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

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TO: **Hon. Alicemarie H. Stotler, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Hon. D. Lowell Jensen, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT: **Report of the Advisory Committee on Criminal Rules**

DATE: **May 12, 1997**

I. Introduction

The Advisory Committee on the Rules of Criminal Procedure met on April 7, 1997 in Washington, D.C. and took action on a number of proposed amendments. The draft Minutes of that meeting are included at Attachment B. This report addresses matters discussed by the Committee at that meeting. First, the Committee considered public comments on proposed amendments to the following Rules:

- Rule 5.1. Preliminary Examination (Production of Witness Statements)
- Rule 26.2. Production of Witness Statements
- Rule 31. Verdict (Polling the Jurors Individually)
- Rule 33. New Trial (Time for Filing)
- Rule 35(b). Correction or Reduction of Sentence (Substantial Assistance)
- Rule 43. Presence of Defendant (Presence at Reduction or Correction of Sentence)

In discussing those rules, the Committee also considered the suggestions of the Subcommittee on Style. As noted in the following discussion, the Advisory Committee proposes that these amendments be approved by the Committee and forwarded to the Judicial Conference.

Second, the Committee considered proposed amendments to other rules and recommends that the proposed changes to those rules be published for public comment:

- Rule 6. Grand Jury (Presence of Interpreters; Return of Indictment)
- Rule 11. Pleas (Acceptance of Pleas and Agreements, etc.)
- Rule 24(c). Alternate Jurors (Retention During Deliberations)
- Rule 30. Instructions (Submission of Requests for Instructions)
- Rule 32.2. Forfeiture Procedures
- Rule 54. Application and Exception

Third, as noted *infra*, the Advisory Committee recommends that the Standing Committee propose an amendment to 18 U.S.C. § 3060(c) that would permit a magistrate judge to grant a continuance in holding a preliminary examination in those cases in which the defendant does not consent to the delay.

Finally, the Advisory Committee has several information items to bring to the attention of the Standing Committee.

II. Action Items--Recommendations to Forward Amendments to the Judicial Conference

A. Summary and Recommendations

At its June 1996 meeting, the Standing Committee approved the publication of proposed amendments to six rules for public comment from the bench and bar. In response, the Advisory Committee received written comments from 20 persons or organizations commenting on all or some of the Committee's proposed amendments to the rules. In addition, the Committee received suggested changes from the Style Subcommittee. The Committee has considered those comments and recommends that all of the proposed amendments be forwarded to the Judicial Conference for approval and transmittal to the Supreme Court. The following discussion briefly summarizes the proposed amendments.

1. ACTION ITEM--Rule 5.1. Preliminary Examination (Production of Witness Statements)

The proposed amendment to Rule 5.1 would extend the requirements of Rule 26.2, regarding the production of a witness' statements, to preliminary examinations. Under the amendment, a party would be required to produce its witness' prior statements once the witness had personally testified at a preliminary examination. Of the 12 commentators who submitted written comments, 11 favored the proposed amendment. The Advisory Committee considered the suggested style changes of the Style Subcommittee and decided to forward the amendment as published. That version of the rule was intended to follow the language and format of similar amendments made to Rules 32, 32.1, 46 and Rule 8 of the Rules Governing Proceedings under 28 U.S.C. § 2255. The Committee believed that departing from that language, without also changing those rules, might lead to confusion and uncertainty in the rule.

Recommendation--The Committee recommends that the amendment be approved and forwarded to the Judicial Conference.

2. ACTION ITEM--Rule 26.2. Production of Witness Statements

The proposed amendment to Rule 26.2(g) parallels the amendment to Rule 5.1, supra and extends the rule's requirement to produce a witness' statement to preliminary examinations. Again, 11 of the 12 commentators favored the amendment. The Committee considered the proposed style changes but decided to forward the amendment as published; the Committee noted that the rule generally needs to be restructured and decided that it would be better to wait with that task until the Criminal Rules are restyled.

Recommendation--The Committee recommends that the amendment to Rule 26(g) be approved and forwarded to the Judicial Conference.

3. ACTION ITEM--Rule 31. Verdict (Polling the Jurors Individually)

The proposed amendment to Rule 31 would require the court to conduct an individual poll of each juror anytime a poll is requested or ordered sua sponte by the court. Of the eight comments received on the proposed amendment, only

one of them recommended complete rejection of the proposal. In addition to making suggested style changes, the Committee also changed the rule to indicate that any poll of the jury must occur before the jury is discharged--as opposed to before the verdict is recorded--as currently provided. That change was suggested by one of the commentators who noted the problems of interpreting when a verdict is recorded. *See United States v. Marinari*, 32 F.3d 1209 (7th Cir. 1994).

Recommendation--The Committee recommends that the amendment be approved and forwarded to the Judicial Conference.

4. ACTION ITEM--Rule 33. New Trial (Time for Filing Motion)

The proposed amendment to Rule 33 was intended to provide consistency in the timing requirements for filing motions for new trial by making the verdict or finding of guilty the starting point for both types of motions for new trial--motions based on newly discovered evidence and motions based on other grounds. While two commentators favored the amendment, ten commentators were opposed, primarily because the amendment would effectively reduce the overall time available to a defendant to file a motion for new trial based upon newly discovered evidence. Upon further consideration, the Committee decided to increase the total amount of time in which to file the motion from two years to three years. The Committee also included the suggested style changes.

