ADVISORY COMMITTEE
ON
CRIMINAL RULES

Cape Elizabeth, Maine
September 26-27, 2002

CRIMINAL RULES COMMITTEE MEETING

September 26 and 27, 2002
Cape Elizabeth, Maine

I PRELIMINARY MATTERS

A. Remarks, Introductions, and Administrative Announcements by the Chair.

B. Review/Approval of Minutes of April 2002, Meeting in Washington, D.C.

C. Status of Criminal Rules: Report of Rules Committee Support Office.

II. CRIMINAL RULES UNDER CONSIDERATION

A. Rules Pending Before Congress

1. Style Changes to Rules Approved by Judicial Conference in Fall 2001.

2. Substantive Amendments to Rules Approved by Judicial Conference in Fall 2001

   a. Rule 5. Initial Appearances. Proposed Amendment Regarding Video Teleconferencing of Initial Appearance.

   b. Rule 10. Arraignment. Proposed Amendment Regarding Video Teleconferencing of Arraignment.

   c. Rule 12.2. Notice of Insanity Defense; Mental Examination. Proposed Amendment Regarding Notice of Insanity Defense, etc.

   d. Rule 12.4. Disclosure Statement. Proposed New Rule.

   e. Rule 26. Taking Testimony. Proposed Amendment Regarding Taking of Testimony by Remote Transmission (Proposed Rule 26(b), rejected by Supreme Court).

f. Rule 30. Jury Instructions. Proposed Amendment Regarding Timing of Submission of Jury Instructions.

g. Rule 32. Sentence and Judgment. Proposed Amendment Regarding Requirement that Court Rule on Unresolved Objections to Material Matters.

h. Rule 35. Correcting or Reducing a Sentence. Proposed Amendments to Rule 35(b) Regarding Motions to Reduce Sentence for Substantial Assistance.

3. Other Substantive Amendments Pending Before Congress.

a. Rule 6. Amendments by USA PATRIOT ACT.

b. Rule 41. Amendments by USA PATRIOT ACT.

B. Proposed Amendments Published for Public Comment.

1. Rule 41. Search Warrants.

2. Rules Governing § 2254 and § 2255 Proceedings.

3. Consideration of Official Forms Accompanying Rules Governing § 2254 and § 2255 Proceedings.

C. Other Proposed Amendments to Rules

1. Rule 12.2. Notice of Insanity Defense; Mental Examination. Proposed amendment regarding sanction for defense failure to disclose information (Memo).

2. Rules 29, 33 and 34; Proposed Amendments re Rulings by Court (Memo).

3. Rule 32, Sentencing; Proposed amendment re allocution Rights of Victims of Economic Crimes (Memo).

4 Rule 32.1. Revoking or Modifying Probation or Supervised Release. Proposed amendment to rule concerning defendant's right of allocution (Memo)

5. Rule 35. Correcting or Reducing a Sentence (Memo); Proposed Amendment regarding definition of "sentencing."

6. Proposed New Rule Concerning Rulings by Magistrate Judges as Counterpart to Rule of Civil Procedure 72; Magistrate Judges Taking Guilty Pleas (Memo).

III. RULES AND PROJECTS PENDING BEFORE CONGRESS, STANDING COMMITTEE, JUDICIAL CONFERENCE, AND OTHER ADVISORY COMMITTEES.

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

B. Other Matters

IV. DESIGNATION OF TIMES AND PLACES FOR FUTURE MEETINGS

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August 26, 2002
Projects

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

April 25-26, 2002
Washington, D.C.

The Advisory Committee on the Federal Rules of Criminal Procedure met at Washington, D.C. on April 25 and 26, 2002. These minutes reflect the discussion and actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Carnes, Chair of the Committee, called the meeting to order at 8:30 a.m. on Thursday, April 25, 2002. The following persons were present for all or a part of the Committee's meeting:

Hon. Edward E. Carnes, Chair
Hon. John M. Roll
Hon. Susan C. Bucklew
Hon. Paul L. Friedman
Hon. David G. Trager
Hon. Harvey Bartle III
Hon. Tommy E. Miller
Hon. Reta M. Strubhar
Prof. Nancy J. King
Mr. Robert B. Fiske, Esq.
Mr. Donald J. Goldberg, Esq.
Mr. Lucien B. Campbell
Mr. John P. Elwood, designate of the Asst. Attorney General for the Criminal Division, Department of Justice
Prof. David A. Schlueter, Reporter

Also present at the meeting were: Hon. A. Wallace Tashima, member of the Standing Committee and liaison to the Criminal Rules Committee; Hon. Roger Pauley of the Board of Immigration Appeals; Prof. Kate Stith, former member of the Committee; Mr. Peter McCabe, Ms. Nancy Miller, and Mr. James Ishida of the Administrative Office of the United States Courts, Mr. John Rabiej Chief of the Rules Committee Support Office of the Administrative Office of the United States Courts; Mr. Joseph Spaniol, consultant to the Standing Committee; Ms. Laurel Hooper, of the Federal Judicial Center; and Mr. Christopher Jennings, briefing attorney for Judge Scirica.

Judge Carnes, the Chair, welcomed the attendees and noted the presence of new members of the Committee, Judge Bartle and Professor King. He also recognized the contributions and dedicated service of the outgoing members of the Committee, Judge Davis and Professor Stith. He also recognized the long years of service of Hon. Roger Pauley, who had represented the Department of Justice at the Committee meetings for many years, before accepting an appointment to the Board of Immigration Appeals.

II. APPROVAL OF MINUTES

Judge Miller moved that the minutes of the Committee's meeting in San Diego, California in October 2000 be approved. The motion was seconded by Judge Bucklew and following minor corrections to the Minutes, carried by a unanimous vote.

III. RULES PENDING BEFORE THE SUPREME COURT

Professor Schlueter informed the Committee that the package of Style amendments to Rules 1-60, the proposed substantive amendments to Rules 5, 10, 12.2, 12.4, 26, 30, and 35; and the more recent proposed amendments to Rules 6 and 41, were pending before the Supreme Court.

IV. RULES PUBLISHED FOR PUBLIC COMMENT: RULE 35.

The Reporter informed the Committee that seven written comments had been received on the proposed amendment to Rule 35. He briefly reviewed the history of the pending amendment to the effect that although the restyled Rule 35 was in the process of being approved by the Supreme Court, the Advisory Committee believed it important to move forward with another amendment to Rule 35 that would more clearly spell out the starting point for the 7-day period for correcting a clear error in the sentence. Thus, the proposed new Rule 35(a) includes a definition of "sentencing"--only for purposes of Rule 35. He continued by reporting that the written comment were mixed. The Department of Justice, the Federal Bar Association, the Committee on the U.S. Courts of the State Bar of Michigan, and the NACDL opposed the amendment. On the other hand, the State Bar of California Committee on Federal Courts, the Federal Magistrate Judges Assn., and Judge David Lawson endorsed the amendment.

The Reporter further noted that the public comments opposing the amendment cited concerns about interjecting more uncertainty into the area, leaving open the possibility of the court changing the sentence, and adopting the minority, rather than majority view of the circuit courts that have addressed the issue. At least one commentator noted that the rule as proposed creates a special definition for "sentencing" that normally does not apply to other rules, such as Rule 32 itself. He also reported that those commentators endorsing the amendment believed that it would clarify an ambiguity in the rule and make it more consistent with Appellate Rule 4.

The Reporter pointed out that, as reflected in the comment submitted by the Department of Justice, the Circuits are split on the question of what the term "sentencing" means in relation to the 7-day rule in Rule 35. The majority view (six circuits) is that the 7-day period is triggered by the oral pronouncement of the sentence. The minority view (one circuit), and the one adopted in the proposed amendment, is that the period commences with the entry of the judgment. He noted that the Committee had opted for the latter position in order to make the rule more consistent with Appellate Rule 4 and any other rules that might specify when the right to appeal is triggered.

Mr. Campbell indicated that he favored a change to the proposed amendment that would substitute the words "entry of judgment" in place "sentencing" throughout the rule. That option, he stated, would avoid the necessity of a separate definitional provision in the Rule. Mr. Elwood stated that the Department of Justice was opposed to the proposed amendment because it interjects yet another delay in the finality of the sentence for purposes of triggering the Rule 35 provisions. He noted that he favored substituting the words "oral announcement" or "oral pronouncement" of the sentence as the preferred language in place of entry of the judgment, which might not actually take place until weeks or perhaps months after the court announces the sentence.

Judges Bucklew and Roll, and Mr. Goldberg indicated that in their experience the entry of judgment generally follows the oral announcement of sentence within a short period of time.

Following additional discussion on whether to use the term "oral announcement" or "oral pronouncement," Mr. Campbell moved that the proposed amendment be changed to the effect that the proposed definitional provision in Rule 35(a) be dropped and that the term "entry of judgment" be used throughout the rule. Mr. Goldberg seconded the motion, which failed by a vote of 4 to 6.

Judge Roll moved that the amendment be revised by dropping the definitional provision in proposed Rule 35(a), and the term "oral announcement" be used throughout the rule and that the rule be forwarded to the Standing Committee for action. Judge Bucklew seconded the motion. Following additional brief discussion, the Committee approved the motion by a vote of 6 to 4. The Reporter responded that he would make the necessary changes in the Rule and the Committee Note and circulate the draft for the Committee's consideration.

V. PENDING PROPOSED AMENDMENTS TO RULES

A. Rule 41. Tracking Device Warrants

Judge Miller, as chair of the Rule 41 Subcommittee, reported that the Subcommittee had agreed on a number of proposed changes to Rule 41 that would

address first, the issue of tracking-device warrants and second, delayed notification that a search warrant has been executed.

He provided a brief overview of the proposed changes, noting that the Department of Justice had raised the issue of tracking-device warrants in 1998 and that as a result of that proposal, he had polled magistrate judges on how they were handling those types of searches, in the absence of any guidance in Rule 41 itself. The response indicated that the practice varied throughout the districts. Any proposals to address the issue, however, were held pending the restyling project. He further noted that the issue of delayed notification that warrants had been executed had been addressed in Section 213 of the USA PATRIOT Act and that some amendment to Rule 41 would be appropriate.

Judge Miller reported that the Rule 41 Subcommittee had considered a number of issues in relation to the USA PATRIOT Act. First, it had considered whether Section 209 of the Act, which addresses the ability of the government to access unopened voicemail messages should be addressed in Rule 41. He reported that the Subcommittee recommended that the topic not be included. Second, the Subcommittee had decided not to address Section 216 of the Act, which concerns government's ability to capture certain addressing information from electronic facilities. He noted that such orders were not search warrants covered by Rule 41. And third, the Subcommittee decided not to address Section 220 of the Act, which addresses nationwide service of search warrants for electronic evidence. He noted that the section has a sunset provision of December 31, 2005.

The Committee concurred in the Subcommittee's recommendations not to amend Rule 41 to account for those three new statutory provisions.

Judge Miller also reported that Judge D. Brock Hornby (Chief Judge, D. Maine) had recommended that Rule 41 be amended to permit law enforcement officers to return executed search warrants to the clerk of the court, and not necessarily the issuing judge or magistrate. Judge Miller noted that the issue had been addressed during the restyling project and that the Committee had determined that it was preferable to have the returns made to the magistrate judge designated in the warrant. He also noted that the sense of the Subcommittee was that it would be better to maintain judicial monitoring of the warrants and that requiring the warrant to be returned to a judicial officer would further that interest. Judge Bartle spoke in favor of the proposed change, noting that in practice, warrants are returned to the clerk of the court and not to the issuing magistrate. Following additional discussion by the Committee, it voted 8 to 1 to reject the proposal to amend Rule 41 by requiring the return to be made to the clerk.

Turning to the Subcommittee's proposed amendments to Rule 41, Judge Miller noted that the Subcommittee had proposed that two new definitions for "domestic terrorism," "international terrorism," and "tracking device" be added to Rule 41(a)(2). He also pointed out the proposed language in revised Rule 41(b)(4) that would explicitly address the authority of a magistrate judge to issue a tracking device warrant. He noted

that the proposed amendment would authorize only magistrate judges, and not state judicial authorities, to issue tracking-device warrants. He noted that the Subcommittee believed that because such warrants often include monitoring across state and district lines, it would be preferable to vest that authority in federal judicial officers. Following additional brief discussion, the Committee voted 8 to 0 to adopt the proposed changes.

Professor Stith raised the question whether amendments to Rule 41 concerning tracking-device warrants might supersede other types of searches. The Committee generally agreed that amending Rule 41 would not preclude the development or recognition of others types of searches, not otherwise addressed in Rule 41. Several members noted that the traditional caselaw view is that Rule 41 is not intended to provide an exhaustive list of permissible search warrants.

Judge Miller noted that Subcommittee had decided to amend Rule 41(e)(2) into two main subdivisions, (e)(2)(A), which deals with contents of regular search warrants, and (e)(2)(B), which addresses the contents of tracking-device warrants. The Subcommittee used similar parallel construction in Rule 41(f), concerning executing and returning the warrant. Judge Miller informed the Committee that the Subcommittee had considered several possible alternatives for specifying the length of time a tracking-device warrant might be used and that it had settled on 45 days. Mr. Elwood responded that the Department of Justice would favor using time limits similar to those used in Title III wiretaps. Mr. Fiske agreed with that view. Other members, however, expressed reservations about including the Title III deadlines in Rule 41 and noted that the 45-day limit should normally provide ample time for authorities to install and monitor tracking devices. In addition, the proposed rule permitted officers to seek additional time periods. The Committee rejected the proposal to adopt the Title III time limits, instead of the Subcommittee's 45-day provision, by a vote of 2 to 7.

Discussion on the time limits continued with focus on the 10-day period for installing tracking devices in Rule 41(e)(2)(B)(i). Following additional discussion, the Committee voted 11-0 to amend the proposed rule to provide for 10 calendar days for installation, which would provide ample time for installation.

Several members raised the question whether in light of the time requirements, AO Form 93 was still correct. Mr. MaCabe indicated that those forms are the responsibility of the Director of the Administrative Office and they could be conformed to meet the Rule's requirements.

Judge Miller continued by pointing out that the Subcommittee had suggested a major revision of Rule 41(f) to accommodate the differences in regular warrants and warrants for tracking devices. Following discussion, the Committee agreed to provide in Rule 41(e)(2)(A) that the officer executing the warrant should be required to note on tracking-device warrants the date the device was installed, and the periods during which the device was used. The Committee also agreed to the Subcommittee's proposed

amendments for serving a tracking device warrant on the person who was tracked or whose property was tracked.

Finally, Judge Miller pointed out that the Subcommittee had recommended that Rule 41(f)(3) be added to the rule. That provision, which is co-extensive with Section 213 of the USA PATRIOT Act, permits a judge (including a state judicial officer) to grant a delay for any provision in Rule 41. The Committee discussed the question of whether that provision would extend only to the "sneak and peek" searches. There was general agreement that it was not so limited.

In that regard, Mr. Pauley urged the Committee to reconsider its decision not include amendments to Rule 41 that would provide explicitly for covert, or sneak and peek, searches. He pointed out that there was caselaw supporting such searches. Judge Miller responded that following the comment period for a proposed amendment in 2001 that would have addressed such searches, the Subcommittee had decided not to address that topic, given the great difficulty in addressing the variety of questions and objections to any attempt to include coverage of those searches in Rule 41. The Subcommittee had decided to recommend that the issue be left with any developing caselaw.

Following additional discussion on proposed changes to the proposed Committee Note, Judge Miller moved that the proposed amendments to Rule 41 be approved and forwarded to the Standing Committee with a recommendation that they be published for public comment. Judge Bucklew seconded the motion, which carried by a vote of 12-0.

B. Rules Governing § 2254 and § 2255 Proceedings

1. Consideration of Substantive Issues

Judge Trager, chair of the Habeas Rules Subcommittee, reported that the Subcommittee had considered style and substantive amendments to the Rules Governing § 2254 and § 2255 Proceedings. He began the discussion by noting that the Subcommittee had considered several substantive issues that might change current practice. First, he noted that the Subcommittee had addressed the issue of handling defective petitions or motions. He pointed out that before the Antiterrorism and Effective Death Penalty Act of 1996, defective petitions and motions were rejected and returned to the petitioner or moving party. That Act, however, created a one-year statute of limitations and thus if a court rejects a petition or motion because it does not conform to the rules, may penalize the person. Thus, the Subcommittee proposed eliminating Rule 2(e) of the § 2254 rules and Rule 2(d) of the § 2255 rules, and including a new provision in Rule 3 of each of those rules that would parallel Rule 5 of the Federal Rules of Civil Procedure and require the clerk to file such papers, even if they were in some way defective. If the papers are defective, the Subcommittee envisioned that the court would direct the petitioner or moving party to correct the deficiencies.

The Committee agreed with the Subcommittee's recommendations concerning Rule 2.

Second, Judge Trager stated that the Subcommittee had discussed whether Rule 9(a) of both the § 2254 and § 2255 rules was still necessary; that rule, he explained, addressed the issue of delayed petitions and motions. He noted that it was the view of some members that that rule no longer has any viability in light of the one-year statute of limitations. Judge Miller stated that the original position of the Subcommittee (in 1998) that the provisions might still have some utility for any petitions still pending in the state court systems. Following additional discussion, Judge Bartle moved that Rule 9(a) be deleted. Judge Miller seconded the motion, which carried by a vote of 10-0, with one abstention.

Third, Judge Trager noted that the Subcommittee had discussed whether Rule 5 of the rules should include a specific reference for replies from the petitioner or moving party to the government's response. He noted that in some districts, the court permits the petitioner or moving party to file a reply, particularly in those cases where they may have a response to the government's claim that a statute of limitations or exhaustion of remedies claim bars the petition or motion. To address that issue, he noted that the Subcommittee had proposed the addition of new Rule 5(e). Judge Bucklew observed that this would certainly be a substantive change to the rules, but noted that the petitioner and moving party should be provided with that opportunity. Following additional discussion, Judge Trager moved that new Rule 5(e), which addressed replies from petitioners and moving parties, be added to Rule 5. Judge Bartle seconded the motion, which carried by a vote of 12-0.

Fourth, Judge Trager informed the Committee that the Subcommittee had discussed the issue of what information, regarding exhaustion of remedies, etc., should be required on the habeas forms and what information should be explicitly required by the rules themselves. Judge Trager moved that the requested information should be placed on the forms, and not in the rules. Judge Miller seconded the motion, which carried by a vote of 11-0.

Fifth, Judge Trager noted that the Subcommittee had considered whether to reference specifically § 2241 petitions in the rules and that it had decided not to do so.

Finally, he informed the Committee that the Subcommittee had considered whether to attempt to blend the two sets of rules into one combined set of rules. Judge Miller had attempted to do so and concluded that doing so would not be feasible, given the differences in the rules and key terminology.

The Committee generally concurred in those proposals.

2. Consideration of Proposed Style Changes to Rules

Judge Trager informed the Committee that Professor Kimble and Mr. Spaniol had prepared the initial "style" draft of the rules, which had in turn had been assigned to individual members of the Subcommittee. The Committee considered each rule for § 2254 and § 2255 Proceedings in tandem. (The titles of the Rules in these minutes are as they appear currently).

Rule 1. Scope of Rules. Judge Miller informed the Committee that the Subcommittee had made several style changes to Rule 1 for both sets of Rules. The Committee approved the changes.

Rule 2. Petition (Motion). Judge Miller pointed out the style changes to Rule 2 for both sets of Rules. As previously discussed, the Committee deleted Rule 2(e) in the § 2254 Rules and Rule 2(d) in the § 2255 Rules, dealing with the court's return of an insufficient petition or motion. The Committee also deleted the language in current Rule 2(c), which requires the petitioner or moving party to specify all grounds for possible relief, including those that should have been known or reasonably known by the petitioner or moving party; members of the Committee believed that this language was probably unnecessary in light of the AEDPA. The Committee also modified the language in the rule that currently requires that the papers be signed personally by the petitioner or moving party under penalty of perjury; the Committee recognized that § 2242 permits someone representing the petitioner or moving party to sign the document. Following discussion, the Committee approved the proposed changes by a vote of 12-0.

Rule 3. Filing Petition. Judge Miller pointed out that the Subcommittee had proposed that the Committee include a new provision in Rule 3(b) that would require the clerk to accept an otherwise insufficient petition or motion and that it use language similar to that found in Federal Rule of Civil Procedure 5. He also pointed out that the Subcommittee had recommended adding a new Rule 3(c), that would call attention to the one-year statute of limitations; in the § 2254 Rules the cite is to § 2244(d) and in the § 2255 Rules the reference is to § 2255, para. 6. The Committee also discussed a new provision, Rule 3(d) that spells out when a paper filed by an inmate, using an institution's internal mailing system, is considered to have been filed. Following additional discussion on the proposed changes to Rule 3, the Committee approved them.

Rule 4. Preliminary Consideration by Judge. Professor King explained the Subcommittee's proposed changes to Rule 4. During the discussion, the Committee agreed to change the Rule to require that the court "serve" the petition or motion on the appropriate parties in § 2254 proceedings, rather than requiring in all cases that certified mail be used to accomplish the delivery of those documents. Judge Bartle also pointed out that the rule currently requires that the petition in § 2254 proceedings be served on the Attorney General of the State, when the actual practice in some states might be to serve some other official. The Committee changed the proposed amendment to permit service on the Attorney General, or another appropriate state officer. The Committee

discussed whether to retain word "promptly" and ultimately decided to leave it in the Rule.

Rule 5. Answer; Contents. Professor King pointed out the Subcommittee's proposed style amendments to Rule 5. The Committee approved changes to Rule 5 for § 2254 proceedings that would require the respondent to supply the court with copies of any briefs it had submitted to an appellate court, and any opinions and dispositive orders from that appellate court.

Rule 6. Discovery. Professor King explained the minor style changes proposed by the Subcommittee; the Committee approved the changes.

Rule 7. Expansion of Record. Mr. Elwood pointed out the Subcommittee's minor style changes to the rule, which included moving the text of Rule 7(d) to revised Rule 7(a). The Committee approved the changes.

Rule 8. Evidentiary Hearing. Mr. Elwood explained the Subcommittee's proposed style changes to Rule 8, including substitution of the word "serve" in place of "certified mail."

Rule 9. Delayed or Successive Petitions (Motions). Mr. Campbell explained the proposed style changes to Rule 9. In particular he pointed out that the proposed revised rule specifically referenced the need to obtain approval from the appropriate court of appeals, a requirement imposed by the AEDPA. Judges Carnes and Trager raised the question about including a provision in Rule 9 to address the situation where a court recharacterizes a post-trial filing as a § 2255 motion, with or without notice to the moving party. Judge Carnes noted that several cases require the court to first notify the moving party that such recharacterization may prevent further filings which would become successive motions. Professor King suggested that if an amendment was in order, perhaps it should go in Rule 1. Several members raised the question about the content of such warnings or advice; eventually a consensus emerged that the issue should be left, for now, to further caselaw developments. Mr. Campbell raised the question whether the rule should address the situation where only a portion of the petition or motion could be dismissed on grounds that the petitioner or moving party had not exhausted all claims. The Committee decided not to include language about that issue.

Rule 10. Powers of Magistrate. Mr. Campbell noted the minor style suggestions to Rule 11, which were approved by the Committee.

Rule 11, § 2254 Proceedings. Applicability of Rules of Civil Procedure. The Committee approved the minor style changes to Rule 11, for § 2254 Proceedings.

Rule 11, § 2255 Proceedings. Time for Appeal. The Committee approved the minor style suggestions proposed by the Subcommittee.

Rule 12, § 2255 Proceedings. Applicability of Rules of Civil Procedure and Rules of Criminal Procedure. The Committee approved the minor style changes to Rule 11 of the § 2255 Rules.

Judge Carnes indicated that the Rules and accompanying forms would be presented to the Standing Committee with a view toward requesting that they be published for comment.

C. Other Proposed Amendments to Rules

1. Rule 12.2. Notice of Insanity Defense; Mental Examination

Judge Carnes stated that Mr. Pauley had written to the Committee suggesting that the revised Rule 12.2, currently pending before the Supreme Court, was missing a sanction provision for those cases where the defense fails to disclose the results of a mental examination conducted by the defense expert. Following additional brief discussion, Judge Carnes indicated that the matter would be placed on the agenda for the Committee's Fall 2002 meeting and he asked the Reporter to draft appropriate language for a possible amendment to Rule 12.2.

2. Rule 16; Discovery and Inspection

The Reporter indicated that Mr. Carl Peterson, an attorney practicing in New York City, had suggested an amendment to Rule 16 that would require the government to disclose automatically the identity of any government expert, in the same manner as that provided for in the Civil Rules. The Committee briefly discussed the proposal and decided to take no further action.

3. Rules 29, 33, and 34; Proposed Amendments re Rulings by Court

Judge Friedman discussed his proposed amendments to Rules 29, 33, and 34 concerning the 7-day time limit for filing motions filed under those rules, or obtaining from the court, within that same 7-day limit, a fixed deadline for filing a motion under those rules. He explained that the case might arise where the defendant files an extension of time within the 7 days but due to the judge's illness or absence, the judge does not, within the 7-day limit, extend the deadline. He noted that at least one Circuit had ruled that the 7-day limit is jurisdictional and that in those cases, through no fault of the defendant, the defendant is not permitted to file a late motion.

Mr. Elwood stated that he believed that that would be the exceptional case and Judge Trager observed that if the defendant was barred from filing a motion under one those three rules, the defendant could still file a § 2255 motion and seek relief. Judge Bartle noted that in those cases there is no real prejudice because the defendant can raise

the issue on appeal. And the Reporter observed that amending the Rules to address that situation might simply create another set of problems. Following additional discussion, Judge Friedman moved that Rules 29, 33, and 34 be amended to remove the requirement that the judge rule on a request for an extension of time within the 7-day time limit. Mr. Fiske seconded the motion, which carried by a vote of 10-2. Judge Carnes stated that the matter would be placed on the Committee's Fall 2002 meeting for a decision about the language to be used.

4. Rule 32. Sentencing; Issue of Finality.

The Reporter stated that Judge D. Brock Hornby had proposed an amendment to Rule 32 that would address the question of when a sentence is final where the court imposes forfeiture as part of the sentence but the actual amount is not set until later. Several members noted that the issue was probably addressed in 18 U.S.C. § 3664(d)(5). Judge Friedman suggested that amending Rule 32 might create a new set of problems; other members noted the interlocking issues of utilizing the statute, Rule 32 as written, and notices of appeal. Other members observed that they did not believe that there was uncertainty in the existing procedural rules. Following additional discussion, the Committee agreed to take no further action on the proposal.

5. Rule 32.1. Revoking or Modifying Probation or Supervised Release

Judge Carnes noted that he had provided the Committee with a copy of *United States v. Frazier*, ____ F.3d _____ (11th Cir. 2002), where the court noted that there is no explicit provision in Rule 32.1 for the defendant's right to allocution; he pointed out that the court had recommended that the Advisory Committee might wish to address that issue. Following additional discussion, Judge Bartle moved that Rule 32.1 be amended to include a right to allocution. Judge Roll seconded the motion, which carried by a vote of 12-0. Judge Carnes indicated that the language effecting the amendment would be on the agenda for the Committee's Fall 2002 meeting.

6. Proposed Rule Regarding Appeal of Rulings by Magistrate Judges

Judge Tashima discussed his proposal that the Committee consider adding a new rule to the Rules of Criminal Procedure that would parallel Rule of Civil Procedure 72(a). That rule addresses what counsel must do to preserve an issue for appeal from a magistrate judge's rulings on nondispositive, pretrial matters. He noted that issue had been raised in *United States v. Abonce-Barerra*, 257 F.3d 959, 969 (9th Cir. 2001), in which the court noted the absence of such a rule and concluded that in criminal cases, unlike civil cases, a defendant is not required to appeal a magistrate judge's decision to the district judge in order to preserve the matter for appeal.

Judge Miller reported that he had polled fellow magistrate judges and that there was no record of this ever being an issue. He supported a possible amendment, however. Following additional discussion, Judge Miller moved that the Committee consider an amendment to the Rules; Judge Roll seconded the motion, which carried by a vote of 11 to 1. Judge Carnes indicated that the matter of the language to be used for the amendment would be placed on the agenda for the Fall 2002 meeting.

7. Miscellaneous Proposed Amendments to Rules

Judge Carnes pointed out that Mr. Pauley had written an extensive memo to the Committee setting out a variety of proposals. He indicated that although some of the issues had already been discussed, the Committee might wish to consider others.

The Reporter briefly discussed each of the proposals, or categories of proposals. First, Mr. Pauley had identified several rules that may need to be amended to address international criminal activity—Rules 4, 5, 6, and 41. The Reporter observed that the Committee had actually accomplished some of those points, especially with recent amendments to Rules 6 and 41.

Second, the Reporter pointed out that Mr. Pauley had noted that the development of DNA evidence may support another global review of the rules. For example, he raised a number of questions about whether the current rules would permit an indictment of a yet unknown defendant who can be identified only by DNA evidence, in order to toll the statute of limitations. Another example is the possible relationship between Rule 33 (New Trial) and the Innocence Protection Act.

Third, Mr. Pauley had identified lingering issues that the Committee may wish to consider, i.e., the issue of intra-Departmental access to grand jury information for purposes of civil enforcement in Rule 6 and addressing the issue of equalizing the number of peremptory challenges in Rule 24.

Fourth, the Reporter noted that Mr. Pauley had suggested that the Committee reconsider the issue of whether the court in conducting a plea colloquy under Rule 11 should be required to apprise the defendant, who is an alien, about possible adverse immigration consequences following a guilty or nolo contendere plea.

Fifth, Mr. Pauley had offered additional views in support of adopting language (or a new rule) on the subject of covert searches and suggests that the Committee may wish to visit the issue of authorizing judges to issue warrants for persons or property "within or outside" the district. The Reporter indicated that the Committee had already addressed that point, at least with regard to terrorist activities and with regard to tracking-device warrants.

Finally, Mr. Pauley had offered a list of miscellaneous matters that may deserve attention; whether to adopt a new general rule regarding waiver vis a vis consent;

clarifying language in Rule 1 concerning the ability of a "judge" to act; and in Rule 16, extending the due diligence requirement to the subsection dealing with disclosure of documents and tangible evidence. Judge Carnes observed that some of those issues had been debated at length in the past, in particular the definition of "judge" in the Rules.

Following brief discussion on these items, Judge Carnes asked for and received a consensus that the proposals be tabled and that if any member wished to formally propose any particular amendment, after further considering any of Mr. Pauley's proposals, to contact him or the Reporter so that the proposal could be placed on the agenda for the Fall 2002 meeting.

VI. OTHER RULES AND PROJECTS PENDING BEFORE ADVISORY COMMITTEES, STANDING COMMITTEE AND JUDICIAL CONFERENCE

Judge Carnes informed the Committee that it had been requested to review model local rules concerning electronic filings in criminal cases. He indicated that last year, a subcommittee of the Committee on Court Administration and Management (CACM) developed a model local rule for accepting electronic filings in civil cases. The Judicial Conference ultimately approved that rule. Now, he said, it appeared that some courts will be able to accept electronic filings in criminal cases in the very near future and that the chair of CACM, Judge John Koeltl (S.D.N.Y) has offered suggested changes to the existing model local rule to accommodate criminal cases. The revised rule had been forwarded to Judge Fitzwater, chair of the Technology Subcommittee of the Committee on Rules of Practice and Procedure who in turn has asked the members of that subcommittee to review the attached draft and offer any comments or suggestions to Judge Koeltl.

Judge Carnes added that in the anticipation that a model local rule will be submitted, eventually, to the Judicial Conference, the Committee should review the enclosed draft and offer its views, suggestions, or comments on the proposed rule. He called on Ms. Nancy Miller, of the Administrative Office, who had been working on the issue, to provide additional background information about the proposed model rules.

The Committee held an extended discussion on what, if any, special problems might arise with electronic filings in criminal cases. Several members were of the view that anything signed by the defendant should be filed in its original form and not electronically. Others noted that a scanned document, electronically transmitted might meet that requirement. Ms. Laurel Hooper informed the Committee that some counsel are using that method to transmit documents to the courts involved in the pilot programs. That in turn lead to a discussion about what documents should be original or scanned, when they are filed.

There was also discussion about the ability of the parties themselves and the public to gain access to criminal court records. Ms. Miller pointed out that the current system was to permit counsel to obtain access, including counsel for co-defendants. The courts were maintaining a private docket and a public docket; thus, although the public could obtain access electronically to certain filings, others were placed on the private docket of filings and were not generally available to the public.

Mr. Rabiej pointed out that the proposed local rules were designed to provide only preliminary guidance to the courts that wished to experiment with electronic filings in criminal cases. After they have used the system, he anticipated that further changes would be made to the model local rules.

Judge Trager observed that the Committee should not place too rigid limits on the ability of the courts to experiment with electronic filing. Following further discussion, Judge Friedman moved that the Committee recommend that all charging documents be filed in their original form and that everything signed by the defendant could be filed in the original or in scanned format, at the discretion of the court. Judge Miller seconded the motion, which carried by a vote of 10-2.

VII. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

The Committee tentatively agreed to hold its next meeting on September 26 to 27, 2002 in Maine, depending on availability of accommodations.

Respectfully submitted

David A. Schlueter
Professor of Law
Reporter, Criminal Rules
Committee

II-A

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

CHAMBERS OF
THE CHIEF JUSTICE

April 29, 2002

Honorable J. Dennis Hastert
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress the amendments to the Federal Rules of Criminal Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code. The Court did not approve the addition of a new Rule 26(b) as proposed by the Judicial Conference. Justice Breyer has issued a dissenting statement, in which Justice O'Connor joins. Justice Scalia has issued a separate statement.

Sincerely,

William H. Rehnquist

APR 2 9 2002

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Criminal Procedure be, and they hereby are, amended by including therein amendments to Criminal Rules 1 through 60.

[See infra., pp. ___ ___ ___.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 2002, and shall govern in all proceedings in criminal cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

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

SUPREME COURT OF THE UNITED STATES

AMENDMENTS TO RULE 26(b) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

[April 29, 2002]

JUSTICE SCALIA filed a statement.

I share the majority's view that the Judicial Conference's proposed Fed. Rule Crim. Proc. 26(b) is of dubious validity under the Confrontation Clause of the Sixth Amendment to the United States Constitution, and that serious constitutional doubt is an appropriate reason for this Court to exercise its statutory power and responsibility to decline to transmit a Conference recommendation.

In *Maryland* v. *Craig*, 497 U. S. 836 (1990), the Court held that a defendant can be denied face-to-face confrontation during live testimony at trial only if doing so is "necessary to further an important public policy," *id.*, at 850, and only "where there is a case-specific finding of [such] necessity," *id.*, at 857–858 (internal quotation marks omitted). The Court allowed the witness in that case to testify via one-way video transmission because doing so had been found "necessary to protect a child witness from trauma." *Id.*, at 857. The present proposal does not limit the use of testimony via video transmission to instances where there has been a "case-specific finding" that it is "necessary to further an important public policy." To the contrary, it allows the use of video transmission whenever the parties are merely unable to take a deposition under Fed. Rule Crim. Proc. 15. Advisory Committee's Notes on Fed. Rule Crim. Proc. 26, p. 54. Indeed, even this showing is not necessary: the Committee says that video transmission may be used generally as an alternative to depositions. *Id.*, at 57.

This is unquestionably contrary to the rule enunciated in *Craig*. The Committee reasoned, however, that "the use

of a two-way transmission made it unnecessary to apply the *Craig* standard." *Id.*, at 55 (citing *United States* v. *Gigante*, 166 F. 3d 75, 81 (CA2 1999) ("Because Judge Weinstein employed a two-way system that preserved . . . face-to-face confrontation . . . , it is not necessary to enforce the *Craig* standard in this case"), cert. denied, 528 U. S. 1114 (2000)). I cannot comprehend how one-way transmission (which *Craig* says does not ordinarily satisfy confrontation requirements) becomes transformed into full-fledged confrontation when reciprocal transmission is added. As we made clear in *Craig*, *supra*, at 846–847, a purpose of the Confrontation Clause is ordinarily to compel accusers to make their accusations *in the defendant's presence*—which is not equivalent to making them in a room that contains a television set beaming electrons that portray the defendant's image. Virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones.

The Committee argues that the proposal is constitutional because it allows video transmission only where depositions of unavailable witnesses may be read into evidence pursuant to Rule 15. This argument suffers from two shortcomings. First, it ignores the fact that the constitutional test we applied to live testimony in *Craig* is different from the test we have applied to the admission of out-of-court statements. *White* v. *Illinois*, 502 U. S. 346, 358 (1992) ("There is thus no basis for importing the 'necessity requirement' announced in [*Craig*] into the much different context of out-of-court declarations admitted under established exceptions to the hearsay rule"). Second, it ignores the fact that Rule 15 accords the defendant a right to face-to-face confrontation during the deposition. Fed. Rule Crim. Proc. 15(b) ("The officer having custody of a defendant shall be notified of the time and place set for the examination and shall, unless the defendant waives in writing the right to be present, produce the defendant at

the examination and keep the defendant in the presence of the witness during the examination . . .").

JUSTICE BREYER says that our refusal to transmit "denies all litigants—prosecutors and consenting defendants alike—the benefits of advances in modern technology . . . that will help to create trial procedures that are both more efficient and more fair." *Post,* at 3. This is an exaggeration for two reasons: First, because Congress is free to adopt the proposal despite our action. And second, because nothing prevents a defendant who believes this procedure is "more efficient and more fair" from voluntarily waiving his right of confrontation.* The only issue here is whether he can be *compelled* to hazard his life, liberty, or property in a criminal teletrial.

Finally, I disagree with JUSTICE BREYER's belief that we should forward this proposal despite our constitutional doubts, so that we can "later consider fully any constitutional problem when the Rule is applied in an individual case." *Post,* at 2. I see no more reason for us to forward a proposal that we believe to be of dubious constitutionality than there would be for the Conference to make a proposal that it believed to be of dubious constitutionality. We do not live under a system in which the motto for legislation is "anything goes, and litigation will correct our constitutional mistakes." It seems to me that among the reasons Congress has asked us to vet the Conference's proposals—indeed, perhaps *foremost* among those reasons—is to provide some assurance that the proposals do not raise seri-

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*JUSTICE BREYER's assertion to the contrary notwithstanding, existing Fed. Rule Crim. Proc. 26 does not prohibit the use of video transmission by consent. *United States* v. *Mezzanatto,* 513 U. S. 196, 201 (1995) ("The provisions of [the Federal Rules of Criminal Procedure] are presumptively waivable [unless] an express waiver clause . . . suggest[s] that Congress intended to occupy the field and to preclude waiver under other, unstated circumstances").

ous constitutional doubts. Congress is of course not bound to accept our judgment, and may adopt the proposed Rule 26(b) if it wishes. But I think we deprive it of the advice it has sought (in this area peculiarly within judicial competence) if we pass along recommendations that we believe to be constitutionally doubtful.

JUSTICE BREYER, with whom JUSTICE O'CONNOR joins, filed a dissenting statement.

I would transmit to Congress the Judicial Conference's proposed Fed. Rule Crim. Proc. 26(b), authorizing the use of two-way video transmissions in criminal cases *in* (1) "exceptional circumstances," *with* (2) "appropriate safeguards," and *if* (3) "the witness is unavailable." The Rules Committee intentionally designed the proposed Rule with its three restrictions to parallel circumstances in which federal courts are authorized now to admit depositions in criminal cases. See Fed. Rule Crim. Proc. 15. Indeed, the Committee states that its proposal permits "use of video transmission of testimony only in those instances when deposition testimony could be used." Advisory Committee Notes on Fed. Rule Crim. Proc. 26, p. 53. See Appendix, *infra*, at 5.

The Court has decided not to transmit the proposed Rule because, in its view, the proposal raises serious concerns under the Confrontation Clause. But what are those concerns? It is not obvious how video testimony could abridge a defendant's Confrontation Clause rights in circumstances where an absent witness' testimony could be admitted in nonvisual form via deposition regardless. And where the defendant seeks the witness' video testimony to help secure exoneration, the Clause simply does not apply.

JUSTICE SCALIA believes that the present proposal does

not much concern itself with the limitations on the use of out-of-court statements set forth in *Maryland* v. *Craig*, 497 U. S. 836 (1990). I read the Committee's discussion differently than does JUSTICE SCALIA, and I attach a copy of the Committee's discussion so that the reader can form an independent judgment. In its five pages of explanation, the Committee refers to *Maryland* v. *Craig* five times. It begins by stating that "arguably" its test is "at least as stringent as the standard set out in [that case]." It devotes a lengthy paragraph to explaining why it believes that its proposal satisfies *Craig*, and it refers to the two relevant Court of Appeals decisions, both of which have so held. See *United States* v. *Gigante*, 166 F. 3d 75 (CA2 1999), cert. denied, 528 U. S. 1114 (2000); *Harrell* v. *Butterworth*, 251 F. 3d 926 (CA11 2001), cert. denied, 535 U. S. ____ (2002). Given the Committee's discussion of the matter, its logic, the legal authority to which it refers, and the absence of any dissenting views, I believe that any constitutional problems will arise, if at all, only in a limited subset of cases. And, in any event, I would not overturn the unanimous views of the Rules Committee and the Judicial Conference of the United States without a clearer understanding of just why their conclusion is wrong. Cf. Statement of Justice White, 507 U. S. 1091, 1095 (1993) (The Court's role ordinarily "is to transmit the Judicial Conference's recommendations without change and without careful study, as long as there is no suggestion that the committee system has not operated with integrity").

