, and courts experimenting with prototype systems have developed local rules and orders to address a wide range of issues that arise when litigation documents are in electronic form. The Rules Committees should develop a strategy to address such issues as electronic filing becomes more widespread. In the short term, the committees should consider authorizing electronic service as a next step.

---

[19]See, e.g., Judicial Conference of the United States, *Long Range Plan for the Federal Courts* 58 (Dec. 1995)(Implementation Strategy 28b).

ATTACHMENT

Local Rules and Procedures Governing Prototype Electronic Case File (ECF) Systems in the Federal District and Bankruptcy Courts

(As of December 7, 1998)

NOTE: To date, one court testing an ECF prototype system—the U.S. District Court for the District of Oregon—has not adopted a local rule or order generally prescribing special procedures for electronically filed cases. The electronic filing procedures in that court are presently established on a case-by-case basis.

December 7, 1998

Local Rules and Procedures Governing Prototype Electronic Case File (ECF) Systems in the District Courts

Topics/Issues	District Courts			
	Missouri-Western (ecf.mowd.uscourts.gov)	**New York-Eastern** (ecf.nyed.uscourts.gov)	**New Mexico** (www.nmcourt.fed.us) [both district & bankruptcy]	**Ohio-Northern** (ecf.ohnd.uscourts.gov)
Source of ECF Procedures	• En Banc Order (Electronic Filing), dated Nov. 6, 1997 • ECF Procedures Manual, dated Nov. 18, 1997 • Electronic Case Files (ECF) User Manual, dated Oct. 20, 1998	• Administrative Order 97-12, dated Oct. 23, 1997 • User's Manual for ECF [Electronic Case Filing], dated Dec. 5, 1997	• Local Civil Rules 5.5, 5.6 & 83.6 • Local Bankr. Rules 5005-4b & 7005-1 • Administrative Orders 97-26 (dated Feb. 11, 1997) & 97-83 (dated June 9, 1997) • ACE User Documentation, dated Apr. 15, 1998 • Standing orders entered in individual cases when a party advises, at the first conference with a judge, that the party wishes to participate in the case electronically	• Local Rules 5.1, 16.3(b)(2)(B) • General Order 97-38, dated Oct. 6, 1997 • Electronic Filing Policies and Procedures Manual, dated Feb. 2, 1998 (adopted pursuant to Gen. Order 97-38)
Cases Accepted for Electronic Filing	Court selects cases for ECF and notifies the parties (En Banc Order ¶ 1)	• Electronic filing potentially authorized in any civil case assigned to a judge who agrees to participate in testing the prototype system (Admin. Order 97-12, ¶ 2(a)) • Cases become subject to electronic filing procedures if the judge approves and all parties consent at initial scheduling conference or any later time (*id.* ¶ 2(a)-(b))	• Any party in civil proceedings can file and serve any paper by electronic means in accordance with guidelines established by the court (Local Civil Rules 5.5 and 5.6) • Any party in bankruptcy proceedings can file any paper using electronic transmission in accordance with guidelines established by the court (Local Bankr. Rule 5005-4b)	• Electronic filing authorized if ordered by the court (Local Rule 5.1(b)) • Cases selected at initial case management conferences or other times if parties stipulate and presiding judge approves (Local Rule 16.3(b)(2)(B); Gen. Order 97-38, ¶ 5) • Potentially all civil cases included, but the initial focus on civil rights and intellectual

Topics/Issues	District Courts			
	Missouri-Western (ecf.mowd.uscourts.gov)	**New York-Eastern** (ecf.nyed.uscourts.gov)	**New Mexico** (www.nmcourt.fed.us) [both district & bankruptcy]	**Ohio-Northern** (ecf.ohnd.uscourts.gov)
		• Either upon application of a party or *sua sponte*, judge can modify or terminate application of electronic filing procedures at any time (*id.* ¶ 2(d))		property cases (Gen. Order 97-38, ¶ 1) • Cases best suited for electronic filing may include those in which: (a) the parties filing or requiring service are reasonably identifiable; (b) the parties filing or requiring service have or can acquire access to a computer, the World Wide Web and, where necessary, a scanner; and (3) the number and/or size of the documents likely to be scanned before electronic filing is not unreasonable (Pol. & Proc. Manual, ¶ 5).
Voluntary or Mandatory Participation	Not specifically addressed in the court's procedures	• Judge and parties must consent • Addressed at initial scheduling conference • In giving consent, parties also provide e-mail address of record; parties must exchange test e-mail messages (Admin. Order 97-12, ¶¶ 2, 3)	Participation in electronic filing is voluntary for any attorney/user/ participant in a case	In "early stages" of project, court will seek voluntary cooperation by parties and attorneys (Gen. Order 97-38, ¶ 1)
Outside Users (Eligibility and Registration)	Each member in good standing of the court bar is entitled to one ECF system login (account) and password, obtained by applying to	• Members of court's bar and pro se litigants with pending civil actions (for only as long as unrepresented by attorney) may	• Any attorney seeking access to the electronic filing system must meet the court's minimum requirements for participants/	• To utilize the electronic filing system, an attorney must be admitted to practice in the district, and must complete an

Topics/Issues	District Courts			
	Missouri-Western (ecf.mowd.uscourts.gov)	**New York-Eastern** (ecf.nyed.uscourts.gov)	**New Mexico** (www.nmcourt.fed.us) [both district & bankruptcy]	**Ohio-Northern** (ecf.ohnd.uscourts.gov)
	the clerk's office. The login and password cannot be used by anyone other than the attorney or any authorized employee of his/her law firm or organization (En Banc Order ¶ 2)	register as Filing Users (Admin. Order 97-12, ¶ 12) • Registration constitutes consent to service by electronic means as substitute for Fed. R. Civ. P. service (*id.* ¶ 6(c))	users and submit a "WWW Account Request Form" to clerk's office (Admin. Order 97-26, ¶ 3) • To obtain the necessary user identification number and password, an attorney must be admitted to practice in Federal Court and be in good standing (*id.* ¶ 2) • Registration constitutes consent to service by electronic means as substitute for Fed. R. Civ. P. service	"Electronic Filing System Attorney Registration Form" and file it with the clerk of court (Gen. Order 97-38, ¶ 8; Pol. & Proc. Manual, ¶ 12 & App. B) • Registered parties are assigned user identification names and passwords by the court, and are required to protect the security of their passwords, and to notify the clerk of court immediately if the password is compromised (Pol. & Proc. Manual, ¶ 12)
Filing/Service of Initial Case Papers	Complaints to be filed "conventionally and not electronically" unless the court specifically authorizes electronic filing (En Banc Order ¶ 6.a.1)	Initial complaint must be filed in paper form. It must be refiled electronically within 10 days after an action becomes subject to electronic filing (Admin. Order 97-12, ¶ 1, 2 (c))	Not specifically addressed in the court's procedures	Initial papers must be filed and served in the "traditional manner," not electronically (Gen. Order 97-38, ¶ 4). If a case is subsequently accepted for electronic filing previous paper filings must be provided to clerk of court in electronic form (*Id.* ¶ 6.b)
Fees	Credit card payment of fees may be authorized through the clerk's office financial officer (En Banc Order ¶ 3.e)	Not specifically addressed in the court's procedures	Not specifically addressed in the court's procedures	Initial filing fees must be paid in "traditional manner" (Gen. Order 97-38, ¶ 4)

Topics/Issues	District Courts			
	Missouri-Western (ecf.mowd.uscourts.gov)	**New York-Eastern** (ecf.nyed.uscourts.gov)	**New Mexico** (www.nmcourt.fed.us) [both district & bankruptcy]	**Ohio-Northern** (ecf.ohnd.uscourts.gov)
Filing of Other Papers/Receipt from Court	• In cases designated for electronic filing, all motions, pleadings, legal memoranda, or other documents required to be filed with the court shall be filed electronically with the exceptions noted above and below (En Banc Order ¶ 3.a) • Electronically filed pleadings or other documents must be titled using one of the categories specified in the ECF Procedures Manual available from the clerk's office (*id.* ¶ 3.d)	Electronic transmission to web site plus receipt of "Notice of Electronic Filing" from court (Admin. Order 97-12, ¶ 4(c))	• Papers filed electronically via the Internet to court's web site. • Electronic document considered filed on the date received on the court's server (Local Civil Rule 5.6) • Printed copy of court's electronic file stamp serves as equivalent of court's mechanical file stamp (Admin. Order 97-26, ¶ 5) • Filers immediately receive an electronic acknowledgment that filing has occurred	• Unless the presiding judge orders otherwise, papers in cases selected for electronic filing must be filed with the court via the Internet with only the exceptions noted below (Gen. Order 97-38, ¶¶ 1, 6.a.) • Filing of discovery materials to be governed by the Case Management Plan adopted under Local Rule 16.1(b)(4); the judge determines whether or not such materials are filed electronically after consulting with the parties (Pol. & Proc. Manual, ¶ 20) • Filers immediately receive an electronic acknowledgment that filing has occurred (*id.* ¶ 9)
Filing of Court Orders and Judgments	All orders, decrees, judgments, and proceedings of the court in cases designated for electronic filing must be entered in accordance with the electronic filing procedures (En Banc Order ¶ 3.c)	Filed electronically by clerk (Admin. Order 97-12, ¶ 9)	Court-generated documents filed electronically in chambers and by the clerk in both civil and criminal cases	Filings by judges and court officers not specifically mentioned in the court's procedures, but might be subsumed under the general references to filing of "papers" in cases selected for electronic filing

Topics/Issues	District Courts			
	Missouri-Western (ecf.mowd.uscourts.gov)	**New York-Eastern** (ecf.nyed.uscourts.gov)	**New Mexico** (www.nmcourt.fed.us) [both district & bankruptcy]	**Ohio-Northern** (ecf.ohnd.uscourts.gov)
Attachments, Exhibits, Other Difficult-to-Handle Items	• Attachments (to motions and pleadings) not available in electronic form, transcripts, state court records, and proposed orders are not to be filed electronically (En Banc Order ¶ 6.a.(2), (4)-(6)). • However, exhibits to filed documents can be electronically imaged and filed in PDF format; attorneys are encouraged to extract and file electronically relevant portions of conventionally produced documents (ECF Proc. Manual, ¶ III.A.3.)	Filing user brings electronic media to court and files using highband equipment in clerk's office (Admin. Order 97-12, ¶ 4(g))	May be filed electronically if available in electronic form (either originally or as a scanned image); otherwise these items are to be filed conventionally	• Trial exhibits lodged with the court under Local Rule 39.1 (but not yet admitted into the official record) not filed electronically (Gen. Order 97-38, ¶ 6.a.), but the party "lodging" the exhibits may be required to submit them in electronic form once they are admitted into the record (Pol. & Proc. Manual, ¶ 19) • Other papers excludable from electronic filing by court order (Gen. Order 97-38, ¶ 6.a.), including protective orders under Fed. R. Civ. P. 26(c) (Pol. & Proc. Manual, ¶ 15) • Electronic filing may be excused under "limited circumstances," such as when the item cannot be reduced to an electronic format or it exceeds the file size limit (see below) (*id.*). A party who seeks to make a non-electronic filing must file electronically a "Notice of Manual Filing" setting forth the reasons (*id.*).