Recommendation--The Committee recommends that the amendment to Rule 33 be approved and forwarded to the Judicial Conference.

5. ACTION ITEM--Rule 35(b). Correction or Reduction of Sentence (Substantial Assistance)

The proposed change to Rule 35(b) is intended to fill a gap in current practice where a defendant has, considering the aggregate of both pre-sentence and post sentence cooperation, provided substantial assistance to the Government. But because of the provisions in the current Rule 35(b), he or she is not entitled to any sentencing relief as a result of that cooperation. All eight commentators favored the change. The Committee has incorporated the Style Subcommittee's suggested changes.

Recommendation--The Committee recommends that the amendment to Rule 35(b) be approved and forwarded to the Judicial Conference.

6. ACTION ITEM--Rule 43. Presence of Defendant (Presence at Reduction or Correction of Sentence)

The proposed change to Rule 43(c)(4) was intended to correct an inconsistency created by the amendments to the Rule several years ago. Under the current rule it would possible to require the defendant's presence at a reduction of sentence hearing under Rule 35(b) but not at a correction of sentence hearing under Rule 35(c). Of the nine comments received, seven favored the proposed change. The Committee considered the suggested style changes and decided to forward the amendment as published. The current version of Rule 43(c) was restyled just several years earlier and the Committee believed that any other style changes could await the restyling of the Criminal Rules.

Recommendation--The Committee recommends that the amendment to Rule 43(c) be approved and forwarded to the Judicial Conference.

B. Text of Proposed Amendments, Summary of Comments and GAP Reports.

Rule 5.1. Preliminary Examination

* * * * *

(d) PRODUCTION OF STATEMENTS.

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

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

COMMITTEE NOTE

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

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

Summary of Comments on Rule 5.1

Charles W. Daniels (CR-001)
Freedman, Boyd, Daniels, Hollander, Guttmann & Goldberg, P.A.
Albuquerque, NM
Oct. 1, 1996

Mr. Daniels supports the proposed amendment to Rule 5.1. He points out that production of prior witness statements has been held to be important in exercising the right to confront and cross examine, and that the confrontation clause applies at a preliminary examination.

Honorable Jack B. Weinstein (CR-004)
United States District Court
Brooklyn, NY
Oct. 2, 1996

Judge Weinstein expresses concern over the proposed amendment, particularly regarding line 8. Judge Weinstein believes that the words "may not" may eliminate the court's discretion regarding other vital testimony of a witness. Judge Weinstein feels such discretion is called for.

Ohio Prosecuting Attorneys Association (CR-007)
Mr. John E. Murphy, Executive Director
Columbus, Ohio
Dec. 2, 1996

The Association opposes the proposed amendment which would likely be a model for Ohio rules. Mr. Murphy indicates that the advance disclosure of witnesses statements could facilitate perjury by an unscrupulous defendant who would then be better able to construct his defense accordingly. Further concerns include the incremental intimidation of witnesses, and the lack of likelihood of any incremental pleas. Mr. Murphy believes that an across the board amendment such as this is grossly out of proportion to the perceived problem, and is not necessary to address it. He provides an alternative approach which exists in Ohio. The court reviews witnesses statements after the witness testifies at trial, and provides the statement to defense counsel for use in cross if inconsistencies exist.

State Bar of Michigan Standing Committee on U.S. Courts(CR-011)
Richard A. Rossman, Chairman
Detroit, MI.
January 28, 1997

Mr. Rossman expresses concern not only about the proposed amendment, but also the 1993 amendments referred to, and 1983 amendment to Rule 12(i), requiring production of witness statements at suppression hearings. The amendments appear to conflict with the Jencks Act, 18 U.S.C. section 3500(a) which states that "no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until a said witness has testified on direct examination in the trial of the case." Mr. Rossman recommends that this conflict be resolved.

Paul M. Rashkind (CR-012)
Federal Public Defender, Chief of Appeals
Southern District of Florida
Feb. 4, 1997

Mr. Raskind, on behalf of The Office of The Federal Public Defender of the Southern District of Florida, favors adoption of the amendment, mentioning that it will clarify 1993 amendments to Rules 32, 32.1, 46, and Rule 8.

Ms. Carol A. Brook (CR-015)
Federal Defender Advisory Committee's Subcommittee on Legislation
Northern District of Illinois
February 13, 1997

Ms. Brook commends the Committee for recognizing the need to extend the provisions of Rule 26.2 to preliminary hearings and strongly agrees with the Committee's view that credibility determinations are critical in those proceedings. However, Ms. Brooks suggests that the last sentence of the proposed committee note to Rule 5.1 be eliminated. That note states "A witness' statement must be produced only after the witness has personally testified." Ms. Brook points out that today many prosecutions consist of affidavits in lieu of calling live witnesses. It could be argued that hearsay and/or affidavits even when admitted for their truth are not subject to proposed Rule 5.1, effectively defeating the purpose of the Rule.