To transmit the proposed Rule to Congress is not equivalent to upholding the proposed Rule as constitutional. Were the proposal to become law, the Court could later consider fully any constitutional problem when the Rule is applied in an individual case. At that point the Court would have the benefit of the full argument that now is lacking. At the same time, that approach would

permit application of the proposed Rule in those cases in which application is clearly constitutional. And, while JUSTICE SCALIA is correct that Congress is free to consider the matter more deeply and to adopt the proposal despite our action, the Court's refusal to transmit the proposed Rule makes full consideration of the constitutional arguments much less likely.

Without the proposed Rule, not only prosecutors but also defendants, will find it difficult, if not impossible, to secure necessary out-of-court testimony via two-way video—JUSTICE SCALIA's statement to the contrary notwithstanding. Cf. *ante*, at 3. Without proposed Rule 26(b), some courts may conclude that other Rules prohibit its use. See, *e.g.*, Fed. Rule Crim. Proc. 26 (testimony must "be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence or other Rules adopted by the Supreme Court"). Others may hesitate to rely on highly general and uncertain sources of legal authority. Cf. *United States* v. *Gigante*, 971 F. Supp. 755, 758–759 (EDNY 1997) (relying on court's "inherent power" to structure a criminal trial in a just manner under Fed. Rules Crim. Proc. 2 and 57(b)); *United States* v. *Nippon Paper Industries Co.*, 17 F. Supp. 2d 38, 43 (Mass. 1998) (relying on "a constitutional hybrid" procedure that "borrow[ed] from the precedent associated with Rule 15 videotaped depositions [and] marr[ied] it to the advantages of video teleconferencing"). Thus, rather than consider the constitutional matter in the context of a defendant who objects, the Court denies all litigants—prosecutors and consenting defendants alike—the benefits of advances in modern technology. And it thereby deprives litigants, judges, and the public of technology that will help to create trial procedures that are both more efficient and more fair.

I consequently dissent from the Court's decision not to transmit the proposed Rule.

APPENDIX TO STATEMENT OF BREYER, J.

Rule 26. Taking Testimony

(a) In General. In every trial the testimony of witnesses must be taken in open court, unless otherwise provided by a statute or by rules adopted under 28 U.S.C. §§2072–2077.

(b) Transmitting Testimony from a Different Location. In the interest of justice, the court may authorize contemporaneous, two-way video presentation in open court of testimony from a witness who is at a different location if:

(1) the requesting party establishes exceptional circumstances for such transmission;

(2) appropriate safeguards for the transmission are used; and

(3) the witness is unavailable within the meaning of Federal Rule of Evidence 804(a)(4)-(5).

COMMITTEE NOTE

The language of Rule 26 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Rule 26(a) is amended, by deleting the word "orally," to accommodate witnesses who are not able to present oral testimony in open court and may need, for example, a sign language interpreter. The change conforms the rule, in that respect, to Federal Rule of Civil Procedure 43.

A substantive change has been made to Rule 26(b). That amendment permits 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 con-

sidered, unless otherwise provided by these rules, an Act of Congress, or any other rule adopted by the Supreme Court. An example of a rule that provides otherwise is Rule 15. That Rule recognizes that depositions may be used to preserve testimony if there are exceptional circumstances in the case and it is in the interest of justice to do so. If the person is "unavailable" under Federal Rule of Evidence 804(a), then the deposition may be used at trial as substantive evidence. The amendment to Rule 26(b) 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 when 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 superior to other means of presenting testimony in the courtroom. The participants in the courtroom can see for themselves the demeanor of the witness and hear any pauses in the testimony, matters that are not normally available in non-video deposition testimony. Although deposition testimony is normally taken with all counsel and parties present with the witness, there may be exceptions. *See, e.g., United States v. Salim*, 855 F. 2d 944, 947–948 (2d Cir. 1988) (conviction affirmed where deposition testimony, taken overseas, was used although defendant and her counsel were not permitted in same room with witness, witness's lawyer answered some questions, lawyers were not permitted to question witness directly, and portions of proceedings were not transcribed verbatim).

The revised rule envisions several safeguards to address

possible concerns about the Confrontation Clause rights of a defendant. First, under the rule, the court is authorized to use "contemporaneous two-way" video transmission of testimony. Thus, this rule envisions procedures and techniques very different from those used in *Maryland* v. *Craig,* 497 U. S. 836 (1990) (transmission of one-way closed circuit television of child's testimony). Two-way transmission ensures that the witness and the persons present in the courtroom will be able to see and hear each other. Second, the court must first find that there are "exceptional circumstances" for using video transmissions, a standard used in *United States* v. *Gigante,* 166 F. 3d 75, 81 (2d Cir.), cert. denied, 528 U. S. 1114 (1999). While it is difficult to catalog examples of circumstances considered to be "exceptional," the inability of the defendant and the defense counsel to be at the witness's location would normally be an exceptional circumstance. Third, arguably the exceptional circumstances test, when combined with the requirement in Rule 26(b)(3) that the witness be unavailable, is at least as stringent as the standard set out in *Maryland* v. *Craig,* 497 U. S. 836 (1990). In that case the Court indicated that a defendant's 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 government public policy and only where the reliability of the testimony is otherwise assured." *Craig,* 497 U. S. at 850. In *Gigante,* the court noted that because the video system in *Craig* was a one-way closed circuit transmission, the use of a two-way transmission made it unnecessary to apply the *Craig* standard.

The Committee recognized that there is a need for the trial court to impose appropriate safeguards and procedures to insure the accuracy and quality of the transmission, the ability of the 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).

Deciding what safeguards are appropriate is left to the sound discretion of the trial court. The Committee envisions that in establishing those safeguards the court will be sensitive to a number of key issues. First, it is important that the procedure maintain the dignity and decorum normally associated with a federal judicial proceeding. That would normally include ensuring that the witness's testimony is transmitted from a location where there are no, or minimal, background distractions, such as persons leaving or entering the room. Second, it is important to insure the quality and integrity of the two-way transmission itself. That will usually mean employment of technologies and equipment that are proven and reliable. Third, the court may wish to use a surrogate, such as an assigned marshal or special master, as used in *Gigante, supra,* to appear at the witness's location to ensure that the witness is not being influenced from an off-camera source and that the equipment is working properly at the witness's end of the transmission. Fourth, the court should ensure that the court, counsel, and jurors can clearly see and hear the witness during the transmission. And it is equally important that the witness can clearly see and hear counsel, the court, and the defendant. Fifth, the court should ensure that the record reflects the persons who are present at the witness's location. Sixth, the court may wish to require that representatives of the parties be present at the witness's location. Seventh, the court may inquire of counsel, on the record, whether additional safeguards might be employed. Eighth, the court should probably preserve any recording of the testimony, should a question arise about the quality of the transmission. Finally, the court may consider issuing a pretrial order setting out the appropriate safeguards employed

under the rule. *See United States* v. *Gigante,* 971 F. Supp. 755, 759–760 (E.D.N.Y. 1997) (court order setting out safeguards and procedures).

The Committee believed that including the requirement of "unavailability" as that term is defined in Federal Rule of Evidence 804(a)(4) and (5) will insure that the defendant's Confrontation Clause 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 one-way closed circuit television. The Court outlined four elements that 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's 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. 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 Supreme Court noted that any harm to the defendant resulting from the transmitted testimony was minimal 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, supra* (use of remote transmission of unavailable witness's testimony did not violate confrontation clause); *Harrell* v. *Butterworth,* [251] F. 3d [926] (11th Cir. 2001) (remote transmission of unavailable witnesses' testimony in state criminal trial did not violate confrontation clause).

Although the amendment is not limited to instances

such as those encountered in *Craig*, it is limited to situations when the witness is unavailable for any of the reasons set out in Federal Rule of Evidence 804(a)(4) and (5). Whether under particular circumstances a 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.

The amendment provides an alternative to the use of depositions, which are permitted under Rule 15. The choice between these two alternatives for presenting the testimony of an otherwise unavailable witness will be influenced by the individual circumstances of each case, the available technology, and the extent to which each alternative serves the values protected by the Confrontation Clause. See *Maryland* v. *Craig, supra.*

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Dave Schlueter, Reporter

RE: Proposed Amendment to Rule 12.2; Missing Sanction Provision

DATE: August 20, 2002

In a July 2001 memo to the Committee, Mr. Roger Pauley, a former representative of the DOJ to the Committee, pointed out that the approved restyled-substantive version of Rule 12.2 (now pending before Congress) does not include a provision for sanctions where the defense fails to disclose the results of a mental examination conducted by the defense's expert(s). At its April 2002 meeting, the Committee briefly discussed the matter and the Chair requested that I draft appropriate language for the Committee's consideration at the September meeting.

I have attached a copy of Mr. Pauley's memo, a copy of Rule 12.2, as it was sent to Congress, and a draft of a proposed amendment to Rule 12.2(d), which addresses the issue of sanctions for failure to comply with the rule.

U.S. Department of Justice

Criminal Division

Washington, D.C. 20530

July 5, 2001

MEMORANDUM

To: Honorable W. Eugene Davis, Honorable Edward E. Carnes, Professor David A. Schlueter, and John Rabiej

From: Roger A. Pauley RAP

Re: Possible Error in Rule 12.2(d)

An AUSA's request for a copy of our pending substantive amendments to Rule 12.2 caused me to look anew at that rule, and in doing so I think I may have found an error, in the nature of a failure to conform, in Rule 12.2(d). I hasten to make clear that the error is of minor dimension and is not such as to merit delaying the progress of the amendments to the current rule (copies of which have already been requested by AUSAs handling capital cases and which I believe will be of immediate assistance), but may warrant fixing at a future time.

Rule 12.2(d) deals with the remedy for a "failure to comply" with the rule. As drafted, the pending version follows the existing rule in saying that the remedy of exclusion of the defendant's expert evidence on the issue of mental condition can be imposed in two instances: (1) if the defendant fails to give notice under Rule 12.2(b); and (2) if the defendant fails to "submit to an examination when ordered" under Rule 12.2(c). The pending version, however, omits to account for the fact that the (new) rule creates a further obligation of the defendant under Rule 12.2(c)(3), namely to disclose to the government the results of its expert's mental examination once the government, at the penalty phase in a capital case, has disclosed to the defendant the results of its expert's mental examination of the defendant. A court faced with a defendant who obstinately refused to make the required disclosure would assuredly have the remedy of contempt available, but whether or not, in the light of the specific conditions specified in Rule 12.2(d) for excluding the defendant's proffered expert testimony, the court would be able to employ the exclusion sanction is unclear.

I believe the Committee intended to apply Rule 12.2(d) in this circumstance and that the failure to do so was inadvertent. (I can recall no discussion of limiting the exclusion sanction so that it would not apply to a failure to disclose and cannot fathom a reason for such a limitation). Compare Rule 26.2(e) (sanction for defendant (or government) failing to comply with disclosure requirements includes striking of testimony). Accordingly, the Committee should consider rectifying this apparent error in the rule.

Rule 12.2 Forwarded to Congress
by the Supreme Court on April 29, 2002,
to Take Effect on December 1, 2002

Rule 12.2. Notice of an Insanity Defense; Mental Examination

(a) **Notice of an Insanity Defense.** A defendant who intends to assert a defense of insanity at the time of the alleged offense must so notify an attorney for the government in writing within the time provided for filing a pretrial motion, or at any later time the court sets, and file a copy of the notice with the clerk. A defendant who fails to do so cannot rely on an insanity defense. The court may, for good cause, allow the defendant to file the notice late, grant additional trial-preparation time, or make other appropriate orders.

(b) **Notice of Expert Evidence of a Mental Condition.** If a defendant intends to introduce expert evidence relating to a mental disease or defect or any other mental condition of the defendant bearing on either (1) the issue of guilt or (2) the issue of punishment in a capital case, the defendant must — within the time provided for filing a pretrial motion or at any later time the court sets — notify an attorney for the government in writing of this intention and file a copy of the notice with the clerk. The court may, for good cause, allow the defendant to file the notice late, grant the parties additional trial-preparation time, or make other appropriate orders.

(c) **Mental Examination.**

(1) ***Authority to Order an Examination; Procedures.***

(A) The court may order the defendant to submit to a competency examination under 18 U.S.C. § 4241.

(B) If the defendant provides notice under Rule 12.2(a), the court must, upon the government's motion, order the defendant to be examined under 18 U.S.C. § 4242. If the defendant provides notice under Rule 12.2(b) the court may, upon the government's motion, order the defendant to be examined under procedures ordered by the court.

(2) ***Disclosing Results and Reports of Capital Sentencing Examination.*** The results and reports of any examination conducted solely under Rule 12.2 (c)(1) after notice under Rule 12.2(b)(2) must be sealed and must not be disclosed to any attorney for the government or the defendant unless the defendant is found guilty of one or more capital crimes and the defendant confirms an intent to offer

during sentencing proceedings expert evidence on mental condition.

(3) ***Disclosing Results and Reports of the Defendant's Expert Examination.*** After disclosure under Rule 12.2(c)(2) of the results and reports of the government's examination, the defendant must disclose to the government the results and reports of any examination on mental condition conducted by the defendant's expert about which the defendant intends to introduce expert evidence.

(4) ***Inadmissibility of a Defendant's Statements.*** No statement made by a defendant in the course of any examination conducted under this rule (whether conducted with or without the defendant's consent), no testimony by the expert based on the statement, and no other fruits of the statement may be admitted into evidence against the defendant in any criminal

proceeding except on an issue regarding mental condition on which the defendant:

(A) has introduced evidence of incompetency or evidence requiring notice under Rule 12.2(a) or (b)(1), or

(B) has introduced expert evidence in a capital sentencing proceeding requiring notice under Rule 12.2(b)(2).

(d) Failure to Comply. If the defendant fails to give notice under Rule 12.2(b) or does not submit to an examination when ordered under Rule 12.2(c), the court may exclude any expert evidence from the defendant on the issue of the defendant's mental disease, mental defect, or any other mental condition bearing on the defendant's guilt or the issue of punishment in a capital case.

(e) Inadmissibility of Withdrawn Intention. Evidence of an intention as to which notice was given under

Rule 12.2(a) or (b), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

COMMITTEE NOTE

The language of Rule 12.2 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

The substantive changes to Rule 12.2 are designed to address five issues. First, the amendment clarifies that a court may order a mental examination for a defendant who has indicated an intention to raise a defense of mental condition bearing on the issue of guilt. Second, the defendant is required to give notice of an intent to present expert evidence of the defendant's mental condition during a capital sentencing proceeding. Third, the amendment addresses 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 mental condition during capital sentencing proceedings and when the results of that examination may be disclosed. Fourth, the amendment addresses the timing of disclosure of the results and reports of the defendant's expert examination. Finally, the amendment extends the sanctions for failure to comply with the rule's requirements to the punishment phase of a capital case.

Under current Rule 12.2(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 a pretrial notice of that intent. The amendment extends that notice requirement to a defendant who

intends to offer expert evidence, testimonial or otherwise, 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, 754-64 (E.D. Va. 1997); *United States v. Haworth*, 942 F. Supp. 1406, 1409 (D.N.M. 1996). The amendment adopts that view.

Revised Rule 12.2(c)(1) addresses and clarifies the authority of the court to order mental examinations for a defendant — to determine competency of a defendant to stand trial under 18 U.S.C. § 4241; to determine the defendant's sanity at the time of the alleged offense under 18 U.S.C. § 4242; or in those cases where the defendant intends to present expert testimony on his or her mental condition. Rule 12.2(c)(1)(A) reflects the traditional authority of the court to order competency examinations. With regard to examinations to determine insanity at the time of the offense, current Rule 12.2(c) implies that the trial court *may* grant a government motion for a mental examination of a defendant who has indicated under Rule 12.2(a) an intent to raise the defense of insanity. But the corresponding statute, 18 U.S.C. § 4242, *requires* the court to order an examination if the defendant has provided notice of an intent to raise that defense and the government moves for the examination. Revised Rule 12.2(c)(1)(B) now conforms the rule to § 4242. Any examination conducted on the issue of the insanity defense would thus be conducted in accordance with the procedures set out in that statutory provision.

Revised Rule 12.2(c)(1)(B) also addresses those cases where the defendant is not relying on an insanity defense, but intends to offer expert testimony on the issue of mental condition. While the authority of a trial court to order a mental examination of a defendant who has registered an intent to raise the insanity defense seems clear,

the authority under the rule to order an examination of a defendant who intends only to present expert testimony on his or her mental condition on the issue of guilt is not as 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 under the rule to order a mental examination of a defendant who had provided notice of an intent to offer evidence 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 when the defendant intends to rely on the defense of insanity. The court also rejected the argument that the 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 clarifies that the authority of a court to order a mental examination under Rule 12.2(c)(1)(B) extends to those cases when the defendant has provided notice, under Rule 12.2(b), of an intent to present expert testimony on the defendant's mental condition, either on the merits or at capital sentencing. *See, e.g., United States v. Hall*, 152 F.3d 381 (5th Cir. 1998), *cert denied*, 119 S. Ct. 1767 (1999).

The amendment to Rule 12.2(c)(1) is not intended to affect any statutory or inherent authority a court may have to order other mental examinations.

The amendment leaves to the court the determination of what procedures should be used for a court-ordered examination on the

defendant's mental condition (apart from insanity). As currently provided 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 so doing, 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.

Additional changes address the question when the results of an examination ordered under Rule 12.2(b)(2) may, or must, be disclosed. The Supreme Court has recognized that use of a defendant's statements during a court-ordered examination may compromise the defendant's right against self-incrimination. *See Estelle v. Smith*, 451 U.S. 454 (1981) (defendant's privilege against self-incrimination violated when 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 the defendant waives the privilege if the defendant introduces expert testimony on his or her mental condition. *See, e.g., Powell v. Texas*, 492 U.S. 680, 683-84 (1989); *Buchanan v. Kentucky*, 483 U.S. 402, 421-24 (1987); *Presnell v. Zant*, 959 F.2d 1524, 1533 (11th Cir. 1992); *Williams v Lynaugh*, 809 F.2d 1063, 1068 (5th Cir. 1987); *United States v Madrid*, 673 F.2d 1114, 1119-21 (10th Cir. 1982). 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 if, and to what extent, the prosecution may see the results of the examination, which may include the defendant's

statements, when evidence of the defendant's mental condition is being presented solely at a capital sentencing proceeding.

The proposed change in Rule 12.2(c)(2) 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 evidence about his or her mental condition at a capital sentencing hearing; i.e., after a verdict of guilty on one or more capital crimes, and a reaffirmation by the defendant of an intent to introduce expert mental-condition evidence in the sentencing phase. *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. *See, e.g., United States v. Hall, supra*, 152 F.3d at 398 (noting that sealing of record, although not constitutionally required, "likely advances interests of judicial economy by avoiding litigation over [derivative use issue]").

Except as provided in Rule 12.2(c)(3), the rule does not address the time for disclosing results and reports of any expert examination conducted by the defendant. New Rule 12.2(c)(3) provides that upon disclosure under subdivision (c)(2) of the results and reports of the government's examination, disclosure of the results and reports of the defendant's expert examination is mandatory, if the defendant intends to introduce expert evidence relating to the examination.

Rule 12.2(c), as previously written, restricted admissibility of the defendant's statements during the course of an examination conducted under the rule to an issue respecting mental condition on which the defendant "has introduced testimony" — expert or otherwise. As amended, Rule 12.2(c)(4) provides that the admissibility of such evidence in a capital sentencing proceeding is triggered only by the defendant's introduction of expert evidence. The Committee believed

that, in this context, it was appropriate to limit the government's ability to use the results of its expert mental examination to instances in which the defendant has first introduced expert evidence on the issue.

Rule 12.2(d) has been amended to extend sanctions for failure to comply with the rule to the penalty phase of a capital case. The selection of an appropriate remedy for the failure of a defendant to provide notice or submit to an examination under subdivisions (b) and (c) is entrusted to the discretion of the court. While subdivision (d) recognizes that the court may exclude the evidence of the defendant's own expert in such a situation, the court should also consider "the effectiveness of less severe sanctions, the impact of preclusion on the evidence at trial and the outcome of the case, the extent of prosecutorial surprise or prejudice, and whether the violation was willful." *Taylor v. Illinois*, 484 U.S. 400, 414 n.19 (1988) (citing *Fendler v. Goldsmith*, 728 F.2d 1181 (9th Cir. 1983)).

Proposed Amendments to Rule 12.2

Rule 12.2. Notice of Insanity Defense; Mental Examination

* * * * *

(d) Failure to Comply. If the defendant fails to give notice under Rule 12.2(b), ~~or~~ does not submit to an examination when ordered under Rule 12.2(c), or fails to comply with the disclosure requirements under Rule 12.2(c)(3), the court may exclude any expert evidence from the defendant on the issue of the defendant's mental disease, mental defect, or any other mental condition bearing on the defendant's guilt or the issue of punishment in a capital case.

* * * * *

ALTERNATE VERSION

Because the exceptions cannot be stated briefly, it might be better to adopt the following version, which places the exceptions at the end of the subdivision. *See* Garner, GUIDELINES FOR DRAFTING AND EDITING COURT RULES, Rule 2.4B.

(d) Failure to Comply. ~~If the defendant fails to give notice under Rule 12.2(b) or does not submit to an examination when ordered under Rule 12.2(c), the~~ The court may exclude any expert evidence from the defendant on the issue of the defendant's mental disease, mental defect, or any other mental condition bearing on the defendant's guilt or the issue of punishment in a capital case if the defendant fails to:

(1) give notice under Rule 12.2(b);

(2) does not submit to an examination when ordered under Rule 12.2(c); or

(3) fails to comply with the disclosure requirements under Rule 12.2(c)(3).

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Dave Schlueter, Reporter

RE: Rules 29, 33 & 34; Proposed Amendments re Rulings on Motions

DATE: August 21, 2002

At the suggestion of Judge Friedman, the Committee voted at the April 2002 meeting to amend Rules 29, 33, and 34 to remove the requirement that judge grant any motions under those rules, for extension of time, within seven (7) days of the verdict. The decision on the actual language to be used was deferred until the Fall 2002 meeting.

I am attaching drafts of proposed amendments to Rules 29, 33, 34, and 45, which I believe would remove the limitation. Please note that the versions of the rules being amended are the restyled versions currently before Congress. The proposed amendments simply delete the words "during the 7-day period." That seems, at least at this point, to be the simplest solution. There seemed to be an informal consensus at the April meeting that simply striking those words would solve the problem.

If the Committee decides to simply eliminate the requirement in Rules 29, 33, and 34 for the judge to rule on a motion for an extension of time, and not substitute any other potentially limiting language, then the "exceptions" in restyled Rule 45(b)(2) regarding those three rules are probably unnecessary and can be deleted in their entirety.

I am attaching Judge Friedman's memo of April 18, 2002, in which he addresses the issue and offers his suggested solution. After the meeting in April, James Ishida conducted a search of the archives and located some materials from 1944 that provide some information on why the original drafters included the current limitation. Although the attached one-page memo concerns Rule 33, other materials indicate that the drafters almost always considered Rules 29, 33, and 34 together when considering possible amendments concerning time requirements.

This matter will be on the agenda for the September meeting in Maine.

United States District Court
for the District of Columbia
Washington, D.C. 20001

Chambers of
Paul L. Friedman
United States District Judge

MEMORANDUM

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

FROM: **Judge Paul L. Friedman**

RE: **Rules 29, 33 and 34 of the Federal Rules of Criminal Procedure**

DATE: **April 18, 2002**

The following is the memorandum I referred to in my letter of March 22, 2002, to Judge Carnes requesting that this item be placed on the agenda for the meeting on April 25-26, 2002. See Advisory Committee on Criminal Rules, Agenda Book for Meeting on April 25-26, 2002, Tab II-D. I am sorry for the delay in submitting it.

Rule 29(c) of the Federal Rules of Criminal Procedure provides that after a jury returns a guilty verdict, "a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period." Rule 33 of the Federal Rules of Criminal Procedure provides that "[a] motion for a new trial based on . . . grounds [other than newly discovered evidence] may be made only within 7 days after the verdict or finding of guilty or within such further time as the court may fix during the 7-day period." Rule 34 of the Federal Rules of Criminal Procedure

provides that a "motion in arrest of judgment shall be made within 7 days after verdict or finding of guilty, or after plea of guilty or *nolo contendere*, or within such further time as the court may fix during the 7-day period." Rule 45(b)(2) of the Federal Rules of Criminal Procedure permits the district court to enlarge the period of time in which to file a motion after the expiration of the specific period of time upon a showing of excusable neglect, "but the court may not extend the time for taking any action under Rules 29, 33, 34 and 35, except to the extent and under the conditions stated in them."

Although strict enforcement of these time limits arguably serves the legitimate interest of finality of criminal convictions, many situations exist in which the 7-day time periods of Rules 29, 33 and 34 work a hardship on criminal defendants and could lead to unfair results. Under these three rules, for example, a defendant may seek an enlargement of time in which to file an appropriate motion but in doing so, defendant must file and the trial court must grant the motion within the 7 days. Thus, even the defendant who has acted promptly by seeking an extension within 7 days may lose his opportunity to move for judgment of acquittal, new trial or arrest of judgment if the trial judge is dilatory or, for example, is on vacation or is ill. In United States v. Hall, 214 F.3d 175, 176 (D.C. Cir. 2000), for example, the trial court received a timely motion for an extension of time in which to file a motion for new trial under Rule 33 but held the motion in abeyance to give the government a chance to respond. The court of appeals held that because the trial court waited over 7 days after the guilty verdict was returned, the trial court lacked jurisdiction to act on the motion, and the *nunc pro tunc* order granting the extension was a nullity. See id. Thus, a defendant who acts appropriately to

preserve his right to seek relief under these rules may forfeit his right to such relief because of the action or inaction of the trial judge.

When trial counsel for a defendant has rendered ineffective assistance at trial, strict construction of the 7-day time period also may unfairly prejudice the defendant. If, for example, a defendant wants to seek a new trial based on his trial counsel's ineffective assistance, he will be forced: (1) to rely on the trial counsel whom he felt was constitutionally deficient to file the motion for a new trial based on his or her own ineffective representation (something which trial counsel may not be able to do),[1] (2) to ask trial counsel to file a motion for an extension of time and to rely on counsel to make sure that the Court acts on the motion within 7 days of the verdict, or (3) to file a *pro se* motion for a new trial. In this context, a defendant is forced to depend on trial counsel whom he believes performed below the constitutional standard for effective counsel to preserve his right to certain types of post-trial relief.

The Advisory Committee Notes do not explain why the drafters thought it appropriate in the case of these particular Rules – as opposed to countless others with no such requirement – to require not only that a party file a motion within a particular time frame, but also that the trial judge must act on the motion within that same amount of time or lose jurisdiction. Nor does Professor Wright offer any explanation. See 2A CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE §§ 461-70 (3d 2000) (Rule 29); 3 CHARLES

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[1] Since the grounds on which the motion is based must be set forth with specificity within the 7-day time frame, see, e.g., United States v. Quintanilla, 193 F.3d 1139, 1148 (10th Cir. 1999), this places a particularly incongruous burden on defense counsel.

ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE §§ 551-59 (2d 1982) (Rule 33); id. §§ 571-74 (Rule 34). And judges generally resist such constraints on their discretion. I know from my own experience as chair of our Court's Civil Justice Reform Act Advisory Group, for example, how soundly we were rebuffed by the Court when we suggested a CJRA plan that would require that all pending motions in civil cases be decided within 90 days. Furthermore, while finality is a legitimate goal, the current Rules do not provide it. Under the current version of Rules 29, 33 and 34, there is nothing that prevents the trial court from granting a defendant a significant extension of time so long as this additional time is fixed within 7 days of the verdict. Thus, as the Rules are currently drafted, the merits of a substantive motion under any of these three Rules will not necessarily be dealt with shortly after the jury's verdict is returned. A judge can set a briefing schedule as extensive as he or she thinks appropriate so long as it is set within 7 days.

Rules 29, 33 and 34 could be amended to give the district court jurisdiction to grant motions for an extension of time *nunc pro tunc*. In effect, this rule change would allow defendant to stop the 7-day clock by filing a motion for extension of time in which to file an appropriate motion. This change would eliminate the unfairness to a criminal defendant created when he seeks an extension of time within 7 days, but the trial court fails to act within the allotted amount of time. Furthermore, such a change still would put a burden on defendant to act within 7 days either by filing the appropriate motion under Rules 29, 33 or 34 or by filing a motion for an extension of time. Or the Rules could be written to require that a motion for a new trial, etc. or a motion to extend time for filing such a motion "must be made within 7 days . . ." eliminating the requirement that it also be decided within that period. Alternatively,

Rule 45(b)(2) could be amended by removing the language after the semi-colon which relates to Rules 29, 33, 34 and 35. This change also would eliminate the hardship worked on criminal defendants when the court does not grant the motion for an extension of time within the 7 day period and may help to eliminate the unfairness of forcing a defendant to rely on ineffective trial counsel for post-trial relief. This rule change may be less desirable because a defendant would not necessarily have to file a motion within 7 days, and the trial court could be forced to deal with motions filed well after the jury's guilty verdict is returned.

Rule 29. Motion for a Judgment of Acquittal

* * * * *

(c) After Jury Verdict or Discharge.

(1) Time for a Motion. A defendant may move for a judgment of acquittal, or renew such a motion, within 7 days after a guilty verdict or after the court discharges the jury, whichever is later, or within any other time the court sets ~~during the 7-day period~~.

* * * * *

COMMITTEE NOTE

[To be drafted after Committee agrees on language for the amendment]

Rule 33. New Trial

* * * * *

(b) Time to File.

* * * * *

(2) Other Grounds. Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 7 days after the verdict or finding of guilty, or within such further time as the court sets ~~during the 7-day period~~.

COMMITTEE NOTE

[To be drafted after Committee agrees on language for the amendment]

Rule 34. Arresting Judgment

* * * * *

(b) Time to File. The defendant must move to arrest judgment within 7 days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere, or within such further time as the court sets ~~during the 7-day period~~.

COMMITTEE NOTE

[To be drafted after Committee agrees on language for the amendment]

Rule 45. Computing and Extending Time

* * * * * *

(b) **Extending Time.**

(1) In General. When an act must or may be done within a specified time period, or the court on its own may extend the time, or for good cause may do so on a party's motion made:

(A) before the originally prescribed or previously extended time expires; or

(B) after the time expires if the party failed to act because of excusable neglect.

(2) **Exceptions**. The court may not extend the time to take any action under Rule ~~Rules 29, 33, 34 and~~ 35, except as stated in ~~those rules~~ that rule.

* * * * *

COMMITTEE NOTE

[To be drafted after Committee agrees on language for the amendment]

July 1944

Approved 10/3

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RULE 33

NEW TRIAL

The court on motion of a defendant may grant a new trial to a defendant him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time (not exceeding 5 days) as the court may fix during the 5-day period.

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ADVISORY COMMITTEE'S NOTE

The amendment to the first two sentences are designed to make it clear that a judge has no power to order a new trial on his own motion, that he can act only in response to a motion timely made by a defendant. Problems of double jeopardy arise when the court acts on its own motion. See United States v. Smith, 331 U.S. 469 (1947).

The amendment to the last sentence restricts to 5 days the extension of time in which to move for a new trial. It appears desirable to so limit the time in order that the motion must be made within the 10 day period in which it will serve to extend the time for appeal. See Rule 37.

*

Suggestions that the time in which motions must be made under this rule be lengthened and under Rule 34 have been considered but not approved. Such motions are normally made and disposed of prior to the entry of judgment. Since they can be made in simple form and since the court has power to extend the time for 5 days where reason appears, good policy would appear to favor keeping the time limits short in order to avoid delay in the disposition of criminal cases. It is true that practical problems may arise where the defendant is not represented by counsel at the time of judgment or plea. The remedy for these problems, however, would appear to lie in the direction of providing counsel rather than in the direction of extending the time in which these motions can be made. State law generally provides for very short time periods. See American Law Institute, Code of Criminal Procedure 1040-1042, 1076-1077 (1931). Some states even require that they be made and disposed of prior to the entry of judgment. See, e.g., Cal. Pen. C. §§ 1182, 1185, 1202.

LEONIDAS RALPH MECHAM
Director

CLARENCE A LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

JOHN K. RABIEJ
Chief

Rules Committee Support Office

WASHINGTON, D.C. 20544

August 26, 2002

MEMORANDUM TO PROFESSOR DAVID SCHLUETER

SUBJECT: *Additional Historical Records on Rule 33*

I have reviewed the historical rules-related records dealing with the time limitations contained in Rule 33 and located some additional materials that may be relevant to the committee's consideration. The first preliminary draft of Rule 33 proposed in 1943 was set out as part of Rule 31 and is attached. The original notes to this rule refer to the 1934 procedural rules as the basis for the requirement governing the time within which a motion for a new trial must be made. A copy of the 1934 rules of procedure is also attached.

The consideration of the 1943 draft rule includes a statement made by several committee members requesting that the rule go further and permit a motion to be made at any time if the verdict or plea of guilty was achieved by "fraud, duress or gross impropriety." Although a writ of habeas corpus would be available to correct such injustices, the committee members contended that the motion was far superior than a petition for a writ of habeas corpus as a procedural device.

> The motion would be made in the court by which the judgment was rendered; the writ is ordinarily sought elsewhere. The fact that the writ, if sustained, results in an order of release may conceivably present double jeopardy problems in the event of a new trial. We think, therefore, that there would be substantial gain if most of the contentions now presented after conviction on habeas corpus could be presented upon a motion for a new trial.

The full committee considered the request and determined not to change the proposals. It determined that unlike "newly discovered evidence" the existence of fraud, duress or gross impropriety would be known at the time of the occurrence and expanding the exception to include such causes might open the flood gates wide to applications for relief.

John K. Rabiej

Attachments

RULES OF PRACTICE AND PROCEDURE, AFTER PLEA OF GUILTY, VERDICT OR FINDING OF GUILT, IN CRIMINAL CASES BROUGHT IN THE DISTRICT COURTS OF THE UNITED STATES AND IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

PROMULGATED MAY 7, 1934

Rules of Practice and Procedure, after plea of guilty, verdict or finding of guilt, in Criminal Cases brought in the District Courts of the United States and in the Supreme Court of the District of Columbia.

ORDER.

Pursuant to the provisions of the Act of Congress, approved March 8, 1934, amending an Act entitled "An Act to give the Supreme Court of the United States authority to prescribe Rules of Practice and Procedure with respect to proceedings in criminal cases after verdict" (Act of February 24, 1933, c. 119, U.S.C., Title 28, Sec. 723(a))—

It is ordered on this seventh day of May, 1934, that the following rules be adopted as the Rules of Practice and Procedure in all proceedings after plea of guilty, verdict of guilt by a jury or finding of guilt by the trial court where a jury is waived, in criminal cases in District Courts of the United States and in the Supreme Court of the District of Columbia, and in all subsequent proceedings in such cases in the United States Circuit Courts of Appeals, in the Court of Appeals of the District of Columbia, and in the Supreme Court of the United States.

It is further ordered that these rules shall be applicable to proceedings in all cases in which a plea of guilty shall be entered or a verdict or finding of guilt shall be rendered, on or after the first day of September, 1934.

I. *Sentence.* After a plea of guilty, or a verdict of guilt by a jury or finding of guilt by the trial court where a jury is waived, and except as provided in the

Act of March 4, 1925, c. 521, 43 Stat. 1259, sentence shall be imposed without delay unless (1) a motion for the withdrawal of a plea of guilty, or in arrest of judgment or for a new trial, is pending, or the trial court is of opinion that there is reasonable ground for such a motion; or (2) the condition or character of the defendant, or other pertinent matters, should be investigated in the interest of justice before sentence is imposed.

Pending sentence, the court may commit the defendant or continue or increase the amount of bail.

II. *Motions.* (1) Motions after verdict or finding of guilt, or to withdraw a plea of guilty, shall be determined promptly.

(2) Save as provided in subdivision (3) of this Rule, motions in arrest of judgment, or for a new trial, shall be made within three (3) days after verdict or finding of guilt.

(3) A motion for a new trial solely upon the ground of newly-discovered evidence may be made within sixty (60) days after final judgment, without regard to the expiration of the term at which judgment was rendered, unless an appeal has been taken and in that event the trial court may entertain the motion only on remand of the case by the appellate court for that purpose, and such remand may be made at any time before final judgment.

(4) A motion to withdraw a plea of guilty shall be made within ten (10) days after entry of such plea and before sentence is imposed.

III. *Appeals.* An appeal shall be taken within five (5) days after entry of judgment of conviction, except that where a motion for a new trial has been made within the time specified in subdivision (2) of Rule II, the appeal may be taken within five (5) days after entry of the order denying the motion.

Petitions for allowance of appeal, and citations, in cases governed by these rules are abolished.

Federal Rules of

Criminal Procedure

Preliminary Draft

With Notes and Forms

Prepared by the

Advisory Committee on Rules of Criminal Procedure

Appointed by the

Supreme Court of the United States

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1943

Rule 31. Relief from Judgment or Order.

(a) CLERICAL MISTAKES. Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission

may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

(b) CORRECTION OR REDUCTION OF SENTENCE. The court may correct an illegal sentence at any time. The court may reduce a sentence without regard to whether the term of court at which the sentence was imposed has expired upon motion made within 60 days after sentence, or within 60 days after receipt by the district court of a mandate upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari.

(c) NEW TRIAL. The court may grant a new trial to a defendant whenever required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony, and direct the entry of a new judgment. A motion for new trial based solely on grounds other than newly discovered evidence shall be made within 3 days after verdict or finding of guilty or within such further time as the court may fix during the 3-day period. A motion for a new trial based solely upon the ground of newly discovered evidence may be made at any time before or after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case.

(d) ARREST OF JUDGMENT. The court shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 3 days

after verdict or finding of guilty or within such further time as the court may fix during the 3-day period.

Note to Rule 31

The rule is designed to govern the practice in seeking in the trial court relief from a judgment or order whether or not an appeal is taken.

Note to Subdivision (a). The provision is the same as Fed. Rules Civ. Proc., Rule 60 (a) (Relief from Judgment or Order—Clerical Mistakes). It states the present law with respect to the power of the court to correct clerical errors at any time. See *Rupinski* v. *United States*, 4 F. (2d) 17 (C. C. A. 6th, 1925); 5 Longsdorf, *Cyclopedia of Federal Procedure* (1929) § 2468. With respect to other errors, "arising from oversight or omission," the present law permits such errors to be corrected during the term, at least if the effect is to reduce the penalty. See *United States* v. *Benz*, 282 U. S. 304 (1931); *Ex parte Lange*, 18 Wall. 163 (U. S. 1873). The rule follows the general rule-making policy of removing disabilities of court and counsel based solely on the expiration of a term of court. See Rule 41 (c) (Time—Unaffected by Expiration of Term).

Note to Subdivision (b). The first sentence states the present law, that an illegal sentence may be corrected at any time. See 5 Longsdorf, *loc. cit. supra.* The limitation on the time for reduction of sentence is designed to extend the power of the judge to reduce a sentence imposed after a trial held near the end of a term, and on the other hand to put a limit on the reduction of sentence in a protracted or specially extended term of court or in the absence of fixed terms of court. If Congress should establish the method of sentencing proposed in the *Report to the Judicial Conference of the Committee on Punishment for Crime* (1942) 1, 16, this rule like Rule 30 (Sentence and Judgment) will require reexamination.

Note to Subdivision (c). Compare 28 U. S. C. § 391 (New trials; harmless error). Various grounds for the motion are illustrated by *Berger* v. *United States*, 295 U. S. 78 (1935); *Mattox* v. *United States*, 146 U. S. 140 (1892);

Edwards v. *United States*, 7 F. (2d) 357 (C. C. A. 8th, 1925); *Chadwick* v. *United States*, 141 Fed. 225 (C. C. A. 6th, 1905). See Rule 48 (a) (Harmless Error and Plain Error), and *Note* thereto, *infra*. The disposition of the motion is within the discretion of the court. *Mattox* v. *United States*, *supra*; *United States* v. *Hartenfeld*, 113 F. (2d) 359 (C. C. A. 7th, 1940), cert. denied 311 U. S. 647.

The second sentence is patterned on the corresponding provision of Fed. Rules Civ. Proc., Rule 59 (a) (New Trials—Grounds).

The rule states the requirement of Rule 2 (Motions) of the Criminal Appeals Rules, as to the time within which a motion for a new trial based solely upon grounds other than newly discovered evidence must be made.

Limitations upon the time for making a motion for a new trial solely on the ground of newly discovered evidence are abolished. The motion is grantable in the discretion of the court. Compare Rule 2 (3) of the Criminal Appeals Rules, which requires a motion for a new trial solely on the ground of newly discovered evidence to be made within sixty days after final judgment except in capital cases. Compare American Law Institute Code of Criminal Procedure (1931) § 362 (motion for new trial for newly discovered evidence may be made within one year after verdict or at a later time if the court for good cause permits); N. Y. Code Crim. Proc. § 466 (at any time within one year except in case of a sentence of death); Ohio Code Ann. § 13449–2 (within 120 days following the day upon which the verdict was rendered).

On the subject of remand, compare the last sentence of the subdivision with Criminal Appeals Rule 2 (3). The latter rule limits the time for remand. The proposal would drop this limitation because of two other proposed provisions removing time limitations, namely, the provision that a motion for new trial based solely on the ground of newly discovered evidence may be made at any time, and the provision of Rule 41 (c) (Time—Unaffected by Expiration of Term) *infra*. The last sentence of the subdivision changes also the word "entertain" to "grant." Under present practice application for remand must be made to the

appellate court, and the remand must be granted, before the trial court may entertain the motion for a new trial. Compare *Evans* v. *United States*, 122 F. (2d) 461 (C. C. A. 10th, 1941), conforming to mandate 312 U. S. 651 (1941); *Flowers* v. *United States*, 86 F. (2d) 79 (C. C. A. 8th, 1936). "The case will be remanded, however, only if showing is made to the appellate court that the lower court would be justified in granting a new trial." *Isgrig* v. *United States*, 109 F. (2d) 131, 134 (C. C. A. 4th, 1940).