Topics/Issues	District Courts			
	Missouri-Western (ecf.mowd.uscourts.gov)	**New York-Eastern** (ecf.nyed.uscourts.gov)	**New Mexico** (www.nmcourt.fed.us) [both district & bankruptcy]	**Ohio-Northern** (ecf.ohnd.uscourts.gov)
Sealed Documents	Sealed documents are not to be filed electronically. Motions to file documents under seal and court orders authorizing filing of documents under seal must be filed electronically unless prohibited by law. Paper copy of court order must be attached to the sealed document (which is filed and retained in paper format) (En Banc Order ¶ 6.a.(3))	Material prohibited by order from filing except under seal to be filed under physical seal (Admin. Order 97-12, ¶ 4(i))	Sealed documents are not to be filed electronically	Papers under seal are not to be filed electronically (Gen. Order 97-38, ¶ 6.a.)
Status of Papers Filed Electronically	Pleadings or other documents filed electronically in accordance with the court's procedures are considered filed for all purposes under the Fed. R. Civ. P. and local rules (En Banc Order ¶ 3.b)	Papers filed electronically under the court's procedures considered filed for all purposes under Fed. R. Civ. P. and local rules (Admin. Order 97-12, ¶ 4(c))	Any case document that is filed electronically by the court or an authorized attorney/user/participant is the official document of record (Admin. Order 97-26, ¶ 97-26)	Papers filed electronically under the court's procedures are deemed "written papers" that are filed for purposes of Fed. R. Civ. P. and local rules (Local Rule 5.1(b); Pol. & Proc. Manual, ¶ 9)
Retention of Documents in Paper Form	See below under "Signature"	Filing user must retain documents in paper form until 1 year after final resolution of action, and in electronic form for 10 years after final resolution (Admin. Order 97-12, ¶ 4(f))	• When attorney/other user files electronically an affidavit or other document requiring a verified signature other than his or her own, he or she must retain original paper document so that it can be retrieved if the court so orders (Admin. Order 97-26, ¶ 6) • Attorneys/users/participants must maintain back-up copies of any transmissions to the court (*id.* ¶ 9)	Originals of documents requiring scanning to be filed electronically must be retained by the filer and made available, upon request, to the court or other parties until one year after expiration of all time periods for appeals (Pol. & Proc. Manual, ¶ 16)

Topics/Issues	District Courts			
	Missouri-Western (ecf.mowd.uscourts.gov)	**New York-Eastern** (ecf.nyed.uscourts.gov)	**New Mexico** (www.nmcourt.fed.us) [both district & bankruptcy]	**Ohio-Northern** (ecf.ohnd.uscourts.gov)

Signature	• Use of authorized login and password constitutes attorney's "signature" for all purposes (En Banc Order ¶ 4.a)
	• Any pleading, affidavit or other document in which the original paper contains handwritten signatures must indicate those signatures as "s/Jane Doe" in the electronic version; the original paper must be retained by the filer for five years after final resolution of the action, including any appeals (*id.* ¶ 4.b)
	• In case of a stipulation or other document to be signed by two or more persons:
	  • Filer confirms that document is acceptable to all signatories and obtains their physical signatures on a hard copy of the document (which must be retained as specified above)
	  • Document is then filed electronically, indicating the signatures as "s/Jane Doe, etc."
	  • No later than first business day after filing, each signatory files "Notice of Endorsement"
		• Every paper filed electronically must be signed for purposes of Fed. R. Civ. P. 11 and local rules (Admin. Order 97-12, ¶¶ 4(b), 5)
		(1) **"Filing User"** - use of user ID and password constitutes signature (*id.* ¶ 5(a))
		(2) **Others** - optically scanned page with physical signature; filing user retains executed original paper (*id.* ¶ 5(b))
		• **Where paper already filed electronically** - use "Notice of Endorsement" (*id.* ¶ 5(c))
		• **Multiple signatories** - can combine (1) and (2) in single transmission, or can provide signatures through two or more electronic filings via "Notice of Endorsements" (*id.* ¶ 5(d)-(e))
			• Attorney's identification number and password, when used to file documents in court's electronic system, constitutes his or her signature on such documents for purposes of Fed. R. Civ. P. 11 (Admin. Order 97-26, ¶ 1)
			• See above concerning retention of the original paper if a document filed electronically requires a verified signature other than that of the attorney/ other user of the ECF system
			• On orders initiated within chambers or in clerk's office, use of authorized login and password and attachment of graphical signature block is equivalent of written signature (Admin. Order 97-83, ¶ 3)
				• User identification name and password provided by the court to a registered user (see above) serves as the user's signature (if an attorney) under Fed. R. Civ. P. 11 and serves as the signature for all other purposes under local rules and Federal Rules of Civil Procedure (Gen. Order 97-38, ¶ 7)
				• Documents filed electronically must include a signature block with the typewritten name (preceded by "s/"), address, telephone number, and (where applicable) Ohio Bar registration number (Pol. & Proc. Manual, ¶ 17)
				• Documents requiring more than one party's signature are filed by submitting a scanned document containing all necessary signatures, by representing the consent of the other parties on the document, or by identifying in the document the parties whose signatures are required and submitting a notice of endorsement by the other

Topics/Issues	District Courts			
	Missouri-Western (ecf.mowd.uscourts.gov)	**New York-Eastern** (ecf.nyed.uscourts.gov)	**New Mexico** (www.nmcourt.fed.us) [both district & bankruptcy]	**Ohio-Northern** (ecf.ohnd.uscourts.gov)
	• Document considered fully executed when all Notices of Endorsement are filed (ECF Proc. Manual, ¶ II.C.2)			parties within three business days after filing the document (*id.*)
Service of Papers Filed Electronically	• Participants in the ECF prototype agree to notice and service as prescribed in the court's electronic filing procedures (En Banc Order ¶ 5.b) • "Notice of Electronic Filing" generated by the court's ECF system must be served by hand, facsimile, e-mail, or first-class mail on all parties entitled to service under Fed. R. Civ. P. and local rules. (En Banc Order, ¶ 5.a). Except for documents filed in paper form or on 3.5 inch disk, filers not required to serve any pleading or other document on parties entitled to electronic notice (ECF Proc. Manual, ¶ II.B.2) • Paper copy of any electronically filed document, together with the "Notice of Electronic Filing," must be delivered to the chambers of the judge assigned to the case (unless and until the judge orders	• **Parties consenting to electronic filing** - transmission of e-mail notice to e-mail address of record (Admin. Order 97-12, ¶ 6) • **Third-party defendants** - paper; answer must include consent to or motion for exemption from electronic filing (*id.* ¶ 7(a)) • **Others** - paper (*id.* ¶ 7(b)) • **Judge** - document requiring judge's signature must also be delivered to judge on paper (*id.* ¶ 4(h)); judges may also require paper courtesy copies of any paper required (*id.* ¶ 4 (j))	• Clerk of court or any other person may serve and give notice by electronic transmission, in lieu of service and notice by mail, to any person who has on file with clerk of court a written request (which can be withdrawn) to receive service and notice by electronic transmission on the court's system (Local Civil Rule 5.6; Admin. Order 97-26, ¶ 7; Local Bankr. Rule 7005-1) • Electronic service/notice is complete when the sender of document receives confirmation of receipt of transmission; service after 5:00 p.m. is effective the next business day (*id.*) • Electronic service equivalent to service by mail under Fed. R. Civ. P. 5(b) and 77(d) and Fed. R. Bankr. P. 7005 and 9022 (*id.*) • Attorneys/users/other participants in electronic filing project required to check their	• Parties to cases selected for electronic filing are deemed to consent to all service and other notices (including court notices) by electronic means, are required to make available electronic mail addresses for service, and are strongly encouraged to check the dockets of their cases in the electronic filing system at regular intervals (Gen. Order 97-38, ¶ 6.c.; Pol. & Proc. Manual, ¶ 13) • A certificate indicating that service was accomplished under the court's electronic filing procedures must be included with all electronically filed documents (Pol. & Proc. Manual, ¶ 13). • Service by electronic mail does not constitute service by mail under Fed. R. Civ. P. 6(e) (*id.*)

Topics/Issues	District Courts			
	Missouri-Western (ecf.mowd.uscourts.gov)	**New York-Eastern** (ecf.nyed.uscourts.gov)	**New Mexico** (www.nmcourt.fed.us) [both district & bankruptcy]	**Ohio-Northern** (ecf.ohnd.uscourts.gov)
	otherwise), and must be served, in accordance with Fed. R. Civ. P. and local rules, on parties not designated (or able) to receive electronic notice (En Banc Order, ¶ 5.a; ECF Proc. Manual, ¶ II.B.1) • Except as otherwise ordered by the court, pleadings and other documents that are not filed electronically (including those filed on 3.5 inch floppy disks) must be served in accordance with Fed. R. Civ. P. and local rules (En Banc Order, ¶ 5.a; ECF Proc. Manual, ¶ III.B.)		"electronic mailboxes" as they would regular mailboxes (Admin. Order 97-26, ¶ 8) • Attorneys and *pro se* parties with a written request on file to receive service and notice by electronic transmission have a continuing duty to notify the clerk of court in writing of any change in their electronic address (Local Civil Rule 83.6)	
Notice of Court Orders and Judgments	Clerk's office to follow above-described procedures for service of court orders and other documents that are electronically filed (En Banc Order ¶ 5.a)	• **Parties consenting to electronic filing** - transmission of notice of entry to e-mail addresses of record, with note of transmission in docket • **Others** - notice in paper form (Admin. Order 97-12, ¶ 9)	• See above under "Service of Papers Filed Electronically" • Court can also provide notice by fax, but only with consent of the party/attorney	See above under "Service of Papers Filed Electronically"
Docket Entries	• All electronically filed documents (including pleadings, other party-filed documents, and court orders, decrees and other proceedings) are considered entered on the docket kept by the	• Papers filed electronically considered entered on the docket kept by the clerk under Fed. R. Civ. P. 58 and 79 (Admin. Order 97-12, ¶ 4(c)) • Electronic docket to denote	Filer's description of electronically filed document is provisionally accepted as docket entry, subject to modification by the clerk	• Upon complete receipt by the clerk of court, the electronic transmission of a document under the court's procedures constitutes entry of that document onto the docket by the