Mr. George E. Tragos (CR-017)
Chair, Federal Court Practice Committee's Subcommittee on Criminal Rules
Florida Bar Association
Feb. 10, 1997

Mr. Tragos indicates the Florida Bar's support for the amendments to Rules 5.1.

Carol A. Brook and William J. Genego (CR-018)
Co-Chairs, National Association of Criminal Defense Lawyers Committee on Rules of Procedure
Washington, DC
Feb. 14, 1997

Ms. Brook and Mr. Genego support the proposed amendment, but suggest that the last sentence of the proposed committee note to Rule 5.1 be clarified. They point out that today many prosecutions consist of affidavits in lieu of calling live witnesses. Without including witness testimony whether through direct testimony, or affidavit, or declaration from the witness, it could be argued that hearsay and/or affidavits even when admitted for their truth are would not be subject to proposed Rule 5.1, effectively defeating the purpose of the Rule. Additionally, Ms. Brooks and Mr. Genego feel that the word "witness" in the last sentence of the Committee Notes be clarified. They see a potential confusion in determining which witness' statements must be produced. They suggest that in order to achieve the intended purpose, and not cause unintended

results, the "witness" whose prior statements need to be produced should be the person whose first hand knowledge is being offered to establish probable cause.

Hon. Dana E. McDonald (CR-019)
President, Federal Bar Association
Washington, DC
Feb. 12, 1997

Judge McDonald indicates that the Federal Bar Association is opposed to the proposed amendment. It believes that it may prompt pleas of guilty when the strength of the government's case is measured by the accused.

Mr. David C. Long (CR-020)
Director, Office of Research,
State Bar of California
March 4, 1997

Mr. Long's committee endorses the amendment, and adds that it represents the last expansion of *Jencks* to various facets of criminal procedure.

E. S. Swearingen (CR-021)
United States Magistrate Judge
President, Federal Magistrate Judges Association
March 7, 1997

Judge Swearingen indicates support of the amendment, adding its effect will be minimal. He also comments on the Jencks Act, 18 U.S.C. 3500, adding that the 1993 amendment to Rule 26.2 provides for production of such statements at various other proceedings, including pretrial hearings on motions to suppress evidence and in detention hearings.

GAP Report--Rule 5.1

The Committee made no changes to the published draft.

Rule 26.2. Production of Witness Statements

* * * * *

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

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

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

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

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

(5) in Rule 5.1 at a preliminary examination.

COMMITTEE NOTE

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

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

Summary of Comments--Rule 26.2

Charles W. Daniels (CR-001)
Freedman, Boyd, Daniels, Hollander, Guttmann & Goldberg, P.A.
Albuquerque, NM
Oct. 1, 1996

Mr. Daniels expresses support for the proposed amendment to Rule 26.2. He points out that production of prior witness statements has been held to be important in exercising the right to confront and cross examine, and that the confrontation clause applies at a preliminary examination.

Mr. Jack E. Horsley, Esquire (CR-003)
Craig and Craig
Mattoon, Illinois
Oct. 4, 1996

Mr. Horsley suggests that line 2 of the proposed amendment be expanded to read "suppression or proscription hearing." He believes the word "suppression" may not be sufficient to accomplish the purpose intended by the rule. He states that he deems "proscription" tomean "writing against" to be what is contemplated by the hearing conducted under Rule 12.

Irwin Schwartz (CR-005)
Private Practice
Seattle, WA
Oct. 30, 1996

Mr. Schwartz applauds the amendment and states that the burden on the prosecution will be modest and that the increase in fairness will be substantial.

Ohio Prosecuting Attorneys Association (CR-007)
Mr. John E. Murphy, Executive Director
Columbus, Ohio
Dec. 2, 1996

The Association opposes the proposed amendment which would likely be a model for Ohio rules. Mr. Murphy believes that the advance disclosure of witnesses statements could facilitate perjury by an unscrupulous defendant who would then be better able to construct his defense accordingly. Further concerns include the incremental intimidation of witnesses, and the lack of likelihood of any incremental pleas. He indicates that an across the board amendment such as this is grossly out of proportion to the perceived problem, and is not necessary. Mr. Murphy provides an alternative approach which exists in Ohio. The court reviews witnesses statements after the witness testifies at trial, and provides the statement to defense counsel for use in cross if inconsistencies exist.

Edward LeRoy Dunkerly (CR-009)
Private Practice
Vancouver WA
Dec. 9, 1997

Mr. Dunkerly supports the amendment.

State Bar of Michigan Standing Committee on U.S. Courts(CR-011)
Richard A. Rossman, Chairman
Detroit, MI.
January 28, 1997

Mr. Rossman expresses concern not only about the proposed amendment, but also the 1993 amendments referred to in the Committee Note, and 1983 amendment to Rule 12(i), requiring production of witness statements at suppression hearings. The amendments appear to conflict with the Jencks Act, 18 U.S.C. section 3500(a) which states that "no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until a said witness has testified on direct examination in the trial of the case." Mr. Rossman recommends that the conflict be resolved.