The provision that if an appeal is pending the court may *grant* the motion only on remand of the case, is intended to change the existing practice pursuant to which a remand of the case from the appellate court must be secured before the motion for a new trial is made in the trial court. Under the proposed rule a motion for a new trial could be made without securing a remand. If, however, the trial court decides to grant the motion then, prior to the entry of the order granting it, a remand will have to be obtained. This course will eliminate the need of a remand in those cases in which the trial court determines to deny a motion for a new trial.

Note to Subdivision (d). In regard to the grounds for motions in arrest of judgment, see *Mulloney* v. *United States*, 79 F. (2d) 566, 584 (C. C. A. 1st, 1935); *Towe* v. *United States*, 238 Fed. 557 (C. C. A. 4th, 1916); *United States* v. *Marrin*, 159 Fed. 767 (E. D. Pa., 1908), affirmed 167 Fed. 951 (C. C. A. 3d, 1909). The time requirement is the same as that now provided by Rule 2 (2) (Motions) of the Criminal Appeals Rules, except for adding the provision for an enlargement.

No express provision is made with respect either to providing for relief or to barring relief under the common law writ of error *coram nobis*. See *Robinson* v. *Johnston*, 118 F. (2d) 998 (C. C. A. 9th, 1941), 130 F. (2d) 202 (C. C. A. 9th, 1942), remanded on other grounds, 316 U. S. 649 (1942). See also *People* v. *Reid*, 195 Cal. 249 (1924). See generally *Lamb* v. *Florida*, 91 Fla. 396 (1926). Nothing in the rules limits existing power of the court to grant any type of relief from judgments or orders which is not expressly provided for in this rule.

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II. Additional Statement by Messrs. Dession, Glueck, Orfield, and Wechsler.

We believe that the following matters, on which we disagree with the recommendation of the Committee, are sufficiently important to warrant submission to the Court of a statement of our views.

Rule 31 (c)

The rule recommended by the Committee provides that the court may grant a new trial "whenever required in the interest of justice." A motion for new trial based solely upon the ground of newly discovered evidence may be made at any time. A motion based upon some other ground must, however, be made within three days after verdict or finding of guilt or within such further time as the court may fix during the three-day period.

We are in full agreement with the rule in so far as it thus provides a broad basis for granting new trials when required in the interest of justice; and, further, in so far as it eliminates a time limit on motions for new trial based upon the ground of newly discovered evidence. We believe, however, that the rule should go further. A conviction of crime should not be permitted to stand at any time if achieved by fraud, duress or other gross impropriety. This, indeed, is substantially the present law, except that the

remedy available is the extraordinary writ of habeas corpus (see *Waley* v. *Johnston*, 316 U. S. 101), there being as yet no authoritative decision by the Supreme Court on the availability of the writ of error *coram nobis* (*Wells* v. *United States*, No. 11, Original, decided March 1, 1943). As a device for correcting gross injustices the motion for new trial is in our judgment superior to the writ of habeas corpus. The motion would be made in the court by which the judgment was rendered; the writ is ordinarily sought elsewhere. The fact that the writ, if sustained, results in an order of release may conceivably present double jeopardy problems in the event of a new trial. We think, therefore, that there would be substantial gain if most of the contentions now presented after conviction on habeas corpus could be presented upon a motion for a new trial. To be sure, the elimination of a time limit on motions for new trial based on newly discovered evidence goes a long distance towards meeting the problem. In most cases evidence of fraud or gross impropriety would, if available, be presented within the time allowed; if not then available the evidence would necessarily be newly discovered. There may, however, be cases in which evidence of duress, and perhaps also of fraud or gross impropriety, is not newly discovered and where by reason of ignorance or neglect the point was not made within the three-day or extended period otherwise permitted for motions for new trial. To permit such cases to be litigated on motion rather than on habeas corpus, we propose that the motion for new trial available without time limitation be expanded to include not only motions based upon newly discovered evidence, but also those based "upon the grounds of fraud, duress or other gross impropriety."

To achieve this result we suggest that paragraph (c) of Rule 31 be amended as follows:

> (c) For New Trial. The court may grant a new trial to a defendant whenever required in the interest of justice. If trial was by the court without a jury, the court may vacate the judgment, if entered, take additional testimony, and direct the entry of a new judgment. A motion for a new trial based solely upon the

ground of newly discovered evidence, fraud, duress, or other gross impropriety may be made at any time before or after final judgment, but if an appeal is pending the trial court may grant the motion only on remand of the case. A motion for new trial based on other grounds shall be made within three days after verdict or finding of guilty or within such further period as the court may fix during the three-day period.

Respectfully submitted.

GEORGE DESSION,
SHELDON GLUECK,
LESTER B. ORFIELD,
HERBERT WECHSLER.

Reply Memorandum to Additional Statement. Prepared by the Secretary of the Advisory Committee.

The purpose of this statement is to explain the action of the majority of the Committee in respect to those few Rules concerning which an "additional statement" is being filed by Mr. Wechsler, and three other members of the Committee. In this memorandum these Rules will be taken up in the same order in which they are considered in the additional statement.

Rule 31 (c)

The Committee adopted a rule the effect of which is to abolish all time limits on motions for a new trial on the ground of newly discovered evidence. There were two reasons for this action. First, it seemed illogical that there should be a time limit on such an application, since the motion cannot be made until the evidence is discovered. Irrespective of when the evidence comes to light, if it is sufficient to warrant a reopening of the case, such relief should be granted. Second, experience has shown that in fact cases have occurred in which new evidence was dis-

covered a considerable time after conviction and that such evidence led to the conclusion that a miscarriage of justice had resulted. It seemed to the Committee that judicial redress should be afforded in such cases and that executive clemency was neither a satisfactory nor adequate remedy from the standpoint of the Government or from the point of view of the defendant.

The additional statement while not objecting to the foregoing provision suggests that it should be carried still further, namely, that it should be extended to motions for a new trial based on fraud, duress, or other gross impropriety.

It was the view of the majority of the Committee that the reasons which warranted an abolition of all time limits on motions for a new trial on the ground of newly discovered evidence, would not apply to motions for a new trial based on fraud, duress, or other gross improprieties, since the existence of such facts would naturally be known at the time they transpired. Moreover, it seemed that the last mentioned proposal might open the flood gates wide to applications made years after the trial when some of the participants may no longer be available or their recollections may be partially faded.

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Allocution for All Victims in Felony Cases; Proposed Amendment of Rule 32, Sentencing**

DATE: **August 19, 2002**

Attached is a memo from Judge Miller and an accompanying law review article by Professor Barnard. She urges an amendment to Rule 32 that would require the court to provide allocution rights to victims of all felony offenses.

This item is on the agenda for the Fall 2002 meeting.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
SUITE 173
WALTER E. HOFFMAN UNITED STATES COURTHOUSE
600 GRANBY STREET
NORFOLK, VIRGINIA 23510-1915
(757) 222-7007

CHAMBERS OF
TOMMY E. MILLER
UNITED STATES MAGISTRATE JUDGE

FACSIMILE NO.
(757) 222-7027

August 16, 2002

The Honorable Edward E. Carnes
United States Circuit Judge
United States Court of appeals
United States Courthouse, Suite 500D
One Church Street
Montgomery, AL 36104

Dear Judge Carnes:

Enclosed is a letter and a copy of a law review article that I received from Professor Jayne W. Barnard. I understand that she mailed it to all committee members in January of 2002.

I request that her letter and the law review article be included as an agenda item for the September 2002 meeting. The topic certainly is a high profile one.

Respectfully submitted,

Tommy E. Miller
United States Magistrate Judge

TEM:plc

cc: Professor David A. Schleuter, Reporter
John K. Rabiej, Chief, Rules Committee Support Office

The College Of
WILLIAM & MARY

School of Law

P.O. Box 8795
Williamsburg, Virginia 23187-8795
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January 16, 2002

Honorable Tommy E. Miller
United States Magistrate Judge
173 Walter E. Hoffman
United States Courthouse
600 Granby Street
Norfolk, Virginia 23510-1915

Re: Advisory Committee on Criminal Rules

Dear Judge Miller:

I am writing to you in your role as a member of the Advisory Committee on Criminal Rules. I am enclosing a copy of my recent article, *Allocution for Victims of Economic Crimes*, 77 N. D. L. REV. 39 (2001).

In this article, I propose that Federal Rule of Criminal Procedure 32(c)(3)(E) be amended to provide for victim allocution in all felony cases, rather than limiting allocution to cases involving violence and sexual abuse.

I think the article makes a strong case for amendment and deals in practical way with reasonable concerns about the impact of allocution on the criminal justice system.

I encourage the members of the committee to consider this proposal.

Very truly yours,

Jayne W. Barnard
Cutler Professor of Law

Volume 77 Number 1 November 2001

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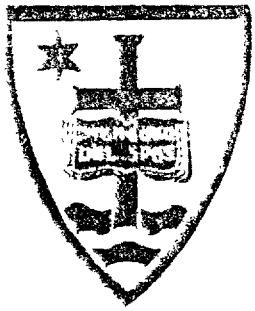

ALLOCUTION FOR VICTIMS OF ECONOMIC CRIMES

Jayne W. Barnard

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ALLOCUTION FOR VICTIMS OF ECONOMIC CRIMES

*Jayne W. Barnard**

* Cutler Professor of Law, The College of William & Mary. Thanks to Paul Cassell, Edna Erez, John Levy, Frank Bowman, Sarah Welling, and John Tucker for their comments on earlier drafts of this Article. Thanks also to the faculty at Seattle University School of Law whose comments during a faculty workshop sent me in some new directions. Also to Heather Stacey, Gretchen Greisler, Pia Thadhani, and Miles Uhlar for their research and cite-checking assistance on this project.

> Narratives with evocative, rich details about subjective experiences can be used to persuade people—like judges—who have sufficient power to make a difference actually to do so. . . .
>
> Martha Minow[1]

INTRODUCTION

Since 1994, the Federal Rules of Criminal Procedure have required federal courts to entertain in-court victim impact testimony as part of the sentencing process.[2] However, this testimony (also known as victim allocution) is required only in cases in which the defendant is guilty of a crime involving violence or sexual abuse.[3]

This Article argues that this limitation on the ability of victims of *non*-violent crimes to have access to the courts for purposes of allocution is unwise and inappropriate. Federal courts should be required to entertain in-court victim impact testimony in cases involving nonviolent crimes as well as in cases involving violent crimes. Specifically, in-court victim impact testimony should be required in cases involving economic crimes such as mail fraud, wire fraud, securities fraud, telemarketing fraud, and "identity theft." Victims of other federal

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1 Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665, 1689 (1990).

2 *See* FED. R. CRIM. P. 32(c)(3)(E) ("[Under appropriate circumstances, the sentencing judge must] address the victim personally if the victim is present at the sentencing hearing and determine if the victim wishes to make a statement or present any information in relation to the sentence."). This provision was enacted as part of the Violent Crime Control and Law Enforcement Act of 1994, Pub L. No. 103-322, 108 Stat. 1796.

3 *See* FED. R. CRIM. P. 32(c)(3)(E).

felonies, to the extent they are clearly identifiable as victims,[4] should also be entitled to victim allocution.

The background for this proposal is simple. Experience in economic crime cases demonstrates that victims of these types of crimes often feel just as violated, anxious, confused, betrayed, and depressed as do victims of violent crimes.[5] Often they are the kinds of "vulnerable victims" recognized in the U.S. Sentencing Guidelines,[6] yet they have few resources by which to express their vulnerability or to feel they have had a real impact on decisions relating to their victimizer's fate.

Federal prosecutors often invite victims of economic crimes to recount their experiences *in writing*, in order to lend weight to a request for restitution, an enhancement of the defendant's sentence, or an upward departure from the Sentencing Guidelines.[7] Frequently, federal judges will include specific references to these written declarations in the course of the sentencing process.[8] What I am proposing in this Article involves a greater commitment to victims of non-violent crimes, however—a legislatively-assured opportunity to be heard in open court.[9]

The purpose of this proposal is three-fold: (1) to permit the victim to regain a sense of dignity and respect rather than feeling powerless and ashamed; (2) to require defendants to confront—in person and not just on paper—the human consequences of their illegal conduct; and (3) to compel courts to fully account in the sentencing process for the serious societal harms—harms that go well beyond issues of money—that economic crimes often impose.

The theories underlying this proposal are those that recognize the "expressive" and "educative" functions of sentencing, in addition to the deterrent and retributive functions. Victim allocution not only satisfies the public's need for denunciation of offenders,[10] but it can

4 *See infra* note 228 and accompanying text.

5 Some fraud victims describe their experience as "the psychological equivalent of rape." Leslie Eaton, *Assault with a Fiscal Weapon: As Swindlers Branch Out, Victims Want To Be Heard*, N.Y. TIMES, May 25, 1999, at C1.

6 *See* U.S. SENTENCING GUIDELINES MANUAL § 3A1.1 (1998).

7 *See infra* Part I.B.

8 *See* Joseph A. Slobodzian, *A Phila. Lawyer Who Stole Millions Gets a 15-Year Term*, PHILA. INQUIRER, Aug. 13, 1998, at 1 (describing the collection of more than 1,000 victim impact statements compiled by federal prosecutors in connection with a $53 million insurance fraud). The sentencing judge took specific notice of the statements of policyholders and their heirs who had been left without health or life insurance coverage. *Id.*

9 For the text of this proposal, see *infra* Part VI.

10 *See infra* Part V.A.

also serve as a platform for the moral re-education of the defendant.[11] At the same time, permitting fraud victims to tell their stories aloud and in public, rather than solely through the intermediation of a written document, can respond to victims' needs for restorative justice.[12] Most importantly, though, victim allocution should materially assist judges in reaching more appropriate sentencing decisions.

I. THE EVIDENTIARY BACKGROUND FOR THIS PROPOSAL

Victims of economic crimes are always permitted to offer testimony concerning a defendant's conduct, and facts supporting the *elements* of the crime. Courts have cautioned, however, that—at least during the *guilt* phase of the prosecution—testimony having to do with the victim's emotional reactions to the defendant's conduct may have "little, if any, probative value and may be unfairly prejudicial."[13] Consequently, testimony that is designed "to generate feelings of sympathy for the victims and outrage toward [the defendant] for reasons not relevant to the charges"[14] is inadmissible during the defendant's trial on the merits.[15] Failure to distinguish between occurrence testimony and victim impact testimony may lead to a reversal of a defendant's criminal conviction.[16]

By contrast, victim impact testimony during the *penalty* phase of a trial carries no such baggage. Victim impact testimony has been held to be relevant to sentencing issues generally and not inconsistent with principles of due process.[17] Even in death penalty cases, and even where the testimony is repetitive, graphic, and emotionally overwrought,[18] victim impact testimony is now an accepted feature on the federal sentencing landscape.

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11 *See infra* Part V.B.

12 *See infra* Part V.C.

13 United States v. Sokolow, 91 F.3d 396, 407 (3d Cir. 1996); *see also* United States v. Copple, 24 F.3d 535, 545 (3d Cir. 1994) (stating that extensive victim impact testimony as to collateral losses "went beyond anything that was reasonable to prove [defendant's] specific intent to defraud").

14 *Copple*, 24 F.3d at 546.

15 Typically, challenges to guilt-phase victim impact testimony are advanced under Rule 403 of the Federal Rules of Evidence. *See, e.g.*, United States v. McVeigh, 153 F.3d 1166, 1199 (10th Cir. 1998).

16 As a practical matter, reviewing courts often find there has been no "plain error" in admission of victim impact-type evidence or find any such error in the trial to have been "harmless." *See, e.g., id.* at 1201; *Sokolow*, 91 F.3d at 407, *Copple*, 24 F.3d at 538.

17 *See* Payne v. Tennessee, 501 U.S. 808, 827 (1991).

18 *See McVeigh*, 153 F.3d at 1220 (describing the intensely emotional victim impact testimony at the defendant's sentencing hearing); James Collins, *Day of Reckoning: The*

However, except in a handful of cases in which federal judges have *voluntarily* entertained victim impact testimony,[19] such testimony has not been permitted in economic crime cases. That is not because the testimony is irrelevant to the sentencing process—as will be seen below,[20] it clearly *is* relevant. Rather, this exclusion of otherwise relevant testimony is a function of the limits of Rule 32(c)(3)(E).

A. *The Role of the Sentencing Guidelines*

Victim impact information may often be relevant in economic crime cases to specific sentencing issues such as the length of the defendant's prison term or the amount of the fine to be imposed. In fact, the Federal Sentencing Guidelines set out a number of victim-related issues which victim impact testimony could illuminate.

1. Upward Departures for Psychological Harms to Victims

Criminal sentencing in federal courts begins with the court determining an "offense level" for the crime, which, in economic crime cases, is typically based on the victim's economic loss.[21] The resulting sentence or fine may then be adjusted upward or downward where certain factors are present. For example, where the victim's monetary loss "does not fully capture the harmfulness and seriousness of the

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Jury That Found McVeigh Guilty Wrestles with Emotion and Tears as It Prepares To Decide His Fate, TIME, June 16, 1997, at 26 (same).

19 *See, e.g.*, United States v. Dodson, No. 99-5039, 2000 U.S. App. LEXIS 6261, at *16–*19 (10th Cir. Apr. 4, 2000) (referring to victim testimony at sentencing as a basis for the trial court's upward departure from the Guidelines); United States v. Luca, 183 F.3d 1018, 1026–27 (9th Cir. 1999) (quoting victim impact testimony from some of the defendant's victims); United States v. Van Zandt, No. 97-1622, 1998 U.S. App. LEXIS 24472, at *3 (2d Cir. Sept. 25, 1998) (citing the testimony of a victim at the sentencing hearing); United States v. Robertson, No. 96-1233, 1998 U.S. App. LEXIS 690, at *9 (10th Cir. Jan. 16, 1998) (mentioning that the judge heard victim testimony at the sentencing hearing); United States v. Smith, 133 F.3d 737, 751 (10th Cir. 1997) (mentioning that the district court had received some victim impact testimony at the sentencing hearing); United States v. Akindele, 84 F.3d 948, 954 (7th Cir. 1996) (recounting the in-court testimony of victims); United States v. Dobish, 102 F.3d 760, 763 (6th Cir. 1996) (referring to in-court testimony of some of the defendant's victims); United States v. Serhant, 740 F.2d 548, 551 (7th Cir. 1984) (referring to the testimony of seven victims).

20 *See infra* Part I.A.

21 *See* U.S. SENTENCING GUIDELINES MANUAL § 2F1.1 (1998). For a critical examination of the mechanics of sentencing in economic crime cases, see generally Frank O. Bowman, III, *Coping with "Loss": A Re-Examination of Sentencing Federal Economic Crimes Under the Guidelines*, 51 VAND. L. REV. 461 (1998).

[defendant's] conduct,"[22] the court may depart from the Guidelines' restrictions. Under this rubric, the prosecution may argue that the fraud "caused or risked reasonably foreseeable, substantial non-monetary harm"[23] or, more specifically, that the offense "caused reasonably foreseeable, physical or psychological harm or severe emotional trauma"[24] in addition to monetary losses.

Some degree of emotional harm is present in most economic crime cases.[25] But some economic crimes impose a special psychological burden on their victims and these are the cases that warrant upward departures. Using the available tools (that is, written documentation), judges have granted upward departures based on psychological or other non-economic harms where a telemarketer defrauded elderly victims, often by "badgering and insulting and degrading [them]";[26] another telemarketer persuaded elderly victims to contribute large sums to non-existent charities, often reducing them to begging to be left alone;[27] a bookkeeper defrauded dozens of small business owners, driving some of them into states of clinical depression;[28] and a neighbor defrauded his long-time neighbors, causing them to experience a "deep sense of loss and betrayal" at his actions.[29] Other examples of foreseeable psychological harms giving rise to an upward departure from the Guidelines include a business owner who looted his firm's pension fund, causing his retired employees "to seek work at an advanced age and rely on help from family members, [and

22 U.S. SENTENCING GUIDELINES MANUAL § 2F1.1, cmt. n.1 (1998).

23 *Id.* § 2F1.1, cmt. n.11(a).

24 *Id.* § 2F1.1, cmt. n.11(c).

25 For example, fraud victimization can often lead to self-blame, shame, guilt, feelings of societal condemnation and indifference (the attitude that victims of fraud deserve what they get as a result of their own greed and stupidity), and isolation (when victims suffer their losses in silence rather than risking alienation and blame from family members, friends, and colleagues). *See* OFFICE FOR VICTIMS OF CRIMES, DEP'T OF JUSTICE, PROVIDING SERVICES TO VICTIMS OF FRAUD: RESOURCES FOR VICTIM/WITNESS COORDINATORS I-1 (1998), *available at* http://www.ojp.usdoj.gov/ovc/publications/infores/fraud/psvf.pdf. Fraud victimization can also lead to more serious pathologies. *See* Linda Ganzini et al., *Prevalence of Mental Disorders After Catastrophic Financial Loss*, 178 J. NERVOUS & MENTAL DISEASE 680, 682 (1990) (noting that 29% of fraud victims studied suffered a "major depressive episode" following the crime).

26 *See* United States v. Davis, 170 F.3d 617, 623 (6th Cir. 1999) (affirming an eight-level upward departure).

27 *See* United States v. Smith, 133 F.3d 737, 751–52 (10th Cir. 1997) (affirming a two-level upward departure).

28 *See* United States v. Finnigan, No. 95-50248, 1996 U.S. App. LEXIS 33991, at *11 (9th Cir. Dec. 31, 1996) (affirming a one-level upward departure).

29 *See* United States v. Iannone, 184 F.3d 214, 231 (3d Cir. 1999) (affirming a two-level upward departure).

to endure the] trauma that comes with losing one's savings";[30] a pharmacist who passed himself off as a physician and examined and treated hundreds of "patients";[31] a defendant convicted of identity theft whose actions caused her victims "turmoil" and "upheaval";[32] and a daughter who defrauded her own parents.[33]

The common theme in these cases is that the victims of these crimes not only lost significant amounts of money, they also were injured in their sense of personal dignity and autonomy and, in some cases, had their intimate relationships destroyed. Obviously, information about these kinds of harm in an economic crime case can best be elicited from victims, their family members, neighbors, and mental health care providers. And the absence of an adequate record on this issue may make an upward departure impossible.[34]

2. Upward Departures for Knowingly Endangering a Victim's Financial Solvency

A defendant's sentence may also be adjusted upward where the offense involved "the knowing endangerment of the solvency of one or more victims."[35] It is one thing to defraud a millionaire of $10,000 and quite another to defraud a working-class person of the same amount. This provision of the Guidelines takes that factor into account.

Defendants subject to this adjustment are often particularly aggressive in their dealings with victims, persistent in their efforts to take those victims' money, and singularly heedless of the import of their actions. Thus, courts have granted upward adjustments for knowing endangerment of financial insolvency where financial advisors caused their clients to lose all of their money in various investment schemes;[36] where a greedy nephew stole his great-aunt's life savings

30 *See* United States v. Helbling, 209 F.3d 226, 251 (3d Cir. 2000) (affirming a two-level upward departure).

31 *See* United States v. Barnes, 125 F.3d 1287, 1294 (9th Cir. 1997) (affirming a two-level upward departure).

32 *See* United States v. Sample, 213 F.3d 1029, 1033–34 (8th Cir. 2000) (affirming a nine-month enhancement).

33 *See* United States v. All, No. 98-4205, 1998 U.S. App. LEXIS 22676, at *5 (4th Cir. Sept. 16, 1998) (affirming a two-level upward departure).

34 Sometimes, judges complain that the prosecution fails to alert the court to the severity of victim impact. *See* United States v. Gill, 99 F.3d 484, 487 (1st Cir. 1996) ("[T]he government could have simplified matters if it had offered evidence from some of [the defendant's] former patients.").

35 U.S. SENTENCING GUIDELINES MANUAL § 2F1.1, cmt. n.11(f) (1998).

36 *See* United States v. Van Zandt, No. 97-1622, 1998 U.S. App. LEXIS 24472, at *3 (2d Cir. Sept. 25, 1998) (affirming an eighteen-month upward departure where de-

and left her "financially dependent on the generosity of others, quite possibly for the rest of her life";[37] and where a daughter misappropriated her elderly parents' money, leaving them with "no income except Social Security" and therefore condemning them to a "bleak future."[38] Once again, as in the case of psychological and other non-monetary harms, the best sources of information about the victim's financial status prior to the crime, and the defendant's knowledge that the victim's solvency was imperiled, are the victim and others familiar with her finances.

3. Sentence Enhancements for Targeting Vulnerable Victims

A defendant's sentence also may be adjusted upward where the victim can be shown to have been an "unusually vulnerable" victim.[39] Under this rubric, the government must first establish that the victim was "more susceptible to abuse from [the] perpetrator than most other potential victims of the particular offense."[40] The government must then prove that the defendant "knew or should have known of this susceptibility or vulnerability; and [that] this vulnerability or susceptibility facilitated the defendant's crime in some manner; that is, there was 'a nexus between the victim's vulnerability and the crime's ultimate success.'"[41]

The vulnerable victim enhancement "cannot be based solely on the victim's membership in a certain class; the sentencing court is required to make particularized findings of vulnerability, focusing on the individual victim and not the class of persons to which the victim

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fendant's mail fraud cost at least two victims "all of their money" and one was "close to losing her home"); United States v. Hogan, 121 F.3d 370, 373 (8th Cir. 1997) (affirming a two-level upward departure where a securities broker sold counterfeit certificates of deposit to victims, knowing they were living on fixed incomes and facing significant medical bills); United States v. Pelkey, No. 95-1008, 1995 U.S. App. LEXIS 15040, at *10–*11 (1st Cir. June 19, 1995) (affirming a two-level upward departure where a financial advisor defrauded her clients even when she knew that some of them were "right down to the last penny and she took that also"); United States v. Strouse, 882 F. Supp. 1461, 1466–67 (M.D. Pa. 1995) (imposing a three-level upward departure where an investment agent repeatedly solicited clients' money for his fraudulent investment scheme, forcing many of them to survive solely on Social Security).

37 *See* United States v. Kaye, 23 F.3d 50, 53 (2d Cir. 1994) (affirming a two-level upward departure).

38 *See All*, 1998 U.S. App. LEXIS 22676, at *4.

39 *See* U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(b)(1), cmt. n.2.

40 United States v. Singh, 54 F.3d 1182, 1191 (4th Cir. 1995).

41 United States v. Iannone, 184 F.3d 214, 220 (3d Cir. 1999) (quoting United States v. Monostra, 125 F.3d 183, 188 (3d Cir. 1997)).

belonged."[42] Obviously, this means hearing from the victim (or a family member or others) concerning the victim's gullibility, lack of sophistication, confusion, dependency, or misunderstanding of the defendant's intentions. The test is whether because of their mental or educational deficiencies, or other reasons, "the victims are less likely to know that they have been defrauded or if they know to have the know-how and initiative required to press a criminal complaint or bring a civil suit."[43]

Enhancements based on vulnerable victim considerations have occurred in economic crime cases where financial advisors exploited the confusion and anxiety of elderly clients[44] (or a bewildered young widow);[45] where a con man preyed on a Vietnam veteran who wrongly believed him to be a "brother-in-arms";[46] where a caregiver stole the savings of her client, an eighty-seven-year-old woman who, for the preceding three years had been "completely reliant on [the defendant] for her care";[47] and where the defendant extorted money from a recent immigrant, persuading him that the money was necessary to pay off the police in order to avoid deportation.[48]

Vulnerable victim adjustments also have been made where loan brokers extorted advance loan fees from people with poor credit ratings who were desperate for cash;[49] where telemarketers preyed on "mooches" (people who had previously been victims of telemarketing frauds);[50] and where insurance salesmen collected premiums for nonexistent policies from people with uninsurable medical conditions.[51] Homeless people,[52] people with poor credit ratings,[53] and persons

42 United States v. Smith, 133 F.3d 737, 749 (10th Cir. 1997).

43 United States v. Grimes, 173 F.3d 634, 637 (7th Cir. 1999).

44 *See Smith*, 133 F.3d at 749 (affirming a two-level enhancement).

45 *See* United States v. Giesse, No. 98-8027, 1999 U.S. App. LEXIS 3812, at *10–*11 (10th Cir. Mar. 10, 1999) (affirming a two-level enhancement).

46 *See Iannone*, 184 F.3d at 221 (affirming a two-level enhancement).

47 *See* United States v. Haines, 32 F.3d 290, 292 (7th Cir. 1994) (affirming a two-level enhancement).

48 *See* United States v. Bengali, 11 F.3d 1207, 1212 (4th Cir. 1993) (affirming a two-level enhancement).

49 *See* United States v. Grimes, 173 F.3d 634, 637 (7th Cir. 1999) (affirming enhancement of sentence to sixty-three months); United States v. Page, 69 F.3d 482, 492 (11th Cir. 1995) (affirming a two-level enhancement).

50 *See* United States v. Coffman, No. 97-5219, 1998 U.S. App. LEXIS 16912 (10th Cir. July 23, 1998) (affirming a two-level enhancement).

51 *See* United States v. O'Brien, 50 F.3d 751 (9th Cir. 1995) (affirming a two-level enhancement).

52 *See* United States v. Bragg, 207 F.3d 394, 400–02 (7th Cir. 2000) (affirming a two-level enhancement).

with mental deficiencies[54] have all been found to be unusually vulnerable victims.

In each of these cases, the finding that a victim is "unusually vulnerable" has been based on paper submissions. Persuading judges to appreciate the vulnerability of a particular victim, though, may often depend on their opportunity to observe the victim's demeanor, listen to the victim's narration of his experiences, and assess the victim's ability to resist the defendant's inducements. This is where victim allocution could greatly assist the court.

4. Sentence Enhancements for Abuse of Trust

A defendant's sentence may also be adjusted upward where the defendant can be shown to have "abused a position of public or private trust."[55] Under this rubric, the government may argue that the victim's particular relationship to the defendant "contributed in some significant way to facilitating the commission or concealment of the offense."[56] Positions of trust are not limited to traditional fiduciaries.[57] But "reliance on the integrity of the person occupying the position" is an essential element of the position of trust analysis.[58]

"There are two indicia of [a] position of trust: (1) 'the inability of the trustor objectively and expediently to determine the trustee's honesty' and (2) 'the ease [or difficulty] with which the trustee's activities can be observed.'"[59] Both involve fact-specific inquiries[60] and both may be established by victim impact evidence.[61] Upward adjustments based on abuse of trust considerations have occurred in economic crime cases where lawyers[62] or financial advisors[63] defrauded their cli-

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53 *See* United States v. Borst, 62 F.3d 43, 46 (2d Cir. 1995) (affirming a two-level enhancement); United States v. Holmes, 60 F.3d 1134, 1136–37 (4th Cir. 1995) (affirming a three-level enhancement); United States v. Peters, 962 F.2d 1410, 1416–18 (9th Cir. 1992) (affirming a two-level enhancement for both defendants).

54 *See* United States v. Gabrion, No. 98-1822, 2000 U.S. App. LEXIS 18740, at *18–*21 (6th Cir. July 27, 2000) (affirming a two-level enhancement).

55 U.S. SENTENCING GUIDELINES MANUAL § 3B1.3 (1998).

56 *Id.* cmt. n.1; United States v. Williams, 993 F.2d 1224, 1227–28 (6th Cir. 1993).

57 *See* United States v. Iannone, 184 F.3d 214, 223 (3d Cir. 1999).

58 *See id.*

59 United States v. Velez, 185 F.3d 1048, 1051 (9th Cir. 1999) (quoting United States v. Hill, 915 F.2d 502, 506 (9th Cir. 1990)).

60 *See* United States v. Baker, 200 F.3d 558, 564 (8th Cir. 2000).

61 *See* United States v. Cusack, 66 F. Supp. 2d 493, 502 (S.D.N.Y. 1999) (noting that "whether a position is one of trust 'is to be viewed from the perspective of the offense victims'") (quoting United States v. Laljie, 184 F.3d 180, 195 (2d Cir. 1999)).

62 *See* United States v. Holmes, 193 F.3d 200, 205 (3d Cir. 1999) (holding that a lawyer who misappropriated funds from several clients had abused his position of

ents; a key employee embezzled from her employer;[64] a law firm paralegal misappropriated client documents in a forgery-and-fraud scheme;[65] a school administrator misappropriated school operating funds for his personal use;[66] and a real estate agent used his clients' social security numbers and other personal information from their files to fraudulently secure credit cards.[67] As in the case of unusually vulnerable victims, the evidence necessary to support an abuse of trust enhancement will best come from the victim(s) or their associates, and in-court testimony may prove the most effective way to establish the veracity of claims of a trust-type relationship.

5. Departures from the Guidelines for Aggravating and Mitigating Circumstances

Finally, a sentence may be calculated so as to depart from the Guidelines where "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines that should result in a sentence different from that described [in the Guidelines]."[68] A departure under this provision may only be granted where the crime is so different in kind or effect from a "typical" crime of its type that it "fall[s] outside the heartland of cases in the Guidelines."[69]

Establishing the "heartland" and defining its boundaries usually involves proof that the defendant defrauded more than some "typical" number of victim,[70] or dealt with his victims in a way that is particu-

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trust, and to such an extraordinary degree that an upward departure—on top of the two-level sentence enhancement—was warranted).

63 *See Baker*, 200 F.3d at 563–64 (holding that an insurance agent who received premium payments from her elderly clients, then misappropriated them for her own personal use, abused her position of trust); United States v. Trammell, 133 F.3d 1343, 1355 (10th Cir. 1998) (same).

64 *See* United States v. Allen, 201 F.3d 163, 165–66 (2d Cir. 2000) (affirming a two-level enhancement).

65 *See Cusack*, 66 F. Supp. 2d at 497–98 (imposing a two-level enhancement).

66 *See* United States v. Robinson, 198 F.3d 973, 975 (D.C. Cir. 2000) (affirming a two-level enhancement).

67 *See* United States v. Akinkoye, 185 F.3d 192, 196 (4th Cir. 1999) (affirming a two-level enhancement).

68 18 U.S.C. § 3553(b) (1994); U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (1998).

69 Koon v. United States, 518 U.S. 81, 98 (1996).

70 *See, e.g.*, United States v. Melvin, 187 F.3d 1316, 1321 (11th Cir. 1999) (affirming upward departure where district court considered the large number of victims defrauded).

larly degrading, offensive, or cruel.[71] Upward departures based on aggravating circumstances specifically related to economic crime victims have occurred where the defendant, an employee of a children's hospital, misappropriated the social security numbers of 135 of the hospital's patients and used them in an elaborate credit card scam;[72] the defendant defrauded 336 elderly victims—sometimes repeatedly—in a telemarketing scheme;[73] the defendant defrauded more than 600 investors in twenty-two states in a Ponzi scheme;[74] the defendant paid his accomplices in drugs, rather than cash, for each stolen credit card they delivered to him;[75] the defendant defrauded real estate buyers, sellers, lending institutions, and title insurance companies in an elaborate scheme that played out over seven years;[76] and the defendant forged her mother's signature on dozens of checks in a scheme to defraud her mother's employer.[77] Defendants "without scruples,"[78] and those "who would sacrifice any person or institution in the service of [their] greed,"[79] may be subject to these sorts of upward departures. So may defendants whose crimes strike the court as "despicable,"[80] those who show no remorse for their crimes,[81] and those whose crimes are "extraordinarily shocking to the public con-

71 *See* U.S. SENTENCING GUIDELINES MANUAL § 5K2.8 (authorizing upward departure where defendant's conduct was unusually heinous, cruel, brutal, or degrading to the victim).

72 *See Melvin*, 187 F.3d at 1319 (affirming a fifteen-level upward departure).

73 *See* United States v. Brown, 147 F.3d 477, 486 (6th Cir. 1998) (affirming a two-level upward departure)

74 *See* United States v. Benskin, 926 F.2d 562, 563 (6th Cir. 1991) (affirming a twenty-seven month upward departure).

75 *See* United States v. Johnson, No. 95-5414, 1997 U.S. App. LEXIS 7588, at *5 (4th Cir. Apr. 17, 1997) (affirming a one-level upward departure).

76 *See* United States v. Conklin, No. 97-1813, 1998 U.S. App. LEXIS 31975, at *5 (6th Cir. Dec. 22, 1998) (affirming a seven month upward departure).

77 *See* United States v. Kay, 83 F.3d 98, 100 (5th Cir. 1998) (affirming a seven-level upward departure).

78 *See* United States v. Cusack, 66 F. Supp. 2d 493, 517 (S.D.N.Y. 1999) (imposing a one-level upward departure).

79 *See id.*

80 *See* United States v. Robertson, No. 96-1233, 1998 U.S. App. LEXIS 690, at *9 (10th Cir. Jan 16, 1998) (affirming a two-level upward departure where the defendant solicited money from elderly victims by telling them their money was to be used to keep children off drugs—only $45 out of $915,000 collected went to charity).

81 *See* United States v. Brown, 147 F.3d 477, 486–87 (6th Cir. 1998) (affirming a three-level upward departure where the defendant led a telemarketing scheme that solicited funds from elderly victims by telling them they had won a "fabulous prize").

science."[82] In these sorts of cases, the number and nature of the victims, the manipulative ways in which the defendants interacted with them, and the totality of the impact of the crime on society can best be elicited by victim impact testimony.

B. The Common Use of Written Comments

Using the various victim-centered provisions of the Guidelines, courts in economic crime cases have frequently considered *written* victim impact statements and used them as an element in determining a defendant's sentence. The documents relied on have included direct communications to the court,[83] written victim impact statements appended to the pre-sentence investigation report (PSIR),[84] summaries of victim interviews by U.S. Probation Service personnel,[85] affidavits prepared for submission at the sentencing,[86] and various forms of supporting documentation.[87] Written victim

82 *See* United States v. Moskal, 211 F.3d 1070, 1075 (8th Cir. 2000) (affirming a three-level upward departure where the defendant, a noted personal injury attorney, stole $2.4 million from clients, referring attorneys, and his own law firm).

83 *See* United States v. Van Zandt, No. 97-1622, 1998 U.S. App. LEXIS 24472, at *3 (2d Cir. Sept. 25, 1998) (victims' letters to the court); United States v. Barnes, 125 F.3d 1287, 1293 (9th Cir. 1997) (same); United States v. Finnigan, Nos. 95-50248, 95-50251, 1996 U.S. App. LEXIS 33991, at *10 (9th Cir. Dec. 31, 1996) (same); United States v. Wells, 101 F.3d 370, 372 (5th Cir. 1996) (same); United States v. Dobish, 102 F.3d 760, 763 (6th Cir. 1996) (same); United States v. Hoffenberg, No. 94-CR213, 1997 U.S. Dist. LEXIS 2394, at *38 (S.D.N.Y. Mar. 4, 1997) (sentencing opinion) (recounting the "hundreds of letters detailing the devastating economic, psychological, and even physical effects of [the defendant's] successful scheme to defraud"); United States v. Skodnek, 933 F. Supp. 1108, 1121 n.31 (D. Mass. 1996) (referring to victims' letters to the court).

There is no prohibition against courts considering letters from victims. *See* Reid v. State, 490 A.2d 1289, 1294 (Md. 1985) (holding that it does not violate a defendant's due process rights for the sentencing judge to receive and consider information sent directly to him by the victim). *But see* United States v. Hayes, 171 F.3d 389, 392–95 (6th Cir. 1999) (vacating a sentence where the judge considered victims' letters to the court without giving notice of same to the defendant).

84 *See* 18 U.S.C. § 3552 (1994) (describing the PSIR process). These statements may include a detailed history of the victims' losses, including psychological harms, disruptions to their lives, and loss of income and property. *See* United States v. Rezaq, 134 F.3d 1121, 1141 (D.C. Cir. 1998).

85 *See Finnigan*, 1996 U.S. App. LEXIS 33991, at *10.

86 *See* United States v. Pelkey, No. 95-1008, 1995 U.S. App. LEXIS 15040, at *10 (1st Cir. June 19, 1995) (noting use of victims' affidavits at sentencing).

87 For example, written victim impact statements may include corroborating materials from physicians, psychiatrists, and employers. *See Rezaq*, 134 F.3d at 1141. Occasionally, psychologists are also permitted to testify regarding victim impact at the

impact documentation is required to support an order of restitution.[88]

II. A Sampling of the Voices of Victims of Non-Violent Crimes

Victims of economic crimes are currently afforded a limited range of options when it comes to communicating their stories. They are, of course, permitted to submit *written* forms of victim impact evidence, as noted above. But many victims of economic crimes have found that option to be inadequate and have sought other avenues to express their opinions and feelings about the crime and the offender. Thus, victims of economic crimes, like victims of violent crimes, are sometimes found demonstrating outside of the courthouse,[89] packing the seats at the defendant's trial or sentencing,[90] writing impassioned letters to the editor, or making their cases to sympathetic reporters. A few try physical violence against their victimizers[91]—others commit suicide.[92] The need to be heard, to describe the events leading up to the crime, and to develop some sense that their listeners can truly *grasp* the depth of their loss, is obviously a compelling one for many economic crime victims.[93]

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sentencing hearing. *See* United States v. Newman, 965 F.2d 206, 209 (7th Cir. 1992) (describing the testimony of the victim's treating psychologist).

88 *See* 18 U.S.C. § 3664(d)(2)(A)(vi) (Supp. 2000); Fed. R. Crim. P. 32(b)(4)(D).

89 *See* John Rothchild, *A Wonderful Life*, L.A. TIMES, May 9, 1993, at Book Review 10 (book review) (incorporating a photograph of elderly picketers in front of the Los Angeles Criminal Courts Building protesting against Charles Keating).