Topics/Issues	District Courts			
	Missouri-Western (ecf.mowd.uscourts.gov)	**New York-Eastern** (ecf.nyed.uscourts.gov)	**New Mexico** (www.nmcourt.fed.us) [both district & bankruptcy]	**Ohio-Northern** (ecf.ohnd.uscourts.gov)
	clerk under Fed. R. Civ. P. 79(a) (En Banc Order ¶ 3.b-c) • Electronic filer responsible for designating a title for the filed document from a court-approved "Listing of Events" (ECF Proc. Manual, ¶ II.F.) • Documents forming part of the same pleading (e.g., a motion and supporting affidavit), if filed at the same time by the same party, may be electronically filed together as one docket entry; a suggestion in support of a motion should be filed separately and shown as a related document to the motion (ECF Proc. Manual, ¶ II.A.2.)	filings of paper in electronic filing case, regardless of whether filed electronically (*id.* ¶ 8) • The clerk of court is to make technical accommodations to permit access to electronic dockets through the existing PACER system (*id.*)		clerk under Fed. R. Civ. P. 58 and 79 (Pol. & Proc. Manual, ¶ 9) • Docket entry created using information provided by the filer, subject to modification by the clerk of court where necessary and appropriate to comply with quality control standards (*id.* ¶ 10)
Technical Failures	• Filings due on a given day that are not filed solely as a result of a technical failure are due the next business day (ECF Proc. Manual, ¶ V) • Delayed filing will be rejected unless accompanied by the filer's declaration/affidavit attesting to at least two failed attempts to file electronically (not less than one hour apart) occurring after 12	• Filings due next business day if web site unable to accept filings continuously or intermittently for more than one hour after 12:00 noon (Admin. Order 97-12, ¶ 10(a)) • May retransmit a copy if it is discovered within 24 hours after filing that the electronic version available for viewing through the ECF system does	Filer must inform clerk's office of problem by telephone and fax copy of document to be filed; and on the next day, filer must file document electronically, at which time it will be backdated by the clerk	If a party is unable to file electronically and, as a result, may miss a filing deadline, the party must contact the court's Help Desk to inform the clerk of court of the difficulty. If the deadline is missed due to an inability to file electronically, the party may file the document no later than noon of the court's first business day after the deadline

Topics/Issues	District Courts			
	Missouri-Western (ecf.mowd.uscourts.gov)	**New York-Eastern** (ecf.nyed.uscourts.gov)	**New Mexico** (www.nmcourt.fed.us) [both district & bankruptcy]	**Ohio-Northern** (ecf.ohnd.uscourts.gov)
	noon on each day the filing was delayed (*id.*) • Court's public web site subject to a "technical failure" on a given day if unable to accept filings continuously or intermittently for longer than one hour after 12 noon on that day (*id.*)	not conform to the document transmitted (*id.* ¶ 10(c))		passes, accompanied by a declaration stating the reason(s) for missing the deadline (Pol. & Proc. Manual, ¶ 11)
Public Access	• Docket and electronically filed documents accessible without a system password through the court's Internet site (ECF Proc. Manual, ¶ IV.A.) • Electronic access to docket and electronically filed documents at the clerk's office during regular business hours (*id.* ¶ IV.B.)	• Clerk to provide equipment and facilities to allow public electronic filing and public access to all court records (Admin. Order 97-12, ¶ 16(a)) • Internet site includes list of E-Mail Addresses of Record for cases subject to electronic filing (*id.* ¶ 3(c))	• Clerk to provide equipment and facilities to allow public electronic filing and public access to all court records	Not specifically addressed in the court's procedures
Other Special Provisions for Electronic Filing		• One day added to prescribed period re Fed. R. Civ. P. 6(e) for papers filed and served electronically • Parties must have stipulated and court authorized filing of discovery requests, responses, and materials; otherwise, can only be excerpted, quoted or used as selected exhibits with other filings (Admin. Order 97-12, ¶ 6(b))	In motion practice: • Standing order entered in any case with electronic participant waives "packet" submission rule • Notice is immediately generated (and placed in electronic "mailboxes" of all attorneys/ users/other participants in particular case who agreed to electronic filing) whenever document is filed in court's system; this constitutes service on	• Documents filed electronically must be broken into their component parts--a foundation document (e.g., a motion) and other supporting items (e.g., memorandum and exhibits)--each of which must be uploaded separately in the filing process (Pol. & Proc. Manual, ¶ 14) • No component exceeding 1.5 megabytes in size shall be filed electronically (*id.*)

Topics/Issues	District Courts			
	Missouri-Western (ecf.mowd.uscourts.gov)	**New York-Eastern** (ecf.nyed.uscourts.gov)	**New Mexico** (www.nmcourt.fed.us) [both district & bankruptcy]	**Ohio-Northern** (ecf.ohnd.uscourts.gov)
		• Internet site contains prominent notice of copyright and other proprietary rights (*id.* ¶ 13) • Provides for motion for protective order respecting proprietary rights or privacy interests (i.e., order prohibiting electronic filing of specific materials) (*id.* ¶¶ 14-15)	those parties, and is equivalent to mail service for purposes of "three-day mailing" rule under Fed. R. Civ. P. 6(e) • Attorney/user/other participant required to notify court of conventional service on non-electronic case participants • Timing of responses and replies must conform to local rule otherwise applicable to motion practice unless parties otherwise agree • Movant required to give court electronic notice that matter is either ready for a ruling or no longer requires a ruling. (Admin. Order 97-26, ¶ 7, as amended by Admin. Order 97-83, ¶ 2(b); Standing Order)	• Filing documents electronically does not alter any filing deadlines, and all electronic transmissions must be received completely by the clerk's office before midnight to be considered filed on a given day. Although filing can occur 24 hours a day, parties are strongly encouraged to file during normal clerk's office working hours when assistance is available (*id.* ¶ 9) • Electronically filed documents must meet the requirements of Fed. R. Civ. P. 10 (form of pleadings), the local rules governing general format of filed papers and designation of district judge and/or magistrate judge, and the local rule and any court order establishing page limitations (Pol. & Proc. Manual, ¶ 8)
Record on Appeal	Not specifically addressed in the court's procedures	Clerk to deliver complete paper copy of record on appeal or electronic reproduction until court advised otherwise (Admin. Order 97-12, ¶ 16(b))	Not specifically addressed in the court's procedures	Not specifically addressed in the court's procedures

Local Rules and Procedures Governing Prototype Electronic Case File (ECF) Systems in the Bankruptcy Courts

Topics/Issues	Bankruptcy Courts				
	Arizona (ecf.azb.uscourts.gov)	**California-Southern** (ecf.casb.uscourts.gov)	**Georgia-Northern** (ecf.ganb.uscourts.gov)	**New York-Southern** (ecf.nysb.uscourts.gov)	**Virginia-Eastern** (ecf.vaeb.uscourts.gov)
Source of ECF Procedures	• General Order No. 69, dated Oct. 2, 1997, as amended by General Order No. 74, dated Aug. 11, 1998 (authorizes "[t]he filing of petitions and papers . . . by electronic means as established by an Interim Operating Order") • Interim Operating Order No. 2 (In re Electronic Case Filing Procedures), dated Aug. 11, 1998 (superseded Interim Operating Order No. 1, dated Oct. 2, 1997) • "Administrative Procedures for Electronically Filed Cases" (Exhibit 2 to Interim Operating Order No. 2), dated Aug. 3, 1998 • Electronic Filing System User's Manual, revised Aug. 11, 1998	• Local Bankr. Rule 9004-1 (provides that Fed. R. Bankr. P. 9004, read in conjunction with the applicable local rules, governs preparation and filing of papers "except as otherwise required by the court") • Bankruptcy General Order No. 162 (In re Provisions for Electronic Case Filing), dated June 17, 1998 (with effect from Mar. 25, 1998) • "Administrative Procedures for Filing, Signing and Verifying Pleadings and Papers by Electronic Means," dated June 17, 1998 • Online Electronic Case Filing Manual, updated through Aug. 13, 1998	• Local Bankr. Rule 5005-5 (authorizes clerk of court to receive for filing "documents submitted, signed, verified or served by electronic means that are consistent with technical standards, if any, that the Judicial Conference established and that comply with administrative procedures established by the Bankruptcy Court"), adopted Aug. 31, 1998 • [The bankruptcy court's administrative procedures are still in preparation]	• Local Bankr. Rules 1002-1, 5005-1, 5005-2, 5075-1, 9001-1(c), 9011-1, 9021-1, and 9070-1 • General Order No. M-182 (Electronic Case Filing Procedures), dated June 26, 1997 (entered *nunc pro tunc* to Nov. 25, 1996), as amended on May 1, 1998 • "Administrative Procedures for Electronically Filed Cases" (Exhibit to Gen. Order M-182), revised May 1, 1998 • Electronic Filing System Attorney User's Manual, revised July 21, 1998 • Order published in N.Y.L.J., Dec. 8, 1997, p. 42 • Order published in N.Y.L.J., Jan. 21, 1998, p. 35, col. 9	• General Order No. 97-1 (Order Adopting Electronic Case Filing Procedures), dated October 30, 1997 • "Administrative Procedures for Electronically Filed Cases" (Exhibit to Gen. Order 97-1), revised July 17, 1998 • In anticipation of expanding the ECF system beyond the Alexandria division (see below), the court, in February 1998, disseminated for public comment a series of amendments to the local bankruptcy rules relating to electronic filing

Topics/Issues	Bankruptcy Courts				
	Arizona (ecf.azb.uscourts.gov)	**California-Southern** (ecf.casb.uscourts.gov)	**Georgia-Northern** (ecf.ganb.uscourts.gov)	**New York-Southern** (ecf.nysb.uscourts.gov)	**Virginia-Eastern** (ecf.vaeb.uscourts.gov)
Cases Accepted for Electronic Filing	Cases designated by court (Admin. Proc. ¶ I.A); cases filed under any chapter of the Bankruptcy Code in the Phoenix Division may be included in the electronic filing pilot program (Gen. Order 69, ¶ 2, as amended by Gen. Order 74))	• Cases designated by court (Admin. Proc. ¶ I.A) • Electronic filing procedures applicable only to Chapter 7 cases (including adversary proceedings and contested matters) until further order of the court (Gen. Order 162, ¶ 10)		• Cases designated by court (Admin. Proc. ¶ I.A) • As of Dec. 31, 1997, filings in all new Chapter 11 cases will be made electronically	Cases designated by court (Admin. Proc. ¶ I.A); limited until further order to Chapter 11 cases (including adversary proceedings and contested matters) filed in Alexandria Division (Gen. Order 97-1, ¶ 10)
Voluntary or Mandatory Participation	Not specifically addressed in the court's procedures	Parties and attorneys who are not participants in the court system (see below) not required to make electronic filings in cases assigned to the system (Admin. Proc. ¶ II.A.1)		Not specifically addressed in the court's procedures	Parties and attorneys who are not participants in the ECF system (see below) are not required to file papers electronically in cases assigned to the system (Admin. Proc. ¶ II.A.1)
Outside Users (Eligibility and Registration)	• Attorneys admitted to practice in the court (Admin. Proc. ¶ I.B)	• Attorneys admitted to practice in the court are entitled to one system password each upon registration using the prescribed form; except for out-of-state attorneys (who can make special arrangements), the system password must be picked up at the clerk's office by the registered attorney or		• Attorneys admitted to practice in court (Admin. Proc. ¶ I.B) • Password required for electronic filing to be used only by the attorney to whom it is assigned, or by authorized members and employee's of the attorney's law firm (Local Rule 9011-1(c)) • Participation constitutes	• Attorneys admitted to practice in court (Admin. Proc. ¶ I.B) • Participation constitutes request for service and notice electronically under Fed. R. Bankr. P. 9036, and agreement to accept such notice and service (Gen. Order 97-1, ¶ 8) • A registered attorney/