David Long (CR-013)
State Bar of California
San Francisco, CA
Feb. 27, 1996

Mr. Long, through Ms. Ruth L. Robinson of the Litigation Committee, supports the amendment.

Carol A. Brook and William J. Genego (CR-018)
Co-Chairs, National Association of Criminal Defense Lawyers Committee on Rules of Procedure
Washington, DC
Feb. 14, 1997

Ms. Brook and Mr. Genego support the proposed amendment, but suggest that the last sentence of the proposed committee note to Rule 5.1 be clarified. They point out that today many prosecutions consist of affidavits in lieu of calling live witnesses. Without including witness

testimony whether through direct testimony, or affidavit, or declaration from the witness, it could be argued that hearsay and/or affidavits even when admitted for their truth are would not be subject to proposed Rule 5.1, effectively defeating the purpose of the Rule. Additionally, Ms. Brooks and Mr. Genego feel that the word "witness" in the last sentence of the Committee Notes be clarified. They see a potential confusion in determining which witness' statements must be produced. They suggest that in order to achieve the intended purpose, and not cause unintended results, the "witness" whose prior statements need to be produced should be the person whose first hand knowledge is being offered to establish probable cause. This needs to be explicitly clear.

Hon. Dana E. McDonald (CR-019)
President, Federal Bar Association
Washington, DC
Feb. 12, 1997

Judge McDonald indicates that the Federal Bar Association supports the proposed amendment. It may prompt pleas of guilty when the strength of the government's case is measured by the accused.

Mr. David C. Long (CR-020)
Director, Office of Research,
State Bar of California
March 4, 1997

Mr. Long's committee endorses the amendment.

E. S. Swearingen (CR-021)
United States Magistrate Judge
President, Federal Magistrate Judges Association
March 7, 1997

Judge Swearingen indicates support of the amendment, adding its effect will be minimal. He also comments on the Jencks Act, 18 U.S.C. 3500, adding that the 1993 amendment to Rule 26.2 provides for production of such statements at various other proceedings, including pretrial hearings on motions to suppress evidence and in detention hearings.

GAP Report--Rule 26.2

The Committee made no changes to the published draft.

Rule 31. Verdict

* * * * *

(d) POLL OF JURY. ~~When~~ After a verdict is returned ~~and~~ but before ~~it is recorded~~ the jury is discharged, the court must, on a party's request, or may on its own motion, poll the jurors individually. ~~jury shall be polled at the request of any party or upon the court's own motion.~~ If ~~upon~~ the poll reveals a lack of unanimity ~~there is not unanimous concurrence~~, the court may direct the jury ~~may be directed~~ to deliberate ~~retire for~~ further ~~deliberations~~ or may declare a mistrial ~~be discharged~~ and discharge the jury.

* * * * *

COMMITTEE NOTE

The right of a party to have the jury polled is an "undoubted right." *Humphries v. District of Columbia*, 174 U.S. 190, 194 (1899). Its purpose is to determine with certainty that "each of the jurors approves of the verdict as returned; that no one has been coerced or induced to sign a verdict to which he does not fully assent." *Id.*

Currently, Rule 31(d) is silent on the precise method of polling the jury. Thus, a court in its discretion may conduct the poll collectively or individually. As one court has noted, although the prevailing view is that the method used is a matter within the discretion of the trial court, *United States v. Miller*, 59 F.3d 417, 420 (3d Cir. 1995) (citing cases), the preference, nonetheless of the appellate and trial courts, seems to favor

individual polling. *Id.* (citing cases). That is the position taken in the American Bar Association Standards for Criminal Justice § 15-4.5. Those sources favoring individual polling observe that conducting a poll of the jurors collectively saves little time and does not always adequately insure that an individual juror who has been forced to join the majority during deliberations will voice dissent from a collective response. On the other hand, an advantage to individual polling is the "likelihood that it will discourage post-trial efforts to challenge the verdict on allegations of coercion on the part of some of the jurors." *Miller*, *Id.* at 420 (citing *Audette v. Isaksen Fishing Corp.*, 789 F.2d 956, 961, n. 6 (1st Cir. 1986)).

The Committee is persuaded by the authorities and practice that there are advantages of conducting an individual poll of the jurors. Thus, the rule requires that the jurors be polled individually when a polling is requested, or when polling is directed sua sponte by the court. The amendment, however, leaves to the court the discretion as to whether to conduct a separate poll for each defendant, each count of the indictment or complaint or on other issues.

Summary of Comments--Rule 31

Judge Franklin S. V. Antwerpen (CR-002)
United States District Court
Eastern District of Pennsylvania
Sept. 27, 1996

Judge Antwerpen strongly urges that the word "individually" be stricken from the proposed amendment. He believes that without striking that word, the amendment would cast doubt on the validity of polling by conduct, a practice followed in his area. He also expresses concern that the use of the word "individually" could be interpreted to require naming individuals who are serving on anonymous juries in major criminal cases.