90 *See* Tom Lowry, *Stockbroker Convicted in Laundering Scheme Scam Left 550 Investors with $8.6 M in Losses*, U.S.A. TODAY, Nov. 23, 1998, at 8B (noting the attendance of forty of the defendant's victims at the sentencing hearing). As the defendant walked into the hearing, one victim was heard to shout, "Slither into the courtroom, you rat." *Id.*

91 During the trial of Charles Keating for securities fraud, two of Keating's elderly victims attacked him physically in the courtroom. *See* Joe Morgenstern, *Profit Without Honor*, PLAYBOY, Apr. 1992, at 68.

92 According to the Lincoln/ACC Bondholders Action Committee, seven of Keating's victims committed suicide. *See* Ted Johnson & Anne Michaud, *Buyers of Bonds Remain Bitter, Unsatisfied*, L.A. TIMES, Apr. 11, 1992, at A1.

93 *See* Gordon Bazemore, *Restorative Justice and Earned Redemption*, 41 AM. BEHAV. SCIENTIST 768, 783 (1998).

> I can tell you that what most victims want most is quite unrelated to the law. It amounts more than anything else to three things: victims need to have people recognize how much trauma they've been through. . . . They need to express that, and have it expressed to them; they want to find out what kind of person could have done such a thing, and why to them; and it really helps to hear that the offender is sorry—or that someone is sorry on his or her behalf.

But what are their stories? Are they all about money? About shame? About vengeance? About loss of faith in others? The range of emotions, and the variety of victims' experiences, are at best merely hinted at in most written court records. Still, the experiences of victims of economic crimes, even when confined to the written page and even when they are merely summarized by the sentencing judge, are undeniably gripping.

In sentencing a defendant convicted of securities fraud, for example, one sentencing judge noted:

> The correspondence received by the Court details again and again the effects on working people, the elderly, the disabled, single parents and their children, and police officers and firefighters whose lives were forever altered when their life savings, retirement and college funds were destroyed as a consequence of [the defendant's] acts.[94]

In another securities fraud case, the court of appeals noted:

> Trial testimony indicated [the defendant] would ingratiate himself to victims in order to ascertain the extent of their financial resources. [The defendant] would then take everything he could get, going so far as to take one victim's last dollar. When victims indicated there was no more money, [the defendant] continued to call, proud of the fact these people were "mooches" who could be preyed on again and again. As a result of [the defendant's] conduct, victims lost all their savings. One victim, an 83 year-old widow, was forced to mow lawns and clean motel rooms to get by. [The defendant's] victims also were psychologically and emotionally harmed, suffering from depression and loss of self-esteem.[95]

In a "theft of identity" case involving the unauthorized use of credit cards and related acts of mail fraud, the sentencing judge took particular note of two of the victims' experiences:

Id. (quoting a victim).

94 United States v. Hoffenberg, No. 94-CR213, 1997 U.S. Dist. LEXIS 2394, at *38 (S.D.N.Y. Mar. 4, 1997).

95 United States v. Smith, 133 F.3d 737, 751 (10th Cir. 1997). In a similar case, the sentencing judge noted that the victims in the case had "suffered mental strain and emotional anxiety," "become physically sick and [had to take] anti-depression and anxiety medication," one lost her home, and "many of the victims lost their life savings on which they planned to live for the rest of their lives." United States v. Strouse, 882 F. Supp. 1461, 1464–65 (M.D. Pa. 1995). In yet another case, the court noted that the fraud had "caused a range of stress, depression, and stress-related physical ailments" among the victims. United States v. Finnigan, Nos. 95-50248, 95-50251, 1996 U.S. App. LEXIS 33991, at *11 (9th Cir. Dec. 31, 1996).

> The thing that impresses me is not just the misuse of the credit cards, but the description by each one of the victims about the tremendous amount of time and energy that they had to devote to getting their credit cleared up, the embarrassment which they suffered from stores, collection agencies, being turned down for credit, having to produce identification, having to carry—having to pay cash.
>
> . . . .
>
> [T]he [victims] whose identity [the defendant] assumed lost days from work, feared arrest, were forced to appear in court, struggled to repair their credit rating, were not able to use the credit cards in their possession, and still face problems connected with this offense.[96]

In another credit card fraud case, the sentencing judge observed:

> [I]t is an enduring victimization in that the persons subjected to it may never totally recover because it is true that once your name is sullied, it's very difficult to get everyone in the world to believe [the truth] . . . and you are then subject continually all your life to the possibility of being blindsided, although now you might know where it originated, you don't know how it has proliferated. . . . If you will, it's like having adult chicken pox and always wondering whether you're going to get shingles.[97]

These passages, however compelling, only reflect the *translation* of the victims' stories into the rarified language of the judge who has recounted them. The language of the victims themselves is something else altogether.[98] Consider the comments of elderly churchgoers, who were defrauded by their pastor's son and who submitted their comments (in writing) to a state court in Florida:

> This was someone that I trusted and knew . . . my husband has had to try and accept he may have lost his total retirement. This was all the money we had left.
>
> My reaction to this atrocity is devastating. My husband died believing that the money . . . he left invested with Dan Strader . . . had left me financially able to take care of myself . . . for the rest of my

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96 United States v. Wells, 101 F.3d 370, 372, 374 (5th Cir. 1996).

97 United States v. Akindele, 84 F.3d 948, 954 (7th Cir. 1996) (quoting the sentencing judge).

98 Anthony Alfieri has made this point in the context of Legal Services. There, lawyers must constantly guard against displacing client narratives with lawyer narratives. "The different voices of client narratives imbue client story with normative meanings. . . When the client's voices are silenced and her narratives are displaced by the lawyer's narratives, client integrity is tarnished and client story is lost." Anthony V. Alfieri, Essay, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2119 (1991).

> life. . . . I am now emotionally and financially ruined. I am living on my Social Security and had to go out and find a job and return to work at the age of 70 years.
>
> I have no one to help me and no money to hire help like I did before . . . we cannot buy the medicine that we need because of this . . . I would get a job if I had someone to stay with my wife . . . At the time this happened my wife was on a new drug for this problem and I had to quit it because she or we could not afford it any longer. Our granddaughter has been very sick for a long, extended time . . . We were using the interest that Daniel Strader guaranteed to pay her bills until she could go back to work. My granddaughter became permanently disabled so we decided to get our money from Mr. Strader to pay off her home. We never received our money, so they are foreclosing on her home, and she has no way of supporting herself. We only receive $573 in Social Security payments to live on. This has made me depressed and I have lost trust in anyone.
>
> I am 75 years old and will be long gone before I receive any amount that he owes me. In the mean time, I live day to day worrying about finances.
>
> It has made me feel betrayed not only by the business community but also by the Christian community in which Mr. Daniel Strader is held in such high regard.
>
> Mr. Strader has preyed on the trusting, the needy, the vulnerable, and elderly. We were gullible to trust his suave line of lies and deceptive innuendos. His deceit and cunning were well planned and he exploited all of us without any human conscience . . .
>
> I was a victim of being a sad, lonely, widow.[99]

Or consider the comments of a victim of another fraud scheme, also involving members of the defendant's close-knit church:

> [The defendant] skillfully manipulated my faith in God to his advantage, looking in me in the eye while praying to God to bless the investment, all the while stealing my life savings . . . . To summarize, Luca is an expert at using people's faith in God as a means of getting to their savings, reaching through their souls to pick their pockets, taking not only their savings but also their faith.[100]

Or consider the testimony of two victims of an identity theft:

> I've had two missed days off [sic] work trying to get different problems straightened out, and the frustration of the many phone calls that I've had to deal with while I've been at work that relate to this case has been overwhelming and distracting. I'm an elementary

99 *Judge Outlines Strader's Lies, Deceit*, LEDGER (Lakeland, Fla.), Aug. 10, 1995, at 3B (original punctuation retained).

100 United States v. Luca, 183 F.3d 1018, 1027 (9th Cir. 1999) (quoting the victim's letter).

> school teacher, and it has been extremely difficult for me to deal with these phone calls and then immediately step back into my classroom emotionally ready to meet the educational needs of my students.
>
> . . . .
>
> I cannot even begin to explain the embarrassment and the humiliation that I feel when I'm rejected [sic] credit or when stores refuse to accept my checks because of the criminal actions of Ms. Sample. Try to imagine how demoralizing it is to be treated like a criminal for a crime committed against you. Emotionally, it's very degrading.[101]

Two features characterize these written first-person reports: they are tendered in the victims' own—sometimes colorful and sometimes awkward—language, and they often express intense, and intimate, emotions. The best of them are painful to read, sometimes surprising, but always recognizable as a genuine human experience. The worst of the victim impact statements are obsessive, vindictive, and frankly unappealing.

In either case, though, first-person evidence can be instructive. "Research shows that legal professionals who have been exposed to [victims' stories] have commented on how uninformed they were about the extent, variety and longevity of various victimisations [sic], and how much they have learned from [victim impact statements] . . . ."[102] It is this process of direct communication between the victim and the decisionmaker that underlies the proposal for victim allocution.

III. The Affirmative Case for Victim Allocution

Economic crimes now represent over twenty percent of the federal courts' criminal dockets.[103] And—unlike violent crimes—the

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101 United States v. Sample, 213 F.3d 1029, 1033 (8th Cir. 2000).

102 Edna Erez, *Who's Afraid of the Big, Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice*, 1999 Crim. L. Rev. 545, 554.

103 *See* Bureau of Justice Stats., U.S. Dep't of Justice, Compendium of Federal Justice Statistics, 1998, at 53 tbl.4.1 (2000) ("Defendants in cases commenced, by offense, from October 1, 1997 - September 30, 1998."), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs98.pdf. This figure is composed of fraud offenses (15.9% of the total), racketeering and extortion (1.5% of the total), and "regulatory offenses" (1.7% of the total). It does not include misdemeanors. By comparison, drug offenses represent 35.8% of the federal court caseload. *Id.*

number of economic crimes have been increasing in recent years.[104] This is especially true of economic crimes involving the Internet.[105]

The victims of these crimes now represent a substantial cross-section of the American population. (As a practical matter, nearly two-thirds of adult Americans have been victimized by some form of fraud scheme.)[106] Many of these victims are indifferent to allocution issues, of course, but many others of them are clamoring for the courts' attention.[107] They question their exclusion from victims' rights protections,[108] and they want their stories to be heard. There are a number of reasons why their concerns should give rise to an amendment of Rule 32(c)(3)(E).

A. *A Rule That Privileges Victims of Violent Crimes and Excludes Victims of Non-Violent Crimes Is Unsound*

One argument to be made in favor of victim allocution in economic crime cases is that the current situation—in which victims of violent crimes are entitled to be heard in court while victims of other federal felonies are not entitled to be heard—makes little *principled* sense. The existing limitation may be a function of legislative triage (in which those victims whose circumstances seemed most compelling—or whose advocacy was the most politically appealing—were addressed first). Or, it may be a matter of resource conservation.

104 *See* Jayson Blair, *In a Side Effect of Economic Prosperity, White-Collar Crime Flourishes*, N.Y. TIMES, Mar. 13, 2000, at B1 (reporting that while violent crime has "plummeted" nationwide, white-collar crime has "skyrocketed").

105 *See Complaints Soar About On-Line Fraud*, BOSTON GLOBE, Feb. 24, 1999, at D2 (reporting that the number of consumers complaining that they were defrauded in an Internet transaction had increased from 1,280 in 1997 to 7,752 in 1998); Frank James, *Scam Artists on Internet Warned of Big Crackdown*, CHI. TRIB., Mar. 24, 2000, § 1, at 4 (reporting that a multinational law enforcement team recently identified 1,600 sites "pitching scams over the Web"); Peter Lewis, *Police Finally Probe Scam on E-Bay*, SEATTLE TIMES, Nov. 26, 1999, at E2 (reporting that in the first half of 1999 the FTC's Bureau of Consumer Protection received about 6000 complaints involving online auction fraud as compared with about 300 during the same period in 1998); Timothy L. O'Brien, *Officials Worried over a Sharp Rise in Identity Theft*, N.Y. TIMES, Apr. 3, 2000, at A1 (reporting on the increasing misuse of Social Security numbers, often involving purchases over the Internet).

106 *See* Richard Titus et al., *The Anatomy of Fraud: Report of a Nationwide Survey*, NAT'L INST. OF JUST. J., Aug. 1995, at 28 (noting that close to 60% of American adults have been the victims of fraud), *available at* http://ncjrs.org/pdffiles/nijj_229.pdf.

107 *See* Eaton, *supra* note 5.

108 For example, the most recent iteration of a victims' rights constitutional amendment at the federal level only applied to victims of violent crime. *See* S. Res. 3, 106th Cong. (1999) (introduced by Senators Kyl and Feinstein).

(Barely 5% of federal prosecutions involve violent crimes.)[109] Or, it may be a function of institutional racism.[110] Whatever its origin, the legal distinction between violent and non-violent crimes is problematic.

First, it is not necessarily true that violent crimes have a greater impact on a victim's sense of personal autonomy or well-being than other crimes. This may often be true, but is often *not* true in individual cases. Thus, some violent crimes have only a passing impact on some victims. And some economic crimes may have a devastating impact on other victims. Consider the argument of Senator Orrin Hatch (R-Utah), in response to the proposed Victims' Rights Constitutional Amendment, which provided protections to victims of violent crimes but not to victims of non-violent crimes:

> I believe we must tread carefully when assigning constitutional rights on the arbitrary basis of whether the legislature has classified a particular crime as "violent" or "non-violent." Consider, for example, the relative losses of two victims. First, consider the plight of an elderly woman who is victimized by a fraudulent investment scheme and loses her life's savings. Second, think of a college student who happens to take a punch during a bar fight which leaves him with a black eye for a couple days. I do not believe it to be clear that one of these victims is more deserving of constitutional protection than the other.[111]

Similar arguments are obvious. Some victims of a federal economic crime such as mail fraud (especially where they are "unusually vulnerable victims" or the victims of an abuse of trust) may suffer much more than, say, a victim who is assaulted while camping on federal lands.[112] But, under current law, only the latter will be permitted to offer victim impact testimony at the defendant's sentencing.

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109 *See* BUREAU OF JUSTICE STATS., U.S. DEP'T OF JUSTICE, *supra* note 103, at 53 tbl.4.1 (reporting that violent offenses represented only 4.8% of the criminal cases prosecuted in federal courts during 1998).

110 Thanks to John Levy for making this point. Certainly, in the federal system, as elsewhere, violent crimes are more likely to be committed by persons of color than by whites. Conversely, white collar crimes are more likely to be committed by whites than by persons of color. *See* DAVID WEISBURD ET AL., CRIMES OF THE MIDDLE CLASSES: WHITE-COLLAR OFFENDERS IN FEDERAL COURTS 71 (1991) (discussing demographic characteristics of offenders which show whites constitute 77.9% of white-collar criminals, while the percentage of non-whites is more than twice that of whites in common street crimes).

111 *See* S. REP. NO. 105-409, at 42 (1998) (Sen. Orrin Hatch, proposing an amendment to the Constitution of the United States to protect the rights of crime victims).

112 In the civil context juries have long understood this distinction. For example, juries in defamation cases, invasion of privacy cases, and intentional infliction of emo-

And while Hatch's argument is persuasive on its own, Sissela Bok makes an even stronger argument—that in many ways (from the victim's perspective) fraud is a form of interpersonal abuse that, although not physical, may be even more insidious:

> Deceit and violence—these are the two forms of deliberate assault on human beings. Both can coerce people into acting against their will. Most harm that can befall victims through violence can come to them also through deceit. But deceit controls more subtly, for it works on belief as well as action.[113]

In other words, neither the quality of a victim's suffering nor the perfidy of the offender bears any relationship to whether the crime committed was violent or non-violent. Such a distinction is arbitrary and offers no useful justification for Rule 32(c)(3)(E).

Paul Cassell argues that the distinction between violent and non-violent crimes is historical and that it "follows in a long line of state [victims' rights] amendments" that exclude victims of non-violent crimes.[114] In fact, Cassell can point to only one state constitutional victims' rights amendment that expressly excludes victims of non-violent crimes.[115] A handful of other states have elected to exclude these victims from victims' rights provisions statutorily.[116] What is impor-

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tional harm cases often award damages at a much higher rate than would be appropriate in a simple slip-and-fall case or a routine medical malpractice case. *See, e.g.*, Weller v. Am. Broad. Co., 232 Cal. App. 3d 991 (Ct. App. 1991) (awarding $1 million for infliction of emotional harm); Almog v. Isr. Travel Advisory Serv., Inc., 689 A.2d 158 (N.J. Super. Ct. App. Div. 1997) (affirming award of $525,000 for injury to reputation, plus $4.5 million in punitive damages, in a libel case); Household Credit Servs., Inc. v. Driscol, 989 S.W.2d 72 (Tex. App. 1998) (approving an award of $450,000 in actual damages and $1.25 million in punitive damages in an invasion of privacy case).

113 SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 18 (1989).

114 *See Protecting the Rights of Crime Victims: Hearing Before the Senate Subcomm. on the Constitution, Federalism and Property Rights of the Comm. on the Judiciary*, 106th Cong. 23–26 (1999) (statement of Paul G. Cassell, Professor of Law, on behalf of the National Victims' Constitutional Amendment Network) [hereinafter *Hearing*].

115 *See* N.M. CONST. art. II, § 24. This victims' rights amendment is limited to victims of

> arson resulting in bodily injury, aggravated arson, aggravated assault, aggravated battery, dangerous use of explosives, negligent use of a deadly weapon, murder, voluntary manslaughter, involuntary manslaughter, kidnapping, criminal sexual penetration, criminal sexual contact of a minor, homicide by vehicle, great bodily injury by vehicle or abandonment or abuse of a child or that victim's representative . . . .

Id.

116 *See, e.g.*, COLO. REV. STAT. ANN. § 24-4.1-302 (West 2001) (victims' rights provisions applicable only in cases of murder, manslaughter, negligent homicide, assault, menacing, kidnapping, sexual assault, robbery, incest, child abuse, sexual exploitation

tant to note, though, is that a vastly larger collection of state victims' rights provisions specifically *include* victims of non-violent as well as violent crimes in their coverage. As of now, nearly half the states require their courts to hear live victim impact testimony—as well as to consider written victim impact statements—in economic felonies and other non-violent crime cases.[117]

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of children, crimes against at-risk adults or at-risk juveniles, acts of domestic violence, stalking, ethnic intimidation, careless driving that results in the death of another person, and failure to stop at the scene of an accident where the accident results in the death of another person); GA. CODE ANN. § 17-17-3 (1997) (victims' rights provisions applicable only in cases of "crimes against persons," sexual offenses, theft and armed robbery, sexual exploitation of children, homicide by vehicle, feticide by vehicle, or serious injury by vehicle); IDAHO CODE § 19-5306 (Michie 2001) (victims' rights provisions applicable only to crimes involving physical injury, threat of physical injury, or sexual assault); TEX. CODE CRIM. PROC. ANN. art. 56.01 (Vernon Supp. 2001) (victims' rights provisions applicable only to victims of sexual assault, kidnapping, aggravated robbery, or crimes involving bodily injury or death).

117 *See, e.g.*, ALA. CODE § 15-23-72 (1995) (allowing victims to be heard at any sentencing proceeding); ALASKA STAT. § 12.55.023(b) (Michie 2000) (allowing for sworn victim impact testimony or an unsworn victim presentation at sentencing); ARIZ. REV. STAT. ANN. § 13-702(E) (West 2001) (requiring the court to consider victim impact testimony at an aggravation or mitigation proceeding); CAL. PENAL CODE § 1191.1 (West Supp. 2001) (permitting victim to appear and reasonably present views concerning the crime, the person responsible, and the need for restitution); CAL. PENAL CODE § 679.02(a)(3) (West 1993); CONN. GEN. STAT. ANN. § 54-91c.(b) (West Supp. 2001) (permitting testimony of victim of a class A, B, or C felony concerning the facts of the case, the appropriateness of any penalty and the extent of any injuries, financial losses, and loss of earnings directly resulting from the crime); FLA. STAT. ANN. § 921.143(2)(a) (West 2001) (permitting victim impact testimony at sentencing, limited to the facts of the case, the extent of any harm, and "any matter relevant to an appropriate disposition of the case"); GA. CODE ANN. § 17-10-1.2 (1997) (permitting victim impact testimony in the discretion of the sentencing judge, with limitations as to subject matter); HAW. REV. STAT. ANN. § 706-604(3) (Michie 1999) (permitting victim impact testimony at sentencing); IND. CODE ANN. § 35-35-3-5(b) (Michie 1998) (same); IOWA CODE ANN. § 915.21 (West Supp. 2001) (same); LA. REV. STAT. ANN. § 46:1844K (West 1999 & Supp. 2001) (same); ME. REV. STAT. ANN. tit. 17-A, § 1174 (West Supp. 2000) (same); MASS. ANN. LAWS ch. 279, § 4B (Law. Co-op. 1992 & Supp. 2001) (same); MICH. COMP. LAWS ANN. § 780.765 (West 1998) (same); MINN. STAT. ANN. § 611A.038(a) (West Supp. 2001) (same—subject to "reasonable limitations as to time and length"); NEV. REV. STAT. ANN. § 176.015(3) (Michie 2001) (permitting testimony of a victim concerning the crime, the person responsible, the impact of the crime on the victim, and the need for restitution); N.J. STAT. ANN. § 39:4-50.11 (West 1990) (permitting victims to submit an oral statement to be considered in deciding sentencing terms); N.M. STAT. ANN. § 31-26-4(G) (Michie 2000) (permitting victim impact testimony at sentencing); OHIO REV. CODE ANN. § 2929.19 (Anderson 1999 & Supp. 2001) (same); R.I. GEN. LAWS § 12-28-3(11) (1998) (permitting victim impact testimony at sentencing where the defendant was found guilty following a trial); S.C. CODE ANN. § 16-3-1550(F) (Law. Co-op. Supp. 2000) (permitting victim impact testi-

In addition to the rules set out in state law, moreover, *federal* law traditionally has not distinguished between violent crimes and non-violent crimes. For example, there is no legal difference between violent crimes and non-violent crimes when it comes to the right to jury trial,[118] the right to speedy trial,[119] the right to confront witnesses,[120] the right to assistance of counsel,[121] the right to avoid double jeopardy,[122] the right to be excused from self-incrimination,[123] or the right to *defendant* allocution.[124] Nor is there any such distinction in the Federal Rules of Criminal Procedure, save for Rule 32(c)(3)(E).[125]

In short, there is no obvious correlation between the fact of violence and the fact (or magnitude) of social harm. It therefore does not make sense to have a rule governing sentencing procedures in felony cases involving physical violence that differs in significant ways from the rule governing sentencing procedures in non-violent felony cases.

B. *Requiring That Victim Impact Testimony Be Heard in Open Court Will Materially Assist the Sentencing Judge in Determining an Appropriate Sentence*

There is a second, even more compelling, reason why victim allocution should be required in economic crime cases. Simply stated, *written* victim impact evidence is not as useful as *spoken, narrative* vic-

mony at sentencing); S.D. CODIFIED LAWS § 23A-28C-1(8) (Michie 1998) (same); UTAH CODE ANN. § 77-38-4(7) (1999) (same); VT. STAT. ANN. tit. 13, § 7006(a)(2) (1998) (same); WASH. REV. CODE ANN. § 9.94A.110 (West Supp. 2001) (permitting victims to make "arguments" at sentencing); W. VA. CODE § 61-11A-2(b) (1997) (permitting victim impact testimony at sentencing); WIS. STAT. ANN. § 972.14(3)(a) (West 1998) (same); WYO. STAT. ANN. § 7-21-102 (Michie 2001) (same).

118 *See* U.S. CONST. art. III, § 2, cl. 3.

119 *See id.* amend. VI.

120 *See id.*

121 *See id.*

122 *See id.* amend. V.

123 *See id.*

124 *See* FED. R. CRIM. P. 32(c)(3)(C) (providing that the court must personally address the defendant, inquiring into the defendant's wish to speak on his behalf).

125 Similarly, the law in civil cases makes no categorical distinction between violent and non-violent conduct. For example, neither the Federal Rules of Civil Procedure nor the Federal Rules of Evidence treat violent (or "bodily") torts any differently than dignitary torts. The remedies may differ (as the sanctions may differ in criminal cases based on the gravity of the crime), but the process of adjudication does *not* differ merely because violence is involved.

tim impact evidence and judges can benefit from the presence of victims in the courtroom.

The utility of a victim's own words, inflections, and gestures—as opposed to a written statement or a summary by others—lies partly in the fact that court officials—and judges especially—often become desensitized to the pain that victims of a crime may feel. Judges often develop an inherent sense of the "normal" degree of suffering a "normal" victim should experience.[126] This may be based on their own experiences and preconceptions about crimes[127] and may not reflect the true impact of a crime on a specific victim. Moreover, over time, some judges may lose their outrage about crimes in general or about specific crimes[128] and may come to regard them—especially economic crimes—as routine and unexceptional, and unworthy of their special attention.

Often, for example, fraud can be reduced to a caricature of a victim who is greedy, a defendant who is clever, and a transfer of money from one unworthy hand to another. Identity theft is easy to minimize—why doesn't the victim simply get a new set of credit cards? Indeed, why didn't the victim of a securities scam think twice before investing his savings in a company of which he learned over the Internet? How stupid could he have been?

Even the grossest of frauds—the fleecing of clients with limited education or the exploitation of the elderly or infirm—can involve the court in a complex review of hundreds of documents that leaves the judge fatigued at the point of handing down a sentence. Differentiating among these burdensome cases, identifying those defendants who are deserving of enhanced punishment, calculating an appropriate sanction, and writing a reversal-proof sentencing opinion, can sometimes simply seem like a chore. As a practical matter, determining an appropriate sentence for a defendant may not be the most rewarding work a federal judge (or her clerk) is called upon to perform.

Personalized victim impact statements—especially those highlighting the intimate details of loss, pain, and recovery—can break through this barrier of contempt, familiarity, and ennui.[129] This is

126 *See* Edna Erez & Linda Rogers, *Victim Impact Statements and Sentencing Outcomes and Processes: The Perspectives of Legal Professionals*, 39 BRIT. J. CRIMINOLOGY 216, 224 (1999) (recounting interviews with judges and lawyers).

127 *See* Erez, *supra* note 102, at 554.

128 *See* Erez & Rogers, *supra* note 126, at 225.

129 Martha Minow makes a related point when writing about the power of a victim's personal narrative to break through the complacency of family court judges, in the context of spousal and child abuse. *See* Minow, *supra* note 1, at 1689.

true even of written victim impact statements.[130] It is even more true of statements made orally, in the presence of the court, and especially true of statements made without prior scripting.

Even if a statement is rehearsed, however (as may be desirable as will be seen below),[131] spoken testimony—as compared to a written victim impact statement—can engage the listener in a totally different way than reading a printed document possibly could.[132] Thus, courts routinely now allow the testimony of absent witnesses to be presented by videotape rather than by written deposition, and experienced trial lawyers spend large sums of money to present key testimony in that form, solely because of its greater impact on the factfinder.[133] (Similarly, no lawyer who has participated in an administrative proceeding where the direct testimony is presented in writing can doubt the difference between that form of "testimony" and testimony from a live witness.)

It is because oral testimony is so much more powerful than equivalent evidence in writing that, in one Maryland case, the court of appeals (the state's highest court) directed trial judges who might otherwise rely solely on written victim impact statements, to "accept victim impact testimony wherever possible."[134] And it is why some

130 *See* Erez, *supra* note 102 and accompanying text.

131 *See infra* Part IV.E.

132 *See* Dennis O'Brien, *Ruling Supports Victim Testimony at Sentencing*, BALT. SUN, June 7, 1995, at 1B ("It's easy to read a statement and brush it off, but to hear someone's voice when they talk about the emotional toll of [a crime], it's a lot harder to put that out of your mind.") (quoting prosecutor); *see also* Paul Gewirtz, *Victims and Voyeurs: Two Narrative Problems at the Criminal Trial*, *in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 135, 146–47 (Peter Brooks & Paul Gewirtz eds., 1996).

> A VIS [victim impact statement] document can be shaped, structured, and polished to produce a desired effect. It also has the imprimatur of the "state" as author and therefore arguably gains narrative authority. . . . But, as a written document that is read, it will not have the human immediacy of live testimony from the victims' survivors, which allows their sadness and suffering to be observed, not just explained.

Id.

133 *See* Michael J. Henke & Craig D. Margolis, *The Taking and Use of Video Depositions: An Update*, 17 REV. LITIG. 1, 14 (1998) (stating that a video deposition is "a superior method of conveying to the fact finder the full message of the witness") (quoting Riley v. Murdock, 156 F.R.D. 130, 131 (E.D.N.C. 1994)); Gregory T. Jones, *Lex, Lies & Videotape*, 18 U. ARK. LITTLE ROCK L.J. 613, 613 (1996) (describing videotape as a "high-impact litigation tool" and noting that "as a means for offering testimony from one's own witness, videotapes normally are the medium of choice").

134 Cianos v. State, 659 A.2d 291, 295 (Md. 1995).

federal courts have voluntarily received victim impact testimony, in order to capture the flavor of the victims' experiences.[135]

It is important, incidentally, to recognize that victim impact testimony need not be limited to emotionally-appealing victims or even to the stories of defrauded individuals. Often, organizations are victims of economic crimes, and they, too, may suffer harms beyond mere economic loss. For example, more than 180 evangelical groups, colleges, and seminaries were victims of the pyramid scheme involving the Foundation for New Era Philanthropy.[136] Many religious organizations, including the Anti-Defamation League of B'Nai B'Rith along with numerous black Baptist churches, were among the defrauded victims of the Reverend Henry Lyons.[137] Unions can be victims.[138] Banks can be victims.[139] Insurance companies can be victims too.[140] Organizations should not be excluded from the opportunity to present victim impact testimony any more than individual victims should be excluded.[141] Organizations can express their victimhood in the same way that any organizational value is expressed—through their elected or appointed leaders.[142]

What is most important, though, is that all victims of serious federal crimes be given a realistic opportunity to be present in the courtroom, to be heard with respect to issues that are relevant to the

135 *See* cases cited *supra* note 19.

136 *See* Tony Carnes, *New Era's Bennett to Prison: How Could a Little-Known Christian Business Executive Defraud Charities of $354 Million While Claiming To Do God's Work?*, CHRISTIANITY TODAY, Oct. 27, 1997, at 86.

137 *See Black Baptists: A Collection for What?*, ECONOMIST, Feb. 13, 1999, at 30.

138 *See* Lou Mumford, *Former Niles Police Officer Avoids Jail*, S. BEND TRIB., Feb. 23, 1999, at D1 (detailing an embezzlement from the local Fraternal Order of Police).

139 *See* T. Christopher McLaughlin et al., *Financial Institutions Fraud*, 1998 AM. CRIM. L. REV. 789, 802–07 (detailing recent prosecutions under 18 U.S.C. § 1344 (1994) for bank fraud).

140 *See* Deborah Lohse & Mitchell Pacelle, *Case of Vanishing Manager and Missing Millions*, WALL ST. J., June 21, 1999, at C1 (describing a fraud involving at least $218 million in losses and resulting in the insolvency of at least eight insurance companies).

141 *See* United States v. Ruffen, 780 F.2d 1493, 1496 (9th Cir. 1986) (awarding restitution to a governmental agency victimized by defendant's scheme to defraud); United States v. Trettenaro, 601 F. Supp. 183, 185 (D. Colo. 1985) (awarding restitution to a corporate victim); United States v. Hendey, 585 F. Supp. 458, 462 (D. Colo. 1984) (same); *see also* Deborah P. Kelly, *Have Victim Reforms Gone Too Far—Or Not Far Enough?: What Their New Rights Mean*, CRIM. JUST., Fall 1991, at 22, 25 (noting that medical clinics and other institutions have successfully used victim participation statutes).

142 *See* United States v. Medford, 194 F.3d 419, 422 (3d Cir. 1999) (recounting the victim impact testimony of the president of the Historical Society of Pennsylvania, from which priceless artifacts had been stolen by the defendant).

sentencing decision, and to educate the judge as to the many and varied consequences of economic crimes. The more detail they are able to provide, the more easily the judge will be able to articulate a basis for her sentencing decision. And the more detailed (and thoughtful) the sentencing decision, the less likely it is to be reversed on appeal.

It is this aspect of the victim allocution proposal that is most compelling in my view—not that it will afford victims the opportunity to purge their emotions (though in many cases that may be one result of the allocution experience), but that it will afford victims the opportunity to educate the judge on the true nature and consequences of the crime.

IV. The Arguments Against Victim Allocution

There are nine obvious arguments against the required use of victim impact testimony in the sentencing phase of an economic crime case: (1) allocution hearings will consume judicial resources; (2) preparation for the hearings will consume prosecutorial resources; (3) allocution will tend to reward, and thus to protract, the witness's feelings of victimhood; (4) it will encourage disorder and histrionics in the courtroom; (5) it may result in disparate sanctioning outcomes depending on the articulateness of the testifying victims; (6) in cases of multiple victims, it may exclude victims who desire to testify, thus compounding their frustration and feelings of loss; (7) it may be fruitless in terms of its intended behavioral impact; (8) it may (paradoxically) result in exacerbation of victim dissatisfaction; and (9) it is merely a retributive device, designed to infringe the defendant's right to a fair sentence. All these concerns are legitimate, and each has been advanced with respect to victim allocution in violent crime cases.

A. *Cost and Court Time*

Of course, any proposal that would extend the time required of a judge to determine an appropriate sentence is open to challenge. And requiring a court to entertain the testimony of an economic victim or a group of victims will inevitably take up some scarce court time. One cannot merely dispatch such witnesses, but must treat them with care and respect and solicitude. One must be patient. Even with coaching, most victim witnesses will be hesitant, perhaps

inarticulate, but will want to tell their stories in some detail.[143] In addition, those stories will likely be duplicative of some of the testimony already received during the guilt phase of the trial or of material contained in the defendant's pre-sentence investigation report.[144]

The simple response to concerns about time is to permit the judge to set time limits on victim impact testimony, to set limits on the number of victims permitted to testify,[145] and even, perhaps, to require the victim witnesses to confine their remarks to a prepared script or outline.[146] So long as all parties know the court's expectations, time and cost can be kept to a minimum.[147]

B. Prosecutorial Resources

A related concern about victim allocution is that selecting victims to testify and orchestrating victim impact presentations will demand increased time and attention from federal prosecutors and victim ser-

143 *See* JOHN M. CONLEY & WILLIAM M. O'BARR, RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE 130 (1990) ("[In small claims court cases,] the opportunity to tell [one's] whole story is sometimes more important than the result.").

144 *See supra* note 84.

145 In the sentencing hearing for Timothy McVeigh following his conviction for the bombing of the Oklahoma City Federal Building in 1995, the court limited the number of witnesses who could present in-court victim impact testimony. "[T]hese [thirty-eight] witnesses comprised an extremely small percentage of the number of potential witnesses the government might have called . . . ." United States v. McVeigh, 153 F.3d 1166, 1216 (10th Cir. 1998). At the sentencing hearing for Terry Nichols, the prosecutors were permitted to call fifty-five victim witnesses. *See No Execution for Terry Nichols*, N.Y. TIMES, Jan. 8, 1998, at A26.

146 *See, e.g.*, State v. Muhammad, 678 A.2d 164, 180 (N.J. 1996) (permitting a victim witness to read his or her written testimony only if it is previously approved by the court).

147 Overall, studies have shown that involvement of victims in the trial and sentencing process does not prolong the proceedings. *See* Deborah P. Kelly & Edna Erez, *Victim Participation in the Criminal Justice System*, *in* VICTIMS OF CRIME 231, 237 (Robert C. Davis et al. eds., 2d ed. 1997). The experience of the state courts, several of which have been subject to comprehensive victims' rights legislation for several years now, is that the inclusion of victim impact testimony from victims of non-violent crimes has in no way overwhelmed those systems or their judges. *See Hearing*, *supra* note 114, at 18 (statement of Darrell Ashlock, President of Missouri Victim Assistance Network, Inc.) (arguing that those states—such as Missouri—that extend victims' rights protections to victims of non-violent as well as violent crimes have not found the system unworkable); *id.* at 23 (statement of Joe Traylor, President of AID for Victims of Crime, Inc.) (arguing that those states that have extended procedural rights to victims of non-violent crimes have "not [been] bogged down as a result").

vices personnel. These resources are always limited and jealously guarded.[148]

To some extent, Congress has already anticipated these sorts of concerns, by permitting use of the Crime Victims Fund to address the needs of economic crime victims.[149] As a consequence, the Victims of Crime Act Victim Assistance Program Guidelines have recently been amended to take into account the needs of those victims,[150] a handbook for fraud victims has been prepared,[151] and a video has been circulated to U.S. Attorneys' offices across the country, illustrating both the problems of fraud victims and the means of addressing them in the course of fraud prosecutions.[152]

Resource issues, nevertheless, are legitimate. We are talking about increasing the number of cases in which victim impact testimony would be required by more than 14,000 defendants each year.[153] If these cases were spread evenly across the U.S. Attorneys' offices (an unlikely proposition), that could mean up to 150 additional victim impact presentations per office each year.[154]

One response to this concern is that not all eligible victims will exercise their right of allocution so the burden on U.S. Attorneys' offices should not be as great as these numbers at first suggest. According to one victims' services professional, many victims—especially victims of financial crimes—"live far away, don't want to waste any more time or money, are intimidated at the thought" of appearing before a federal judge and are "happier to write than to speak" about

148 Recently, for example, federal prosecutors lobbied successfully to exclude victims of non-violent crimes from coverage under a proposed victims' rights constitutional amendment, largely because of concerns about resource issues. *See* Eaton, *supra* note 5.

149 *See id.*

150 *See* OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, 1997 VOCA VICTIM ASSISTANCE FINAL PROGRAM GUIDELINES, http://www.ojp.usdoj.gov/ovc/welcovc/scad/guides/vaguide.htm (last modified Apr. 19, 2001).

151 *See* OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, ROLES, RIGHTS AND RESPONSIBILITIES: A HANDBOOK FOR FRAUD VICTIMS PARTICIPATING IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, http://www.ojp.usdoj.gov/ovc/publications/infores/fraud/rrr/rrrpdf.pdf (last modified Apr. 19, 2001).

152 *See* Videotape: Victims of Fraud: Beyond the Financial Loss (Office for Victims of Crime, U.S. Dep't of Justice 1998).

153 *See* BUREAU OF JUSTICE STATS., U.S. DEP'T OF JUSTICE, *supra* note 103, at 53 tbl.4.1 (indicating that approximately 15,000 persons were tried for felony-level "property offenses" (including all forms of fraud) in federal courts in 1998). The figure above assumes that 95% of these defendants would be found or plead guilty. *See id.*

154 There are 93 U.S. Attorney's offices. *See* Executive Office for United States Attorneys, *at* http://www.usdoj.gov/usao/eousa/index.html (last visited Sept. 8, 2001).

their victimhood experiences.[155] Recent studies also make clear that victims who are entitled to offer victim allocution (in those states where allocution is available for all felonies, for example) often decline to do so.[156]

Another (and more persuasive) response is that funds for the support of victim allocution should be plentiful in coming years. The Crime Victims Fund is fed largely by criminal fines,[157] and, in recent years, the Antitrust Division alone has delivered more than two billion dollars in such fines to the Treasury.[158] The Crime Victims Fund may be used (1) to respond to the emotional and physical needs of crime victims; (2) to assist victims of crime in stabilizing their lives after a victimization; (3) to help victims understand and *participate in* the criminal justice system; and (4) to provide victims of crime with a measure of safety and security.[159] The breadth of the fund (and the depth of its pockets) means that resources should be available to help support victim services for economic crime victims.

A third response to concerns about resources is that the rules governing victim allocution can be drafted so as to minimize the impact on prosecutors and their offices. In the proposal in this Article, for example, I address those concerns by (1) excluding all misdemeanor cases from the victim allocution provision;[160] (2) expressly permitting

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155 Telephone Interview with Karen Spinks, Victim-Witness Coordinator, Office of the U.S. Attorney, Eastern District of Virginia (Sept. 1, 1999).

156 In an early study of victim allocution in California, "very few victims took advantage of [the allocution] opportunity. . . . [O]nly about 3 percent of the eligible victims . . . made statements at sentencing hearings." ANDREW KARMEN, CRIME VICTIMS: AN INTRODUCTION TO VICTIMOLOGY 202 (2d ed. 1990) (citing EDWIN VILLMOARE & VIRGINIA V. NETO, VICTIM APPEARANCES AT SENTENCING UNDER CALIFORNIA'S VICTIMS' BILL OF RIGHTS (Nat'l Inst. of Justice, U.S. Dep't of Justice, Research in Brief No. NCJ 107206, 1987)). A more recent study reports that, of those permitted to do so, over 90% of victims surveyed made an in-court statement at the sentencing proceeding. *See* DEAN G. KILPATRICK ET AL., THE RIGHTS OF CRIME VICTIMS—DOES LEGAL PROTECTION MAKE A DIFFERENCE? 6 (Nat'l Inst. of Justice, U.S. Dep't of Justice, Research in Brief No. NCJ 173839, 1998), *available at* http://ncjrs.org/pdffiles/173839.pdf. Recent experience in Missouri has been in between these figures, averaging just under a 20% victim allocution rate. *See Hearings*, *supra* note 114, at 18 (statement of Darrell Ashlock, President of Missouri Victim Assistance Network, Inc.).

157 *See* 42 U.S.C. § 10601(b)(1) (1994 & Supp. V 1999).

158 *See* Antitrust Div., U.S. Dep't of Justice, *Sherman Act Violations Yielding a Fine of $10 Million or More* (May 23, 2001), *at* http://www.usdoj.gov/atr/public/criminal/8271.pdf.