Topics/Issues	Bankruptcy Courts				
	Arizona (ecf.azb.uscourts.gov)	**California-Southern** (ecf.casb.uscourts.gov)	**Georgia-Northern** (ecf.ganb.uscourts.gov)	**New York-Southern** (ecf.nysb.uscourts.gov)	**Virginia-Eastern** (ecf.vaeb.uscourts.gov)
		authorized representative (Admin. Proc. ¶¶ I.B & I.C.1-3) • A registered attorney participant in the court's system may withdraw from that participation upon written notice (*id.* ¶ I.C.4) • Participation (signified by receipt of password) constitutes request for electronic service and notice under Fed. R. Bankr. P. 9036, and agreement to accept notice and service by that means (Gen. Order 162, ¶ 8) • No attorney to knowingly permit or cause to permit anyone other than an authorized employee of his/her law firm to utilize his/her password; no person other than an authorized employee of the law firm to knowingly utilize or cause anyone to utilize a registered		waiver of conventional service, including notice under Fed. R. Bankr. P. 2002 and service under Fed. R. Bankr. P. 7004, and agreement to accept by electronic means (Gen. Order M-182 ¶ 10)	other participant may withdraw from participation upon written notice (Admin. Proc. ¶ I.C.5)

Topics/Issues	Bankruptcy Courts				
	Arizona (ecf.azb.uscourts.gov)	**California-Southern** (ecf.casb.uscourts.gov)	**Georgia-Northern** (ecf.ganb.uscourts.gov)	**New York-Southern** (ecf.nysb.uscourts.gov)	**Virginia-Eastern** (ecf.vaeb.uscourts.gov)
		attorney's password (*id.* ¶¶ 3, 4)			
Filing/Service of Initial Case Papers	Petitions to commence cases under the Bankruptcy Code and complaints initiating adversary proceedings must be filed conventionally unless the court specifically authorizes electronic filing (Admin. Proc. ¶ III.A.1 & A.2)	Petitions in cases assigned to the court's electronic filing system must be filed electronically; but non-participants in the system are not required to file electronically even in assigned cases (Admin. Proc. ¶ II.A.1)		• No electronic filing unless specifically authorized; petitions to commence case under Bankruptcy Code and complaints initiating adversary proceedings are to be filed conventionally (Admin. Proc. ¶ III.A.1 & A.2) • If an exception is made to allow electronic filing of a petition, filer must provide the court with a diskette of creditor information for noticing purposes and immediately send paper copies of the petition to the U.S. trustee, SEC (2 copies), IRS, and the assigned judge (User's Manual pt. II.D.1)	Not specifically addressed in the court's procedures
Fees	• May apply to clerk's office for authorization of credit card payment (Admin. Proc. ¶ II.D)	For filings requiring a fee, application must be made to the financial administrator in the clerk's office for		May to clerk's office apply for authorization of credit card payment (Admin. Proc. ¶ II.D); payment by	May apply to clerk's office for authorization of credit card payment (Admin. Proc. ¶ II.D)

Topics/Issues	Bankruptcy Courts				
	Arizona (ecf.azb.uscourts.gov)	**California-Southern** (ecf.casb.uscourts.gov)	**Georgia-Northern** (ecf.ganb.uscourts.gov)	**New York-Southern** (ecf.nysb.uscourts.gov)	**Virginia-Eastern** (ecf.vaeb.uscourts.gov)
	• When a document requiring a filing fee is filed, the clerk's office charges the fee to the lawyer/law firm's account by the next business day (User's Manual pt. I.G.) • If a document requiring a filing fee is filed before a credit card account is established with the court, the filing fee must be delivered to the clerk's office no later than the close of the next business day (i.e., 4:00 p.m.). Copy of the "Notice of Electronic Filing" for the filed document must be submitted with the fee (*id.*)	authorization to make payment by credit card (Admin. Proc. ¶ II.D)		credit card available as of January 1998	
Filing of Other Papers/Receipt from Court	• Papers in cases designated for electronic filing generally must be filed electronically (Admin. Proc. ¶ II.A.1) • An original declaration containing a verification of the schedules and	• All documents required to be filed with the court in cases assigned to the court's electronic filing system generally must be filed electronically; but non-participants in the system are not required to		• Papers in cases designated for electronic filing generally must be filed electronically (Admin. Proc. ¶ II.A) • Hard copies of all papers electronically filed with the court, other than	Papers in cases designated for electronic filing generally must be filed electronically; but non-participants in electronic filing not required to file papers electronically even in designated cases

Topics/Issues	Bankruptcy Courts				
	Arizona (ecf.azb.uscourts.gov)	**California-Southern** (ecf.casb.uscourts.gov)	**Georgia-Northern** (ecf.ganb.uscourts.gov)	**New York-Southern** (ecf.nysb.uscourts.gov)	**Virginia-Eastern** (ecf.vaeb.uscourts.gov)
	statement of affairs must be filed conventionally with the clerk as separate document (Interim Order 2, ¶ 2; Admin. Proc. ¶ II.C.) • Delivery of paper copies of pleadings and documents for chambers required unless court orders otherwise (Interim Order 2, ¶ 7) • Whenever a pleading or other paper is filed electronically, the system generates a "Notice of Electronic Filing" (User's Manual pt. II.C., Exh. 5)	file electronically even in assigned cases (Admin. Proc. ¶ II.A.1) • When otherwise required, electronic filing is not required in exceptional circumstances that prevent an attorney/other participant from filing electronically (*id.*) • Whenever a pleading or other paper is filed electronically, clerk's office serves filer with "Notice of Electronic Filing" by electronic means at time of docketing (Gen. Order 162, ¶ 7.a; Admin. Proc. ¶ II.B.1)		proofs of claim, must be provided to the clerk of court for transmittal to the U.S. trustee (Local Rule 9070-1) • Hard copies of all papers electronically filed with the court must also be provided to chambers unless and until the judge deems it unnecessary (Local Rule 9070-1; Gen. Order M-182 ¶ 5)	(Admin. Proc. ¶ II.A.1)
Filing of Court Orders and Judgments	• Clerk enters all orders, decrees, and judgments in the electronic filing system; notation in the docket constitutes entry and docketing for all purposes (Interim Order 2, ¶ 9). • To facilitate electronic	For the time being, all orders will be submitted conventionally to the court; when orders are submitted through the court's system, procedures will be amended to reflect the change (Admin. Proc. ¶ II.E)		• Clerk of court enters all orders, decrees, and judgments of the court in the court's electronic filing system, which constitutes docketing for all purposes; clerk's notation of an order, judgment, or decree on	Filed electronically by judge; to facilitate, parties provide judge with proposed order (and related documents electronically filed) on disk with paper copy (Admin. Proc. ¶ II.E)

Topics/Issues	Bankruptcy Courts				
	Arizona (ecf.azb.uscourts.gov)	**California-Southern** (ecf.casb.uscourts.gov)	**Georgia-Northern** (ecf.ganb.uscourts.gov)	**New York-Southern** (ecf.nysb.uscourts.gov)	**Virginia-Eastern** (ecf.vaeb.uscourts.gov)
	filing of orders, a party seeking an order must provide the judge with a proposed order on 3.5 inch diskette and a paper copy of any related, electronically filed document. A party may alternatively submit a proposed order and a copy of the Notice of Electronic Filing of the related document by e-mail (Admin. Proc. ¶ II.E; User's Manual pt. II.C.5)			the appropriate docket constitutes entry (Local Rule 9021-1) • Filed electronically by judge; to facilitate, parties provide judge with proposed order (and related documents electronically filed) on disk with paper copy (Admin. Proc. ¶ II.E)	
Attachments, Exhibits, Other Difficult-to-handle Items	• All documents forming part of a pleading may be filed together under one docket number (Admin. Proc. ¶ II.A.2) • Unless otherwise authorized, trial or hearing exhibits to be filed conventionally (*id.* ¶ III.A.4) • Court's copy of court hearing transcripts to be filed conventionally if not	• With the exception of a memorandum of law, all documents forming part of a pleading may be filed together under one docket number; memorandum of law must be separately filed and shown as related to the particular motion (Admin. Proc. ¶ II.A.2) • Exhibits not available in electronic form can be filed conventionally; but		• With the exception of a memorandum of law, all documents forming part of a pleading may be filed together under one docket number (Admin. Proc. ¶ II.A.2) • When an exhibit is not available in an electronically produced text form, only excerpts directly germane to the matter under the court's	• With exception of a memorandum of law, all documents forming part of a pleading may be filed together under one docket number (Admin. Proc. ¶ II.A.2) • Exhibits not available in electronic form can be conventionally filed and must be served per Fed. R. Bankr. P. and local rules (*id.* ¶ III.A.2 & B)

Topics/Issues	Bankruptcy Courts				
	Arizona (ecf.azb.uscourts.gov)	**California-Southern** (ecf.casb.uscourts.gov)	**Georgia-Northern** (ecf.ganb.uscourts.gov)	**New York-Southern** (ecf.nysb.uscourts.gov)	**Virginia-Eastern** (ecf.vaeb.uscourts.gov)
	filed in acceptable electronic format (*id.* ¶ III.A.5)	such documents, or the relevant portions thereof, should be imaged and filed electronically wherever possible (*id.* ¶ III.A.2) • Proofs of claim must be filed conventionally unless specifically authorized by the court (*id.* ¶ III.A.3) • Emergency motions, supporting pleadings, and objections to be filed electronically, but the filer must advise the judge's law clerk of the filing by phone (*id.* ¶ II.A.3)		consideration should be filed conventionally (with complete exhibit made available in the courtroom and to the court and other counsel upon request) (Gen. Order M-182 ¶ 14; Admin. Proc. ¶ II.F.); if an exhibit not available in an electronically produced text format cannot be excerpted, it should be submitted as an electronically produced image (Admin. Proc. ¶ III.A.4.) • Conventionally filed documents must be served per Fed. R. Bankr. P. and local rules (*id.* ¶ III.B.)	
Sealed Documents	• Filed conventionally unless court authorizes electronic filing (Admin. Proc. ¶ III.A.3) • Motions to file documents under seal and court orders authorizing filing under seal are filed	• Filed conventionally unless electronic filing is specifically authorized by the court; paper copy of order authorizing filing under seal must be attached to the sealed document and delivered		• Filed conventionally unless court authorizes electronic filing, but also submitted on diskette so that it can be filed electronically if later unsealed (Admin. Proc. ¶ III.A.3)	• Filed conventionally unless court authorizes electronic filing (Admin. Proc. ¶ III.A.1) • Motion to file documents under seal and court orders authorizing filing under seal are filed