Judge Michael S. Kanne (CR-006)
United States Court of Appeals
Chicago, Illinois
Oct. 31, 1996

While supporting the amendment as appropriate, Judge Kanne suggests that rather than using "it is recorded" as appears in lines 2 and 3, the Committee should substitute " before the jury has dispersed." This has been a confusing issue in the past. Judge Kanne cites *United States v.*

Marinari, 32 F.3rd 1209 (7th Cir. 1994) to demonstrate that the recording of a verdict is defined as occurring "upon separation and dispersal of the jury".

Judge Jerry Buchmeyer (CR-010)
United States District Court
Northern District of Texas
Nov. 15, 1996

Judge Buchmeyer, on behalf of the judges in the Northern District of Texas, *opposes* the amendment. He states that he doubts that the additional time is warranted by the minimal concern that individual jurors will hesitate to voice their dissent when polled as part of a collective body. Moreover, it should be left to the judge's discretion.

David Long (CR-013)
State Bar of California
San Francisco, CA
Feb. 27, 1996

Mr. Long, through Ms. Ruth L. Robinson of the Litigation Committee, supports the amendment, indicating that the change will minimize coercion and diminishes the possibility that post-trial efforts to attack the verdict on certain grounds will be successful.

Ms. Carol A. Brook (CR-015)
Federal Defender Advisory Committee's Subcommittee on Legislation
Northern District of Illinois
February 13, 1997

Ms. Brook commends the Committee concerning this amendment, and recommends, however, that the Committee make polling mandatory to avoid litigation should a judge fail to poll the jury. She cites *United States v. Randle*, 966 F.2d 1209 (7th Cir. 1992) as an example of such litigation.

Mr. George E. Tragos (CR-017)
Chair, Federal Court Practice Committee's Subcommittee on Criminal Rules
Florida Bar Association
Feb. 10, 1997

The Federal Bar Assocation supports the proposed amendment to Rule 31.

Carol A. Brook and William J. Genego (CR-018)
Co-Chairs, National Association of Criminal Defense Lawyers Committee on Rules of Procedure
Washington, DC
Feb. 14, 1997

Ms. Brook and Mr. Genego support the proposed amendment, but suggest that it should be done in all cases, not just when requested by a party or done sua sponte by the court.

Hon. Dana E. McDonald (CR-019)
President, Federal Bar Association
Washington, DC
Feb. 12, 1997

Judge McDonald indicates that the Federal Bar Association supports the proposed amendment. Individual polling substantially reduces post-trial efforts to overturn the verdict on the ground that a juror was coerced into voting for a conviction.

Mr. David C. Long (CR-020)
Director, Office of Research,
State Bar of California
March 4, 1997

Mr. Long's committee endorses the amendment.

E. S. Swearingen (CR-021)
United States Magistrate Judge
President, Federal Magistrate Judges Association
March 7, 1997

Judge Swearingen supports the amendment. It will eliminate any uncertainty which arises out of the silence of the current Rule on this subject.

GAP Report--Rule 31

The Committee changed the rule to require that any polling of the jury must be done before the jury is discharged and it incorporated suggested style changes submitted by the Style Subcommittee.

Rule 33. New Trial.

On a defendant's motion, the court ~~The court on motion of a defendant~~ may grant a new trial to that defendant if ~~required in the interest of justice.~~ the interests of justice so require. If trial was by the court without a jury, the court may--on defendant's motion for new trial--~~motion of a defendant for a new trial may~~ vacate the judgment, ~~if entered~~, take additional testimony, and direct the entry of a new judgment. A motion for new trial based on ~~the ground of~~ newly discovered evidence must ~~may~~ be made ~~only before or~~ within three ~~two~~ years after ~~final judgment,~~ the verdict or finding of guilty. ~~but~~ 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~~ must be made within 7 days after the verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

COMMITTEE NOTE

As currently written, the time for filing a motion for new trial on the ground of newly discovered evidence runs from the "final judgment." The courts, in interpreting that language, have uniformly concluded that that language refers to the action of the Court of Appeals. *See, e.g., United States v. Reyes*, 49 F.3d 63, 66 (2d Cir. 1995)(citing cases). It is less clear whether that action is the appellate court's judgment or the issuance of its mandate. In *Reyes*, the court concluded that it was the latter event. In either case, it is clear that the present approach of using the appellate court's final judgment as the triggering event can cause great disparity in the amount of time available to a defendant to file timely a motion for new trial. This would be especially true if, as noted by the Court in *Reyes*, *supra* at 67, an appellate court stayed its mandate pending review by the Supreme Court. *See also Herrera v. Collins*, 113 S.Ct. 853, 865-866 (1993)(noting divergent treatment by States of time for filing motions for new trial).

It is the intent of the Committee to remove that element of inconsistency by using the trial court's verdict or finding of guilty as the triggering event. The change also furthers internal consistency within the rule itself; the time for filing a motion for new trial on any other ground currently runs from that same event.

Finally, the time to file a motion for new trial based upon newly discovered evidence is increased to three years to compensate for what would have otherwise resulted in less time than that currently contemplated in the rule for filing such motions.