159 *See* OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, *supra* note 25, app. A (emphasis added).

160 Such cases currently represent 17% of the federal courts' workload. *See* BUREAU OF JUSTICE STATS., U.S. DEP'T OF JUSTICE, *supra* note 103, at 39 tbl.3.1.

the sentencing judge to limit the number of victims who can testify;[161] and (3) suggesting that many federal financial felonies are in fact "victimless" for purposes of victim allocution.[162] In short, only some felony cases will result in victim allocution, and those that do should be amply supported by the resources of the Crime Victims Fund.

C. *Exacerbation of Victimhood*

Some critics have suggested that permitting a victim to appear in court to testify regarding her experiences serves only to reinforce the victim's preoccupation with her loss. Apparently, there has been no real research on this issue, but let's assume that, at least for some victims, victim allocution may do more harm than good.

As Paul Gewirtz writes,

> We have been assuming thus far that survivors are pushing to have their stories heard and that allowing victim impact evidence to be considered at the sentencing phase promotes the interests of the victims and the survivors. But surely the dynamic of survivor testimony is far more complicated. To tell the story of personal suffering requires the teller to relive that suffering, to retrieve it from repression, to reexpose wounds that may have started to heal. This may be beneficially therapeutic, but it may not be.[163]

The presence of victim services professionals in U.S. Attorneys' offices should minimize this problem, and recent publications addressing the special needs of fraud victims[164] should make the efforts of these professionals even more successful. Further, U.S. Attorneys should be encouraged to select which persons among a group of victims are likely to be the most effective witnesses and most able to cope with the emotions unleashed in the course of providing victim impact testimony, should limit the risk that unhealthy victimhood will be rewarded.

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161 *See infra* Part VI.

162 *See infra* notes 228–29 and accompanying text.

163 Gewirtz, *supra* note 132, at 148.

> [I]t is well known that certain forms of intervention can . . . aggravate or perpetuate the psychological wounds rather than healing them. Some interventions can be effective in some cases and totally ineffective in others or beneficial to some recipients and deleterious to others. . . . [V]ictim services might have a side effect of delaying the natural healing process and prolonging the trauma of victimization.

Ezzat A. Fattah, *Toward a Victim Policy Aimed at Healing, Not Suffering*, *in* VICTIMS OF CRIME, *supra* note 147, at 257, 268.

164 *See generally, e.g.*, OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, *supra* note 25 (outlining services provided for fraud victims).

D. *The Likelihood of Emotional Outbursts*

A recurring concern about victim impact testimony is that the victim will lose his composure in the courtroom. Some critics fear the spread of "lawless emotionalism" in court proceedings.[165] Others decry the "Oprah-ization of sentencing."[166] Judge Richard Matsch, who presided over both the Timothy McVeigh and Terry Nichols trials, expressed a concern that the overwhelming emotional force of extensive victim impact testimony in those trials might turn the proceedings "into some kind of lynching."[167] Whatever the metaphor, the concern is familiar: victims set free to describe their losses will overwhelm the decisionmaker's ability to exercise reasoned judgment.

A victim's loss of control while testifying about her victimization may be especially troubling where the sentencing decision is made by a jury,[168] but there is no jury sentencing in federal economic crime cases. Rather, the decisionmaker in a federal economic crime case is an experienced, professional, federal judge. These judges—like all judges—are accustomed to dealing with emotional witnesses.[169] So, the mere fact that some economic crime victims—like some violent crime victims—may become emotional or distraught in their victim impact presentations is no reason, standing alone, to reject the use of victim allocution.

It is also possible to limit the likelihood of an emotional outburst by setting time limits, excluding certain subjects,[170] indicating to the

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165 *See* Editorial, *Victim Justice*, NEW REPUBLIC, Apr. 17, 1995, at 9.

166 *See* Michael J. Sandel, *The Hard Questions: Crying for Justice*, NEW REPUBLIC, July 7, 1997, at 25 (quoting a defense attorney).

167 *See* Tom Kenworthy & Lois Romano, *Death-Penalty Testimony Limited; Judge Seeks To Prevent "Lynching"*, CHI. SUN-TIMES, June 4, 1997, at 33.

168 In such cases, "when a victim impact witness succumbs to [her] emotions, the trial court has a duty to take appropriate action." Jackson v. State, 964 P.2d 875, 893 (Okla. Crim. App. 1998). Otherwise, the jury's sentencing recommendation may be voided. *See* Payne v. Tennessee, 501 U.S. 808, 831 (1991) (O'Connor, J., concurring) ("If, in a particular case, a witness' testimony . . . so infects the sentencing proceeding as to render it fundamentally unfair, the defendant may seek appropriate relief under the Due Process clause."); Conover v. State, 933 P.2d 904, 920 (Okla. Crim. App. 1997) (finding that the probative value of victim impact evidence was substantially outweighed by its prejudicial effect where that evidence was "inflammatory" and "designed to invoke an emotional response by the jury").

169 *See* Christopher Johns, Editorial, *Court Not Place To Salve Victims*, ARIZ. REPUBLIC, June 29, 1997, at H5 ("It is true that daily courtrooms are unavoidably scenes of intense emotions. Grief, anger, hate, greed and the grotesque are frequent inhabitants of trial courts.").

170 For example, in the sentencing hearing of Timothy McVeigh, the sentencing judge directed that victim witnesses not mention the funerals of loved ones who had died as a result of the federal building bombing and not present pictures of the vic-

witness and her supporters that an emotional outburst will end that witness's testimony,[171] or confining the witness's testimony to the reading of a pre-approved statement.[172] None of these practices need be required in every case, but they are tools that should be available (and are now available) to federal judges in every sentencing proceeding.

There may be a larger issue, however, surrounding the issue of victim emotionalism—that is, whether the federal courts should be encouraged to limit victim impact testimony to that which is professionally attractive or socially acceptable. Judges often prefer to take victim impact testimony in its most bloodless form—in writing.[173] They recognize that, by its nature, live victim impact testimony often "cannot be controlled."[174]

The simple response to these (often class-based) concerns is that federal judges' comfort level (and the status quo which currently affords them total discretion as to whether to entertain live victim impact testimony in economic crime cases) ought not to govern this issue. Rather, public policy concerns—specifically, principles of equity and restorative justice[175]—should override the judges' (perfectly understandable) preferences for victims whose behavior they find to

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tims or their family members at weddings, Christmas celebrations, or other joyous occasions. *See* Beth E. Sullivan, Note, *Harnessing* Payne · *Controlling the Admission of Victim Impact Statements to Safeguard Capital Sentencing Hearings from Passion and Prejudice*, 25 FORDHAM URB. L.J. 601, 621 n.82 (1998) (citations omitted). Judge Matsch also prohibited the use of certain videotapes of victims and the testimony of a nine-year old concerning the loss of his mother. *See* Kevin Flynn, *Boy's Words Describe Life Without Mom*, ROCKY MOUNTAIN NEWS, June 7, 1997, at 10A; *Penalty Testimony Powerful*, DENVER POST, June 12, 1997, at A22; *see also* Collins, *supra* note 18, at 28.

171 *See, e.g.*, Huffman v. State, 543 N.E.2d 360, 376 (Ind. 1989) (recounting trial judge's admonition—after the victim's mother cried and fled the courtroom—that if another outburst occurred, the victim's family would be removed from the courtroom); State v. Muhammad, 678 A.2d 164, 180 (N.J. 1996) ("During the preliminary hearing, the trial court should inform the victim's family that the court will not allow a witness to testify if the person is unable to control his or her emotions.").

172 *See, e.g.*, *Muhammad*, 678 A.2d at 180 (permitting a victim witness to read his or her written testimony only if it is previously approved by the court).

173 *See* Sandra Crockett, *A Voice for the Victims*, BALT. SUN, June 26, 1995, at 1D.

> "There's nothing those [victim impact witnesses] could tell me that [hasn't] already been said in whatever letters I've received . . . . While I respect their right to be heard, we're already running, I think, a half hour late. I really don't think it would be beneficial to take the time to hear from them."

Id. (quoting a trial judge).

174 *See* Ball v. State, 699 A.2d 1170, 1189 (Md. 1997).

175 *See infra* Part V.C.

be "appropriate" and whose presentation to the court is untainted by emotion.

E. The Problem of the Inarticulate Victim

One problem with victim allocution is that not all victims are similarly gifted in describing their experiences, expressing their pain, or communicating effectively with the sentencing judge. In a series of well-drawn hypotheticals, Donald Hall has illustrated how the educational level of a victim, his race, his ability to formulate a coherent story, his mental stability, his ability to hire a lawyer to assist him, and his own criminal history all may influence the way in which a judge receives that person's victim impact testimony.[176] Hall also points out that, in a survey of judges, "a number of judges observed that articulate victims' statements, whether written or oral, were far more effective than those received from inarticulate victims."[177]

Victim advocates may be able to assist victims in preparing for their in-court appearance, but even with rehearsal, many victims—especially those who are elderly, ill-educated, or speakers of English as a second language—may be intimidated by the courtroom setting, embarrassed to speak before a distinguished federal judge and, thus, unable to tell their stories effectively. This could lead to increased frustration, a continuing sense of their own incompetence, or a sense that their efforts were not recognized or appreciated.

Even so, the risk that some victims will not be as forceful as others, or as reasoned in their presentations, should not exclude all economic crime victims from testifying at sentencing hearings. Once again, the ability of the U.S. Attorneys' offices to select out those victims with the greatest ability to tell their stories well and those with the most compelling personal characteristics should minimize the problems of the inarticulate victim. And where selection does not eliminate the problem (in the case of a fraud with a handful of victims, for example), support from victim services personnel should go a long way toward minimizing the problem.

F. Problems of Exclusion and the Representative Victim

The inevitable by-product of those steps that can be taken to minimize both emotionalism and inarticulateness is that, in cases of multi-

176 *See* Donald J. Hall, *Victims' Voices in Criminal Court: The Need for Restraint*, 28 AM. CRIM. L. REV. 233, 236–38, 259 (1991).

177 *Id.* at 246 (citing HILLENBRAND & SMITH, VICTIM RIGHTS LEGISLATION: AN ASSESSMENT OF ITS IMPACT ON CRIMINAL JUSTICE PRACTITIONERS AND VICTIMS 70 (A.B.A. Crim. Just. Sec., Victim Witness Project 1989)).

ple fraud victims, not everyone who wishes to do so may be permitted to testify. This means that the judge will have to decide how much time she wishes to allot to hearing presentations of victim impact testimony, and the prosecutor will then have to make choices about whom to present. In some cases, the process of winnowing may cause disappointed fraud victims to feel that they have been victimized once again.

Nevertheless, limiting victim witnesses to a reasonable number may be required by due process considerations.[178] It may also represent the most effective form of advocacy. Either way, a prosecutor orchestrating the sentencing proceeding has a duty to select victims who are both representative of the universe of the defendant's victims and able to withstand the rigors of victim impact testimony. The fact that some victims who desire to testify will not be selected for this task, and may be angry with the prosecutor or the court or "the system," is not sufficient reason to exclude victim impact testimony by other witnesses. Rather, these problems should be the focus of attention for victim advocates and victim services professionals.

G. The Unlikelihood of Influencing the Defendant's State of Mind

If one purpose of victim allocution is to make some kind of moral impression on the defendant,[179] the proposal in this Article will often fail. Some—perhaps many—defendants will be morally indifferent to having to listen to the stories their victims tell the court. Some defendants—especially in fraud cases—show no remorse for their actions, regard their victims as suckers and fools, and regard the court system as just another "mark" to be conned. Many fraud defendants are repeat offenders;[180] some fraud defendants even continue their

178 *See* State v. Muhammad, 678 A.2d 164, 176 (N.J. 1996) (indicating that the use of victim impact testimony "requires a balancing of the probative value of the proffered evidence against the risk that its admission may pose the danger of undue prejudice or confusion"); Katie Long, Note, *Community Input at Sentencing: Victim's Right or Victim's Revenge?*, 75 B.U. L. REV. 187, 223 (1995) ("Information overload may . . . lead to unfair sentencing. As the amount of information and the number of people testifying at a sentencing hearing increases, so does the risk of unjust punishment.").

179 *See infra* Part V.B.

180 Studies of the records of persons convicted of mail fraud, bank embezzlement, income tax evasion, false claims, and bribery have found that approximately 40% of the offenders had at least one prior arrest. *See* Michael L. Benson & Elizabeth Moore, *Are White-Collar and Common Offenders the Same? An Empirical and Theoretical Critique of a Recently Proposed General Theory of Crime*, 29 J. RES. CRIME & DELINQ. 251, 260 (1992); David Weisburd et al., *White-Collar Crime and Criminal Careers: Some Preliminary Findings*, 36 CRIME & DELINQ. 342, 343–47 (1990) (discussing how white-collar criminals are

scams while in prison.[181]

Thus, for some defendants at whom victim impact testimony would be directed, the notions of shaming or moral education are irrelevant, perhaps even laughable. And the idea that *any* defendant would be likely to develop empathy for his victims as a consequence of having to listen to them tell their stories in the context of a request for enhanced sentencing may be fanciful. So be it.

As in the case of uncontrollable witnesses, the argument must be that just because some—indeed many—defendants may well be immune to victim impact testimony at the time it is offered, that is no reason to exclude all victim impact testimony in economic crime cases. Victim impact testimony has multiple purposes: to express community values, to assist the judge in reaching an appropriate sentencing determination, to unburden the witness, and to enlighten the defendant. That not all of these purposes will be satisfied in many of the cases in which victim allocution would be required, or be satisfied at the same time, is no reason to reject the victim allocution proposal.

H. Inadequate Return on the Victim's Emotional Investment

Another concern is that in-court victim impact testimony—especially if it is offered by just a few among many victims of an economic crime—will be no more effective in purging the victims' emotions regarding the crime than the less costly, less time-consuming written victim impact statement has proven to be. Even those victims who are permitted to testify may be disappointed. There is no real evidence that offering victim impact *testimony* results in a more satisfying encounter with the judicial system than filling out a written victim impact *statement*.[182] In fact, there is some evidence that victim impact testimony may be *less* satisfying than filling out a victim impact

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often repeat offenders). For just one example of a recidivist defrauder, see Michael Perlstein, *Couple Given Stiff Sentences for Scam*, TIMES-PICAYUNE (New Orleans), Mar. 18, 1999, at B1 (reporting on a defendant who "launched [an elaborate fraud scheme that resulted in $3.3 million in losses to his victims] while on parole from an earlier federal fraud conviction").

181 *See* Scott Higham, *Swindler Draws Top Sentence, 12 1/2 Years*, BALT. SUN, Feb. 8, 1997, at 2B (reporting on a defendant in a home-refinancing scheme who, after being sent to federal prison, was accused of swindling a fellow inmate out of $15,000).

182 Indeed, there is some evidence that systems that offer an opportunity to submit a *written* victim impact statement offers no more victim satisfaction than systems in which such statements are prohibited. *See* Robert C. Davis & Barbara E. Smith, *Victim Impact Statements and Victim Satisfaction: An Unfulfilled Promise?*, 22 J. CRIM. JUST. 1, 10–11 (1994) (finding that victims permitted to submit a written victim impact statement did not report greater satisfaction with the criminal justice system than those not permitted to do so); Edna Erez et al., *Victim Harm, Impact Statements and Victim*

form,[183] most likely because a witness permitted to testify has a higher level of expectation than those who are confined to written expression.

Not only may allocution prove disappointing, moreover, but in-court testimony, and all the stress that it entails, may add to, rather than reduce, victims' feelings of dissatisfaction with the system. As one commentator has noted, "[t]he victim is unlikely to feel that a courtroom is the right place for this kind of emotional experience."[184] Another has argued that "most judges and lawyers simply aren't trained to respond in any therapeutic sense to grief."[185]

That being said, studies do suggest that, in general, the more participation a jurisdiction affords crime victims, the greater the victims' levels of satisfaction and sense of resolution of the matter.[186] There are many reasons why this is so:

> For some, [providing victim impact evidence to the court restored] the unequal balance between themselves and the offender, particularly in cases in which the victim did not have an opportunity to testify or be heard because they were resolved by a plea. Others wanted "to communicate the impact of the offense to the offender."[187]

Still others "wanted to remind judges of the fact that behind the crime is a real person who is a victim."[188] Providing victim impact testimony can further any of these objectives.

The "feel good" factor may not be enough, however. Looking at these studies more critically, we find that victims who believed their participation had an *impact* on their cases were more satisfied with their experience as a victim witness than those who thought their par-

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Satisfaction with Justice: An Australian Experience, 5 INT'L. REV. VICTIMOLOGY 37, 51 (1997) (same).

183 For example, one study suggests that 62% of the victims given the opportunity to present an oral victim impact statement were satisfied with their experience with the criminal justice system, while 66% of the victims given the opportunity to present a written victim impact statement reported satisfaction. *See* IMPACT STATEMENTS: A VICTIM'S RIGHT TO SPEAK, A NATION'S RESPONSIBILITY TO LISTEN (Ellen K. Alexander & Janice Harris Lord eds., 1994), *at* http://www.ojp.usdoj.gov/ovc/help/impact.

184 Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 980 (1985).

185 Johns, *supra* note 169, at H5; *see also* Vivian Berger, Payne *and Suffering—A Personal Reflection and a Victim-Centered Critique*, 20 FLA. ST. U. L. REV. 21, 59 (1992) ("The system is not equipped to nurture victims or their representatives.").

186 *See* Kelly & Erez, *supra* note 147, at 239.

187 Erez, *supra* note 102, at 551.

188 *Id.* at 552.

ticipation was meaningless.[189] Thus, one might readily hypothesize that victims providing testimony in jurisdictions (like the federal system) that are governed by strict sentencing guidelines may be more dissatisfied than victims providing testimony in jurisdictions giving judges more discretion in sentencing decisions.[190] They may also feel that the use of complex guidelines—which necessarily require the sentencing judge to prepare preliminary calculations in advance of the sentencing hearing—will render their testimony extraneous or unwelcome. This in turn might suggest that victim allocution in the federal sentencing context is a recipe for frustration and dissatisfaction. A study conducted abroad suggests that this is *not* the case and that victims who provide victim impact evidence have a high level of satisfaction even where they conclude that it has had little appreciable impact on the sentence.[191]

One way of dealing with the concern about victim dissatisfaction would be to conduct a pilot study in one or more judicial circuits, just as studies have previously been conducted regarding cameras in the courtroom, electronic document filing, and alternative dispute resolution. The experiences of victims who have been granted the right to allocution could then be compared to those who have not.

Another (and, in my view, preferable) way of dealing with this concern is to have federal victim services personnel explain in careful detail the way in which the Sentencing Guidelines work, the limitations they impose on sentencing judges, and the issues to which victim impact testimony can most effectively be directed, including claims related to psychological and other non-monetary harms,[192] claims related to abuses of trust,[193] claims relating to the victim's "unusual vulnerability,"[194] and (perhaps most important) claims that can clearly demonstrate to the sentencing judge the lasting and devastating impact that can result from economic crime victimization. Victims should be told that judges are educable when it comes to crime victims' concerns[195] and that their testimony is important but will not be

189 *See* KILPATRICK ET AL., *supra* note 156, at 8.

190 *See* Hall, *supra* note 176, at 265 (noting that in states governed by sentencing guidelines, a victim's testimony, however forceful, is likely to have only a small, if not negligible, impact on the sentence).

191 *See* Erez, *supra* note 102, at 552 ("[F]or the majority of the victims filing [a written victim impact] statement was a worthwhile therapeutic experience, and the cathartic effect of recording the impact of the offence had been an end in itself.").

192 *See supra* Part I.A.1.

193 *See supra* Part I.A.4.

194 *See supra* Part I.A.3.

195 *See* Erez, *supra* note 102, at 554.

dispositive of the sentencing decision. They should also be advised that testimony is not therapy.

With preparation and professional counseling, the limitations of allocution—and the limitations of the Sentencing Guidelines—need not be fatal to the proposal advanced in this Article.

I. Victim Allocution Is Merely a Vehicle for Harsher Sentencing

A final objection to victim allocution in economic crime cases is that, like other victims' rights mechanisms, allocution is really just designed to persuade the sentencing judge to impose a draconian sentence.[196] It would be perfectly fine, according to this view, to permit—even encourage—victims to pursue their claims against the defendant in a civil proceeding. Let them sue; let them testify; let them vent within the context of a civil trial for damages. They should not, however, be permitted to influence the criminal sentencing process.

There are at least three responses to this (again, legitimate) concern. First, not all victim impact testimony is aimed at enhancing the defendant's sentence. The Guidelines permit evidence of mitigating as well as aggravating circumstances,[197] and, although it is uncommon, victims have sometimes offered such evidence, even in capital cases.[198] Further, studies show that, even where testimony has been aimed at sentence enhancement, some judges have *reduced* the sentences they originally had in mind as a result of hearing victim impact testimony.[199] Certainly, the presence of victim impact testi-

196 *See* Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 401 (1996) (arguing that victim allocution is "prejudicial and inflammatory").

197 *See* U.S. SENTENCING GUIDELINES MANUAL § 5K2.10 (permitting departure where victim's conduct was provocative); *id.* § 5K2.12 (permitting departure where defendant acted under duress); *id.* § 5K2.13 (permitting departure where the defendant committed the crime while suffering from a significantly reduced mental capacity); *id.* § 5K2.20 (permitting departure where defendant's conduct was aberrational), *id.* § 5K2.0 (permitting departure for other mitigating circumstances).

198 In the case involving the 1993 murder of Matthew Shepard, for example, the victim's parents argued that the death penalty ought not to be imposed on the killer, even though they personally supported the death penalty in other cases. *See* Julie Cart, *Killer of Gay Student Is Spared Death Penalty*, L.A. TIMES, Dec. 31, 1999, at A1; *see also* Karen L. Kennard, *The Victim's Veto: A Way To Increase Victim Impact on Criminal Case Dispositions*, 77 CAL. L. REV. 417, 447 (1989) ("[M]any victims . . . exercise their influence in the direction of leniency.").

199 *See* Erez, *supra* note 102, at 548.

mony does not always mean that requests for enhancement or departures will be granted.[200]

Second, and more importantly, the Sentencing Guidelines sharply circumscribe judges in the degree to which they can punish defendants, even in the most heinous cases. However powerful the victim impact testimony may be, judges cannot simply impose whatever sentence they want, and their efforts to do so will be reversed on appeal.[201] Thus, to the extent that victim impact testimony has the potential to inflame the decisionmaker or distort her judgment (and remember that in this proposal, the sentencing decisionmaker is the judge and not a jury), the Sentencing Guidelines and the appellate process both serve as a strong source of discipline and protection.

Third, it is not at all illegitimate to provide a forum for victims to seek retributional punishment for their offenders, so long as the system is designed to moderate that impulse. It may be true that victim allocution is usually "an enormous benefit to the prosecution because the defendant will almost certainly lose this sort of contest."[202] But victim allocution, as confined by the Federal Sentencing Guidelines, is only a mechanism for victims' expression, not a guarantee of excessive state punishment of the defendant.

V. VICTIM ALLOCUTION IN THEORY

Three bodies of theory and research support the proposal for victim allocution in economic crime cases. First, the "denunciation" theory of punishment suggests that, to be socially legitimate, any punishment system must clearly express the community's moral condemnation of the defendant's behavior.[203] It must say to her, "You

200 One recent study suggests that there is, at best, a "meager" correlation between the use of victim allocution and the imposition of harsher sentences. *See* Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH L. REV. 479, 542 (demonstrating only a slight increase in death penalty decisions after the Supreme Court's approval of victim allocution in *Payne v. Tennessee*, 501 U.S. 808 (1991)); *see also* Edna Erez & Pamela Tontodonato, *The Effect of Victim Participation in Sentencing on Sentence Outcome*, 28 CRIMINOLOGY 451, 468–69 (1990) (stating that, though the presence of the victim in court may have a measurable effect on sentence length, "[n]either the inclusion of a VIS in the file nor the victim's making an oral statement in court influence[s] the length of the prison term").

201 *See, e.g.*, United States v. Sarno, 73 F.3d 1470, 1502 (9th Cir. 1995) (reversing the trial judge's two-level upward departure for lack of a sufficient foundation to support the departure).

202 Robert P. Mosteller, *Victims' Rights and the Constitution: Moving from Guaranteeing Participatory Rights to Benefiting the Prosecution*, 29 ST. MARY'S L.J. 1053, 1060 (1998).

203 *See* Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 598 (1996) (discussing the importance of a sentencing system that expresses the com-

have done something terribly wrong, in our view." Victim allocution can facilitate this result. Second, the "moral education," or "moral reform" theory of punishment suggests that a well-designed punishment system should influence the defendant's attitudes and behavior, and discourage him from committing future criminal acts.[204] It must say to him, "You have done something wrong, and here's how you can go about becoming a morally better person." In many cases, victim allocution can facilitate this result as well. Third, theories of restorative justice suggest that a properly constructed punishment system must address not only the needs of the community for effective denunciation and the needs of the defendant for some degree of moral re-education, but also must meet some significant needs of the victim.[205] It must say to her, "We know you have suffered at the hands of this defendant, and society recognizes your loss." Victim allocution can also facilitate this outcome.

A. Allocution Is a Vehicle for Societal Denunciation

The first basis for embracing victim allocution is to look at sentencing from the perspective of the law-abiding public. The denunciation theory of punishment is addressed to that public and has as its focus the public's "interest in a just scheme of punishment."[206] Specifically, the denunciation theory says that "those who disobey criminal laws should be held up to the rest of society and denounced as violators of the rules that define what the society represents."[207] The message of denunciation should be clear and unambiguous—"You have behaved unacceptably and society therefore condemns you."

Some critics argue that mere denunciation—the cataloguing of "moral facts about what is right and wrong"—is not as important an objective of the criminal justice system as is moral reformation—

munity's moral condemnation of the defendant's behavior); *see also* Ronald J. Rychlak, *Society's Moral Right To Punish: A Further Exploration of the Denunciation Theory of Punishment*, 65 TUL. L. REV. 299, 332 (1990) (describing punishment as an essential means of reinforcing societal values).

204 *See* Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, 739 (1998) (discussing the need for a sentencing system that can "morally 'educate' [the defendant], to make him see the error of his ways, and ideally, to lead to him to repentance"). *See generally* Jean Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFF. 208 (1984) (setting out moral education theory as a basis for inflicting punishment).

205 *See* MARTIN WRIGHT, JUSTICE FOR VICTIMS AND OFFENDERS: A RESTORATIVE RESPONSE TO CRIME 110–14, 117 (1991).

206 Rychlak, *supra* note 203, at 335.

207 *Id.* at 331.

"teach[ing] criminals how to make better moral decisions . . . ."[208] But denunciation has an independent societal value, even where moral reformation would seem to be impossible. As Dan Kahan points out, "[p]unishment is *not* just a way to make offenders suffer; it is a special social convention that signifies moral condemnation."[209] It is for this reason that sentences are handed down in public, that judges often accompany the announcement of their sentences with critical comments directed at the defendant, and that defendants are required to be present when sentence is rendered.[210]

Denunciation typically comes from the prosecutor in her arguments to the jury and to the sentencing judge, and from the sentencing judge while handing down the sentence. But denunciation may equally, and often as effectively, come from the victim(s) of a crime. This is so, in part, because of the passion that a victim is likely to bring to the denunciation process. But this is also true because the public can often more easily identify with the victim's expressions of denunciation than with the studied and professional statements of the prosecutor or the judge.

B. Allocution Is a Vehicle for Moral Education

Another way of looking at victim allocution is from the defendant's perspective. Ideally, a sentencing proceeding will be designed to have some impact on the defendant, cause him to examine his criminal behavior, and cause him in the future to conform to societal norms. One way to accomplish these objectives is through some form of "shaming ritual"[211] by which the defendant is held up to the moral judgment of persons whose opinions he values and is caused to feel unworthy of their esteem—or even their love—unless he changes.[212] An even better way to accomplish these objectives may be through some educative process by which the defendant is made to "recognize

208 *See* Lisa Anne Smith, *Supplemental Paper: The Moral Reform Theory of Punishment*, 37 ARIZ. L. REV. 197, 200 (1995).

209 Kahan, *supra* note 203, at 593 (emphasis in original).

210 *See* 18 U.S.C. § 3553(c) (1994) (requiring the court to provide a statement of reasons for imposing a sentence); FED. R. CRIM. P. 43(a) (requiring the defendant's presence at sentencing).

211 The term "shaming ritual" is taken from anthropological studies. *See* Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1906–15 (1991) (describing shaming rituals from other cultures); *see also* WILLIAM IAN MILLER, HUMILIATION: AND OTHER ESSAYS ON HONOR, SOCIAL DISCOMFORT, AND VIOLENCE 161–65 (1993) (describing the universal characteristics of shaming rituals).

212 *See* JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION 57–59, 69–83 (1989) (describing the shaming process and its objectives).

and understand why what he has done was wrong, and ideally, to repent."[213]

One example of an effort to achieve some combination of shaming and moral education is the Victim Impact Panel (VIP) program initiated in 1982 by Mothers Against Drunk Drivers.

> Victim impact panels provide a forum for crime victims to tell a group of offenders about the impact of the crime on their lives and on the lives of their families, friends, and neighbors. Panels typically involve three or four victim speakers, each of whom spends about 15 minutes telling their story in a non-judgmental, non-blaming manner. The offenders of the victim presenters are not present. While some time is usually dedicated to questions and answers, the purpose of the panel is for the victims to speak, rather than for the victims and offenders to engage in a dialogue.[214]

The purpose of victim impact panels is "to individualize and humanize consequences to the victims, to change attitudes and behaviors, to deter drinking [and] driving, and to reduce recidivism."[215] Most offenders who complete evaluations after listening to a victim impact panel indicate that their experiences were "positive" and "educational" and "contributed to a change in their attitudes and perceptions about their crimes."[216] There is also some evidence that victim impact panels have had the intended effect of reducing recidivism among drinking drivers.[217]

Victim impact panels take place outside of the courtroom and typically are part of the punishment package, but the principles underlying them can translate effectively into victim allocution at sentencing: (1) VIP programs make it impossible for defendants to escape into the anonymity of the criminal justice system; (2) VIPs require defendants to reflect on the pain of their victims in the presence

213 Garvey, *supra* note 204, at 763. According to Garvey, "[t]he aim of the educating model is to get the offender himself to understand why what he did was wrong, an understanding to which the morally appropriate emotional response is guilt. The aim is not, as in the shaming model, to shame him in the eyes of others." *Id.* at 766.

214 Nat'l Inst. of Justice, U.S. Dep't of Justice, *Victim Impact Panels*, *at* http://www.ojp.usdoj.gov/nij/rest-just/CH5/7_impnls.htm (last visited Sept. 8, 2001). A similar program has been developed for men convicted of rape. *See* Garvey, *supra* note 204, at 781.

215 Dorothy Mercer et al., Drunken Driving Victim Impact Panels: Victim Outcomes 4 (Aug. 11, 1995) (unpublished paper, on file with author).

216 Nat'l Inst. of Justice, U.S. Dep't of Justice, *supra* note 214.

217 *See* Stuart W. Fors & Dean G. Rojek, *The Effect of Victim Impact Panels on DUI/DWI Rearrest Rates: A Twelve-Month Follow-up*, 60 J. STUD. ON ALCOHOL 514, 519 (1999) (finding that the re-arrest rates for participants in VIP programs were lower than for others convicted of drunk driving).

of others; and (3) VIPs have at their core the fundamental belief that, if exposed to the harm their conduct has caused, some criminal offenders may change their behavior and ultimately become better social actors.

Permitting victim allocution in the sentencing process would replicate these features, but in some respects more effectively than the VIP system. First, the defendant in an economic crime case would be required to confront directly, rather than indirectly, the losses occasioned by his own behavior—that is, he would be forced to listen to the words and claims of his own victims rather than those of surrogates.

Second, victim allocution, unlike a VIP program, will not be a part of the defendant's punishment but a precursor to it. It will not provide an escape from confinement or a source of entertainment. Rather, as a process, allocution is designed to command the defendant's attention at precisely the time—the sentencing hearing—when his energies are most focused on what is being said.

Third, victim allocution will involve some measure of *public* exposure not found in typical VIP programs.[218] The victim's comments will be given under oath, in a courtroom, and in the presence of spectators as well as the sentencing judge. By honoring the victim's presentation with the *gravitas* of an official, rather than an ad hoc, proceeding, victim allocution at sentencing should have a deeper and more lasting impact on the defendant than may occur in the case of a typical VIP.[219]

C. *Allocution Is a Vehicle for Restorative Justice*

A final way of looking at victim allocution is from the victim's perspective. Under theories of restorative justice, sentencing should be designed so as to restore the material and psychological losses experienced by the defendant's victim(s).[220] These theories have been

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218 It is important to note, however, that the public aspect of the sentencing proceeding proposed here bears little resemblance to those shaming practices involving posting signs, wearing of insignia, or taking out newspaper ads. Critics rightly challenge those practices as degrading, retributive, and "a species of lynch justice." *See* James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055, 1058–59 (1998).

219 Sarah Welling points out that the sense that something *important* is happening when the victim speaks in open court is a significant advantage of victim allocution. *See* Sarah N. Welling, *Victim Participation in Plea Bargains*, 65 WASH. U. L.Q. 301, 347 (1987).

220 *See* Howard Zehr, *Restorative Justice: The Concept*, CORRECTIONS TODAY, Dec. 1997, at 68, 68 ("Restorative justice begins with a concern for victims and how to meet

implemented in a number of forms: restitutional programs, victim-offender mediation programs (VOMs) (also sometimes known as victim-offender reconciliation programs (VORPs)), and various victim support and advocacy programs. All of these programs, like the proposal for victim allocution, have as their focus the recognition that it is the victim—not the state—who suffers most harm from a crime.

VOM and VORP programs—which are typically used in cases of non-violent crimes such as burglary, shoplifting, and vandalism—are based on face-to-face encounters between the defendant and his victim:

> The meeting begins with the mediator explaining his or her role, identifying the agenda and stating any ground rules that may be necessary, such as allowing each party to complete their statements before interrupting them with questions or comments.
> The first part of the meeting focuses on a discussion of the facts and feelings related to the crime. Victims are given the opportunity to express their feelings directly to the person who violated them, as well as to receive answers to lingering questions such as "Why me?" or "Were you stalking us and planning on coming back?"
> While offenders are put in the uncomfortable position of having to face the people they violated, they also are given the rare chance to show a more human dimension to their characters and to express remorse in a very personal way.[221]

VOMs and VORPs have been shown to produce significant satisfaction among both victim and defendant participants.[222] Specifically, "almost all [VOMs] produce mutually agreeable restitution plans that are successfully completed, victims report a reduction of fear and anxiety, juvenile offenders commit considerably fewer and less serious new crimes, and victims and offenders report high levels of satisfac-

their needs, for repairing the harm as much as possible, both concretely and symbolically.").

221 Mark S. Umbreit, *Having Offenders Meet with Their Victims Offers Benefits for Both Parties*, CORRECTIONS TODAY, July 1991, at 164, 166. *See generally* Barbara E. Smith & Susan W. Hillenbrand, *Making Victims Whole Again: Restitution, Victim-Offender Reconciliation Programs, and Compensation*, *in* VICTIMS OF CRIME, *supra* note 146, at 245 (describing programs).

222 *See* Mike Niemeyer & David Shichor, *A Preliminary Study of a Large Victim/Offender Reconciliation Program*, FED. PROBATION, Sept. 1996, at 30, 30 (reporting that 59% of victims and 83% of offenders participating in victim-offender mediation reported satisfaction with the experience); Mark S. Umbreit, *Information on Research Findings Related to Uniquely Restorative Justice Interventions: Victim Offender Mediation and Family Group Conferencing* at 7–8 (Dec. 12, 1996), *available at* http://ssw.che.umn.edu/rjp/Resources/Documents/cumb96d.pdf (reporting that, in a study of victim offender mediation programs in four U.S. states, 90% of the victims and 91% of the offenders expressed satisfaction with the mediation outcome).

tion with the mediation process and outcomes."[223] As yet, there is no useful study on the impact of VOMs and VORPs on adult offenders' recidivism.

VOMs and VORPs share two important characteristics: (1) voluntary participation by the victim[224] (and sometimes the defendant) and (2) a dialogue (usually facilitated) between the victim and the defendant. Victim allocution would be similar to these programs in that participation by the victim would be voluntary.[225] It would differ, however, in that dialogue between the victim and defendant is not anticipated and, indeed, is unlikely to be permitted. This formula may minimize participant anxiety (and also the court's time), but it also eliminates some of the more interactive (and arguably motivational) aspects of the VOM/VORP model.[226] Nonetheless, utilizing a restorative justice perspective—one which forces the defendant to "see [the victim] as [a] human being[ ] in a state of distress"[227]—argues in favor of victim allocution.

VI. A PROPOSAL

Congress should amend Federal Rule of Criminal Procedure 32(c)(3)(E) so that it would read as follows:

> IMPOSITION OF SENTENCE. Before imposing sentence, the court must:

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223 Charles Tracy, Editorial, *The Promises and Perils of Restorative Justice*, 42 INT'L. J. OFFENDER THERAPY & COMP. CRIMINOLOGY 275, 275–76 (1998); *see also* Jennifer M. Cunha, Comment, *Family Group Conferences: Healing the Wounds of Juvenile Property Crime in New Zealand and the United States*, 13 EMORY INT'L L. REV. 283, 330 (1999) ("Regarding victims' satisfaction with VORP sessions, 79% of victims in mediation groups indicate[d] satisfaction with how the system handled their case, compared with only 57% of victims who did not participate in mediation programs.").

224 For a discussion of the reasons why a victim might choose *not* to participate in a VORP, see John Gehm, *Mediated Victim-Offender Restitution Agreements: An Exploratory Analysis of Factors Related to Victim Participation*, *in* CRIMINAL JUSTICE, RESTITUTION, AND RECONCILIATION 177, 179–81 (Burt Galaway & Joe Hudson eds., 1990). For a critique suggesting that victims often feel coerced to participate, see Jennifer Gerarda Brown, *The Use of Mediation To Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247, 1266–67 (1994).

225 Victim participation in sentencing is always voluntary in the sense that a victim has no obligation to provide a written statement or to appear to testify at the sentencing hearing, even if requested to do so by the government.

226 *See* Robert B. Coates, *Victim-Offender Reconciliation Programs in North America: An Assessment*, *in* CRIMINAL JUSTICE, RESTITUTION, AND RECONCILIATION, *supra* note 224, at 125, 132 (arguing that eliminating the face-to-face aspect of VORP is unwise and does not serve the goal of humanizing the parties to a crime).

227 Fattah, *supra* note 163, at 270.

> (E) in any felony case address the victim personally if the victim is present at the sentencing hearing and determine if the victim wishes to make a statement or present any information in relation to the sentence.
>
> Where the felony involves multiple victims, the court may limit the number of victims permitted to testify. Questions as to whether a person is a "victim" in any particular case shall be resolved by the sentencing judge and shall not be reviewable.

This proposal recognizes that there must be some limits to victim allocution, both in terms of the types of crimes to which it will apply (felonies) and the amount of time that a court must devote to it. It also recognizes that some types of felonies (like securities fraud or identity theft) have direct and identifiable victims whose testimony is both relevant (as determined by the Sentencing Guidelines) and useful to the judge's sentencing determination. Other types of felonies (like money laundering, drug trafficking, or bribery of a public official) may have indirect and less identifiable victims whose stories of victimization and loss, though genuine, may not be relevant to the sentencing process.[228] I leave the making of such distinctions to the sentencing judge in the first instance[229] and, by making those judgments unreviewable, I minimize the amount of collateral litigation that will arise.

This proposal carves out some politically safe space between those critics who oppose broad victims' rights accommodations as unduly burdensome on prosecutors and the judicial system[230] and those victims' rights advocates who favor such accommodations regardless of the nature or gravity of the crimes involved.[231] By limiting the protec-

228 Richard Wiebe categorizes crimes as those (such as fraud) for which there are "specific, readily ascertainable victims," those (such as espionage) in which victims are difficult to identify, and those (such as public drunkenness) that are victimless. Richard P. Wiebe, *The Mental Health Implications of Crime Victims' Rights*, *in* LAW, MENTAL HEALTH, AND MENTAL DISORDER 414, 415–16 (Bruce D. Sales & Daniel W. Shuman eds., 1996). Though I do not share Wiebe's categorization of public drunkenness, I do agree that some crimes result in abstract and collective, rather than specific and personal, victimization.

229 Congress, of course, has the right to define more specifically which crimes would entitle victims to make allocution, and the circumstances in which even indirect victims should be given the right to testify. Thus, Congress could determine that local community leaders are appropriate victim witnesses in drug trafficking or public corruption cases or that representatives of consumer organizations are appropriate victim witnesses in antitrust cases.

230 This was an objection of many state and federal prosecutors to early versions of the victims' rights constitutional amendment. *See* Eaton, *supra* note 5.

231 The National Victim Center has taken this position and opposed the proposed federal Victims' Rights Amendment because it failed to protect victims of non-violent

tions of the proposed rule to victims of federal felonies and by making clear that not all victims of felonies can be afforded the right to allocution in every case, this proposal plugs a hole in Rule 32(c)(3)(E) that has deprived victims of economic crimes of important procedural rights, but does so without having to rewrite the Constitution.

CONCLUSION

Over the last fifteen years, we have developed useful experience with victims' rights legislation.[232] The victims' services profession has become over that period a true profession with standards, best practices, and a track record of achievement. It is time to move beyond the initial stages of victim empowerment as represented by the current version of Rule 32(c)(3)(E) and amend the Rule so as to include nonviolent crime victims. Doing so is the best way to recognize that victims of economic crimes, like victims of violent crimes, may suffer significantly as a result of the crime and ought to be heard in the federal sentencing process.