Topics/Issues	Bankruptcy Courts				
	Arizona (ecf.azb.uscourts.gov)	**California-Southern** (ecf.casb.uscourts.gov)	**Georgia-Northern** (ecf.ganb.uscourts.gov)	**New York-Southern** (ecf.nysb.uscourts.gov)	**Virginia-Eastern** (ecf.vaeb.uscourts.gov)
	electronically, with paper copies of those orders attached to the sealed documents and delivered to the clerk or chief deputy clerk (*id.*)	to the clerk's office (Admin. Proc. ¶ III.A.1) • Motions to file documents under seal to be filed electronically (*id.*)		• Motion to file documents under seal and court orders authorizing filing under seal are filed electronically (*id.*)	electronically (*id.*)
Status of Papers Filed Electronically	Electronic filing constitutes entry on the docket (Interim Order 2, ¶ 8)	Electronic filing constitutes entry on the docket for purposes of Fed. R. Bankr. P. 5003 (pleadings and other papers) and 9021 (orders, decrees, judgments, and court proceedings) (Gen. Order 162, ¶¶ 5, 6)		Electronic filing constitutes entry on docket under Fed. R. Bankr. P. 5003 (Gen. Order M-182, ¶ 6); see also above under "filing of court orders and judgments"	Electronic filing constitutes entry on docket under Fed. R. Bankr. P. 5003 (Gen. Order 97-1, ¶ 5)
Retention of Documents in Paper Form	Attorney generally must maintain original signed copy of each filing (Interim Order 2, ¶ 1; Admin. Proc. ¶ II.C.1); see also below under "signatures"	See below under "signatures"		See below under "signatures"	Not specifically addressed in the court's procedures
Signature	• Use of initials and either state bar identification number or last four digits of social security number (Interim Order 2, ¶ 1) • Documents requiring original signatures, verifications under Fed.	• Electronic filing by a registered attorney/ participant in the court's system constitutes the attorney's signature for purposes of Fed. R. Bankr. P. 9011 and Local Rule 9004-3(b) (Gen.		• Initials of attorney's first and last names followed by the last four digits of attorney's social security number constitutes the attorney's signature for purposes of Fed. R. Bankr. P. 9011; attorney	• Electronic filing by registered attorney constitutes signature (Gen. Order 97-1, ¶ 2) • Documents requiring original signatures, verifications under Fed. R. Bankr. P 1008 and

Topics/Issues	Bankruptcy Courts				
	Arizona (ecf.azb.uscourts.gov)	**California-Southern** (ecf.casb.uscourts.gov)	**Georgia-Northern** (ecf.ganb.uscourts.gov)	**New York-Southern** (ecf.nysb.uscourts.gov)	**Virginia-Eastern** (ecf.vaeb.uscourts.gov)
	R. Bankr. P 1008, and unsworn declarations under 28 U.S.C. § 1746 are filed electronically with signature indicated as "s/name"; filer maintains originally executed documents, except that originally executed verifications of schedules and statements of affairs are filed with the clerk (Admin. Proc. ¶ II.C.1)	Order 162, ¶ 2) • Petitions, lists, schedules and statements requiring the debtor's signature are filed electronically, with a paper "Declaration re: Electronic Filing" to be signed by the debtor and filed with the court within 15 days after the petition is electronically filed (*id.*; Admin. Proc. ¶ II.C.1) • Documents containing original signatures or requiring verification under Fed. R. Bankr. P. 1008, and unsworn declarations as provided in 28 U.S.C. § 1746, are filed electronically with the signature indicated as "/s/ Jane Doe"; original signed paper documents must be maintained by attorney of record or originating party for the maximum allowable time to complete the appellate process, and the original paper document must be		required to maintain an original signed copy of each filing (Local Rule 9011-1(b); Gen. Order M-182, ¶ 2) • Documents requiring original signatures, verifications under Fed. R. Bankr. P 1008 and unsworn declarations under 28 U.S.C. § 1746 are filed electronically with signature indicated as "s/name"; filer maintains originally executed documents (Admin. Proc. ¶ II.C.1)	unsworn declarations under 28 U.S.C. § 1746 are filed electronically with signature indicated as "s/name"; filer maintains originally executed documents until 3 years after case closing (Admin. Proc. ¶ II.C.1)

Topics/Issues	Bankruptcy Courts				
	Arizona (ecf.azb.uscourts.gov)	**California-Southern** (ecf.casb.uscourts.gov)	**Georgia-Northern** (ecf.ganb.uscourts.gov)	**New York-Southern** (ecf.nysb.uscourts.gov)	**Virginia-Eastern** (ecf.vaeb.uscourts.gov)
		provided to other parties or the court upon request (*id.* ¶ II.C.2)			
Service of Papers Filed Electronically	• Electronic filer may serve the filed pleading or other document on an attorney or other registered participant in the court's electronic filing system by serving by e-mail, hand delivery, fax or, if e-mail, hand delivery and fax are impracticable, by overnight mail a "Notice of Electronic Filing" generated by the system; service by e-mail deemed made on the next business day (Interim Order 2, ¶ 10; Admin. Proc. ¶ II.B.1) • Paper copies must be served according to Fed. R. Bankr. P. and local bankr. rules when a pleading or other document is filed conventionally or on diskette, and when	• Filing party serves the document in accordance with applicable rules; but if service by first-class mail is permitted and the recipient is a registered participant in the court's system, service can be effected by serving the Notice of Electronic Filing (see above) by electronic means (Gen. Order 162, ¶ 7.b-c; Admin. Proc. ¶ II.B.2-3) • Except as otherwise ordered, documents filed conventionally or on 3.5 inch floppy disk must be served in the manner provided in, and to the parties entitled to notice under, Fed. R. Bankr. P. and local bankr. rules (Admin. Proc. ¶ III.B)		**Parties designated to receive electronic notice** - service of "Notice of Electronic Filing" generated by electronic filing system by hand, fax, or authorized e-mail, or by overnight mail if hand, fax, or e-mail service impracticable (Gen. Order M-182, ¶ 8; Admin. Proc. ¶ II.B.1) **Judge** - deliver by hand or overnight mail "Notice of Electronic Filing" with paper copy of document (Admin. Proc. ¶ II.B.1) **Others** - in accordance with Fed. R. Bankr. P and local rules (*id.*)	• Filing party serves "Notice of Electronic Filing" received electronically from Clerk on all persons in accordance with applicable rules (Gen. Order 97-1, ¶ 7; Admin. Proc. ¶ II.B.1-3) • If service by first class mail is permitted by applicable rules and party entitled to service is an electronic filing participant, service may be by electronic means (Gen. Order 97-1, ¶ 7; Admin. Proc. ¶ II.B.1-3)

Topics/Issues	Bankruptcy Courts				
	Arizona (ecf.azb.uscourts.gov)	**California-Southern** (ecf.casb.uscourts.gov)	**Georgia-Northern** (ecf.ganb.uscourts.gov)	**New York-Southern** (ecf.nysb.uscourts.gov)	**Virginia-Eastern** (ecf.vaeb.uscourts.gov)
	service is required on the debtor as well as the debtor's attorney, on a Chapter 13 trustee (for schedules, statements, plans, or any amendments thereto), on a Chapter 7 trustee who is not a registered participant in the court's electronic filing system, on the United States Trustee (unless the U.S. Trustee otherwise directs), on a creditor (for notices required to be served on all creditors), and on all parties who are not registered participants in the court's electronic filing system (Interim Order 2, ¶ 11; Admin. Proc. ¶ II.B.1). • Unless the judge directs otherwise, paper copies of the Notice of Electronic Filing and electronically filed document must be delivered to the judge by means of hand delivery or				

Topics/Issues	Bankruptcy Courts				
	Arizona (ecf.azb.uscourts.gov)	**California-Southern** (ecf.casb.uscourts.gov)	**Georgia-Northern** (ecf.ganb.uscourts.gov)	**New York-Southern** (ecf.nysb.uscourts.gov)	**Virginia-Eastern** (ecf.vaeb.uscourts.gov)
	mail to the clerk's office (Admin. Proc. ¶ II.B.1) • Attorney filing a pleading or other document electronically must include in the filing any fax number or Internet e-mail address at which the attorney can be reached (Interim Order 2, ¶ 12)				
Notice of Court Orders and Judgments	Upon docketing of an order, decree, judgment, or other court document, the clerk serves the proponent of the order or other document by e-mail, facsimile, or first class mail; the proponent, in turn, serves the parties as described above under "Service of Papers Filed Electronically" (Interim Order 2, ¶ 10)	Not specifically addressed in the court's procedures		Clerk serves proponent with "Notice of Electronic Filing" by e-mail; proponent serves on all parties entitled to electronic filing by fax or e-mail, and to other parties/attorneys by overnight or first class mail (Gen. Order M-182, ¶ 8)	Clerk electronically serves "Notice of Electronic Filing" on all persons in accordance with applicable rules. If service by first class mail is permitted by such rules and party is an electronic filing participant, service may be by electronic means (Gen. Order 97-1, ¶ 7; Admin. Proc. ¶ II.B.1-3)
Other Notices	See above	Not specifically addressed in the court's procedures		• Paper copies of Fed. R. Bankr. P. 2002(a) (1) (4) (5) (7) and (8) and (b) (1) and (2) notices required until recipient requests electronic notice under Fed. R. Bankr. P. 9036	Same as notice for court orders and judgments

Topics/Issues	Bankruptcy Courts				
	Arizona (ecf.azb.uscourts.gov)	**California-Southern** (ecf.casb.uscourts.gov)	**Georgia-Northern** (ecf.ganb.uscourts.gov)	**New York-Southern** (ecf.nysb.uscourts.gov)	**Virginia-Eastern** (ecf.vaeb.uscourts.gov)
				(Gen. Order M-182, ¶ 9; Admin. Proc. ¶ I.A) • Fed. R. Bankr. P 2002 (a) (2) (3) and (6) notice may be served in manner outlined above under "service" (Gen. Order M-182, ¶ 9)	
Docket Entries	Electronic filer designates title of docket entry from a list of prescribed categories in the "Glossary of Events" (Admin. Proc. ¶ II.G)	Electronic filer designates title of docket entry from a list of prescribed categories (Admin. Proc. ¶ II.F)		Electronic filer designates title of docket entry from a list of prescribed categories (Admin. Proc. ¶ II.F)	Electronic filer designates title of docket entry from a list of prescribed categories (Admin. Proc. ¶ II.F)
Technical Failures	Not specifically addressed in the court's procedures	Not specifically addressed in the court's procedures		Not specifically addressed in the court's procedures	Not specifically addressed in the court's procedures
Public Access	• Public access to documents and docket at clerk's office (Admin. Proc. ¶ IV.B) • "Read only" access to docket sheet and documents generally available via Internet only for those persons with a current PACER account in good standing who obtain a password (*id.*	• Public access to documents and docket at clerk's office (Admin. Proc. ¶ IV.B) • Public Internet "read only" access to docket sheet and documents via Internet (*id.* ¶ IV.A) • Conventional copies and certified copies of electronically filed documents may be		• Public access to documents and docket at clerk's office (Admin. Proc. ¶ IV.B) • Public Internet "read only" access to docket sheet and documents via Internet (*id.* ¶ IV.A) • May purchase conventional and certified copies of electronically filed documents (*id.*	• Public access to documents and docket at clerk's office (Admin. Proc. ¶ IV.B) • Public Internet "read only" access to docket sheet and documents via Internet (*id.* ¶ IV.A.1) • May purchase conventional and certified copies of electronically filed documents (*id.*