Summary of Comments--Rule 33

Professor Margery B. Koosed (CR-008)
Professor of Law, University of Akron
Akron, Ohio
Nov. 9, 1996

Professor Koosed opposes the shortening of the time period for presentation of newly discovered evidence of innocence, suggesting a period even longer than the three year period the Committee considered and rejected. She writes that the truth often will come out, but that it often

takes longer than two years, citing scientific studies, and a Congressional staff report to support her position.

Paul M. Rashkind (CR-012)
Federal Public Defender, Chief of Appeals
Southern District of Florida
Feb. 4, 1997

Mr. Rashkind opposes the amendment. He states that the rationale for the proposal is not well founded, the change will lead inevitably to duplication of court proceedings, and increase the cost of post-conviction litigation. Regarding the suggestion that the amendment offers consistency and uniformity in the filing deadlines for all types of motions for new trials, Mr. Rashkind makes a strong point that there is good reason to treat newly discovered evidence differently that the other motions, in which they involve issues and facts presently in the record. Furthermore, if the amendment were adopted, defense lawyers would be forced to conduct both an appeal preparation and investigation for new evidence simultaneously, due to the time constraint.

David Long (CR-013)
State Bar of California
San Francisco, CA
Feb. 27, 1996

Mr. Long, through Ms. Ruth L. Robinson of the Litigation Committee, opposes the amendment, stating that it is arbitrary in its imposition of uniformity, and would inure harshly to the detriment of the convicted criminal defendant, particularly those unable to devote resources to the investigation of new evidence during the pendency of the appeal.

Charles D. Weisselberg (CR-014)
University of Southern California Law School
Los Angeles, CA
Feb. 13, 1997

Mr. Weisselberg and a group of 9 law professors oppose the amendment but offer an alternative. He suggests rather than the current two year period, the Rule should read "A motion for a new trial based on the ground of newly discovered evidence may be made only within two years after the verdict or finding of guilty or, if an appeal is taken, within one year after the court of appeal's mandate is filed in the district court,

whichever is later." He is concerned about the defense attorney having to research for new evidence, perhaps filing a pro forma motion for new trial, simultaneous with his appellate efforts. This could waste judicial time, and would likely waste defense efforts.

Ms. Carol A. Brook (CR-015)
Federal Defender Advisory Committee's Subcommittee on Legislation
Northern District of Illinois
February 13, 1997

Ms. Brook opposes the amendment, favoring that instead, the Committee clarify in the current Rule that the two year time period is to run from the judgment of the Court of Appeals. She also expresses concerns that if the amendment were adopted, defense attorneys would be forced to prepare for appeals and investigate for new evidence simultaneously. Other questions raised: Would the remand of the appeal to hear the newly discovered evidence issue permit the appeal to go back up? Would it go back up with the addition of the newly discovered evidence issue?

William W. Taylor, III, Chairperson (CR-016)
ABA Criminal Justice Section
Washington DC
Feb. 14, 1997

The Criminal Justice Section of the ABA opposes the amendment. They believe that it is a trap for unwary attorneys who don't understand that they can file a motion for new trial and pursue an appeal simultaneously. Also, the amendment would force many defendants to file pro forma "protective" new trial motions while an appeal is pending, leading to a waste of judicial resources. The Section proposes an alternative. They suggest that if the Rule is amended, it should allow a new trial motion to be filed within a reasonable period, six months, after the conclusion of the appeal, or within two years of the verdict, whichever is later. When a defendant can make an appropriate showing of extraordinary circumstances, a new motion be permitted after the expiration of this period.

Mr. George E. Tragos (CR-017)
Chairman of the Federal Court Practice Committee's Subcommittee on Criminal Rules
Florida Bar Association
Feb. 10, 1997

Mr. Tragos, on behalf of the Florida Bar Association, supports the proposed amendment to Rule 33.

Carol A. Brook and William J. Genego (CR-018)
Co-Chairs, National Association of Criminal Defense Lawyers Committee on Rules of Procedure
Washington, DC
Feb. 14, 1997

Ms. Brook and Mr. Genego oppose the proposed amendment. Their major concern is that it drastically cuts back the time within which a person who discovers new evidence demonstrating that he or she was wrongly convicted can have that fundamental mistake addressed by a court, and that the only competing justification for the amendment is consistency. They believe that all arbitrary limits on the time within which a demonstration of innocence will permit an erroneous conviction to be overturned should be abolished. Moreover, even if adopted, the term "final judgment" will likely lead to confusion. They also refer to the duplication of the defense attorney's efforts in the appellate process and simultaneously investigating new evidence.

Hon. Dana E. McDonald (CR-019)
President, Federal Bar Association
Washington, DC
Feb. 12, 1997

Mr. McDonald indicates that the Federal Bar Association concludes that the proposed amendment should be supported. The amendment would bring about the desired consistency, and end the great disparity in the running of the time for an appeal.

Mr. David C. Long (CR-020)
Director, Office of Research,
State Bar of California
March 4, 1997

Mr. Long's committee does not endorse the amendment.

E. S. Swearingen (CR-021)
United States Magistrate Judge
President, Federal Magistrate Judges Association
March 7, 1997

Judge Swearingen indicates support of the amendment. It will eliminate the perverse incentive to appeal simply to stretch out the time frame within which to file a motion for new trial.