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crimes. *See* Nat'l Center for Victims of Crime, *The National Center for Victims of Crime Does Not Support SJR 3, at* http://www.ncvc.org/law/Nvc_ca.htm (last visited Sept. 8, 2001).

232 *See* Peggy M. Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years After the President's Task Force on Victims of Crime*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 21, 32–38, 103–05 (1999).

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Dave Schlueter, Reporter

RE: Proposed Amendment to Rule 32.1 re Allocution Rights

DATE: August 21, 2002

At its April 2002 meeting, the Committee considered (at Judge Carnes' suggestion) whether to amend Rule 32.1 to include a provision governing a defendant's right of allocution. The suggested changed was prompted in part by the Eleventh Circuit's *per curiam* decision in United States. v. Frazier (attached). Following discussion, the Committee voted unanimously to amend Rule 32.1 with the understanding that more specific language would be proposed for consideration at the Fall 2002 meeting.

I am attaching a draft of proposed language that would incorporate an allocution provision in the existing rule.

Rule 32.1. Revoking or Modifying Probation or Supervised Release

* * * * *

(b) Revocation Hearing. Unless waived by the person, the court must hold the revocation hearing within a reasonable time in the district having jurisdiction. The person is entitled to:

(A) written notice of the alleged violation;

(B) disclosure of the evidence against the person;

(C) an opportunity to appear, present evidence, and question any adverse witness unless the court determines that the interest of justice does not require the witness to appear; ~~and~~

(D) notice of the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel ~~.~~ ; and

(E) make a statement and present any information in mitigation of the sentence, if the court decides to resentence the person.

* * * * *

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, 2002

Mr. John K. Rabiej
Chief, Rules Committee Support Office
Thurgood Marshall Fed. Judiciary Bldg.
One Columbus Circle, N.E.
Washington, DC 20544

Re: Proposed Amendment to Rule 32.1

Dear John:

Enclosed is a copy of an opinion from my court in United States v. Frazier, ___ F.3d ____ (11th Cir. Feb. 25, 2002). As you can see, the opinion suggests an amendment to Rule 32.1 with respect to allocution by the defendant at a proceeding to revoke supervised release. Please put this proposal on the agenda for consideration at our April meeting.

Sincerely,

ED CARNES
United States Circuit Judge

EC:bb

Enclosure

c: Dave Schlueter
Judge Wilson
Judge Hill
Judge Fay

UNITED STATES of America, Plaintiff–Appellee,

v.

Sidney Carl FRAZIER, a.k.a. Sydney Oliver, Defendant–Appellant.

No. 01–12880.

United States Court of Appeals, Eleventh Circuit.

Feb. 25, 2002.

Defendant appealed from a judgment of the United States District Court for the Northern District of Florida, No. 00-00024-CR-SPM-1, Stephan P. Mickle, J., revoking his term of supervised release and sentencing him to additional incarceration. The Court of Appeals held that defendant did not have the right to allocute upon resentencing for violating the terms of his supervised release.

Affirmed.

1. Criminal Law ⇐1042, 1181.5(8)

Where the defendant fails to make a timely objection, Court of Appeals reviews a district court's failure to address a defendant personally at sentencing for plain error; furthermore, court will remand only if manifest injustice results from the omission. Fed. Rules Cr.Proc.Rule 32, 18 U.S.C.A.

2. Sentencing and Punishment ⇐2308

Defendant did not have the right to allocute upon resentencing for violating the terms of his supervised release; however, given the importance of allocution, the better practice is for district courts to provide defendants with an opportunity to allocute prior to the imposition of a sentence based upon a violation of supervised release. Fed.Rules Cr.Proc.Rules 32(c)(3)(C), 32.1, 18 U.S.C.A.

Appeal from the United States District Court for the Northern District of Florida.

Before WILSON, HILL and FAY, Circuit Judges.

PER CURIAM:

Appellant Sidney Carl Frazier ("Frazier") appeals from the judgment of the district court revoking his term of supervised release and sentencing him to additional incarceration. Frazier argues that the district court erred by sentencing him for violating the terms of his supervised release without allowing him to allocute before imposing the sentence. Specifically, Frazier argues that the district court improperly denied him his right of allocution pursuant to Rule 32 of the Federal Rules of Criminal Procedure. We reject this argument and affirm.

Frazier was originally convicted of possessing counterfeit notes with the intent to defraud, in violation of 18 U.S.C. § 472. On February 18, 1998, the district court sentenced him to 15 months imprisonment followed by a three year term of supervised release. Under the conditions of the supervised release, Frazier was not to commit any federal, state or local crime.

Frazier began his term of supervised release on December 1, 1998. On April 14, 2000, the jurisdiction of his supervised release was transferred to the Northern District of Florida. On April 6, 2001, the probation officer, alleging a violation of a condition of his supervision, filed a Petition for Warrant for Offender Under Supervision. Specifically, the petition alleged that Frazier had

committed aggravated assault and battery.[1] On May 16, 2001, the district court, after conducting a hearing, found that Frazier had violated the terms of his supervised release and committed him to an additional 24 months incarceration. The record is clear that prior to sentencing the district court did not provide Frazier with an opportunity to personally address the court. Frazier made no objection at the time.

[1] Where the defendant fails to make a timely objection, we review a district court's failure to address a defendant personally at sentencing for plain error. *United States v. Gerrow*, 232 F.3d 831, 833 (11th Cir.2000), *rev'd on other grounds, United States v. Sanchez*, 269 F.3d 1250 (11th Cir.2001) (*en banc*). Further, this Court will remand only if "manifest injustice" results from the omission. *Gerrow*, 232 F.3d at 834 (quoting *United States v. Tamayo*, 80 F.3d 1514, 1521 (11th Cir.1996)). After reviewing the record, the parties briefs and the argument of counsel, we find no plain error.

[2] This Court has not yet addressed the question of whether a defendant has the right to allocute upon resentencing for violating the terms of his or her supervised release. Rule 32 of the Federal Rules of Criminal Procedure specifies the process by which a sentence and judgment are imposed upon a defendant following conviction. Rule 32(c)(3)(C) provides a party with the right to allocute, requiring a district court to, "address the defendant personally and determine whether the defendant wishes to make a statement and to present any information in mitigation of the sentence," before the court imposes a sentence. Fed.R.Crim.P. 32(c)(3)(C). Effective December 1, 1980, Rule 32.1 was added to the Federal Rules of Criminal Procedure. It is entitled "Revocation or Modification of Probation or Supervised Release," and provides, in part, that at a revocation hearing, a person shall be afforded:

> (A) written notice of the alleged violation;
>
> (B) disclosure of the evidence against the person;
>
> (C) an opportunity to appear and to present evidence in the person's own behalf;
>
> (D) the opportunity to question adverse witnesses; and
>
> (E) notice of the person's right to be represented by counsel.

Fed.R.Crim.P. 32.1(a)(2).

Appellant urges us to find that Rule 32.1 incorporates the provision of Rule 32 concerning the right of allocution. He bases his argument on the rationale used by several of our sister circuits which have held that the right of allocution in Rule 32 applies at supervised release revocation hearings. *See United States v. Patterson*, 128 F.3d 1259, 1261 (8th Cir.1997) (holding that Rule 32 provides a defendant with the right to allocute at supervised released revocation hearings); *United States v. Rodriguez*, 23 F.3d 919, 921 (5th Cir.1994) (same); *United States v. Carper*, 24 F.3d 1157, 1162 (9th Cir.1994) (same). Although we find these decisions reasonable, we find the conclusion of the Sixth Circuit in *United States v. Waters*, 158 F.3d 933 (6th Cir.1998), more persuasive.

The focus of the discussion before us is whether Rule 32.1 also incorporates the additional provisions of Rule 32 including, but not limited to, the right of allocution. We think

1. On February 24, 2001, Beverly Slappy filed charges against Frazier for assault and battery. Allegedly, Frazier punched Ms. Slappy in the head and threw her on the ground, punching and kicking her several times. Further, he threatened her with a tire iron and stole her money.

not. The appellant in *Waters* argued that the lower court erred by failing to provide him with an opportunity to allocute prior to sentencing for violating his supervised release. *See id.* at 942. In deciding that Rule 32.1 does not incorporate the provisions of Rule 32, the court noted that, "[Rule 32.1] is silent with respect to whether a defendant has a right to allocute before sentence is imposed at a revocation hearing." *Id.* at 943. The court concluded that the right of allocution specified in Rule 32 does not apply at supervised release revocation hearings. *See id.* at 944. Were we to hold that Rule 32.1 incorporates all of the provisions of Rule 32, the sentencing court would not only have to give the defendant a right to allocution, it would have to require presentence investigation reports along with all of the other demands of the rule. *See id.* In our opinion, this would render Rule 32.1 superfluous. However, given the importance of allocution, we agree that the better practice is for district courts to provide defendants with an opportunity to allocute prior to the imposition of a sentence based upon a violation of supervised release.

In suggesting this procedure we are mindful of what we did in *United States v. Eads*, 480 F.2d 131, 133 (5th Cir.1973).[2] In *Eads*, we *sua sponte* noted that the defendant was not given the right to allocute prior to sentencing at a revocation hearing which terminated his term of probation. *See id.* The Court, stressing the importance of the right to allocute and the fundamental nature of such in the process of imposing any sentence of incarceration, granted the appellant the right to allocute.

Although the right to allocution was granted to *Eads*, we recognize that a revocation of probation is different from the revocation of supervised release. *See Waters*, 158 F.3d at 943 (distinguishing sentencing for a violation of supervised release from a probation violation). We also note that Rule 32.1 was not in existence until 1980. Because Rule 32.1 is silent with respect to the right to allocute at a revocation hearing, and since *Eads* does not control our situation, there exists no legal requirement to grant a defendant the right to allocution at a revocation hearing for supervised release. Consequently, Frazier's rights were not violated; and thus, there is no error, plain or otherwise.

It does appear to us, however, that this question is one that should be addressed by the Advisory Committee on the Federal Rules of Criminal Procedure. The right of allocution seems both important and firmly embedded in our jurisprudence. We suspect that its omission from Rule 32.1 could be the result of a simple oversight.

In conclusion, the district court did not commit plain error in denying Frazier an opportunity to allocute prior to imposing the sentence because there presently exists no such requirement. Further, there was no manifest injustice that resulted from the omission. The judgment of the district court is affirmed.

AFFIRMED.

2. This Court adopted as binding precedent all decisions of the Fifth Circuit handed down prior to October 1, 1981. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (*en banc*).

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Proposed Amendments to Rule 35 following Publication and Comment**

DATE: **August 21, 2002**

1. Background on the Amendments to Restyled Rule 35(a).

Several years ago, after the restyled rules were published for comment, the Committee considered an issue raised by members of the Appellate Rules Committee regarding possible conflict over what was meant by the term "imposition of sentence" in current Rule 35(c) (now restyled Rule 35(a)), which serves as the triggering event for the 7-day period for making corrections to the sentence. Initially, the Committee decided to use the term "oral announcement of sentence," but then later determined that the Rule should be more consistent with Appellate Rule 4 and any other rules that might specify when the right to appeal is triggered. Thus, it proposed an amendment that would include in the rule a new definitional section that stated that for purposes of Rule 35, sentencing meant "entry of the judgment." That amendment was published for comment and the comment period expired in February 2002. A copy of the published amendment is attached.

At the April 2002 meeting, I reported to Committee that it had received only seven written comments on the proposed amendment and that those comments were mixed. While The Department of Justice, the Federal Bar Association, the Committee on the U.S. Courts of the State Bar of Michigan, and the NACDL opposed the amendment, the State Bar of California Committee on Federal Courts, the Federal Magistrate Judges Assn., and Judge David Lawson endorsed the amendment.

The public comments opposing the amendment cited concerns about interjecting more uncertainty into the area, leaving open the possibility of the court changing the sentence, and adopting the minority, rather than majority view of the circuit courts that have addressed the issue. On the other hand, those endorsing the amendment believed that it would clarify an ambiguity in the rule and make it more consistent with Appellate Rule 4.

2. Committee Action on Published Rule

Following discussion Mr. Campbell moved to drop the proposed definitional provision in Rule 35(a) and the term "entry of judgment" used

throughout the rule. The motion failed by a vote of 4 to 6.

Judge Roll then moved that the amendment be revised by dropping the definitional provision in proposed Rule 35(a), and the term "oral announcement" be used throughout the rule and that the rule be forwarded to the Standing Committee for action. That motion passed by a vote of 6 to 4. I responded that I would make the necessary changes in the Rule and the Committee Note and circulate the draft for the Committee's consideration.

3. Action Subsequent to the Meeting

In the process of making the necessary substitutions, it became apparent that the fix would not be easy or clean. I have attached a draft that reflects just how the rule would look if the term "oral announcement of sentence" was substituted every time the term "sentencing" is used, throughout the entire rule.

I pointed the problem out to Judge Carnes who agreed that it might be better to revisit the issue at the Committee's next meeting —given the fact that Rule 35 could be blended in with other pending amendments that could be forwarded to the Judicial Conference in 2003.

4. Options.

At this stage, it seems that the Committee has several options. First, it can forward the rule, as modified in the accompanying draft. Although awkward, it seems to do the job.

Second, it can structure some sort of definitional section similar to that published for comment. But there seemed to be consensus that adding a special definitional provision in Rule 35 was not suitable, regardless of whether the Committee decided to change the triggering event for the seven-day period in Rule 35(a).

A third option would be to use the term "oral announcement of the sentence" only in Rule 35(a). But it would seem that to be consistent throughout the rule, the same term should be used.

Fourth, the Committee table any further consideration of the amendment. The majority of the circuits have read the term "imposition of sentence" to mean oral announcement. Arguably, the term "sentencing," which is used in the restyled version currently before Congress, read along with the Committee Note that the Committee intended no other changes to the rule, would leave the caselaw where it is now. The fact that the Committee seems evenly divided on the issue might also suggest that the fourth option is a reasonable course at this point.

Rule 35. Correcting or Reducing a Sentence

(a) Correcting Clear Error. Within 7 days after ~~sentencing~~ oral announcement of the sentence, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.

(b) Reducing a Sentence for Substantial Assistance.

(1) ***In General.*** Upon the government's motion made within one year of ~~sentencing~~ oral announcement of the sentence, the court may reduce a sentence if:

(A) the defendant, after ~~sentencing~~ oral announcement of the sentence, provided substantial assistance in investigating or prosecuting another person; and

(B) reducing the sentence accords with the Sentencing Commission's guidelines and policy statements.

(2) ***Later Motion.*** Upon the government's motion made more than one year after ~~sentencing~~ oral announcement of the sentence, the court may reduce a sentence if the defendant's substantial assistance involved:

(A) information not known to the defendant until one year or more after ~~sentencing~~ oral announcement of the sentence;

(B) information provided by the defendant to the government within one year of sentencing, but which did not become useful to the government until more than one year after ~~sentencing~~ oral announcement of the sentence; or

(C) information the usefulness of which could not reasonably have been anticipated by the defendant until more than one year after ~~sentencing~~ oral announcement of the sentence and which was

promptly provided to the government after its usefulness was reasonably apparent to the defendant.

(3) ***Evaluating Substantial Assistance.*** In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant's presentence assistance.

(4) ***Below Statutory Minimum.*** When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute

COMMITTEE NOTE

[To be drafted, pending action by the Committee]

* * * * *

8. Rule 35. Correcting or Reducing Sentence

Rule 35 contains several changes. First, as noted, *supra*, the published version of Rule 35 used the term "sentencing" to describe the triggering element for the two "time" requirements in the rule. While the rule was out for public comment, and at the suggestion of the Standing Committee, the Advisory Committee discussed the issue of further defining or clarifying the term "sentencing." The Committee's initial decision was to use the term "oral announcement of the sentence." That is the view of the majority of the courts that have addressed the issue. Upon further reflection, however, the Committee decided to add a new provision (now Rule 35(a)) and define sentencing as the entry of the judgment. Even though that may result in the change in practice in some circuits, it is more consistent with describing the triggering event, for example, of an approval of a sentence.*

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* At the request of the Advisory Committee on Criminal Rules, the Committee on Rules of Practice and Procedure agreed at its June 7-8, 2001, meeting to withdraw the proposal defining "sentencing" as the entry of the judgment. The Committee also agreed with the advisory committee's recommendation to publish the withdrawn proposal for public comment.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 35. Correcting or Reducing a Sentence**

(a) **Definition.** For purposes of this rule, "sentencing" means the entry of the judgment.

~~(a)~~ (b) **Correcting Clear Error.** Within 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.

~~(b)~~(c) **Reducing a Sentence for Substantial Assistance.**

* * * * *

(4) ***Below Statutory Minimum.*** When acting under ~~Rule 35(b)~~ Rule 35(c), the court may

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* New matter is underlined and matter to be omitted is lined through.
** The rule includes proposed amendments approved by the Judicial Conference's Committee on Rules of Practice and Procedure in June 2001 and forwarded to the Judicial Conference for its consideration. The amended rule takes effect on December 1, 2002, if approved by the Conference and Supreme Court, and Congress takes no action otherwise on it.

reduce the sentence to a level below the minimum sentence established by statute.

COMMITTEE NOTE

In 2000, the Committee proposed several substantive changes to Rule 35 and published those proposed changes for public comment. After further review, the Committee determined that some attention should be given to the definition of "sentencing," the term used in the published revised rule. As a result of those discussions, the Committee has proposed that the rule be further amended to include a definition of "sentencing" in revised Rule 35(a).

In particular, the current version of Rule 35(c) permits the sentencing court to correct errors in the sentence if the correction is made within seven days of the "imposition of the sentence." Current Rule 35(b) also permits the court to reduce a sentence for the defendant's substantial assistance within one year after "the sentence is imposed." Although the term "imposition of sentence" was not defined in the rule, the courts that addressed the issue were split. The majority view was that the term meant the oral announcement of the sentence and the minority view was that it meant the entry of the judgment. *See United States v. Aguirre*, 214 F.3d 1122, 1124-25 (9th Cir. 2000) (discussion of current Rule 35(c) and citing cases). During the restyling of all of the Criminal Rules in 2000 and 2001, the Committee determined that the uniform term "sentencing" throughout the entire rule was the more appropriate term. Upon further reflection, and after the rule was published for comment, the Committee decided that it should resolve the conflict in the circuits by

defining "sentencing" — for purposes of Rule 35 — as the point when judgment is entered. The Committee reached that decision for two reasons. First, the triggering event for appeal under Federal Rule of Appellate Procedure 4(b)(1)(A) is the entry of the judgment and a different triggering event for purposes of Rule 35 is confusing and a trap for the practitioner. Second, in many cases, more than seven days elapse after oral announcement of the sentence before the court enters the written judgment. In those cases, if the judge misspeaks or makes a technical error in announcing the sentence, no party can call the error to the attention of the judge and thus, the judge cannot correct that error because more than seven days has elapsed. This results in a significant number of appeals where conflicts exist between the oral announcement of the sentence and the sentence reflected in the written judgment but the sentencing court has no opportunity to declare which version of the sentence it intended to impose.

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Proposed New Rule 12(i) Governing Review of Rulings by Magistrate Judges; Guilty Pleas Before Magistrate Judges**

DATE: **August 20, 2002**

At its April 2002 meeting, the Committee considered a proposal from Judge Tashima (member of the Standing Committee and liaison to the Advisory Committee) that the Committee consider amending the Criminal Rules to provide a counterpart to Federal Rule of Civil Procedure 72. That rule sets out procedures for appealing decisions by magistrate judges. Following discussion, the Committee voted 11 to 1 to consider the issue. Judges Miller and Roll were asked to research the issue further and suggest possible language.

Attached is the memo prepared by Judges Roll and Miller that addresses in more detail the proposed rule. They suggest that the new provision be placed in Rule 12, as a new subdivision, Rule 12(i). The memo includes not only a draft of the proposed rule but also supporting documents.

In a related issue, Judges Roll and Miller have addressed the question of whether magistrate judges should be permitted to take guilty pleas. The issue is raised in the August 17th memo, and again in a memo dated August 19th. The latter memo contains additional suggested language to proposed new rule 12(i) that would address that specific issue.

This item is on the agenda for the September 2002 meeting.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
SUITE 173
WALTER E. HOFFMAN UNITED STATES COURTHOUSE
600 GRANBY STREET
NORFOLK, VIRGINIA 23510-1915
(757) 222-7007

CHAMBERS OF
TOMMY E. MILLER
UNITED STATES MAGISTRATE JUDGE

FACSIMILE NO.
(757) 222-7027

MEMORANDUM

TO: THE HONORABLE EDWARD C. CARNES
UNITED STATES CIRCUIT JUDGE

FROM: JOHN M. ROLL
TOMMY E. MILLER

RE: PROPOSAL TO ADD RULE OF CRIMINAL PROCEDURE COUNTERPART TO FEDERAL RULE OF CIVIL PROCEDURE 72

DATE: AUGUST 16, 2002

At the April committee meeting, you requested that we develop a proposal for a criminal rule counterpart for Federal Rule of Civil Procedure 72.

For the committee's convenience, we have attached the following to this memorandum:

Exhibit A - United States v. Abonce-Barrera, 257 F.3d 959 (9th Cir. 2001), the case that initiated this project.

Exhibit B - Current Fed. R. Civ. P. 72.

Exhibit C - The Style Subcommittee's most recent draft of the restyled Fed. R. Civ. P. 72.

Exhibit D - Our attempt at converting Fed. R. Civ. P. 72 to a criminal rule counterpart.

Exhibit E - 28 U.S.C. § 636(b)(1), which sets forth the statutory authorization for magistrate judges to hear pretrial dispositive and nondispositive motions.

We adopted the following standards for making the suggestions:

1. The criminal rule should resemble the restyled Fed. R. Civ. P. 72 as closely as possible for

the sake of consistency.

2. Even though there is a procedure set out in the final paragraph of 28 U.S.C. § 636(b)(1) for considering objections to a magistrate judge's report and recommendation, we thought it best to include the more detailed provisions of Fed. R. Civ. P. 72(b) in the proposed criminal rule. There is also the benefit of keeping both of the procedural rules in one place for the benefit of counsel.

3. Whatever language we come up with must be submitted to the Style Subcommittee so that they can conform this language with the style they plan to use for the restyled civil rules.

There were several places where we considered placing the new rule. We concluded that a new Rule 12(i) is the most appropriate place. Listed below are the placements we considered:

1. A new Rule 12(i)--This site includes the magistrate judge procedures within the section related to pretrial motions. The placement, however, would bury the provision within the rule and not set it out in a separate rule as in Fed. R. Civ. P. 72.

2. New Rule 12.5--This would give the magistrate judge review procedures its own rule and yet still keep the rule within the motions section of the criminal rules.

3. New Rule 17.2--The reasons for this placement are similar to those in Rule 12.5 with the additional benefit that it would be only a ".2" instead of a ".5."

4. Rule 59--This was deleted as part of the rewriting of the rules. Perhaps we should use the blank space.

Since we used the current version of the Style Subcommittee's Fed. R. Civ. P. 72., we did not change language that did not need to be changed to conform to criminal cases. However, we believe that the two sentences in proposed Rule12(i)(A), beginning in the middle of Line 7 and ending at the beginning of Line 10, are not clear. We suggest that the Style Subcommittee examine our draft and

these two sentences in particular.

Felony Guilty Pleas Before Magistrate Judges

The Court of Appeals for the Ninth Circuit provided us with another opportunity to consider a rule change, either in this proposed Rule 12(i) or in Rule 11.

Attached as Exhibit F is the recent case of United States v. Reyna-Tapia, 294 F.3d 1192 (9th Cir. 2002). The Court held that:

> . . .when a defendant explicitly consents, a magistrate judge may administer the Rule 11 plea colloquy in a felony case, so long as the district court reviews the proceedings *de novo.*

The circuits which have addressed the issue of magistrate judges conducting felony Rule 11 proceedings are now split in three directions:

1. The Ninth Circuit now requires de novo review in every case.

2. The Second, Fifth, and Eighth Circuits require a district judge to conduct a de novo review only when there is an objection to the magistrate judge's report and recommendation recommending acceptance of a guilty plea. United States v. Torres, 258 F.3d 791, 795-96 (8th Cir. 2001); United States v. Dees, 125 F.3d 261, 265 (5th Cir. 1997); United States v. Williams, 23 F.3d 629, 633 (2d Cir. 1994).

3. The Tenth Circuit does not require a review by the district judge of the magistrate judge's finding that a defendant has properly entered a guilty plea, absent a request by the parties. United States v. Ciapponi, 77 F.3d, 1247 (10th Cir. 1996).

We are not certain whether it is appropriate for the committee to attempt to resolve these circuit splits by rule making. Judge Roll had 625 felony sentencings in 2001. Most of the guilty plea

proceedings were conducted by magistrate judges. Requiring preparation of a transcript in every such guilty plea for de novo review is time consuming, expensive, and superfluous. Defendants rarely make any objection to the guilty plea procedure before the magistrate judge.

We request the committee's guidance as to whether this is an issue that should be addressed by rule making. The committee may also consider submitting both of the issues raised in this memorandum to the Committee on the Administration of the Magistrate Judge System for its consideration at its December 2002 meeting.

cc: Professor David A. Schleuter,
Reporter
John K. Rabiej, Chief,
Rules Committee Support Office

Key-page 8-10

257 F.3d 959
56 Fed. R. Evid. Serv. 1179, 00 Cal. Daily Op. Serv. 6095, 2001 Daily Journal D.A.R. 7495
(Cite as: 257 F.3d 959)

United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Jose ABONCE-BARRERA, Defendant-Appellant.

No. 99-10282.

Argued and Submitted Nov. 13, 2000
Filed July 20, 2001

Defendant was convicted by jury in the United States District Court for the Northern District of California, Ronald M. Whyte, J., of conspiracy to distribute methamphetamine, distribution of methamphetamine, and possession with intent to distribute methamphetamine. Defendant appealed. The Court of Appeals, Wallace, Circuit Judge, held that: (1) admission of transcriptions and English translations for recorded Spanish-language conversations was not abuse of discretion; (2) qualifying undercover agent who participated in recorded conversations as expert to testify about transcription and translation of tapes was not abuse of discretion or plain error; (3) defendant did not waive his ability to challenge magistrate judge's decision on scope of pretrial disclosure by failing to file appeal of magistrate judge's order to district court; (4) decision to withhold informant's identity prior to trial was not abuse of discretion; (5) defendant was not entitled to disclosure of federal agent's affidavit regarding informant or government's debriefing report on informant; and (6) government did not commit *Brady* disclosure violation when it failed to disclose informant's conviction for drunk driving.

Affirmed.

West Headnotes

[1] Criminal Law ⚿438.1
110k438.1 Most Cited Cases

Admission of transcriptions and English translations for recorded Spanish- language conversations was not abuse of discretion where defendant had notice that transcriptions and translations would play key role and he would have opportunity to present competing versions at trial, court held pretrial hearings regarding qualifications of government's expert and accuracy of its transcriptions and translations, defendant was allowed to cross-examine government's expert, jurors were allowed to listen to tapes to detect problems with audibility and compare tapes to transcriptions, defendant presented expert to testify about government's transcription process, and defendant's two objections to translations that were not incorporated by government were brought to jury's attention.

[2] Criminal Law ⚿1153(1)
110k1153(1) Most Cited Cases

Where there is no dispute as to accuracy, Court of Appeals reviews for abuse of discretion the district court's decision to admit transcriptions of recorded conversations and their English translation and to allow the jury to take such exhibits into the jury room.

[3] Criminal Law ⚿1153(1)
110k1153(1) Most Cited Cases

Abuse of discretion was appropriate standard of review for challenge to admission of transcriptions and translations of recorded Spanish-language conversations when defendant made no effort on appeal to allege specific inaccuracies in transcriptions and their translation, leaving Court of Appeals with largely conclusory allegations of possible inaccuracy.

[4] Criminal Law ⚿1153(1)
110k1153(1) Most Cited Cases

Court of Appeals reviews district court's decision to allow the use of transcripts as an aid in listening to tape recordings for abuse of discretion.

[5] Criminal Law ⚿438.1
110k438.1 Most Cited Cases

Recorded conversation is generally admissible unless the unintelligible portions are so substantial that the recording as a whole is untrustworthy.

[6] Criminal Law ⚿1134(3)
110k1134(3) Most Cited Cases

In reviewing challenge to admissibility of transcriptions of tape-recorded conversations in the case of foreign language tapes, Court of Appeals reviews whether the following steps were taken to ensure the accuracy of the transcriptions and their translation: (1) whether the district court reviewed the transcriptions and

EXHIBIT A

translations for accuracy, (2) whether the defense counsel had the opportunity to highlight alleged inaccuracies and to introduce alternative versions, and (3) whether the jury was allowed to compare the transcript to the tape and hear counsel's arguments as to the meaning of the conversations; in this review, no single question is dispositive.

[7] Criminal Law ⚷481
110k481 Most Cited Cases

[7] Criminal Law ⚷1036.6
110k1036.6 Most Cited Cases

Qualifying undercover agent who participated in recorded Spanish-language conversations as expert to testify about transcription and translation of tapes was not abuse of discretion or plain error, even though agent had never before been qualified as expert and allegedly was biased due to his active participation in investigation of case, given agent's credentials with respect to his proficiency in Spanish language and experience with English-Spanish translations, opportunity which defendant was given to cross-examine agent as to any biases, and impeachment of agent's credibility as expert by defendant's expert, who testified as to inadvisability of having participant in conversation transcribe and translate that conversation. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[8] Criminal Law ⚷481
110k481 Most Cited Cases

The determination of whether an expert witness has sufficient qualifications to testify is a matter within the district court's discretion. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[9] Criminal Law ⚷472
110k472 Most Cited Cases

When court considers the admissibility of testimony based on some "other specialized knowledge," rule governing admission of expert testimony generally is construed liberally. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[10] Criminal Law ⚷1036.6
110k1036.6 Most Cited Cases

Defendant waived argument that government's proffered expert on transcription and translation of recorded Spanish-language conversations, as active participant in investigation of case, was incapable of providing unbiased opinion when defendant did not seek to disqualify expert from testifying due to alleged bias.

[11] Criminal Law ⚷1036.6
110k1036.6 Most Cited Cases

Trial court's decision to qualify agent who was active participant in investigation of case to testify as expert on transcription and translation of recorded Spanish-language conversations could be reviewed for plain error.

[12] Criminal Law ⚷742(1)
110k742(1) Most Cited Cases

[12] Witnesses ⚷80
410k80 Most Cited Cases

[12] Witnesses ⚷378
410k378 Most Cited Cases

Generally, evidence of bias goes toward the credibility of a witness, not his competency to testify, and credibility is an issue for the jury.

[13] United States Magistrates ⚷31
394k31 Most Cited Cases

Defendant did not waive his ability to challenge magistrate judge's decision on scope of pretrial disclosure by failing to file appeal of magistrate judge's order to the district court. 28 U.S.C.A. § 636(b)(1).

[14] Federal Courts ⚷523
170Bk523 Most Cited Cases

Although Court of Appeals has supervisory power to formulate procedural rules, it may act only when there exists a clear basis in fact and law for doing so.

[15] Federal Courts ⚷1.1
170Bk1.1 Most Cited Cases

Federal judiciary's supervisory power is a power it enjoys only concurrently with Congress, and over which Congress has the final say.

[16] Criminal Law ⚷1139
110k1139 Most Cited Cases

Court of Appeals reviews alleged *Brady* violations de novo.

[17] Criminal Law ⚷1148
110k1148 Most Cited Cases

Court of Appeals reviews pretrial decision to withhold

the identity of informant for an abuse of discretion.

[18] United States Magistrates ⚿21
394k21 Most Cited Cases

Decision to withhold informant's identity prior to trial was not abuse of discretion where magistrate judge balanced extent to which pretrial disclosure would be helpful to defendant against government's interest in protecting informant, and assured himself that government would fulfill promise to provide defense with pretrial interview with informant and would disclose informant's identity at trial.

[19] Criminal Law ⚿700(3)
110k700(3) Most Cited Cases

Defendant's statement that list of all cases on which informant had worked might have been useful was insufficient to establish that list was material and thus subject to disclosure pursuant to government's *Brady* disclosure obligations.

[20] Criminal Law ⚿627.6(5)
110k627.6(5) Most Cited Cases

[20] Criminal Law ⚿627.7(1)
110k627.7(1) Most Cited Cases

Defendant was not entitled to disclosure of federal agent's affidavit regarding informant or government's debriefing report on informant. Fed.Rules Cr.Proc.Rule 16(a)(2), 18 U.S.C.A.

[21] Criminal Law ⚿627.10(2.1)
110k627.10(2.1) Most Cited Cases

Finding that, on first day of trial and several days prior to day on which informant was to testify, government retained legitimate safety concerns over disclosure of identifying information other than informant's name, and thus was not required to provide defendant with unredacted materials about informant, was not abuse of discretion.

[22] Criminal Law ⚿700(4)
110k700(4) Most Cited Cases

Government did not commit *Brady* disclosure violation when it failed to disclose informant's conviction for drunk driving, inasmuch as defendant was aware of conviction and able to cross-examine informant about it at trial, government stipulated that it did not have record of drunk driving conviction, and informant's credibility was further damaged by conviction because jury was able to infer that informant lied to government regarding his criminal history.

***961** Laurie Kloster Gray, Esq., United States Attorney's Office, San Francisco, California, for the plaintiff-appellee.

Daniel G. Herns, Esq., Law Offices of Daniel G. Herns, San Jose, California, for the defendant-appellant.

Appeal from the United States District Court for the Northern District of California; Ronald M. Whyte, District Judge, Presiding. D.C. No. CR-98-20025-RMW.

Before: WALLACE, FISHER, and RAWLINSON, Circuit Judges.

WALLACE, Circuit Judge:

Jose Abonce-Barrera appeals from his convictions for conspiracy to distribute methamphetamine, in violation of 21 U.S.C. § 846; distribution of methamphetamine, in violation of 21 U.S.C. § 841(a)(1); and possession with intent to distribute methamphetamine, in violation of 21 U.S.C. § 841(a)(1). The district court had jurisdiction under 18 U.S.C. § 3231. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm.

***962** I

In January 1998, a Drug Enforcement Administration (DEA) informant contacted Martin Tapia, a known drug trafficker, to arrange for the purchase of thirty pounds of methamphetamine. Later, Tapia introduced the informant to Jose Padilla, who was to deliver the methamphetamine. DEA agents requested that the informant arrange for Padilla to provide a sample. The informant, undercover DEA agent Florentino Rosales, and Padilla met at a restaurant in San Jose, California (the first meeting). The DEA agent was wearing a body recording device, and the conversation took place in Spanish. At this meeting, Padilla explained that he did not have the sample with him. He made a call on his cellular telephone and then explained that the person who was supposed to bring the sample could not arrive for several hours. Another meeting was arranged for a later date.

The next meeting took place two days later (the second meeting). Padilla provided the informant with a sample, which he immediately gave to Rosales. Subsequently, the informant was told by DEA agents to finalize the details of the purchase of thirty pounds of methamphetamine. A week later, the informant, again

wearing a body recording device, met Padilla at a gas station to complete the transaction (the third meeting). Padilla, however, did not have the methamphetamine.

Approximately forty-five minutes later, Abonce-Barrera arrived. Abonce-Barrera gave the informant a sample; however, he stated that he had brought only five pounds of methamphetamine rather than the promised thirty pounds. Abonce-Barrera told the informant that he could deliver another ten pounds, but that he could not deliver the entire thirty pounds because he had other commitments. The meeting was broken off at this news.

Later that day, the informant was told to contact Padilla for the purpose of obtaining the five pounds of methamphetamine. The informant, Padilla, and Abonce-Barrera met again at the gas station (the fourth meeting). The informant, who was still wearing the recording device, and Abonce-Barrera got into the informant's truck. A short time later, the informant alerted the agents that the methamphetamine was present. Agents moved in, and Abonce- Barrera was arrested. The agents found four pounds of methamphetamine and a cellular telephone. The cellular telephone records revealed that Padilla had repeatedly called a pager number registered to Abonce-Barrera during the firstmeeting. The records also revealed that Padilla called this number repeatedly while waiting for the third party to bring the methamphetamine to the gas station.

During the trial, recordings from the first, third and fourth meetings provided key evidence of Abonce-Barrera's involvement. DEA agent Rosales, who was present at the first meeting, was qualified as an expert to testify at trial as to the transcription of the recordings and their translation into English. Each member of the jury was given a copy of both the verbatim Spanish transcriptions and the English translations of those transcriptions. In addition, the Spanish-language tapes were played for the jury, and the English translations were read to the jury.

II

[1] Abonce-Barrera makes several related arguments with respect to the transcription and translation of the Spanish language tapes. He contends that the district court failed to formulate "a just and practical method for the use of the body wire tapes." He asserts that he was not afforded sufficient time to review the government's ***963** transcriptions and translations and that the tapes were of such poor quality and the process of transcription so problematic that the district court should have ordered "the wholesale exclusion of the tapes or a continuance of the trial to attempt to fashion a better approach."

[2][3][4][5] Where there is no dispute as to accuracy, we review for abuse of discretion the district court's decision to admit the transcriptions and their English translation and to allow the jury to take such exhibits into the jury room. *United States v. Rrapi*, 175 F.3d 742, 746 (9th Cir.1999); *United States v. Fuentes-Montijo*, 68 F.3d 352, 354 (9th Cir.1995). Abonce-Barrera has made no effort on appeal to allege specific inaccuracies in the transcriptions and their translation. Because we are left "with largely conclusory allegations of possible inaccuracy," abuse of discretion is the proper standard. *United States v. Pena-Espinoza*, 47 F.3d 356, 359 (9th Cir.1995). We also review the district court's decision to allow the use of transcripts as an aid in listening to tape recordings for abuse of discretion. *Rrapi*, 175 F.3d at 746. " 'A recorded conversation is generally admissible unless the unintelligible portions are so substantial that the recording as a whole is untrustworthy.' " *Id.,quoting United States v. Tisor*, 96 F.3d 370, 376 (9th Cir.1996).

[6] In the case of foreign language tapes, we review whether the following steps were taken to ensure the accuracy of the transcriptions and their translation: (1) whether the district court reviewed the transcriptions and translations for accuracy, (2) whether the defense counsel had the opportunity "to highlight alleged inaccuracies and to introduce alternative versions," and (3) whether "the jury was allowed to compare the transcript to the tape and hear counsel's arguments as to the meaning of the conversations." *Id.* No single question is dispositive. *See United States v. Armijo*, 5 F.3d 1229, 1234-35 (9th Cir.1993) (No abuse even where "the trial judge did not review the tape for accuracy because he was not fluent in Spanish and there was no agent involved in the conversation who could testify to its accuracy").

Six months before his trial, Abonce-Barrera entered into a stipulation with the government in which it was agreed that the government would provide Abonce-Barrera with successive drafts of its transcription and translation efforts on the condition that the draft versions could "not be used by either side as evidence in the case or to impeach the person or persons who helped prepare the transcription and translation or to impeach the accuracy of the final transcripts." The government provided drafts to the defense in July 1998, on December 21, 1998, on January 11, 1999, and on January 15, 1999. The start of trial was continued to January 26, 1999, to afford Abonce-Barrera the opportunity to review the final draft.

The stipulation also set forth procedures for ensuring

that the translation at trial would be accurate, including a provision stating that "the defendants and defense counsel will provide to the United States copies of the transcriptions and translations prepared by the defense of those tape-recorded conversations that the defendants and defense counsel intend to use at trial." Thus, Abonce-Barrera was clearly on notice six months before trial that the transcriptions and translations of the tapes were going to play a key role in the prosecution and that he would have the opportunity to present competing transcriptions and translations at trial of the Spanish-language tapes.

The district court held hearings before trial regarding the qualifications of the government's expert and the accuracy of the government's transcripts and translations. At trial, Abonce-Barrera was given ***964** the opportunity, within the confines of the stipulation, to cross-examine the government's witness regarding the translations. The jurors were allowed to listen to the tapes to detect any problems with audibility and to compare the tapes to the transcriptions. Abonce-Barrera presented his own expert to testify about the transcription process employed by the government. Abonce-Barrera's argument that he had insufficient time to review the government's transcriptions and translations is further belied by the fact that Abonce-Barrera's counsel did bring to the government's attention several objections to the translations. All but two of the objections were incorporated by the government, and these two objections were brought to the attention of the jury at trial.

In light of the steps taken by the parties and the district court, we hold that the district court did not abuse its discretion in admitting the transcriptions and translations. The case before us is remarkably like *United States v. Franco*, 136 F.3d 622, 626 (9th Cir.1998), where

> [t]he district court gave the defendants abundant time to review the English- language transcripts and the tapes. It informed the defendants that, to the extent that they did not succeed in securing the government's consent to suggested corrections, they should submit competing translations of disputed passages. Although the defendants did succeed in making numerous agreed corrections, they submitted no competing translations. The district court accordingly was quite correct in concluding that the defendants had not placed the accuracy of the transcripts in issue.

III

[7][8][9] Abonce-Barrera also contends that DEA agent Rosales shouldnot have been qualified by the district court as an expert in the translation and transcription of the Spanish-language tapes. Federal Rule of Evidence 702 provides that if "specialized knowledge will assist the trier of fact to understand the evidence ... a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." "The determination whether an expert witness has sufficient qualifications to testify is a matter within the district court's discretion." *United States v. Garcia*, 7 F.3d 885, 889 (9th Cir.1993) (internal quotation omitted). Further, "in considering the admissibility of testimony based on some 'other specialized knowledge,' Rule 702 generally is construed liberally." *United States v. Hankey*, 203 F.3d 1160, 1168 (9th Cir.2000).