Topics/Issues	Bankruptcy Courts				
	Arizona (ecf.azb.uscourts.gov)	**California-Southern** (ecf.casb.uscourts.gov)	**Georgia-Northern** (ecf.ganb.uscourts.gov)	**New York-Southern** (ecf.nysb.uscourts.gov)	**Virginia-Eastern** (ecf.vaeb.uscourts.gov)
	¶ IV.A.; password application form posted on "www.azb.uscourts.gov") • Conventional copies and certified copies of electronically filed documents may be purchased at the clerk's office (*id.* ¶ IV.C)	purchased at the clerk's office (*id.* ¶ IV.C)		¶ IV.C)	¶ IV.C)
Other Special Provisions for Electronic Filing	If an electronically filed motion or other document is to be set for hearing, the date and time for the hearing can be obtained by sending the courtroom deputy an e-mail request for hearing that includes a copy of the Notice of Electronic Filing of the underlying document (Admin. Proc. ¶ II.F.; User's Manual pt. II.C.4)				
Record on Appeal	Not specifically addressed in the court's procedures	Not specifically addressed in the court's procedures		Not specifically addressed in the court's procedures	Not specifically addressed in the court's procedures

ATTACHMENT

Federal Rules Potentially Affected by Implementation of Electronic Filing

"Filing"—Method and Format

Fed. R. Bankr. P.:
- 5005 (filing and transmittal of papers)
- 7005 (applying Fed. R. Civ. P. 5 to adversary proceedings)
- 8008(a) (filing of papers related to appeals)
- 9004 (general requirements of form)

Fed. R. Civ. P.:
- 5 (filing of pleadings and other papers)
- 6 (time)
- 7(b) (form of motions and other papers)
- 10 (form of pleadings)
- 58 (entry of judgment)
- 79 (books and records kept by clerk and entries therein)

Fed. R. Crim. P.:
- 45 (time)
- 49(d) (filing of papers same as in civil cases)

§ 2254 R.:
- 2(c) (form of petition)
- 3(a) (place of filing petition; number of copies)

§ 2255 R.:
- 2(b) (form of motion)
- 3(a) (place of filing motion; number of copies)

Fed. R. App. P.:
- 12(a) (docketing the appeal)
- 21(d) (form of petitions for extraordinary writs; number of copies)
- 25(a), (e) (filing; number of copies)
- 26 (computation and extension of time)
- 27(d) (motions: form of papers; number of copies)
- 28-30 (briefs and appendices to briefs)
- 31(b) (number of copies of brief)
- 32 (form of briefs, appendices and other papers)
- 35(b), (d) (form and number of copies of petition for en banc determination)
- 40(b) (form of petition for panel rehearing)
- 45(b) (duties of clerks: docket; calendar; other records required).

"Signatures" and Document Authentication

Fed. R. Bankr. P.
1008 (verification of petitions and accompanying papers)
9011 (signing of papers by attorney or unrepresented party)

Fed. R. Civ. P.:
11(a) (signing of pleadings, motions and other papers by attorney or unrepresented party)
44 (proof of official record)
58 (entry of judgment signed by clerk)

Fed. R. Crim. P.:
4(c) (arrest warrant or summons upon complaint signed by magistrate judge)
7 (indictment or information signed by government attorney)
9(b)(1) (warrant or summons upon indictment or information signed by clerk)
32(d)(1) (judgment signed by judge)

§ 2254 R. 2(c) (petition signed by petitioner under penalty of perjury)

§ 2255 R. 2(b) (motion signed by movant under penalty of perjury)

Fed. R. App. P.:
36 (entry of judgment signed by clerk)
42 (dismissal of appeals upon stipulation of parties)

Fed. R. Evid.:
902 (self-authenticating documents)
1001-1004, 1006 (contents of writings, requirement of original, and admissibility of duplicates and other evidence of contents)
1005 (certification of public records)

Service/Notice of Process, Papers, and Court Orders

Fed. R. Bankr. P.:
7005 (applying Fed. R. Civ. P. 5 to adversary proceedings)
8004 (service of notice of appeal)

Fed. R. Civ. P.:
4 (service of summons)
4.1 (service of other process)
5 (service of pleadings and other papers)
77(d) (notice of orders and judgments)

Fed. R. Crim. P.:
4(d) (service of summons upon complaint)
9(c) (service of summons upon indictment or information)
49(a)-(c) (service of papers and orders)

§ 2254 R. 3(b) (service of petition)

§ 2255 R. 3(b) (service of motion)

Fed. R. App. P.:
3(d) (serving notice of appeal as of right—from district courts)
5(a) (service of petitions for discretionary appeals)
13(c) (serving notice of appeal—from tax court)
15(c) (serving petition for review or application for enforcement of agency orders.)
19 (serving proposed judgment when agency order is partially enforced)
21(a)(1) (petitions for extraordinary writs: proof of service on parties; copy for trial judge)
25(b)-(d) (service; manner and proof of service—generally)
27(a) (proof of service of motions)
31 (service of briefs)
36 (copies of opinion or judgment mailed to parties)
41 (proof of service of motion for stay of mandate pending petition for certiorari)
45(c) (notice of orders or judgments).

Types of Papers Filed Electronically

Fed. R. Bankr. P.:
1002-1004 (commencement of case by filing petition; involuntary petitions; partnership petitions)
1007 (lists, schedules, and statements)

Fed. R. Civ. P. 3 (commencement of action by filing complaint)
7 (pleadings, motions)

Fed. R. Crim. P.:
3 (complaint)
4 (arrest warrant or summons upon complaint)
7 (prosecution by indictment or information)
9 (warrant or summons upon indictment or information)
32(b) (pre-sentence investigation report)
41 (search warrant)

§ 2254 R. 3 (petition)

§ 2255 R. 3 (motion)

Fed. R. App. P.:
3, 4 (notice of appeal as of right—district courts)
5 (petitions for discretionary appeals)
6 (appeal in bankruptcy cases)
13 (notice of appeal—Tax Court)
15 (petition for review of agency order)
21 (petition for extraordinary writ)
22 (application for habeas corpus or § 2255 relief; certificate of appealability)
24 (proceedings *in forma pauperis*)
26.1 (corporate disclosure statement0
27 (motions)

Time

Fed. R. Bankr. P.:
8002 (time for filing notice of appeal)
9006 (time generally)

Fed. R. Civ. P. 6 (time generally)

Fed. R. Crim. P. 45(d)-(e) (timing of motions; additional time after mail service)

Fed. R. App. P.:
26 (computation and extension of time)

Fees

Fed. R. App. P. 3(e), 5(d) (filing fee for appeal paid to clerk of court from which appeal is taken)

Fed. R. Bankr. P.:
1006(a) (petition accompanied by filing fee)
8001(a) (filing fee for appeal paid to clerk of the bankruptcy court)

Clerks' Offices

Fed. R. Civ. P. 77(a) (courts are "always open" for the purpose of filing)

Fed. R. App. P. 45(a) (courts are "always open" for the purpose of filing)

Appeals

Fed. R. Bankr. P.:

8001 (manner of taking appeal; voluntary dismissal)
8003 (motion for leave to appeal under 28 U.S.C. § 158(a))
8006 (record and issues on appeal)
8007 (completion and transmission of the record; docketing of the appeal)

Fed. R. App. P.:

3, 4 (notice of appeal as of right)
5 (petitions for discretionary appeal)
6 (appeals for final judgments in bankruptcy cases)
10 (record on appeal)
11(transmission of the record)
12 (docketing the appeal; filing the record)
13 (review of Tax Court decisions)
16 (record on review or enforcement of agency order)
17 (filing of the record on petitions for review/applications for enforcement of agency orders)

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Possible Rule Amendments Concerning Financial Disclosures by Judges**

DATE: **March 26, 1998**

Attached is some correspondence regarding possible amendments to the various procedural rules on the topic of financial disclosure. Although no immediate action is required on this item, it might be worthwhile to begin discussions on the question of whether any of the Criminal Rules should be amended, e.g., Rule 25.

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

ANTHONY J. SCIRICA
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

WILL L. GARWOOD
APPELLATE RULES

ADRIAN G. DUPLANTIER
BANKRUPTCY RULES

PAUL V. NIEMEYER
CIVIL RULES

W. EUGENE DAVIS
CRIMINAL RULES

FERN M. SMITH
EVIDENCE RULES

March 18, 1999

Honorable Rya W. Zobel
Director
Federal Judicial Center
Thurgood Marshall Federal Judiciary Bldg.
One Columbus Circle, N.E.
Washington, D.C. 20002-8003

Dear Judge Zobel:

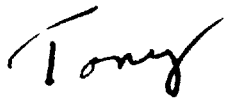
The Committee on Codes of Conduct has asked the rules committees to consider adopting rules similar in nature to Appellate Rule 26.1, which requires parties to disclose certain financial interests to help a judge make a recusal decision.

The rules committees have learned that practices vary widely among the courts on the amount of "financial" information required from parties and on the mechanisms used to obtain this information. Some courts and judges require detailed financial information from the parties, while others require much less information or nothing at all. The courts also use different means to obtain this information. Many judges require parties to complete a financial disclosure form early in the litigation. Other judges have standing orders and a few courts have promulgated local rules of court requiring parties to submit financial disclosure statements.

The Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules are evaluating whether national rules requiring parties to disclose financial interests are necessary, and if so, how detailed the information should be. Accordingly, the rules committees are particularly interested in obtaining data on: (1) the scope of financial information required by courts—including courts of appeals and bankruptcy courts—and judges; and (2) the means used by courts—including courts of appeals and bankruptcy courts—and judges to require parties to submit such information, e.g., local forms, standing orders, local rules, etc. Any other information that the Federal Judicial Center believes would be helpful to the advisory committees on this issue would be welcome. The committees look forward to working with Center staff in developing the survey questionnaires.

We plan to act on this issue at the spring 2000 advisory committee meetings. Under this tentative timetable, the advisory committees would need to review the results of a survey about the first of the year. A status report on the survey's progress would also be helpful at the committees' October-November meetings At your convenience, please advise me whether the Federal Judicial Center would be interested in undertaking this project. I very much appreciate your consideration of this request.

Sincerely yours,



Anthony J. Scirica

cc: Honorable Carol Bagley Amon
Reporters, Advisory Rules Committees
Professor Daniel R. Coquillette
Peter G. McCabe, Secretary
Marilyn J. Holmes

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

November 18, 1998
Via Fax

MEMORANDUM TO JUDGE W. EUGENE DAVIS AND PROFESSOR DAVID A. SCHLUETER

SUBJECT: *Appellate Rule 26.1 and Disclosure of Financial Interests*

For your information, I am attaching excerpts from the minutes of the meeting of the Appellate Rules Committee on the deletion of "affiliates and subsidiaries" from the required list of disclosure items. In short, the committee concluded that these disclosures were unnecessary in most cases. In the compendium of advisory opinions issued by the Committee on Codes of Conduct, it is noted that "a judge who owns stock in a parent corporation must recuse when a subsidiary is a party." But "when a judge, individually or as a fiduciary, owns stock, whether recusal is required when a sister corporation is a party depends upon whether the judge's stock could be substantially affected by the outcome." The Appellate Rules Committee determined that the few occasions on which the disclosure of subsidiaries would be helpful to a judge did not justify the burden.