GAP Report--Rule 33

The Advisory Committee changed the proposed amendment to require that any motions for new trials based upon newly discovered evidence must be filed within *three* years, instead of two years, from the date of the verdict. The Committee also incorporated changes offered by the Style Subcommittee.

Rule 35. Correction or Reduction of Sentence

* * * * *

(b) REDUCTION OF SENTENCE FOR SUBSTANTIAL ASSISTANCE ~~CHANGED CIRCUMSTANCES~~. ~~The court, on motion of~~ If the Government so moves ~~made~~ within one year after ~~the imposition of~~ the sentence~~,~~ is imposed, the court may reduce a sentence to reflect a defendant's subsequent, substantial assistance in ~~the investigation or prosecution of~~ investigating or prosecuting another person, ~~who has committed an offense,~~ in accordance with the guidelines and policy statements issued by the Sentencing Commission under 28 U.S.C. § 994. ~~pursuant to section 994 of title 28, United States Code.~~ The court may

consider a government motion to reduce a sentence made one year or more after ~~imposition of~~ the sentence is imposed if ~~where~~ the defendant's substantial assistance involves information or evidence not known by the defendant until one year or more after ~~imposition of~~ sentence is imposed. In evaluating whether substantial assistance has been rendered, the court may consider the defendant's pre-sentence assistance. ~~The court's authority to reduce a sentence under this subsection subdivision includes the authority to~~ In applying this subdivision, the court may reduce ~~such~~ the sentence to a level below that established by statute as a minimum sentence.

* * * * *

COMMITTEE NOTE

The amendment to Rule 35(b) is intended to fill a gap in current practice. Under the Sentencing Reform Act and the applicable guidelines, a defendant who has provided "substantial" assistance to the Government before sentencing may receive a reduced sentence under United States Sentencing Guideline § 5K1.1. And a defendant who provides substantial assistance after the sentence has been imposed may receive a reduction of the sentence if the Government files a motion under Rule 35(b). In theory, a defendant who has provided substantial assistance both before and after sentencing could benefit from both § 5K1.1 and Rule 35(b). But a defendant who has provided, on the whole, substantial assistance may not be able to benefit from either provision because each provision requires "substantial assistance." As one court has noted, those two provisions contain distinct "temporal boundaries." *United States v. Drown*, 942 F.2d 55, 59 (1st Cir. 1991).

Although several decisions suggest that a court may aggregate the defendant's pre-sentencing and post-sentencing assistance in determining whether the "substantial assistance" requirement of Rule 35(b) has been

met, *United States v. Speed*, 53 F.3d 643, 647-649 (4th Cir. 1995)(Ellis, J. concurring), there is no formal mechanism for doing so. The amendment to Rule 35(b) is designed to fill that need. Thus, the amendment permits the court to consider, in determining the substantiality of post-sentencing assistance, the defendant's pre-sentencing assistance, irrespective of whether that assistance, standing alone, was substantial.

The amendment, however, is not intended to provide a double benefit to the defendant. Thus, if the defendant has already received a reduction of sentence under U.S.S.G. § 5K1.1 for substantial pre-sentencing assistance, he or she may not have that assistance counted again in any Rule 35(b) motion.

Summary of Comments--Rule 35

Paul M. Rashkind (CR-012)
Federal Public Defender, Chief of Appeals
Southern District of Florida
Feb. 4, 1997

Mr. Rashkind supports the amendment, stating that it will fill a gap between U.S. Sentencing Guideline section 5K1.1 and current Rule 35(b).

David Long (CR-013)
State Bar of California
San Francisco, CA
Feb. 27, 1996

Mr. Long, through Ms. Ruth L. Robinson of the Litigation Committee, supports the amendment, stating that it fills a gap and provides flexibility to the prosecution in seeking information. Further, it provides the court more discretion in its sentencing decisions.

Ms. Carol A. Brook (CR-015)
Federal Defender Advisory Committee's Subcommittee on Legislation
Northern District of Illinois
February 13, 1997

Ms. Brook states that the amendment does an admirable job of filling the gap pointed out by the committee, but fears that the last sentence in the Committee Note prohibiting judges from double counting substantial assistance may create more problems than it solves. Judges do not

currently make findings of fact on substantial assistance issues, and it would therefore be difficult to count the previously uncounted assistance. Ms Brook believes that conducting such detailed findings would be an unnecessary use of judicial resources.

William W. Taylor, III, Chairperson (CR-016)
ABA Criminal Justice Section
Washington DC
Feb. 14, 1997

The Criminal Justice Section of the ABA supports the amendment. Criminal defendants and their attorneys will be able to achieve better or fairer results, and the prosecution may see more guilty pleas and more information with which to bring others to justice. The Section does raise the red flag concerning the Committee Note sentence regarding "double benefit". The Note does not consider the potential of the prosecutor withholding affirmative action on a U.S. Sentencing Guidelines section 5K1.1 motion as "incentive" for a defendant's providing continuing or more assistance/cooperation in the hope of securing a reduction in the future pursuant to Rule 35. The Section recommends two amendments to Rule 35. The first would be to eliminate the need for the government to initiate the motion for consideration of post sentence assistance, and allow the defense or the court to so move. The second would be to eliminate the one year requirement from the Rule. It can take the prosecution longer to conclude that there really is something to what the defendant provided.