The district court conducted a pre-trial hearing at which Agent Rosales's qualifications were examined. Agent Rosales's native language is Spanish; he was born in Mexico and lived there until the age of fifteen. He had lived in the United States for twenty years and attended high school and college here. At college, Rosales took between twenty-four and thirty courses in Spanish and Latin American Studies. After being graduated from college, Rosales worked for a Chicago-based, nonprofit organization dedicated to counseling troubled Latino youth. His ability to translate and understand Spanish was an essential part of his job responsibilities. Rosales next worked as a certified social worker for the Illinois Department of Children and Family Services. This job required Rosales to utilize his abilities to translate between Spanish and English frequently. Spanish language proficiency was also a necessity for his job with the DEA: Rosales has been required to interview non-English speaking defendants, translate undercover work for other agents, monitor transmissions from undercover buys, and act as a translator in debriefing defendants. In addition, prior to joining the DEA, Rosales took a language proficiency test with the ***965** FBI and received one of the highest scores.

Abonce-Barrera asserts that these credentials are not sufficient to qualify Rosales as an expert in the transcription and translation of Spanish-language tapes. He points out that Rosales had never before been qualified as an expert. However, there is nothing in Rule 702 that requires an expert to have been previously qualified as an expert; such an approach would lead to absurd results.

[10][11][12] He also contends that Rosales, as an active participant in the investigation of this case, was incapable of providing an unbiased opinion. But

Abonce-Barrera did not seek to disqualify Rosales from testifying in the district court because of his alleged bias, so that argument is waived. *See* United States v. Cook, 53 F.3d 1029, 1031 (9th Cir.1995). We may, however, review the trial court's decision for plain error. *United States v. Wilson*, 690 F.2d 1267, 1273-74 (9th Cir.1982). Generally, evidence of bias goes toward the credibility of a witness, not his competency to testify, and credibility is an issue for the jury. *See* Gilbrook v. City of Westminster, 177 F.3d 839, 856 (9th Cir.1999). Further, Abonce-Barrera had the opportunity to cross-examine Rosales fully about any biases, and Rosales's credibility as an expert was impeached by defendant's expert, who testified that it was inadvisable to have a participant to a conversation transcribe and translate that conversation. Although the government's use of a neutral expert would have obviated this problem,--and would probably have avoided much of the litigation dispute both in the district court and in this appeal--the trial court did not abuse its discretion or commit plain error in qualifying Rosales to testify about the transcription and translation of the Spanish- language tapes.

IV.

Abonce-Barrera's final contention is that his Sixth Amendment right to confront witnesses was violated because the government refused to provide complete information about the undercover informant.

A.

Prior to trial, Abonce-Barrera's co-defendant, Padilla, argued to the district court that he had not received all discoverable material about the informant. This nondispositive motion was referred to a magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(A). In his memorandum in support of the motion, Padilla requested "disclosure of the informant," including the informant's identity and whereabouts, the informant's criminal record, any government notes and records of interviews with the informant, and "all forms of promises, inducements and/or deals between the government and its informant." Padilla urged that this information was necessary because the informant was "the sole percipient witness," Padilla could reasonably assert an entrapment defense, and Padilla would need impeachment material at trial. The government responded to Padilla's motion by stating "the Government has disclosed the informant's compensation in this case, prior cooperation agreements with the Government but not related to this case, information regarding the informant's immigration status, and a redacted copy of the informant's criminal history report." The government refused to provide the informant's identity out of safety concerns and had provided only redacted materials. The government did, however, concede that the informant was a percipient witness and agreed to make the informant available for a pre-trial interview.

At the motion hearing held on January 15, 1999, Abonce Barrera asked to join in ***966** Padilla's motion, and this request was granted by the magistrate judge. The defense first argued that it was entitled to receive an affidavit prepared by Agent Rosales regarding the informant. The magistrate judge reviewed the affidavit and ordered it to be filed under seal. The defendants next asserted that, although the government had provided them with the informant's payment history, they were entitled to "a list of cases in which the informant has testified as a witness and that would correlate to the disclosure of the payments to the informant" in order to impeach the informant properly. The magistrate judge did not specifically address this argument. The defendants also requested a complete criminal history and an account of any pending litigation. The magistrate judge stated that they were entitled to such material and questioned the government's attorney, who replied that he was aware of only one conviction (for marijuana possession) and that there were no pending criminal charges. To this, defense counsel responded, "If the government's representing that that's the entirety of his criminal history, I have it."

In addition, thedefense stated that it required additional supporting immigration documents, although it had received a "series of letters from an Assistant United States Attorney ... to representatives of the Immigration Service intervening in the informant's immigration proceedings." The court responded, "All you have to know is that he was subject to deportation and that he was not deported and that he's here." The defense then asked about its request for a debriefing report on the informant, any notes about the informant, and statements by the informant. The magistrate judge responded that the defense would be entitled to receive at trial any statements, as defined by the Jencks Act, made by the witness but that the government attorney's personal notes constituted privileged work product. Finally, the defense, after having withdrawn its request for the informant's address, argued that the government was required to provide the name of the informant. The magistrate judge ruled that the government had met its burden on the safety issue. In response, the defense asked, and received, leave to renew its motion on the identity issue at a later date. At the conclusion of the hearing, the magistrate judge said to the defense, "You're getting everything you asked for. You will get disclosure of the informant's identity at trial. That is

customary.... I deny your motion because the government has voluntarily provided you with everything you're entitled to under the law. So for the record your motion is denied."

On the first day of trial, January 26, 1999, after the name of the informant had been disclosed, the defense renewed its request that "the court order the unredacted copies of what was provided in *Giglio* materials" because the government could no longer have any concern for the informant's safety. The government responded that the defense had agreed it was not entitled to the informant's address and that the defense had not specifically requested any other identifying information in the hearing before the magistrate judge. In addition, the government expressed continued concerns about the informant's safety. The district court judge agreed with the government and stated, "[T]he matter was heard by [the magistrate judge], who made a decision. It strikes me that the government has complied with that decision, and I don't think anything more should be ordered at this point. You have the name. I'm going to leave it as it is."

B.

On appeal, Abonce-Barrera first argues that the magistrate judge erred in refusing ***967** to order pre-trial disclosure of (1) the informant's identity, (2) a list of the cases on which the informant worked, (3) the affidavit prepared by Agent Rosales regarding the informant, and (4) the report on the debriefing of the informant. Abonce-Barrera asserts that, because of the lack of these materials, he was unable to impeach the informant properly at trial and he was "unduly restricted in his ability to investigate and/or develop an entrapment defense." The government responds that Abonce-Barrera has waived his ability to challenge the magistrate judge's decision on the scope of pre-trial disclosure because he failed to file an appeal of the magistrate judge's order to the district court.

1.

[13] With respect to nondispositive matters heard by a magistrate judge, the Magistrates Act provides:

> [A] judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

28 U.S.C. § 636(b)(1)(A). The Magistrates Act contains "[n]o specific procedures or timetables for raising objections to the magistrate's rulings on nondispositive matters." Fed.R.Civ.P. 72(a) advisory committee's note. In the civil context, Federal Rule of Civil Procedure 72(a) (Civil Rule 72(a)) was enacted to "avoid uncertainty and provide uniformity." *Id.* This rule provides, "Within 10 days after being served with a copy of the magistrate judge's order, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate judge's order to which objection was not timely made." No counterpart to Civil Rule 72(a) exists in the Federal Rules of Criminal Procedure.

In *Simpson v. Lear Astronics Corp.*, 77 F.3d 1170, 1174-76 & n. 1 (9th Cir.1996), we held that failure to appeal to the district court a magistrate judge's order on a nondispositive matter in accordance with Civil Rule 72(a) resulted in forfeiture of appellate review of the order. To reach this result, we relied on Civil Rule 72(a) and on *Thomas v. Arn*, 474 U.S. 140, 146, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985), in which the Supreme Court approved the Sixth Circuit's use of its supervisory powers to create a rule whereby a party waived appellate review of a magistrate judge's *dispositive* orders under 28 U.S.C. § 636(b)(1)(B) by failing to appeal those orders to the district court. *See Simpson*, 77 F.3d at 1174-76.

[14][15] The government urges us to extend our holding in *Simpson* to the criminal context and require criminal defendants to comply with Civil Rule 72(a) in order to preserve appellate review of a magistrate judge's ruling on a nondispositive motion. We have emphasized, however, that our supervisory authority is limited. *See United States v. Tucker*, 8 F.3d 673, 674 (9th Cir.1993) (en banc) ("[T]he circumstances under which we may exercise [supervisory] power are substantially limited."); *United States v. Gatto*, 763 F.2d 1040, 1045 (9th Cir.1985). Although we have supervisory power to formulate procedural rules, we may act only when there exists "a clear basis in fact and law for doing so." *Gatto*, 763 F.2d at 1046 (internal quotations omitted). Further, ***968** "the federal judiciary's supervisory power is a power it enjoys only concurrently with Congress, and over which Congress has the final say." *Id.*; *see also Carlisle v. United States*, 517 U.S. 416, 426, 116 S.Ct. 1460, 134 L.Ed.2d 613 (1996) (supervisory power "does not include the power to develop rules that circumvent or conflict with" the Constitution, federal statutes, or federal rules of

procedure). In the present case, several considerations lead us to hold that the requisite "clear basis in fact and law" for adopting, with our supervisory authority, the government's proposed rule is absent.

First, we must deal with whether we are controlled by *Simpson* 's language. In holding that objections to a magistrate judge's ruling on a nondispositive issue must be filed with the district court to preserve appellate review, *Simpson* heavily relied on the fact that Civil Rule 72(a) was amended in 1991 to prohibit "an aggrieved party who fails to object within the ten-day period from later 'assigning as error a defect in the magistrate judge's order.' " 77 F.3d 1170, 1173-74 (9th Cir.1996) (internal citation omitted). *Simpson* was a civil case and its holding only extends to the civil context. As already mentioned, the Federal Rules of Criminal Procedure contain no counterpart to Civil Rule 72(a). In addition, although prior to *Simpson* our case law was inconsistent, there was no inconsistency among *criminal* cases, and the *criminal* case closest in time to *Simpson* held that defendants were not required to file objections in the district court to preserve appellate review of a magistrate judge's ruling on a nondispositive matter. *United States v. Bogard*, 846 F.2d 563, 567 n. 2 (9th Cir.1988). Because *Simpson* dealt only with civil discovery, any effort to change *criminal* case law would necessarily be nonbinding dicta. Indeed, *Simpson* entirely failed to explain how a rule of *civil* procedure could accomplish such a task. *See Simpson*, 77 F.3d at 1174. If a rule like Civil Rule 72(a) should be adopted in criminal discovery, we believe the normal rule-making process should be employed.

Second, the absence of a criminal counterpart to Civil Rule 72(a) is of further significance because of the way the Magistrates Act distinguishes between nondispositive matters under 28 U.S.C. § 636(b)(1)(A) and dispositive matters heard pursuant to 28 U.S.C. § 636(b)(1)(B). With respect to dispositive motions, the Magistrates Act provides, "Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations *to which objection is made*." *Id.* § 636(b)(1)(C) (emphasis added). Thus, as to *dispositive* matters in both the civil and criminal context, there is in place a formal procedure, akin to Civil Rule 72(a), to which parties must adhere in order to have their objections heard by the district court. As to nondispositive matters, the Magistrates Act provides only that the district court "may reconsider any pretrial matter ... where it has been shown that the magistrate's order is *clearly erroneous* or *contrary to law*." *Id.* § 636(b)(1)(A) (emphasis added). There is no formal procedure specified for review of a nondispositive order by the district court. The Magistrates Act thus treats them differently. Further, the Magistrates Act's specification that nondispositive matters are to be reviewed by the district court under a far more deferential standard-"clearly erroneous" and "contrary to law"-than dispositive matters indicates that decisions by the magistrate judge on nondispositive matters are essentially "final decisions of the district court which may be appealed in due course with ***969** other issues." *United States v. Brown*, 79 F.3d 1499, 1504 (7th Cir.1996) (stating but then rejecting this proposition without further discussion); *see also Arn*, 474 U.S. at 151 n. 10, 106 S.Ct. 466 (indicating that Congress "clearly intended [a magistrate judge's ruling on a nondispositive motion] to be final unless a judge of the court exercises his ultimate authority to reconsider the magistrate's determination." (internal quotations omitted)).

Finally, the Federal Rules of Criminal Procedure do contain a provision specifying how requests for discovery are to proceed before the district court. Federal Rule of Criminal Procedure 12(b)(4) states that "[r]equests for discovery under Rule 16" "must be raised prior to trial." Abonce- Barrera timely made his pre-trial request for the discovery of materials regarding the informant, and at trial he renewed that request as to identifying information. In hearing the motion on this nondispositive discovery matter, the magistrate judge acted as the agent of, and not merely an assistant to, the district judge. As discussed above, the text of the Magistrates Act suggests that the magistrate judge's decision in such nondispositive matters is entitled to great deference by the district court. We will not exercise our supervisory authority to break apart this unity of identity between the district court and the magistrate judge absent clear indication from Congress to the contrary. We recognize that two of our sister circuits, the Seventh and the First, have held that a party in a criminal case is required to challenge a magistrate judge's decision on nondispositive matters before the district court in order to seek appellate review of the magistrate judge's order. *See Brown*, 79 F.3d at 1503-04 (7th Cir.); *United States v. Akinola*, 985 F.2d 1105, 1108-09 (1st Cir.1993). In both cases, however, our sister circuits failed to confront the implications of the text of the Magistrates Act and the absence of a counterpart to Civil Rule 72(a) in the Federal Rules of Criminal Procedure.

We now turn to the merits of the magistrate judge's discovery orders.

2.

[16][17] We review alleged *Brady* violations de novo. *United States v. Manning*, 56 F.3d 1188, 1197-98 (9th Cir.1995). We review the pre- trial decision to withhold the identity of the informant for an abuse of discretion. *United States v. Spires*, 3 F.3d 1234, 1238 (9th Cir.1993).

[18] We are satisfied that the magistrate judge did not abuse his discretion in withholding the identity of the informant before trial. The magistrate judge balanced the extent to which pre-trial disclosure would be helpful to the defendant and the government's interest in protecting the informant. *See id.* In addition, the magistrate judge assured himself that the government would fulfill its promise to provide the defense with a pre-trial interview with the informant and that the government would disclose the informant's identity at trial.

[19] Abonce-Barrera also asserts that the magistrate judge erred in failing to require the production of a list of all the cases on which the informant worked. Abonce-Barrera has failed, however, to show how such a list would be material under *Brady*. *See Kyles v. Whitley*, 514 U.S. 419, 434-38, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); *Manning*, 56 F.3d at 1198 ("Evidence is material for *Brady* purposes only if there is a reasonable probability that, had it been disclosed to the defense, the result of the proceeding would have been different."). In *United States v. Flores*, 540 F.2d 432 (9th Cir.1976), we held that a request "to disclose the names and numbers of the prior cases in which the informant [ ] had testified on behalf of ***970** the government" was not material based only on "a hunch" that the informant may have tampered with evidence in other cases. *Id.* at 437-38. Similarly, Abonce-Barrera has offered nothing to support his proposed fishing expedition beyond stating that it might have been useful. *See also United States v. Cutler*, 806 F.2d 933, 935 (9th Cir.1986) (holding that additional detailed information about a previous unrelated investigation involving an informant could be withheld after balancing the government's interest in insuring the informant's safety).

[20] Abonce-Barrera's insistence that he should have been provided with both the affidavit regarding the informant prepared by Agent Rosales and the debriefing report on the informant is also ill-founded. Federal Rule of Criminal Procedure 16(a)(2) provides that, apart from certain exceptions not applicable here, "discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or any other government agent investigating or prosecuting the case" is not authorized. *See Flores*, 540 F.2d at 438 ("*Brady* does not create any pre- trial discovery privileges not contained in the Federal Rules of Criminal Procedure."). Abonce-Barrera has not asserted on appeal that there was any violation of the Jencks Act, 18 U.S.C. § 3500 (governing the discovery or inspection of statements made by government witnesses or prospective government witnesses).

C.

[21] Abonce-Barrera also raises two alleged *Brady* errors with respect to the informant which took place at trial. First, he asserts that even if pre-trial withholding of the informant's identity was appropriate, he should have received unredacted materials from the government once the informant's name was disclosed at trial. However, this renewed request for unredacted materials came on the first day of trial, several days before the informant was actually to testify. The district court did not abuse its discretion in finding that the government still retained legitimate safety concerns over the disclosure of other identifying information. *Spires*, 3 F.3d at 1238. Further, the defense expressly withdrew its request for a present address during the hearing before the magistrate judge.

[22] The final error Abonce-Barrera alleges is that a "conviction for drunk driving was intentionally or inadvertently withheld from the defense." *See id.* The trial transcript shows, however, that the defense was aware of this conviction and was able to cross-examine the informant about it at trial. *See United States v. Aichele*, 941 F.2d 761, 764 (9th Cir.1991) ("When a defendant has the opportunity to present impeaching evidence to the jury ... there is no prejudice in the preparation of his defense."). In addition, the government stipulated that it did not have a record of the drunk driving conviction. Thus, the informant's credibility was further damaged because the jury was able to infer that the informant had lied to the government about his criminal history. *See United States v. Bernal-Obeso*, 989 F.2d 331, 336 (9th Cir.1993) (holding that a lie by defendant to government regarding his past criminal history was exculpatory material under *Brady*). There is no indication, unlike in *Bernal-Obeso*, that this drunk-driving conviction was the "tip of an iceberg of other evidence that should have been revealed." *Id.* at 333 (internal quotation omitted).

AFFIRMED.

257 F.3d 959, 56 Fed. R. Evid. Serv. 1179, 00 Cal. Daily Op. Serv. 6095, 2001 Daily Journal D.A.R. 7495

Rule 72. Magistrate Judges; Pretrial Orders

(a) NONDISPOSITIVE MATTERS. A magistrate judge to whom a pretrial matter not dispositive of a claim or defense of a party is referred to hear and determine shall promptly conduct such proceedings as are required and when appropriate enter into the record a written order setting forth the disposition of the matter. Within 10 days after being served with a copy of the magistrate judge's order, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate judge's order to which objection was not timely made. The district judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law.

(b) DISPOSITIVE MOTIONS AND PRISONER PETITIONS. A magistrate judge assigned without consent of the parties to hear a pretrial matter dispositive of a claim or defense of a party or a prisoner petition challenging the conditions of confinement shall promptly conduct such proceedings as are required. A record shall be made of all evidentiary proceedings before the magistrate judge, and a record may be made of such other proceedings as the magistrate judge deems necessary. The magistrate judge shall enter into the record a recommendation for

EXHIBIT B

disposition of the matter, including proposed findings of fact when appropriate. The clerk shall forthwith mail copies to all parties. A party objecting to the recommended disposition of the matter shall promptly arrange for the transcription of the record, or portions of it as all parties may agree upon or the magistrate judge deems sufficient, unless the district judge otherwise directs. Within 10 days after being served with a copy of the recommended disposition, a party may serve and file specific, written objections to the proposed findings and recommendations. A party may respond to another party's objections within 10 days after being served with a copy thereof. The district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject,or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

(As added Apr. 28, 1983, eff. Aug. 1, 1983; amended Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993.)

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Rule 72. Magistrate Judges; Pretrial Orders	RULE 72. MAGISTRATE JUDGES; PRETRIAL ORDERS
(a) **Nondispositive Matters.** A magistrate judge to whom a pretrial matter not dispositive of a claim or defense of a party is referred to hear and determine shall promptly conduct such proceedings as are required and when appropriate enter into the record a written order setting forth the disposition of the matter. Within 10 days after being served with a copy of the magistrate judge's order, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate judge's order to which objection was not timely made. The district judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law.	(a) **Nondispositive Matters.** When a pretrial matter not dispositive of a party's claim or defense is referred to a magistrate judge to hear and determine, the magistrate judge must promptly conduct the required proceedings and, when appropriate, enter on the record a written order stating the determination. A party may serve and file objections to the order within 10 days after being served with a copy. After that time, a party must not assign as error a defect in the order not timely objected to. The district judge to whom the case is assigned must consider the timely objections and modify or set aside any portion of the order that is clearly erroneous or contrary to law.
(b) **Dispositive Motions and Prisoner Petitions.** A magistrate judge assigned without consent of the parties to hear a pretrial matter dispositive of a claim or defense of a party or a prisoner petition challenging the conditions of confinement shall promptly conduct such proceedings as are required. A record shall be made of all evidentiary proceedings before the magistrate judge, and a record may be made of such other proceedings as the magistrate judge deems necessary. The magistrate judge shall enter into the record a recommendation for disposition of the matter, including proposed findings of fact when appropriate. The clerk shall forthwith mail copies to all parties. A party objecting to the recommended disposition of the matter shall promptly arrange for the transcription of the record, or portions of it as all parties may agree upon or the magistrate judge deems sufficient, unless the district judge otherwise directs. Within 10 days after being served with a copy of the recommended disposition, a party may serve and file specific, written objections to the proposed findings and recommendations. A party may respond to another party's objections within 10 days after being served with a copy thereof. The district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.	(b) **Dispositive Motions and Prisoner Petitions.** (1) A magistrate judge must promptly conduct the required proceedings when assigned, without the parties' consent, to hear either a prisoner petition challenging the conditions of confinement or a pretrial matter dispositive of a claim or defense. A record must be made of all evidentiary proceedings before the magistrate judge, and of such other proceedings as the magistrate judge considers necessary. The magistrate judge must enter on the record a recommendation for disposing of the matter, including, if appropriate, proposed findings of fact. The clerk must immediately mail copies to all parties. (2) Within 10 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. A party may respond to another party's objections within 10 days after being served with a copy. Unless the district judge directs otherwise, the party objecting to the recommended disposition must promptly arrange for transcribing the record, or whatever portions of it that the parties agree to or the magistrate judge considers sufficient. (3) The district judge to whom the case is assigned must determine de novo — either on the record or after receiving additional evidence — any portion of the magistrate judge's disposition that has been objected to under (2). The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or resubmit the matter to the magistrate judge with instructions.

EXHIBIT C

6-D

RULE ~~72~~ 12(i). MAGISTRATE JUDGES; PRETRIAL ORDERS

~~(a)~~(1) **Nondispositive Matters.** When a nondispositive pretrial matter ~~not dispositive of a party's claim or defense~~ is referred to a magistrate judge to hear and determine, the magistrate judge must promptly conduct the required proceedings and, when appropriate, enter on the record a written order stating the determination. A party may serve and file objections to the order within 10 days after being served with a copy. After that time, a party must not assign as error a defect in the order not timely objected to. The district judge to whom the case is assigned must consider the timely objections and modify or set aside any portion of the order that is clearly erroneous or contrary to law.

~~(b)~~(2) **Dispositive Motions and Prisoner Petitions.**

~~(1)~~(A) A magistrate judge must promptly conduct the required proceedings when assigned, ~~without the parties' consent, to hear either a prisoner petition challenging the conditions of confinement or~~ to hear a defendant's motion to dismiss or quash an indictment or information, or a motion to suppress evidence in a criminal case or another pretrial matter dispositive of ~~a claim or defense~~ the case.

EXHIBIT D

A record must be made of all evidentiary proceedings before the magistrate judge, and of such other proceedings as the magistrate judge considers necessary. The magistrate judge must enter on the record a recommendation for disposing of the matter, including, if appropriate, proposed findings of fact. The clerk must immediately mail copies to all parties.

~~(2)~~(B) Within 10 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. A party may respond to another party's objections within 10 days after being served with a copy. Unless the district judge directs otherwise, the party objecting to the recommended disposition must promptly arrange for transcribing the record, or whatever portions of it that the parties agree to or the magistrate judge considers sufficient.

~~(3)~~(C) The district judge to whom the case is assigned must determine de novo -- either on the record or after receiving additional evidence -- any portion of the magistrate judge's disposition that has been objected to under (2). The district judge may accept, reject, or

modify the recommended disposition; receive further evidence; or resubmit the matter to the magistrate judge with instructions.

Title 28 USC § 636(b):

(b)(1) Notwithstanding any provision of law to the contrary--

(A) a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate judge shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

EXHIBIT E

294 F.3d 1192
2 Cal. Daily Op. Serv. 5883, 2002 Daily Journal D.A.R. 7429
(Cite as: 294 F.3d 1192)

Key-page 6-8

United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Jose Francisco REYNA-TAPIA, aka Jose Reyna,
Defendant-Appellant.

Nos. 01-10415, 01-10416.

Argued and Submitted April 10, 2002.
Filed June 28, 2002.

Alien was convicted, on guilty plea, of illegal reentry by the United States District Court for the District of Arizona, Stephen M. McNamee, Chief Judge, and he appealed. The Court of Appeals, Betty B. Fletcher, Circuit Judge, held that: (1) entry of previous deportation order against alien, following his conviction of sexual abuse of minor, terminated his status as lawful permanent resident (LPR), such that his subsequent reentry into United States was illegal; (2) alien was afforded due process in connection with prior deportation proceedings, and could not collaterally attack his deportation; and (3) with defendant's explicit consent, magistrate judge could administer Rule 11 plea colloquy.

Affirmed.

West Headnotes

[1] Criminal Law ⚿1149
110k1149 Most Cited Cases

District court's denial of motion to withdraw guilty plea prior to sentencing is reviewed for abuse of discretion.

[2] Criminal Law ⚿274(9)
110k274(9) Most Cited Cases

District court may allow defendant to withdraw his guilty plea prior to sentencing where defendant shows any fair and just reason for withdrawing it.

[3] Aliens ⚿56
24k56 Most Cited Cases

[3] Criminal Law ⚿274(3.1)
110k274(3.1) Most Cited Cases

Entry of previous deportation order against alien, following his conviction of sexual abuse of minor, terminated his status as lawful permanent resident (LPR), such that his subsequent reentry into United States was illegal, and alien had no fair and just reason for withdrawing his guilty plea to illegal reentry offense despite his attorney's recent discovery of alien's LPR status. Immigration and Nationality Act, § 276(a), 8 U.S.C.A. § 1326(a).

[4] Statutes ⚿219(4)
361k219(4) Most Cited Cases

When statute is silent or ambiguous with respect to specific question, question for court is whether agency's answer is based upon a permissible construction of statute.

[5] Aliens ⚿54.2(3)
24k54.2(3) Most Cited Cases

In criminal prosecution for illegal reentry by removed alien, defendant can collaterally challenge his underlying deportation only if he can demonstrate: (1) that his due process rights were violated by defects in underlying proceeding; and (2) that he suffered prejudice as result of these defects. Immigration and Nationality Act, § 276(a), 8 U.S.C.A. § 1326(a).

[6] Aliens ⚿54(2)
24k54(2) Most Cited Cases

[6] Aliens ⚿54.2(3)
24k54.2(3) Most Cited Cases

[6] Constitutional Law ⚿274.3
92k274.3 Most Cited Cases

Alien was afforded due process in connection with prior deportation proceedings, and could not collaterally attack his deportation in subsequent prosecution for illegal reentry, even though alien was not specifically advised, at prior deportation hearing, that his status as lawful permanent resident alien was at risk; alien was given notice that government was seeking to deport him based on his conviction for sexual abuse of minor, and this information should have put him on notice that his "privilege of residing permanently in the United States as an immigrant" was at risk. U.S.C.A. Const.Amend. 5; Immigration and Nationality Act, § 276(a), 8 U.S.C.A. § 1326(a).

EXHIBIT F

[7] Criminal Law ⚿273.1(4)
110k273.1(4) Most Cited Cases

[7] Criminal Law ⚿1139
110k1139 Most Cited Cases

When defendant explicitly consents, magistrate judge may administer Rule 11 plea colloquy in felony case, as long as district court reviews proceedings de novo. Fed.Rules Cr.Proc.Rule 11, 18 U.S.C.A.

[8] Criminal Law ⚿1139
110k1139 Most Cited Cases

Court of Appeals reviews de novo district court's delegation of authority to magistrate judge.

[9] United States Magistrates ⚿13
394k13 Most Cited Cases

Presence or absence of consent is most important factor in determining what matters may be delegated to magistrate judge under catchall provision of the Magistrates Act, and a defendant's consent can extend magistrate jurisdiction to cover critical stages of criminal proceeding. 28 U.S.C.A. § 636(b)(3).

[10] United States Magistrates ⚿13
394k13 Most Cited Cases

In felony case, defendant's consent to having matter decided by magistrate judge is required except when judge is handling subsidiary matters. 28 U.S.C.A. § 636(b)(3).

[11] United States Magistrates ⚿13
394k13 Most Cited Cases

When magistrate judge is handling critical stage of criminal proceedings, then defendant's consent is required for delegation to fall within scope of "catch-all" provision of the Magistrates Act. 28 U.S.C.A. § 636(b)(3).

[12] United States Magistrates ⚿13
394k13 Most Cited Cases

There is a limit to how far a criminal defendant's consent will go to confer jurisdiction on magistrate.

[13] United States Magistrates ⚿12.1
394k12.1 Most Cited Cases

For function to properly fall within sphere of "additional duties" that magistrate is authorized to perform under the Magistrates Act, it must bear some relationship to those duties already assigned to magistrates by the Act; additional duty must be comparable in responsibility and in importance to duties specified in Magistrates Act. 28 U.S.C.A. § 636(b)(3).

***1194** Atmore L. Baggot, Apache Junction, AZ, for the defendant- appellant.

Linda C. Boone and Charles Huellmantel, Phoenix, AZ, for the plaintiff- appellee.

Appeal from the United States District Court for the District of Arizona Stephen M. McNamee, Chief District Judge, Presiding.

Before SCHROEDER, Chief Judge, B. FLETCHER and KOZINSKI, Circuit Judges.

OPINION

BETTY B. FLETCHER, Circuit Judge.

We write primarily to establish whether a district court may delegate its duty to conduct a Rule 11 plea colloquy in a felony case to a magistrate judge with the defendant's consent. We hold that it may, provided the district judge reviews the record *de novo*. In addition, the appellant raises the issue of whether deportation terminates lawful permanent residence. To dispel any doubt, we hold that upon deportation an alien's status as a lawful permanent resident ends.

I.
Factual and Procedural Background

Reyna-Tapia originally entered the United States illegally in the mid-1980s. In 1990, he became a lawful permanent resident ("LPR") through the amnesty program. *See* 8 U.S.C. § 1255a (1988). In 1998, Reyna-Tapia pled guilty to the offense of sexual abuse of a minor, an aggravated felony. The INS initiated deportation proceedings against him, pursuant to 8 U.S.C. § 1229, based on the aggravated felony conviction. He was ordered removed from the United States on October 19, 1999.

On October 1, 2000, Reyna-Tapia was found a few miles north of the border between Mexico and Arizona. Magistrate Judge Irwin in Yuma issued an order of temporary detention, which indicated that Reyna-Tapia was "not a citizen of the United States nor lawfully admitted for permanent residence as defined at 8 U.S.C. § 1101(a)(2)." Reyna-Tapia was charged with illegal re-entry. He was also charged with violating the conditions of his supervised release, which he was

serving for his prior conviction for sexual abuse of a minor. Reyna-Tapia entered into a written plea agreement with the government, pleading guilty to the offense of re-entry after deportation in violation of 8 U.S.C. § 1326(a) enhanced by § 1326(b)(2) [FN1] as charged. Reyna-Tapia ***1195** consented to having the magistrate judge administer the Rule 11 plea colloquy, which the district court reviewed *de novo* before accepting the plea.

> FN1. § 1326 provides:
> (a) In general
> Subject to subsection (b) of this section, any alien who--
> (1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter (2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,
> shall be fined under Title 18, or imprisoned not more than 2 years, or both.
> (b) Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection--...
> (2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such Title, imprisoned not more than 20 years, or both....

When the presentence report was prepared, it showed that Reyna-Tapia had become an LPR in 1990. Upon discovering this information in the report, the defense moved to withdraw the guilty plea and for an acquittal. The defense argued that the court should allow Reyna-Tapia to withdraw his guilty plea because his attorney was misled by Magistrate Judge Irwin's temporary order of detention and believed that Reyna-Tapia was not an LPR prior to his deportation. With the new information disclosed in the presentence report, the defense wanted to argue that Reyna-Tapia never lost his status as an LPR, and that if he did, that the termination of his LPR status did not comply with due process.

After listening to the tape of Reyna-Tapia's immigration proceeding, the district court concluded that the 1999 deportation terminated Reyna-Tapia's LPR status and that Reyna-Tapia was not denied due process at his deportation hearing. Therefore, the district court found no just reason to allow Reyna-Tapia to withdraw his plea.

At sentencing, Reyna-Tapia entered an admission to the allegation that he violated the conditions of his supervised release. As a result, his supervised release was revoked, and he was sentenced to 12 months imprisonment to be served concurrently with his 54-month sentence for illegal re-entry.

Reyna-Tapia appeals. [FN2] He contends that the district court erred in refusing to allow him to withdraw his guilty plea and in allowing the magistrate judge to administer the Rule 11 allocution. We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

> FN2. The parties all agree that Reyna-Tapia is entitled to bring this appeal despite his plea agreement waiving all appeals. The district court orally ruled that Reyna-Tapia could appeal its decision on the motion to withdraw the guilty plea, thereby superseding the plea agreement. *United States v. Buchanan*, 59 F.3d 914, 918 (9th Cir.1995) ("[T]he district court's oral pronouncement controls....").

II.
Termination of LPR Status Upon Deportation

Reyna-Tapia argues that the district court erred in concluding that he did not provide a fair and just reason for withdrawing his guilty plea. He claims that, because his attorney was misled by Magistrate Judge Irwin and did not discover that Reyna-Tapia was an LPR until he read the presentence report, he was unaware of the potential defense that his LPR status was never properly terminated. If his 1999 deportation did not terminate his LPR status, the argument goes, ***1196** Reyna-Tapia committed no crime in re-entering the United States after deportation without the express consent of the Attorney General. The district court concluded that there was no merit to this argument.

[1][2] The denial of a motion to withdraw a guilty plea prior to sentencing is reviewed for an abuse of discretion. *United States v. Nagra*, 147 F.3d 875, 880 (9th Cir.1998). The court may allow a defendant to

withdraw his guilty plea prior to sentencing "if the defendant shows any fair and just reason." *United States v. Hyde*, 520 U.S. 670, 671, 117 S.Ct. 1630, 137 L.Ed.2d 935 (1997). Because we too find no merit to Reyna-Tapia's argument that deportation does not terminate an alien's LPR status, we affirm.

[3] The term "lawfully admitted for permanent residence" means "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." 8 U.S.C. § 1101(a)(20) (2000). According to INS regulations, LPR status terminates upon entry of a final administrative order of deportation. [FN3] 8 C.F.R. § 1.1(p) (1998). Reyna-Tapia argues that this regulation conflicts with the statutory definition of "Order of Deportation" at 8 U.S.C. § 1101(a)(47)(A), but we find no conflict between the regulation and the statute.

> FN3. Reyna-Tapia appears to suggest in his briefing that, because he obtained his LPR status through the amnesty program, he is entitled to more protection from deportation than other lawful permanent residents. Amnesty does not grant an alien any sort of super-LPR status. *See* 8 U.S.C. § 1255a(b) (directing the Attorney General to adjust the status of certain aliens who entered the United States prior to January 1, 1982, to that of aliens lawfully admitted for permanent residence). As with any other LPR, the INS could deport Reyna-Tapia, and thereby terminate his LPR status, based on his commission of an aggravated felony by following the procedures for removal found at 8 U.S.C. §§ 1229 and 1229a. As discussed below, the INS followed these procedures properly.

[4] Section 1101(a)(47)(A) provides:

> The term "order of deportation" means the order of the special inquiry officer, or other such administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, concluding that the alien is deportable or ordering deportation.

The statute is silent as to whether or not a final order of deportation ends lawful permanent residence. "[When] the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

The INS's construction that an order of deportation ends lawful permanent residence is permissible. It is inherently reasonable to conclude that, when an alien is ordered deported, he has lost his "privilege of residing permanently in the United States as an immigrant." 8 U.S.C. § 1101(a)(20). In fact, we have held, without relying on the INS regulations, that an alien's lawful permanent residence terminates for certain purposes when the INS is legally permitted to deport the alien. *Foroughi v. INS*, 60 F.3d 570, 574 (9th Cir.1995) (for purposes of establishing his eligibility for discretionary relief based on seven years of unrelinquished domicile within the country, an "alien loses his lawful permanent resident status when he places himself in a legal posture where the INS is no longer precluded by law from deporting him").

In short, the entry of the 1999 deportation order against Reyna-Tapia terminated ***1197** his LPR status. He needed the Attorney General's express consent to re-enter. Because he did not have such consent, his re-entry was illegal.

III.

Due Process

[5][6] Reyna-Tapia contends that, if deportation terminates an alien's LPR status, he was denied due process at his deportation hearing because he was not informed that his LPR status was at risk. In a criminal prosecution for re-entry by a removed alien, a defendant can collaterally challenge his underlying deportation only if he can demonstrate that: (1) his due process rights were violated by defects in the underlying proceeding, and (2) he suffered prejudice as a result of the defects. *United States v. Zarate- Martinez*, 133 F.3d 1194, 1197 (9th Cir.1998). No one questions that, as an LPR, Reyna-Tapia was entitled to due process of law before he could be removed from the United States.

The district court, after reviewing the record of the underlying removal proceeding, concluded that Reyna-Tapia was not denied due process. We too have reviewed the record of the removal proceeding, including the audio tape of his hearing, and agree with the district court that Reyna-Tapia was afforded due process.

In accordance with the requirements of due process and 8 U.S.C. § 1229, Reyna-Tapia was given notice that the INS was seeking to deport him based on his conviction for sexual abuse of a minor. The notice recognized that Reyna- Tapia was an LPR but asserted that he was deportable because of his aggravated felony conviction.

This information should have put Reyna-Tapia on notice that his "privilege of residing permanently in the United States as an immigrant," in other words his LPR status, was at risk. 8 U.S.C. § 1101(a)(20). Reyna-Tapia has identified no valid basis for finding that he was denied due process in his removal proceeding.

IV.

Magistrate Authority to Administer Rule 11 Plea Colloquy

[7] Under Federal Rule of Criminal Procedure 11(f), the district court must confirm that there is a factual basis for a guilty plea before entering judgment upon the plea. In this case, the magistrate judge administered the Rule 11 colloquy with Reyna Tapia's consent. [FN4] The magistrate judge verified that Reyna-Tapia understood the rights he was forfeiting by pleading guilty. She also confirmed that he was mentally competent to enter a guilty plea, that he had gone through the plea agreement with his attorney and understood it, and that he was satisfied with his attorney's representation. Finally, she inquired into the factual basis of the plea. Although the magistrate judge did not ask Reyna-Tapia if he was aware that he was not permitted to re-enter the United States, [FN5] she did ask whether he had "any ***1198** papers or permission to return." He answered that he did not.

FN4. hAt oral argument, it was asserted that Reyna-Tapia did not consent to having the magistrate judge find the factual basis required by Rule 11(f). However, the consent form signed by Reyna-Tapia stated that he agreed "to go forward with his plea of guilty" before a magistrate judge. Furthermore, the form was attached to the district court's order of referral, which specified that the magistrate was to administer the Rule 11 allocution and make findings as to whether there exists a factual basis for the charge.

FN5. For the offense of illegal re-entry, "the government need not prove that [the alien] knew he was not entitled to enter the country without the permission of the Attorney General." *United States v. Leon- Leon*, 35 F.3d 1428, 1432 (9th Cir.1994) (quoting *Pena-Cabanillas v. United States*, 394 F.2d 785, 789-90 (9th Cir.1968)). Specific intent is not required for the offense of illegal re-entry. *Id.*

[8] Based on the Rule 11 hearing, the magistrate judge found that there was a factual basis for the guilty plea and recommended that the district court accept the guilty plea. The district court, "having reviewed [the] matter de novo, and no objections having been filed," accepted the recommendation of the magistrate judge. Reyna-Tapia complains that the district court erred in delegating the Rule 11(f) duty to the magistrate judge. We review *de novo* the delegation of authority to a magistrate judge. *United States v. Gomez- Lepe*, 207 F.3d 623, 627 (9th Cir.2000).

Whether magistrates are permitted to conduct a Rule 11 plea colloquy in a felony case pursuant to a defendant's consent is a question of first impression for our court. The jurisdiction of federal magistrate judges is governed by the Federal Magistrates Act. 28 U.S.C. § 636 (2000). The duty of administering a plea colloquy before the acceptance of a guilty plea is not among the duties specifically assigned in the Magistrates Act. *See* 28 U.S.C. § 636. If the duty may be delegated to magistrates, it must be based on the catch-all provision of § 636(b)(3), which provides that "[a] magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States."

In *Peretz v. United States*, 501 U.S. 923, 935, 111 S.Ct. 2661, 115 L.Ed.2d 808 (1991), the Supreme Court held that a magistrate judge may conduct jury *voir dire* proceedings in felony cases as an "additional duty" sanctioned by the Magistrates Act when the defendant has consented. [FN6] The Supreme Court reasoned that the defendant waives his right to have an Article III judge conduct *voir dire* when he consents to having the magistrate judge conduct it, and that the availability of *de novo* review of *voir dire* adequately preserves Article III's structural guarantees. *Id.* at 936-40, 111 S.Ct. 2661.

FN6. In a prior case, *Gomez v. United States*, 490 U.S. 858, 874- 76, 109 S.Ct. 2237, 104 L.Ed.2d 923 (1989), the Supreme Court had held that a criminal defendant's right to have an Article III judge hear his felony case precluded the conclusion that the "additional duties" language authorized the substitution of a magistrate judge during *voir dire* absent the defendant's consent. The Court had left open whether consent would cure the problem.