The amendment to Rule 26.1 had been cleared by and through the Committee on Codes of Conduct before approval.

John K. Rabiej

Attachment

cc: Honorable Anthony J. Scirica (with attach.)
Professor Daniel R. Coquillette (with attach.)

App. Comte. 10/25-27/94

A member of the Advisory Committee indicated that he reads the statutory language as requiring the Judicial Conference to either "modify or abrogate" a circuit rule, once the Conference determines that the rule is inconsistent with federal law. Another member disagreed; that member believes that the statutory language permits the Judicial Conference to abstain from acting. He noted that the Judicial Conference is not a court and that if it abrogates a circuit rule there is no review by the Supreme Court. Because the Judicial Conference is not a court before which parties appear, it is not presented with the sort of in depth research and argument that is typical of the adversary process. He believes that the questions can and should be litigated and in that context the issues can be presented to the Supreme Court.

Professor Coquillette invited the members of the Advisory Committee to write to him with their recommendations for the Standing Committee.

Item 93-5, Rule 26.1

Fed. R. App. P. 26.1 requires a corporate party to file a statement "identifying all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public." At the Committee's April meeting, Mr. Spaniol noted that although the language of Rule 26.1 had been patterned after the Supreme Court Rule, the Supreme Court had recently amended its rule to omit references to "affiliates." As a result of Mr. Spaniol's observation, the Committee determined that it would reconsider the propriety of requiring disclosure of "affiliates."

As a preliminary matter, one of the Committee members asked whether the scope of the rule should be broader; it does not require disclosure of all matters that are cause for recusal under the statute. Some of the circuit rules require disclosure of anyone who has a financial interest in the case. The Reporter indicated that during the process of developing Rule 26.1, the Advisory Committee approved a rather broad draft and circulated it to the circuits. Several circuits had strongly negative reactions to the broad rule. As a result, the Advisory Committee promulgated a rule that requires bare-bones disclosure. The Committee Note indicates that the Advisory Committee realizes that some circuits may wish to require more complete disclosure.

Another member spoke in support of the limited disclosure required by Rule 26.1. It would impose a serious burden to require a party to certify that it has identified all persons who may have a financial interest in the outcome of the case. A corporate party, however, is in a position to know who it controls and by whom it is controlled and it is reasonable to require the party to disclose that information.

Another member spoke in support of an even narrower rule than current Rule 26.1; in his opinion the seventh circuit provision dealing with corporate affiliates is narrower but sufficient. The rule need only require disclosure of corporations that may be adversely affected by a decision in the case. The seventh circuit rule requires a corporate party or amicus to disclose its parent corporation and a list of stockholders which are publicly held companies owning 10% or more of the stock of the party or amicus. That disclosure is appropriate; if a judge owns stock in a parent corporation of the litigant, the judge has an interest in the litigant. The other disclosures required by the current federal rule and many of the circuit rules, however, seem unnecessary. For example, disclosure of subsidiaries may be unnecessary. If the litigant is a part parent of a corporation in which the judge may own stock, the possibility is quite remote that the judge might be biased by the fact that the judge and the litigant are co-owners of a corporation. Similarly, that a judge owns stock in a brother or sister corporation of the litigant is unlikely to create any bias. In short, it may be appropriate to eliminate not only the term affiliate but also the term subsidiaries.

Another member posed a hypothetical that illustrated the possibility of an ethical problem arising from participation of a judge in a case if the judge owns stock in a corporation which is under common control with a party to the case. A judge owns 20% of Joe's Barber Shop; the other 80% is owned by Barber Shops Inc.. Barber Shops Inc. also owns 80% of Mary's Barber Shop. If Mary's Barber Shop is the litigant and is awarded judgment, 80% of that will accrue to the benefit of Barber Shops Inc. Although Barber Shops Inc. does not owe Joe's Barber Shop any of that money, does the fact the Barber Shops Inc. is wealthier effect Joe's Barber Shop and its shareholders (one of whom is the judge in the case)? Does the fact that the judge's co-owner could be richer as the result of the litigation mean that the judge should recuse himself or herself? It might because if Joe's Barber Shop needs cash at some point in the future, Barber Shops Inc. may be in a better position to provide the cash if Mary's Barber Shop is awarded a substantial judgment.

Another member pointed out that what is striking about the hypothetical is that the ownership interests are large and in such cases the judge is likely to be aware of the ownership interests and the disclosure statement would not be necessary to make the judge aware of his or her potential interest. In the typical case the ownership interests of shareholders are minuscule and the impact of a judgment for or against a brother or sister corporation would be negligible upon a judge shareholder.

Another member indicated that the purpose of the rule is to address clear-cut interests. The party's certificate cannot address all possible problems such as persons who are contemplating purchases of interests, etc.

A motion was made and seconded to weave the seventh circuit solution into the rule and to eliminate disclosure of subsidiaries and affiliates. It was pointed out that there may be political reaction to what may be perceived as a narrowing of the disclosure. In response, it was suggested that the Committee Note should explain the change, indicating that a person who owns stock in a subsidiary or an affiliate is not affected by judgment for or against the parent. The publication period provides an opportunity to gauge the public reaction to the proposal.

Specifically the motion was to amend Rule 26.1 to read as follows:

> Any non-governmental corporate party in a civil or bankruptcy case, or agency review proceeding and any non-governmental corporate defendant in a criminal case must file a statement identifying its parent corporation, if any, and a list of stockholders which are publicly held companies owning 10% or more of the stock of the party.

The motion passed by a vote of 6 to 2.

Although the seventh circuit rule requires an amicus that is a corporation to file a similar statement, the Committee decided to treat the amicus question in Rule 29. Specifically, a motion was made to amend draft Rule 29(d) to indicate that "an amicus brief must comply with Rule 32 and, if a non-governmental corporation, file a disclosure statement like that required of a party in Rule 26.1." The motion was seconded and passed unanimously.

Item 93-10. Rule 26.1

At one of the Advisory Committee's recent meetings, the question of the applicability of Rule 26.1 to trade associations was raised. The language of Fed. R. App. P. 26.1 does not address the trade association question. The current rule requires only that a "corporate" party disclose its parent, subsidiaries and affiliates. Under the current rule, a trade association would be required to make disclosure only if it is incorporated and even then it typically would not have anything to disclose; a trade association does not have a parent and the association's members are not subsidiaries or affiliates in the ordinary sense of those words.

Given the decisions just approved under item 93-5, that the only disclosures required are those involving financial interest and, more specifically, only disclosure of parent corporations, the consensus was that no change is needed.

Item 94-1. Rule 26(c)

Fed. R. App. P. 26(c) provides that when the time for action is measured from the date of service and service is accomplished by mailing, three days are

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor David A. Schlueter, Reporter

RE: Rules 11(c)(6) and 41(d) — Proposed Changes

DATE: March 29, 1999

Attached are letters from: (1) Hon. John W. Sedwick (D.C. Alaska) concerning a possible amendment to Rule 11(e)(6) proposing that the court be required to inquire as to whether the defendant is entitled to an adjustment for acceptance of responsibility; and (2) Hon. B. Waugh Crigler (W.D. Virginia) concerning amendment of Rule 41(d) to enlarge the periods within which to serve an search warrant and to modify methods by which a search is conducted.

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

October 23, 1998

Judge John W. Sedwick
United States District Court
222 West 7th Avenue, #32
Anchorage, AK 99513-7591

In re: Fed. R. Cr.P. 11(e)(6)

Dear Judge Sedwick:

Thanks you for your October 16, 1998 letter on Rule 11. The committee meets in April 1999 and we will put it on the agenda for discussion.

Sincerely,

W. Eugene Davis, Chairman
Criminal Rules Committee

cc: Professor David Schlueter
Mr. John Rabiej

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

CHAMBERS OF
JOHN W. SEDWICK
JUDGE

222 W. 7TH AVE., #32
ANCHORAGE, AK 99513-7591

October 16, 1998

Hon. W. Eugene Davis
Chair, Advisory Committee on Criminal Rules
Suite 300
556 Jefferson Street
Lafayette, LA 70501-6945

Re: Fed. R. Cr. P. 11(e)(6)

Dear Judge Davis:

Recently it has come to my attention that there may be a less than satisfactory fit between the prohibition on consideration of plea discussions in Fed. R. Cr. P. 11(e)(6) and the inquiry that may sometimes be necessary to determine whether a criminal defendant is entitled to a downward adjustment for acceptance of responsibility pursuant to U.S.S.C. Guideline § 3E1.1. Let me explain.

As you know, a defendant who proceeds to trial is not ordinarily entitled to an adjustment under Guideline § 3E1.1. As you also know, a defendant who admits the factual elements of the charge and goes to trial solely to preserve an issue for appeal, such as the constitutionality of the law under which he is prosecuted, may qualify for the adjustment. The problem created by Rule 11(e)(6) arises when a defendant asserts entitlement to the § 3E1.1 adjustment on the grounds he only went to trial to preserve an issue on appeal, and the government responds by saying defendant was offered a conditional plea of guilty which would have spared trial but preserved the issue for appeal. A literal reading and application of Rule 11(e)(6) forecloses consideration of the government's opposition, but risks rewarding a defendant whose only real motivation to go to trial is to "roll the dice" with an adjustment for acceptance of responsibility. Admittedly, this is likely to be a real issue only in rare cases where the defendant admitted the elements of the crime and still proceeded to trial. However, there are such cases; I just tried one, and the issue discussed here arose at sentencing.

One solution would be to add a third exception to the prohibition in the text of the Rule as follows:

> (iii) at sentencing where necessary to determine whether a defendant is entitled to an adjustment for acceptance of responsibility.

I recommend that your committee consider this issue. Thank you for your attention to this matter.

Very truly yours,

John W. Sedwick
United States District Judge

JWS:gmm

cc: Hon. Richard P. Conaboy
Chair, U.S. Sentencing Commission
Joe Bottini, Esq.
Kevin McCoy, Esq.

FRCr.P. 41

November 24, 1998

Honorable B. Waugh Grigler
United States Magistrate Judge
255 West Main Street
Charlottesville, Virginia 22901

Dear Waugh:

Thanks for sending us an interesting problem. By copy of this letter to David Schlueter and John Rabiej I ask that they put this on our agenda for April.

We all miss you and look forward to seeing you soon.

Sincerely,

W. Eugene Davis

cc: Professor David Schlueter
Mr. John J. Rabiej

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
Room 328
255 WEST MAIN STREET
CHARLOTTESVILLE, VIRGINIA 22901

PHONE 804-296-7779

B. WAUGH CRIGLER
U S. MAGISTRATE JUDGE

November 16, 1998

Hon. W. Eugene Davis
United States Court of Appeals
For the Fifth Circuit
Suite 300
556 Jefferson Street
Lafayette, La. 70501-6945

Re: Fed. R. Cr. P. 41

Dear Judge Davis:

I can't tell you and the other members of the Advisory Committee how much I miss your company and the work I did while a member of the Committee. I am grateful, however, that circumstances have dealt me an issue that I can present for your consideration.

Just this Fall, the EPA and the local U. S. Attorney came before me for a covert entry search warrant to seize water samples from a company suspected of illegally discharging contaminated water and falsifying discharge records. There is no question that probable cause was stated, so I will not dwell on those facts. The facts important to this discussion relate to how the search would be conducted and the manner in which the requirements of Rule 41(d) would be either met or modified.

The government wished to make the covert entry by running a sampling device through the public portion of the sewer line into the company's discharge line, far enough up the discharge line that there would be no question of contamination from other sources. It sought to conduct the search over a 30 day period and further asked the court to delay delivery of the warrant and inventory to the target of the search until a time when both the test results on the samples were back and the company had filed its official report of discharge with the EPA's designee. The reason for the request in extending the period of the search beyond 10 days was that it would take that long to obtain enough representative samples to be sure of the types of discharges that were being emitted, and the government did not wish to tip off the company before it filed its monthly report with the EPA.

Authority for the government's requests was offered in cases predating the wiretap statute and upon other cases among the circuits relating to covert video and mail surveillance. *See, e.g. Berger v. New York*, 388 U.S. 41 (1967), *U.S. v. Koyomejian*, 946 F.2d 1450 (9th Cir.

1990); *U.S. v. Villigas*, 899 F.2d 1324 (2d Cir. 1990); *U.S. v. Heatley*, 1998 WL 691201 (S.D. N.Y. 1998). It was with a great deal of trepidation that I issued the warrant, but I did not entirely accede to the government's request to allow the covert search to occur continuously over a 30 day period. Under a separate order, I required that the search take place within the 10 day limit fixed by Rule 41, thus forcing the government to reapply for a new warrant every 10 days during the 30 day target period upon a fresh statement of probable cause. Moreover, the order instructed that the person executing the warrant refrain from delivering a copy thereof and the inventory to the target of the search, instead delivering it in a sealed envelope to the court at the same time the return of search was made to me. The copy of the warrant and the inventory then was to be delivered to the target on a date certain which was after the test results were known and after the date the company would file its version of the water quality report with the EPA's designee.

Now, the problem for me is that Rule 41(d) simply does not, nor could it be expected to keep up with rapidly changing technology, particularly such things as effluent discharge testing that utilizes sophisticated equipment and takes a period of time to execute under the statute and regulations. Yet it may be time to consider whether the Rule should be brought at least out of the early 20th century and into the current age. The Rule could be modified to grant discretion, along the lines of the decisional authorities cited, to the issuing judge to enlarge the search period and the method of return under circumstances that may necessitate those modifications. We should be careful to remember that the purpose of Rule 41 is to place the court as a buffer between the unfettered conduct of the government and the rights of its citizens, even those who are suspected of violating the law, a buffer that is even more real today than the grand jury process. Simply by giving the court the power to enlarge periods in which to serve the warrant, or the power to modify methods by which the search is conducted and the return made, does not constitute an abdication of the court's Rule 41 functions. Instead, such a grant of authority confirms the court's supervisory role over search warrants and gives court-wide recognition to accepted, though diverse and *ad hoc,* practices now recognized among the circuits.

The other avenue, of course, is to have Congress deal with these sorts of things just like it did with wiretapping in the Omnibus Crime Control and Safe Streets Act of 1968. (Of course we know that the streets did not become safer after 1968, but the process for obtaining these types of covert entries did become uniform and better subject to court review.) However, before I would even consider passing such to the appropriate congressional folks, I would like to know whether this is something the Committee thinks is worthy of consideration.

Again, I send greetings to you and the Advisory Committee, and await your reply.

Sincerely,

B. Waugh Crigler

cc: Hon. Alicemarie H. Stotler

Hon. William R. Wilson, Jr.

II-F&G

LEGISLATION AFFECTING
THE FEDERAL RULES OF PRACTICE AND PROCEDURE
106th Congress

SENATE BILLS

S. 32 *No title*

- Introduced by: Thurmond
- Date Introduced: 1/19/99
- Status: Referred to the Committee on Judiciary
- Provisions affecting rules
  - Rule 31(a) of the Federal Rules of Criminal Procedure is amended by striking "unanimous" and inserting "by five-sixths of the jury."

S. 159 *No title*

- Introduced by: Moynihan
- Date Introduced: 1/19/99
- Status: Referred to the Committee on Judiciary; 3/24/99 Referred to Subcommittee on Oversight and Courts.
- Provisions affecting rules
  - Increases juror fees from $40 to $45.

S. 248 Judicial Improvement Act of 1999

- Introduced by: Hatch (5 co-sponsors)
- Date Introduced: 1/19/99
- Status: Referred to the Committee on Judiciary; 3/24/99 Referred to Subcommittee on Oversight and Courts
- Provisions affecting rules
  - Sec. 4. Would amend Section 1292(b) of title 28, and allow for interlocutory appeals of court orders relating to class actions;
  - Sec. 5. Creates original federal jurisdiction based upon minimal diversity in certain single accident cases; and
  - Sec. 10. Clarifies sunset of civil justice expense and delay reduction plans.

S. 250 Federal Prosecutor Ethics Act

- Introduced by: Hatch (2 co-sponsors)
- Date Introduced: 1/19/99
- Status: Referred to the Committee on Judiciary
- Provisions affecting rules
  - Sec. 2 authorizes Attorney General to establish special ethical standards governing federal prosecutors in certain situations. Those standards would override state standards.

S.353 Class Action Fairness Act of 1999

- Introduced by: Grassley (2 co-sponsors)
- Date Introduced: February 3, 1999
- Status: Referred to the Committee on Judiciary
- Provisions affecting rules:
  - Sec. 2. Provides for notification of the Attorney General & state attorney generals;
  - Sec. 2. Limits on attorney fees
  - Sec. 3. Minimal diversity requirements;
  - Sec. 4. Allows for removal of class actions to federal court; and
  - Sec. 5. Removes judicial discretion from Civil Rule 11(c).

S. 625 *Bankruptcy Reform Act of 1999*

- Introduced by: Grassley (5 co-sponsors)
- Date Introduced: March 16, 1999
- Status: Referred to the Committee on Judiciary; Letter sent by Director to Hatch 3/23/99
- Provisions affecting rules:
  - Section 702 requires clerks of court to maintain a register of all governmental units to ensure that the appropriate government office receives adequate notice of bankruptcy filings.
  - Sections 102, 319, and 425 would authorize or mandate the initiation of the rulemaking process with respect to separate proposals for rule changes.

S. 721 Media coverage -

S. 755 Ethical standards -

S. 758 Asbestos -

HOUSE BILLS

H.R . 461 Prisoners Frivolous Lawsuit Prevention Act of 1999

- Introduced by: Gallegly (14 co-sponsors)
- Date Introduced: February 2, 1999
- Status: Referred to the Committee on Judiciary; 2/25/ 99 Referred to the Subcommittee on Courts and Intellectual Property.
- Provisions affecting rules:
  - Sec. 2 would amend Civil Rule 11 creating special sanction rules for prisoner litigation.

H.R . 522 Parent-Child Privilege Act of 1999

- Introduced by: Andrews (co-sponsors)
- Date Introduced: February 3, 1999

- Status: Referred to the Committee on Judiciary; 2/25/99 Referred to the Subcommittee on Courts and Intellectual Property.
- Provisions affecting rules:
  - Sec. 2 would create new rule 502 of the Rules of evidence providing for a parent/child privilege.

H.R. 771 No title

- Introduced by: Coble (10 co-sponsors)
- Date Introduced: February 23, 1999
- Status: Referred to the Committee on Judiciary; 3/11/99 Forwarded by Subcommittee to Full Committee; Letter to Hyde 3/22/99
- Provisions affecting rules:
  - Amends rule 30 of the Federal Rules of Civil Procedure to require that depositions be recorded by stenographic or stenomask means unless the court upon motion orders, or the parties stipulate in writing, to the contrary.

H.R. 833 Bankruptcy Reform Act of 1999

- Introduced by: Gekas (92 co-sponsors)
- Date Introduced: February 24, 1999
- Status: Referred to the Committee on Judiciary; Forwarded by Subcommittee to Full Committee in the Nature of a Substitute by the Yeas and Nays: 5 - 3; letter sent by Director to Hyde on 3/23/99.
- Provisions affecting rules:
  - Section 802 require clerks of court to maintain a register of all governmental units to ensure that the appropriate government office receives adequate notice of bankruptcy filings.
  - Sections 102, 403, 607, and 816(e) would authorize or mandate the initiation of the rulemaking process with respect to separate proposals for rule changes.

HR 1281 Media coverage - No info on thomas

HR 1283 Asbestos - No info thomas

JOINT RESOLUTIONS

S. J. RES. 3; *A joint resolution proposing an amendment to the Constitution of the United States to protect the rights of crime victims.*

- Introduced by: Kyl (30 Co-sponsors)
- Date Introduced: 1/19/99
- Status: Referred to the Committee on Judiciary; 3/23/99 Referred to Subcommittee on Constitution, Federalism, Property; 3/24/99 Committee on Judiciary. Hearings held.
- Provisions affecting rules
  - Calls for a Constitutional Amendments enumerating victim's rights.

- Status: Referred to the Committee on Judiciary; 2/25/99 Referred to the Subcommittee on Courts and Intellectual Property.
- Provisions affecting rules:
  - Sec. 2 would create new rule 502 of the Rules of evidence providing for a parent/child privilege.

H.R. 771 No title

- Introduced by: Coble (10 co-sponsors)
- Date Introduced: February 23, 1999
- Status: Referred to the Committee on Judiciary; 3/11/99 Forwarded by Subcommittee to Full Committee; Letter to Hyde 3/22/99
- Provisions affecting rules:
  - Amends rule 30 of the Federal Rules of Civil Procedure to require that depositions be recorded by stenographic or stenomask means unless the court upon motion orders, or the parties stipulate in writing, to the contrary.

H.R. 833 Bankruptcy Reform Act of 1999

- Introduced by: Gekas (92 co-sponsors)
- Date Introduced: February 24, 1999
- Status: Referred to the Committee on Judiciary; Forwarded by Subcommittee to Full Committee in the Nature of a Substitute by the Yeas and Nays: 5 - 3; letter sent by Director to Hyde on 3/23/99.
- Provisions affecting rules:
  - Section 802 require clerks of court to maintain a register of all governmental units to ensure that the appropriate government office receives adequate notice of bankruptcy filings.
  - Sections 102, 403, 607, and 816(e) would authorize or mandate the initiation of the rulemaking process with respect to separate proposals for rule changes.

HR 1281 Media coverage

HR 1283 Asbestos

JOINT RESOLUTIONS

S. J. RES. 3; *A joint resolution proposing an amendment to the Constitution of the United States to protect the rights of crime victims.*

- Introduced by: Kyl (30 Co-sponsors)
- Date Introduced: 1/19/99
- Status: Referred to the Committee on Judiciary; 3/23/99 Referred to Subcommittee on Constitution, Federalism, Property; 3/24/99 Committee on Judiciary. Hearings held.
- Provisions affecting rules
  - Calls for a Constitutional Amendments enumerating victim's rights.