[9][10][11] Following *Peretz*, we constructed a framework for analyzing the "additional duties" provision of the Magistrates Act, 28 U.S.C. §

636(b)(3). We begin with the premise that "the Supreme Court's interpretation of § 636(b)(3) establishes the presence or absence of consent as the most important factor in determining what the section encompasses." *Gomez-Lepe*, 207 F.3d at 628. In a felony case, the defendant's consent is required except when the magistrate judge is handling what are considered "subsidiary matters." *United States v. Carr*, 18 F.3d 738, 740 (9th Cir.1994) (reading back trial testimony to the jury considered "subsidiary"). By contrast, when a magistrate judge is handling a "critical stage" of a criminal proceeding, the defendant's consent is required for the delegation to fall within the "catch-all" provision of § 636(b)(3). *United States v. Foster*, 57 F.3d 727, 731 (9th Cir.1995), *rev'd on other grounds*, 133 F.3d 704 (9th Cir.) (en banc), *vacated as to that ground*, 525 U.S. 801, 119 S.Ct. 32, 142 L.Ed.2d 24 (1998). In cases where consent is given, "far more extensive sorts of proceedings" beyond subsidiary matters may be conducted by a magistrate judge. ***1199***NLRB v. A-Plus Roofing, Inc.*, 39 F.3d 1410, 1416 (9th Cir.1994). Under this line of cases, consent is treated as the most important factor and can extend magistrate jurisdiction to cover critical stages of criminal proceedings.

[12][13] However, according to *Peretz*, there is a limit to how far consent will go to confer jurisdiction on magistrates. In addition to consent and *de novo* review, the Supreme Court indicated that, for a function to properly fall within the sphere of "additional duties" authorized by Congress in the Magistrates Act, it must bear some relationship to those duties already assigned to magistrates by the act. *Peretz*, 501 U.S. at 930, 111 S.Ct. 2661; *see also United States v. Williams*, 23 F.3d 629, 632 (2d Cir.1994) (interpreting *Peretz*). The additional duty must be "comparable in responsibility and importance" to the duties specified in the Magistrates Act. *Peretz*, 501 U.S. at 933, 111 S.Ct. 2661.

We are concerned that the duty of administering a plea colloquy in a felony case involves responsibilities of greater importance than those involved in the duties already assigned by the Magistrates Act. Although the Magistrates Act specifically provides that, with the parties' consent, a district court may delegate to a magistrate supervision of entire civil and misdemeanor trials, *see* 28 U.S.C. § 636(a)(3), (a)(4), (c), it provides no jurisdiction for magistrates to preside over entire felony trials simply because the defendant consents. *See Gomez*, 490 U.S. at 872, 109 S.Ct. 2237 (holding that "the carefully defined grant of authority to conduct trials of civil matters and of minor criminal cases should be construed as an implicit withholding of the authority to preside at a felony trial"). The rights at stake in felony trials are far greater than those involved in misdemeanor or civil trials and substantial discretion must be exercised by the district court to protect those rights.

Likewise, a felony plea colloquy constitutes a sensitive and critical stage of a criminal prosecution where the same rights are at stake as with felony trials and the court must exercise similar discretion. *See Gomez-Lepe*, 207 F.3d at 629 (defining a "critical stage" of a criminal prosecution). As the Supreme Court has said, "a plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). By pleading guilty, the criminal defendant is forfeiting significant constitutional rights, including his Fifth Amendment right against self-incrimination and his right to put the government to its burden of proving his guilt beyond a reasonable doubt. The discretion exercised by the judge in deciding whether to accept the plea depends upon the information and impressions he gains from the plea colloquy. He uses these to determine whether in his judgment the defendant is acting voluntarily, whether he understands the rights he is forfeiting, and whether there is a factual basis for the plea. *De novo* review, which entails a reading of a cold transcript, acts as a poor substitute for these first-hand impressions. Consent may be insufficient to cure the problems involved with the delegation of Rule 11 duties to a non-Article III judge.

The delegation of the duty to inquire into the factual basis of the plea under Rule 11(f) is particularly problematic. Reyna-Tapia argues that the judge who sentences the defendant, the district judge, should bear the Rule 11(f) responsibility to ensure that all available information is considered before entry of judgment on the plea. There is some merit to this argument.

***1200** Rule 11(f) is designed to protect defendants who do not realize that their conduct does not actually fall within the charge. Fed.R.Crim.P. 11 advisory committee notes; *see also Libretti v. United States*, 516 U.S. 29, 42, 116 S.Ct. 356, 133 L.Ed.2d 271 (1995). Only the sentencing judge has the benefit of the presentence report, which may reveal additional facts showing that the defendant's conduct does not fall within the charge to which he is pleading. *See* Fed.R.Crim.P. 11 advisory committee notes (recognizing the presentence report as a useful tool to ensure that the defendant's conduct actually falls within the offense charged). To delegate this responsibility to a magistrate judge, who will conduct the inquiry

without the benefit of the presentence report, dilutes the important safeguard in Rule 11(f).

Nonetheless, all other circuits that have addressed this issue have concluded that the duty of conducting a Rule 11 allocution, when the defendant consents, is a duty comparable in responsibility to the duties already assigned to magistrates by the Act. *See United States v. Torres*, 258 F.3d 791, 795-96 (8th Cir.2001); *United States v. Dees*, 125 F.3d 261, 265 (5th Cir.1997); *United States v. Ciapponi*, 77 F.3d 1247, 1250-51 (10th Cir.1996); *United States v Williams*, 23 F.3d 629, 633 (2d Cir.1994). The Second Circuit explained in detail in *Williams:*

> An allocution is an ordinary garden variety type of ministerial function that magistrate judges commonly perform on a regular basis. The catechism administered to a defendant is now a standard one, dictated in large measure by the comprehensive provisions of Rule 11 itself, which carefully explain what a court must inquire about, what it should advise a defendant and what it should determine before accepting a plea. *See* Fed.R.Crim.P. 11(c), (d) and (f). Further, administrating an allocution is less complex than a number of duties the Magistrates Act specifically authorizes magistrates to perform. For example, such judicial officers may hear and determine pretrial matters, other than eight dispositive motions. *See* 28 U.S.C. § 636(b)(1)(A). In addition, a magistrate may conduct hearings, including evidentiary hearings, and submit to the district court recommended findings of fact for the eight dispositive motions, and do the same with habeas petitions. *See id.* § 636(b)(1)(B).
>
> In construing the additional duties clause as encompassing the referral to a magistrate judge of a Rule 11 allocution, we rely on the same rationale spelled out by *Peretz:* "The generality of the category of 'additional duties' indicates that Congress intended to give federal judges significant leeway to experiment with possible improvements in the efficiency of the judicial process that had not already been tried or even foreseen." 501 U.S. at ----, 111 S.Ct. at 2667. Congress evinced its purpose, the Court continued, by including a "broad residuary clause" in the Act rather than "a bill of particulars." *Id.*
>
> The legislative history of the Magistrates Act and its various amendments supports the notion that it aims to give district courts the helping hands of a magistrate judge so as to free the district court from the burden of dealing with subordinate, but distracting, duties. *Id.* at ----, 111 S.Ct. at 2668.

23 F.3d at 632-33.

We disagree with the Second Circuit that a Rule 11 plea colloquy is a "garden variety ministerial function." As discussed above, a plea colloquy is a highly critical stage of a criminal prosecution. However, we recognize the weight of authority holding that magistrates may perform this function with the defendant's consent, and we join our sister circuits in ***1201** acknowledging that Congress intended to give district courts significant leeway to experiment with the use of magistrates. Therefore, we hold that, when a defendant explicitly consents, a magistrate judge may administer the Rule 11 plea colloquy in a felony case, so long as the district court reviews the proceedings *de novo*. [FN7]

> FN7. We note that the Tenth Circuit has held that the district court need not review Rule 11 proceedings referred to a magistrate judge unless the parties so demand. *Ciapponi*, 77 F.3d at 1251. However, the Fifthand the Eighth Circuits have relied on the district court's *de novo* review to conclude that administering a plea colloquy is a "ministerial" function and "sufficiently reviewable so as not to threaten Article III's structural guarantees." *See Torres*, 258 F.3d at 796 (quoting *Dees*, 125 F.3d at 268). We agree with the Fifth and the Eighth Circuits that *de novo* review by the district court is a crucial factor for finding the duty to be delegable.

In the case before us, Reyna-Tapia consented to having the magistrate judge administer his plea colloquy, and the district court reviewed the record *de novo* before accepting the plea. Under these circumstances, the district judge did not err in delegating his Rule 11 duties to the magistrate judge, and the plea is not infirm.

V.

Conclusion

We affirm the district court's denial of Reyna-Tapia's motion to withdraw his guilty plea. Reyna-Tapia has not provided a fair and just reason for withdrawing his plea. Reyna-Tapia's 1999 deportation terminated his LPR status, and the underlying deportation proceeding complied with the requirements of due process. Finally, the district court's delegation of its Rule 11 duties to the magistrate judge was proper under the circumstances of this case.

AFFIRMED.

294 F.3d 1192, 2 Cal. Daily Op. Serv. 5883, 2002

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
SUITE 173
WALTER E. HOFFMAN UNITED STATES COURTHOUSE
600 GRANBY STREET
NORFOLK, VIRGINIA 23510-1915
(757) 222-7007

CHAMBERS OF
TOMMY E. MILLER
UNITED STATES MAGISTRATE JUDGE

FACSIMILE NO.
(757) 222-7027

MEMORANDUM

TO: THE HONORABLE EDWARD C. CARNES
UNITED STATES CIRCUIT JUDGE

FROM: TOMMY E. MILLER

RE: ADDITIONAL COMMENTS ON MAGISTRATE JUDGES' ACCEPTANCE OF FELONY GUILTY PLEAS

DATE: AUGUST 19, 2002

After Judge Roll and I submitted our memorandum on a criminal rule counterpart to Federal Rule of Civil Procedure 72, I have had the opportunity to reconsider the issue of magistrate judges conducting felony plea proceedings. Because of the Reporter's deadline for submission of agenda items, and my family's vacation, I have not had an opportunity to present the contents in this memorandum to Judge Roll before submitting them to the committee.

According to a memorandum from the Magistrate Judges Division, guilty plea proceedings by magistrate judges were reported in significant volume in 46 districts. The procedures that district courts have adopted in assigning magistrate judges to conduct felony guilty pleas and in reviewing magistrate judges' procedures, have been created on a court-by-court basis. Therefore, it is understandable that different procedures have developed in the different circuits, as the courts have interpreted the statutory authorities and the Article III power under the Constitution in different

manners.

In this memorandum, I present what I believe is a simple way this committee can adopt a rule provision that will pass muster under Article III of the Constitution, the Magistrate Judges Acts, and the Rules Enabling Act. Attached is Alternative 1 to the Exhibit D, which was attached to the August 16, 2002 memorandum. The additional language appears at Lines 21, 38 and 39 and is in bold type. I think that this amendment will solve the circuit splits on how magistrate judges' acceptance of guilty pleas should be reviewed.

There are three requirements that must be present in order for a magistrate judge to conduct a felony guilty plea proceeding and still provide to the defendant de novo review to the extent required to satisfy Article III concerns.

1. The Defendant Must Consent to the Magistrate Judge Conducting the Guilty Plea Proceedings

All of the circuit courts that have addressed the propriety of a magistrate judge conducting a guilty plea have agreed that the defendant must consent to the magistrate judge conducting the Rule 11 guilty plea.

The reason for this, cited in the circuit court opinions, is that the Supreme Court has laid a firm foundation that consent by the defendant is required for a magistrate judge to conduct certain district judge-like duties in felony cases. For example, in Gomez v. United States, 490 U.S. 858 (1989), the Supreme Court held that 28 U.S.C. § 636(b)(3) did not authorize a magistrate judge to conduct voir dire in a felony case as an additional duty, if the litigants objected to the magistrate judge's involvement. Only two years later, in Peretz v. United States, 501 U.S. 923 (1991), the Supreme Court held that a district judge could refer a felony voir dire proceeding to a magistrate

judge as an additional duty under 28 U.S.C. § 636(b)(3) with the parties' consent.

My discussions with many magistrate judges, corroborated by the Magistrate Judges Division study of many districts, reveals that consent is very rarely withheld by the defendant. A magistrate judge who is a former criminal defense attorney told me that the critical decision for the defendant is whether to plead guilty. The title of the judge accepting the guilty plea was of no concern to any defendant that she represented.

Therefore, the foundation for a magistrate judge to conduct a guilty plea must be built on the voluntary consent of the defendant prior. Many courts have forms for the defendant to sign giving consent.

2. The Magistrate Judge's Decision

The Tenth Circuit, in United States v. Ciapponi, 77 F.3d 1247, upheld a magistrate judge accepting a defendant's guilty plea in a felony case where the defendant consented to the magistrate judge conducting the proceedings. All other circuits require that the magistrate judge submit a report and recommendation to the district judge recommending that the district judge accept the felony guilty plea. Even under the Tenth Circuit standard, a defendant can seek to withdraw the acceptance of his guilty plea and require review by a district judge. The procedure in the Tenth Circuit is more akin to a magistrate judge's finding in a nondispositive pretrial matter and would fit within the procedures set out in Exhibit D, Alternative 1, 12(i)(1) Nondispositive Matters. A report and recommendation from a magistrate judge, which is the standard adopted by the other circuits, falls within the procedures of 12(i)(2).

The report and recommendation procedure is the more conservative approach to follow by a magistrate judge, in any circuit other than the Tenth, to recommend that a district judge accept a

felony guilty plea. It has a firm basis in constitutional, statutory, and case law.

3. Review of Guilty Plea Finding by District Judge

As noted above, the Tenth Circuit does not require district judge review of a magistrate judge's acceptance of a guilty plea unless the defendant objects or moves to withdraw the plea. The Fifth, Eighth, and Eleventh Circuits follow the report and recommendation procedure and require a review of a magistrate judge's recommendation that a felony guilty plea be accepted only if the party objects.

United States v. Reyna-Tapia, 294 F.3d 1192 (9th Cir. 2002), states, "We hold that when a defendant explicitly consents, a magistrate judge may administer the Rule 11 plea colloquy in a felony case, so long as the district judge reviews the proceedings de novo." The Ninth Circuit panel then states in footnote 7 that "We agree with the Fifth and Eighth Circuits that de novo review by the district court is a crucial factor for finding the duty to be delegable." The Ninth Circuit panel misstated the holdings by the Fifth and Eighth Circuits. The Fifth and Eighth Circuits require de novo review when the defendant **objects** to the report and recommendation. The Ninth Circuit panel requires de novo review in **every** case, even when the defendant does not object. Based on anecdotal evidence, and I am certain Judge Roll could speak to this better than I, less than one out of 300 defendants object to the magistrate judge's report and recommendation that a felony guilty plea be accepted. Thus the Ninth Circuit has misstated the Fifth and Eighth Circuits' requirement of district judge review. Peretz stated that, to the extent de novo review is required to satisfy Article III concerns, it need not be exercised unless requested by the parties. 501 U.S. at 939. In other words, if the defendant does not object to the magistrate judge's report and recommendation, then there is no availability of de novo review and no requirement that a district judge conduct it under the Peretz

standard.

In Thomas v. Arn, 474 U.S. 140 (1985), the Supreme Court stated, "[C]ourt of appeals may adopt a rule conditioning appeal, when taken from a district court judgment that adopts a magistrate's recommendations, upon the filing of objections with the district court identifying those issues on which further review is desired. Such a rule, at least when it incorporates clear notice to the litigants and an opportunity to seek an extension of time for filing objections, is a valid exercise of the supervisory power that does not violate either the Federal Magistrates Act or the Constitution."

The Supreme Court granted to the courts of appeals authority to take an appeal only when a party has appropriately objected to a report and recommendation of the magistrate judge in the district court. Thus, if the defendant fails to object, there is a waiver of any appellate review on the issues to which no objection was taken.

It appears to me that, under this authority, the Criminal Rules Advisory Committee can craft a rule of criminal procedure that establishes that if a defendant fails to object to a magistrate judge's report and recommendation, then the defendant waives the right to have this issue considered by either the district judge or the court of appeals. Enacting a waiver provision, as I have suggested in Exhibit D, Alternative 1, at Lines 38 and 39, prevents the committee from violating the Rules Enabling Act, 28 U.S.C. § 2072(b), which provides, "such rule shall not abridge, enlarge, or modify any substantive right." There is no prohibition, of course, for the rules to set up a procedure to waive a substantive right. In fact, Rule 11 itself is in large part a waiver of the right of a defendant to go to trial.

I request that this committee consider adopting a waiver rule that would permit a defendant to consent to a magistrate judge conducting a felony guilty plea and would require a de novo review

by a district judge prior to sentencing only if the defendant timely objects. The waiver, as I have presented it, covers all failures to object to a magistrate judge's report and recommendation. If we propose such a broad waiver, the Civil Rules Committee may wish to consider such a waiver when it restyles Fed. R. Civ. P. 72.

The alternatives to such a rule are not very satisfactory. For example:

1. We could do nothing, and let the courts sort out the problem. Eventually the Supreme Court would decide the proper procedural standard. In the meantime, district court judges in the Ninth Circuit will be overwhelmed by de novo reviews in hundreds, or perhaps thousands, of felony guilty pleas conducted by magistrate judges. In the alterative, district judges will be required to conduct the felony guilty pleas themselves.

2. As suggested in the August 16, 2002 memo, this committee could attempt to create a rule that would exempt felony guilty plea proceedings conducted by magistrate judges from de novo review. This procedure probably would run afoul of the Rules Enabling Act, Article III of the Constitution, and the Magistrate Judges Act.

3. We could conclude that any attempt at rulemaking here would affect substantive rights and therefore send this matter to the Committee on the Administration of the Magistrate Judge System for study as to whether to request Congress to amend 28 U.S.C. § 636(b) to specifically identify acceptance of felony guilty pleas as matters that may be referred to magistrate judges on a report and recommendation basis. Legislative action is clearly required if the substantive rights are abridged, enlarged, or modified. The proposal presented here merely provides a waiver provision in the criminal rules so that, with the consent of the defendant and the court, the defendant can consent to have the

felony guilty plea conducted by a magistrate judge instead of the district judge.

cc: The Honorable John M. Roll
United States District Judge
Professor David A. Schleuter,
Reporter
John K. Rabiej, Chief,
Rules Committee Support Office

RULE ~~72~~ 12(i). MAGISTRATE JUDGES; PRETRIAL ORDERS

~~(a)~~(1) **Nondispositive Matters.** When a nondispositive pretrial matter ~~not dispositive of a party's claim or defense~~ is referred to a magistrate judge to hear and determine, the magistrate judge must promptly conduct the required proceedings and, when appropriate, enter on the record a written order stating the determination. A party may serve and file objections to the order within 10 days after being served with a copy. After that time, a party must not assign as error a defect in the order not timely objected to. The district judge to whom the case is assigned must consider the timely objections and modify or set aside any portion of the order that is clearly erroneous or contrary to law.

~~(b)~~(2) **Dispositive Motions and Prisoner Petitions.**

~~(1)~~(A) A magistrate judge must promptly conduct the required proceedings when assigned, ~~without the parties' consent, to hear either a prisoner petition challenging the conditions of confinement or~~ to hear a defendant's motion to dismiss or quash an indictment or information, or a motion to suppress evidence in a criminal case, **or a felony guilty plea under Rule 11,** or another pretrial matter

dispositive of ~~a claim or defense~~ the case. A record must be made of all evidentiary proceedings before the magistrate judge, and of such other proceedings as the magistrate judge considers necessary. The magistrate judge must enter on the record a recommendation for disposing of the matter, including, if appropriate, proposed findings of fact. The clerk must immediately mail copies to all parties.

~~(2)~~(B) Within 10 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. A party may respond to another party's objections within 10 days after being served with a copy. Unless the district judge directs otherwise, the party objecting to the recommended disposition must promptly arrange for transcribing the record, or whatever portions of it that the parties agree to or the magistrate judge considers sufficient. **Failure to file objections within the specified time waives *de novo* review.**

~~(3)~~(C) The district judge to whom the case is assigned must determine de

novo -- either on the record or after receiving additional evidence -- any portion of the magistrate judge's disposition that has been objected to under (2). The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or resubmit the matter to the magistrate judge with instructions.

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

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EVIDENCE RULES

June 12, 2002

Honorable Patrick J. Leahy
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

On April 29, 2002, the Supreme Court transmitted to Congress a revision of all the Federal Rules of Criminal Procedure to clarify and simplify their language in accordance with the Rules Enabling Act. 28 U.S.C. §§ 2072-2077. No "substantive" changes were intended unless otherwise specifically indicated in the Committee Notes accompanying the amendments. The comprehensive revision takes effect on December 1, 2002, unless Congress acts in the interim to modify or reject them. I write to alert you to inadvertently omitted provisions in revised Rule 16(a)(1)(G) (presently numbered Rule 16(a)(1)(E)) and Rule 16(b)(1)(C) that need to be reinserted, effective December 1, 2002, to prevent unintended and undesirable substantive changes.

In 1997, two provisions of Rule 16 were amended to impose reciprocal obligations on the government and defendant requiring each to disclose their expert witnesses' testimony on the defendant's mental condition bearing on the issue of guilt. Rule 16(b)(1)(C) was amended to require a defendant at the government's request to give a written summary of the expert mental-condition testimony that the defendant intends to use at trial (after giving notice under Rule 12.2 of its intent to present the evidence). At the same time, Rule 16(a)(1)(E) (renumbered as Rule 16(a)(1)(G)) was amended to require the government to give a written summary of the expert mental-condition testimony that it intends to use at trial (after the defendant provides a written summary of its expert witness's testimony at the government's request). Failure to give advance notice of these experts and their testimony commonly results in the necessity for a significant continuance in the middle of trial. The amendments were non-controversial and since promulgation they have worked as intended.

The 1997 provisions were inadvertently deleted during the lengthy drafting process culminating in the comprehensive revision of the criminal rules. Unless corrected, the provisions will be eliminated from the Federal Rules of Criminal Procedure on December 1, 2002, and the procedures will then revert to those in effect before 1997, causing surprises at trial and leading to unnecessary continuances.

On behalf of the federal judiciary, we recommend that your committee:

(1) amend Rule 16(a)(1)(G) and (b)(1)(C), as transmitted by the Supreme Court on April 29, 2002, to include the substance of the inadvertently omitted 1997 amended provisions, and

(2) set the effective date of Rule 16(a)(1)(G) and (b)(1)(C), as amended by Congress, on December 1, 2002, to coincide with the date on which the comprehensive revision is to take effect to prevent undue confusion.

Corrected Rule 16(a)(1)(G) and (b)(1)(C) provisions that reinstate the omitted 1997 amendments are set out below. The "corrections" will restore the existing provisions with only the indicated minor stylistic changes.

Corrected Rule 16(a)(1)(G)
(Omitted matter struck through; new matter underlined.
Based on existing Rule 16(a)(1)(E).)

(~~E~~G) *Expert Witnesses*. At the defendant's request, the government ~~shall disclose~~ must give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) of this rule and the defendant complies, the government ~~shall~~ must, at the defendant's request, ~~disclose~~ give to the defendant a written summary of testimony the government intends to use under Rules 702, 703, or 705 as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subdivision ~~shall~~ must describe the witnesses' opinions, the bases and the reasons for those opinions, and the witnesses' qualifications.

Corrected Rule 16(b)(1)(C)
(Omitted matter struck through; new matter underlined.
Based on existing Rule 16(b)(1)(C).)

(C) *Expert Witnesses.* Under the following circumstances, the defendant ~~shall~~ must, at the government's request, ~~disclose~~ give to the government a written summary of any testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial: (i) if the defendant requests disclosure under subdivision (a)(1)~~(E)~~(G) of this rule and the government complies, or (ii) if the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition. This summary ~~shall~~ must describe the witnesses' opinions, the bases and reasons for those opinions, and the witnesses' qualifications.

Thank you for considering our request. If you have any questions about this matter, please call me, or Michael W. Blommer (202-502-1700).

Sincerely,

Anthony J. Scirica
Judge, Third Circuit Court of Appeals

cc: Honorable Charles E. Schumer

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 4] — Clarify the ability of judges to issue warrants via facsimile transmission	Magistrate Judge Bernard Zimmerman 1/29/01 (01-CR-A)	1/01 — Referred to chair and reporter for consideration **PENDING FURTHER ACTION**
[CR 5] — Video Teleconferencing of Initial Appearances and Arraignments	Judge Fred Biery 5/98; Judge Durwood Edwards 6/98	5/98 — Referred to chair and reporter for consideration 10/98 — Referred to subcmte 10/99 — Approved for publication by advisory cmte 1/00 — Considered by cmte as part of style package 4/00 — Considered; request to publish 6/00 — ST Cmte approves request to publish 8/00 — Published 4/01 — Forwarded to ST Cmte; version requires defendant's consent and court approval 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf 4/02 — Approved by Sup Ct **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**

Proposal	Source, Date, and Doc #	Status
[CR 5.1(d)] — 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 cmtes to propose amendment 4/98 — Approves amendment, but defers until style project completed 6/98 — ST Cmte concurs with deferral 6/99 — Considered 10/99 — Approved for publication by advisory cmte 1/00 — Considered by cmte 4/00 — Considered; request to publish 6/00 — ST Cmte approves request to publish 8/00 — Published 4/01 — Approved and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf 4/02 — Approved by Sup Ct **PENDING FURTHER ACTION**
[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 — Cmte declined to act on the issue **COMPLETED**
[CR 6] — Allow grand jury witness to be accompanied by counsel (see CR 6(d) below)	Robert D. Evans, ABA, 3/2/01 (01-CR-B)	3/01 — Referred to chair and reporter for consideration **PENDING FURTHER ACTION**
[CR 6] — Allow sharing of grand jury information pertaining to foreign intelligence	USA Patriot Act of 2001 (P.L. 107-56) 10/26/01	11/01 — Adv Cmte approved conforming amendments 1/02 — Standing Cmte approved 3/02 — Jud Conf approved 4/02 — Approved by Sup Ct **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 6(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 — ST 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 ST Cmte 9/98 — Approved by Jud Conf 4/99 — Approved by Sup. Ct. 12/01— Effective **COMPLETED**
[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 10/99 — Approved for publication by advisory cmte **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**
[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 ST Cmte 9/98 — Approved by Judicial Conference 4/99 — Approved by Sup. Ct. 12/01— Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR7(b)] — Effect of tardy indictment	Congressional constituent 3/21/00 (00-CR-B)	5/00— Referred to chair and reporter **PENDING FURTHER ACTION**
[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 ST Cmte 10/98 — revised and resubmitted to ST Cmte for transmission to conference — 1/99— Approved by ST Cmte 3/99— Approved by Jud Conf 4/00— Approved by Supreme Court 12/00 — Effective **COMPLETED**
[CR 10] — Arraignment of detainees through video teleconferencing; Defendant's presence not required	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 4/98 —Draft amendments considered, but subcmte appointed to further study 10/98 — Considered by cmte; reporter to redraft and submit at next meeting 4/99 — Considered 10/99— Approved for publication by advisory cmte 1/00 — Considered by cmte as part of style package 4/00 — Considered; request to publish 6/00 — ST Cmte approves request to publish 8/00 — Published 4/01— Approved and forwarded to ST Cmte 6/01— Approved by ST Cmte 9/01 — Approved by Jud Conf 4/02 — Approved by Sup Ct **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 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] — Advise non-U.S. citizen defendant of potential collateral consequences when accepting guilty plea	Richard J. Douglas, Atty., Senate Committee on Foreign Relations 4/3/01 (01-CR-C)	4/01 — Referred to reporter & chair **PENDING FURTHER ACTION**
[CR 11] — To expressly inquire prior to trial whether prosecution's proposed guilty plea agreement was communicated to defendant	Judge David D. Dowd, Jr. 5/20/02 (02-CR-C)	6/02 — Referred to reporter & chair **PENDING FURTHER ACTION**
[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 ST Cmte 6/98 — Approved by ST Cmte 9/98 — Approved by Jud Conf 4/99 — Approved by Sup. Ct. 12/99— Effective **COMPLETED**
[CR 11(b)(2)] — Examine defendant's prior discussions with a government attorney	Judge Sidney Fitzwater 11/94 & 3/99	4/95 — Discussed and no motion to amend **COMPLETED** 3/99 — Sent to chair and reporter 4/00 — Considered; request to publish 6/00 — ST Comte approves request to publish 8/00 — Published 4/01 — Approved and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf 4/02 — Approved by Sup Ct **PENDING FURTHER ACTION**
[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 subcmte on other Rule 11 issues 6/02 — Cmte Note recognizes practice but expressly takes no position **COMPLETED**
[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**

Proposal	Source, Date, and Doc #	Status
[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 ST Cmte 9/98 — Approved by Jud Conf 4/99 — Approved by Sup. Ct. 12/99 — Effective **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 subcmte in place to monitor/respond to the legislation. **COMPLETED**
[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)	10/98 — Referred to chair and reporter 6/99 — Cmte considered and declined to adopt **COMPLETED**
[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 — Subcmte appointed 4/96 — No action taken **COMPLETED**
[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**

Proposal	Source, Date, and Doc #	Status
[CR 12.2(c)] — 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 4/99 — Considered 10/99 — Considered by cmte 1/00 — Considered by cmte as part of style package 4/00 — Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Approved and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf 4/02 — Approved by Sup Ct **PENDING FURTHER ACTION**
[CR 12.2(d)] — Sanction for defendant's failure to disclose results of mental examination	Roger Pauley 7/5/01	4/02 — Adv Cmte considered **PENDING FURTHER ACTION**
[CR 12.4] — Financial disclosure	Stg Comte, 1/00	4/00 — Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Approved with post-publication changes and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf 4/02 — Approved by Sup Ct **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**

Proposal	Source, Date, and Doc #	Status
[CR 16(a)(1)(A)] — Disclosure of statements made by organizational defendants	ABA	11/91 — Considered 4/92 — Considered 6/92 — Approved by ST Cmte 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**
[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 1/00 — Considered by cmte as part of style package 4/00— Comte decided not to take action **COMPLETED**
[CR 16(a) — Permit the same discovery of experts as is permitted under the civil rules	Carl E. Person, Esq. 6/01 (01-CR-D)	6/01— Referred to reporter and chair 4/02 — Considered and rejected **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 16(a) and (b)] — Disclosure of witness names and statements before trial	William R. Wilson, Jr., Esq. 2/92 5/18/99 (99-CR-D)	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** 5/99— Sent to chair and reporter **PENDING FURTHER ACTION**
[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 — Subcmte appointed 4/96 — Rejected by subcmte **COMPLETED**
[CR 23(a)] — Address the issue of when a jury trial is authorized	Jeremy A. Bell 11/00 (00-CR-D)	11/00 — Sent to chair and reporter **PENDING FURTHER ACTION**
[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**
[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 in style package 10/99 — Rejected inclusion in style package **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[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 ST Cmte 6/98 — Approved by ST Cmte 9/98 — Approved by Jud Conf 4/99 — Approved by Sup. Ct. 12/99 — Effective **COMPLETED**
[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 — Subcmte will be appointed 10/97—Subcmte recommended amendment. Adv Cmte voted to consider a draft amendment at next meeting. 4/98 — Deferred for further study 10/98 — Cmte approved, but deferred request to publish until spring meeting or included in style package 4/99 — Considered 10/99 — Approved for publication by advisory cmte 1/00 — Considered by comte as part of style package 4/00 — Considered; request to publish 6/00 — ST Cmte approves request to publish 8/00 — Published 4/01 — Approved and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf 4/02 — Proposed amendment rejected by Sup Ct **COMPLETED**
[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] — Extension of time for filing	Judge Paul L. Friedman 3/02 (02/CR/B)	4/02 — Sent directly to chair and reporter 4/02 — Adv Cmte considered **PENDING FURTHER ACTION**
[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 — Subcmte appointed 4/96 — Rejected by subcmte **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[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 cmte, but deferred pending Civil Rules Cmte action on CV 51 1/00 — Considered by cmte as part of style package 4/00 — Considered; request to publish 6/00 — ST Cmte approves request to publish 8/00 — Published 4/01 — Approved and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf 4/02 — Approved by Sup Ct **PENDING FURTHER ACTION**
[CR 31] — Provide for a 5/6 vote on a verdict	Sen. Thurmond, S.1426, 11/95	4/96 — Discussed, rulemaking process should handle it **COMPLETED**
[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 Cmte 10/98 — revised and resubmitted to stg cmte for transmission to conference 1/99— Approved by Stg Cmte 3/99 — Approved by Jud Conf 4/00 — Approved by Supreme Court 12/00 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[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 subcmte in place to monitor/respond to the legislation. **PENDING FURTHER ACTION**
[CR 32]—findings on controverted matters in presentence report		3/00 — considered by subcomte as part of style package 4/00 — Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Advisory Cmte withdrew recommendation **COMPLETED**
[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**
[CR 32(c)(5)] — clerk required to file notice of appeal	Clerk, 7th Circuit 4/11/00 (00-CR-A)	3/00 — Sent directly to chair 5/00 — referred to reporter **PENDING FURTHER ACTION**
[CR 32(d)(1)] — finality of sentence imposing order of restitution	Judge D. Brock Hornby 3/11/02	3/02 — Sent to chair and reporter 4/02 — Adv Cmte considered and declined to take action **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 Cmte 10/98 — revised and resubmitted to stg cmte for transmission to conference 1/99— Approved by Stg Cmte 3/99 — Approved by Jud Conf 4/00 — Approved by Supreme Ct 12/00 — Effective **COMPLETED**
[CR 32(e)] — Delete provision addressing probation and production of statements (later renumbered to CR32(c)(2))	DOJ	7/91 — Approved by ST Cmte for publication 4/92 — Considered 6/92 — Approved by ST Cmte 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."	John Rabiej (2/6/98)	2/98—Letter sent advising chair & reporter 4/98 — Approved, but deferred until style project completed 1/00 — considered by comte as part of style package 4/00 — Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Approved by Advisory Cmte as part of style package and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf 4/02 — Approved by Sup Ct **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[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 subcmte in place to monitor/respond to the legislation. **PENDING FURTHER ACTION**
[CR 32.1]— Right of allocution before sentencing at revocation hearing	U.S. v. Frazier 2/25/02 02-CR-D	3/02—Referred to chair and reporter 4/02 — Adv Cmte considered **PENDING FURTHER ACTION**
[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 Cmte 10/98 — revised and resubmitted to stg cmte for transmission to conference 1/99 — Approved by Stg Cmte 3/99 — Approved by Jud Conf 4/00 — Approved by Supreme Ct 12/00 — Effective **COMPLETED**
[CR 33] — Extension of time for filing motion for new trial	Judge Paul L. Friedman 3/02 (02-CR-B)	4/02 — Sent directly to chair and reporter 4/02 — Adv Cmte considered **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 34] — Extension of time for filing	Judge Paul L. Friedman 3/02 (02-CR-B)	4/02 — Sent directly to chair and reporter 4/02 — Adv Cmte considered **PENDING FURTHER ACTION**
[CR 35] — Allow defendants to move for reduction of sentence	Robert D. Evans, ABA, 3/2/01 (01-CR-B)	3/01 — Referred to chair and reporter for consideration **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[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)] To permit sentence reduction when defendant assists government before or within 1 year after sentence	Judge Ed Carnes 3/99 (99-CR-A); Asst. Attorney Gen./ Crim. Div. 4/99 (99-CR-C)	3/99— Referred to chair and reporter 1/00 — Considered by comte as part of style package 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Approved with post-publication changes and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf 4/02 — Approved by Sup Ct **PENDING FURTHER ACTION**
[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 4/99 — Considered 4/00— Considered and included in request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Approved and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf 4/02 — Approved by Sup Ct **PENDING FURTHER ACTION**
[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 Cmte 10/98 — revised and resubmitted to stg cmte for transmission to conference 1/99— Approved by Stg Cmte 3/99 — Approved by Jud Conf 4/00— Approved by Supreme Ct 12/00 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[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**
[CR 41] — Allow magistrate judge to issue nationwide search warrant	USA Patriot Act of 2001 (P.L. 107-56) 10/26/01	11/01 — Adv Cmte approved conforming amendments 1/02 — Standing Cmte approved 3/02 — Jud Conf approved 4/02 — Approved by Sup Ct **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 41(c)(1) — to just provide that the warrant designate the court to which shall be returned	Judge D. Brock Hornby 11/28/01 (02-CR-A)	2/02— Referred to reporter, chair, and Rule 41 Subcommittee 4/02 — Adv Cmte considered and declined to take action **COMPLETED**
[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(d) — enlarge time period within which to serve search warrant and modify how search is conducted	Judge B. Waugh Crigler 11/98 (98-CR-D)	6/00 — Stg Comte approves request to publish 8/00 — Published (rejects expansion of time period) 4/01— Approved and forwarded to ST Cmte 6/01— Approved by ST Cmte 9/01 — Approved by Jud Conf 4/02 — Approved by Sup Ct **PENDING FURTHER ACTION**
[CR 41(d)] — covert entry for purposes of observation only	DOJ 9/2/99	10/99 — Considered 1/00 — Considered by comte as part of style package 4/00 — Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Advisory Cmte decided to defer further action 4/02 — Advisory Cmte considered and elected not to amend rules to provide for covert searches. (Rule 41 Subcom recommended that issue be left to developing caselaw.) **COMPLETED**
[CR42(b)] — magistrate judge contempt power clarification	Magistrate Judge Tommy Miller 12/00 (00-CR-E)	4/01 — Approved and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf 4/02 — Approved by Sup Ct **PENDING FURTHER ACTION**
[CR 43(b)] —Sentence absent defendant	DOJ 4/92	10/92 — Subcmte 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**

Proposal	Source, Date, and Doc #	Status
[CR 43(b)] — Arraignment of detainees by video teleconferencing		10/98 — Subcmte appointed 4/99 — Considered 1/00 — Considered by comte as part of style package 4/00— Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Approved and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf 4/02 — Approved by Sup Ct **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(a) — Defendant may waive 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, subcmte appointed 10/98 — Cmte considered; reporter to submit draft at next meeting 4/00— Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Approved & forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf 4/02 — Approved by Sup Ct **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(d)] — 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 4/00 — Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Approved & forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf 4/02 — Approved by Sup Ct **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 — Subcmte appointed 4/96 — Rejected by subcmte **COMPLETED**
[CR 49] — Double-sided paper	Environmental Defense Fund 12/91	4/92 — Chair informed EDF that matter was being considered by other cmtes 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 4/99 — Considered 4/00— Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Approved and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf 4/02 — Approved by Sup Ct **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 Subcmte study 4/99 — Considered 4/00 — Considered; request to publish 6/00 — ST Cmte approves request to publish 8/00 — Published 4/01 — Approved and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf 4/02 — Approved by Sup Ct **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**

Proposal	Source, Date, and Doc #	Status
[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 Cmte 9/98 — Approved by Jud Conf 4/99 — Approved by Sup. Ct. 12/99— Effective **COMPLETED**
[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 Cmte meeting 12/97	4/98 — Considered an deferred for further study **DEFERRED INDEFINITELY**
[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] — magistrate judge petty offenses jurisdiction	Magistrate Judge Tommy E. Miller 12/00 (00-CR-E)	12/00 — Sent to chair & reporter 4/01 — Approved & forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf 4/02 — Approved by Sup Ct **PENDING FURTHER ACTION**
[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 Cmte 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**

Proposal	Source, Date, and Doc #	Status
[Appeal from a magistrate judge's nondispositive, pretrial order]	U.S. v. Abonce-Barerra 7/20/01	4/02 — Adv Cmte considered **PENDING FURTHER ACTION**
[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 Rules Governing Section 2254 Cases and Section 2255 Proceedings	CV Cmte	10/97 — Subcmte appointed 4/98 — Considered; further study 10/98 — Cmte approved some proposals and deferred others for further consideration 4/00 — Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Advisory Cmte deferred further action 4/02 — Advisory Cmte approved amendments 6/02 — Approved for publication by ST Committee **PENDING FURTHER ACTION**
[Hab Corp R8(c)] — Apparent mistakes in Rules Governing Section 2254 Cases and Section 2255 Proceedings	Judge Peter Dorsey 7/9/97 (97-CR-F)	8/97 — Referred to reporter 10/97 — Referred to subcmte 4/98 — Cmte considered 10/98 — Cmte considered 4/00 — Considered; request to publish 6/00 — ST Cmte approves request to publish 8/00 — Published 4/01 — Advisory Cmte deferred further action 4/02 — Advisory Cmte approved amendments 6/02 — Approved for publication by ST Committee **PENDING FURTHER ACTION**
[Modify the model form for motions under 28 U.S.C. § 2255]	Robert L. Byer, Esq. & David R. Fine, Esq. 8/11/00 (00-CR-C)	8/00 — Referred to reporter & chair 4/02 — Cmte approved forms 6/02 — Approved for publication by ST Committee **PENDING FURTHER ACTION**
[U.S. Attorneys admitted to practice in Federal courts]	DOJ 11/92	4/93 — Considered **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[Restyling CR Rules]		10/95 — Considered 4/96 — On hold pending consideration of restyled AP Rules published for public comment 4/98 — Advised that Style Subc intends to complete first draft by the end of the year 12/98 — Style subcmte completes its draft 4/99 — Considered Rules 1-9 6/99 — Considered Rules 1-22 4/00— Rules 32-60 approved by comte; request to publish Rules 1-60 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Approved with amendments and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf 4/02 — Approved by Sup Ct **PENDING FURTHER ACTION**
[Restyling Hab. Corp. Rules]		10/00 — Considered 1/01 — ST Cmte authorizes restyling to proceed 4/02 — Advisory Cmte approved for request to publish 6/02 — Approved for publication by ST Committee **PENDING FURTHER ACTION**