Mr. George E. Tragos (CR-017)
Chairman of the Federal Court Practice Committee's Subcommittee on Criminal Rules
Florida Bar Association
Feb. 10, 1997

Mr. Tragos supports the proposed amendment to Rule 35--on behalf of the Florida Bar Association.

Carol A. Brook and William J. Genego (CR-018)
Co-Chairs, National Association of Criminal Defense Lawyers Committee on Rules of Procedure
Washington, DC
Feb. 14, 1997

Ms. Brook and Mr. Genego support the proposed amendment, but state that the portion of the Committee Note that addresses "double dipping" is both unnecessary and unclear, and should be deleted, as it is both unnecessary and potentially confusing. They believe that judges can be trusted to exercise good judgment and not reward the same assistance twice. Ms. Brook and Mr. Genego raise three other related items which would benefit from appropriate clarifying amendments. First, the court is not bound or restricted by the reduction recommended by the government. Second, a defendant has the right to be heard, by counsel or otherwise, before the court rules on a Rule 35(b) motion by the government. Third, in acting on a Rule 35(b) motion, the court should be able to consider facts and circumstances beyond the assistance provided by the defendant that have arisen since the original sentencing.

Hon. Dana E. McDonald (CR-019)
President, Federal Bar Association
Washington, DC
Feb. 12, 1997

Mr. McDonald indicates that the Federal Bar Association supports the proposed amendment. The amendment would provide a formal mechanism for aggregating assistance which has occurred before conviction and continues afterwards.

Mr. David C. Long (CR-020)
Director, Office of Research,
State Bar of California
March 4, 1997

Mr. Long's committee endorses the amendment.

E. S. Swearingen (CR-021)
United States Magistrate Judge
President, Federal Magistrate Judges Association
March 7, 1997

Magistrate Judge Swearingen indicates support of the amendment which he believes would allow the court to aggregate the activities of the defendant in determining whether the substantiality requirement of the Rule has been met.

GAP Report--Rule 35

The Committee incorporated the Style Subcommittee's suggested changes.

Rule 43. Presence of the Defendant

* * * * *

(c). PRESENCE NOT REQUIRED. A defendant need not be present:

(1) when represented by counsel and the defendant is an organization, as defined in 18 U.S.C. § 18;

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

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

(4) when the proceeding involves a reduction or correction of sentence under Rule ~~35~~ 35(b) or (c) or 18 U.S.C. § 3582(c).

COMMITTEE NOTE

The amendment to Rule 43(c)(4) is intended to address two issues. First, the rule is rewritten to clarify whether a defendant is entitled to be present at resentencing proceedings conducted under Rule 35. As a result of amendments over the last several years to Rule 35, implementation of the Sentencing Reform Act, and caselaw interpretations of Rules 35 and

43, questions had been raised whether the defendant had to be present at those proceedings. Under the present version of the rule, it could be possible to require the defendant's presence at a "reduction" of sentence hearing conducted under Rule 35(b), but not a "correction" of sentence hearing conducted under Rule 35(a). That potential result seemed at odds with sound practice. As amended, Rule 43(c)(4) would permit a court to reduce or correct a sentence under Rule 35(b) or (c), respectively, without the defendant being present. But a sentencing proceeding being conducted on remand by an appellate court under Rule 35(a) would continue to require the defendant's presence. *See, e.g., United States v. Moree*, 928 F.2d 654, 655-656 (5th Cir. 1991)(noting distinction between presence of defendant at modification of sentencing proceedings and those hearings that impose new sentence after original sentence has been set aside).

The second issue addressed by the amendment is the applicability of Rule 43 to resentencing hearings conducted under 18 U.S.C. § 3582(c). Under that provision, a resentencing may be conducted as a result of retroactive changes to the Sentencing Guidelines by the United States Sentencing Commission or as a result of a motion by the Bureau of Prisons to reduce a sentence based on "extraordinary and compelling reasons." The amendment provides that a defendant's presence is not required at such proceedings. In the Committee's view, those proceedings are analogous to Rule 35(b) as it read before the Sentencing Reform Act of 1984, where the defendant's presence was not required. Further, the court may only reduce the original sentence under these proceedings.

Summary of Comments--Rule 43

Richard A. Rossman, Chair (CR-011)
Standing Committee on United States Courts of the State Bar of Michigan
Detroit, MI
Jan. 28, 1997

Mr. Rossman, as Chairman, is opposed to this amendment. He feels it is drafted too broadly. He points out that there is a difference between a technical or ministerial correction of a sentence, where a defendant's presence is not required, and a post sentencing hearing on a government's motion to reduce sentence where a defendant's presence may be important. The latter may be a critical stage in the prosecution and thus a defendant would have the right to be present.

Paul M. Rashkind (CR-012)
Federal Public Defender, Chief of Appeals
Southern District of Florida
Feb. 4, 1997

Mr. Rashkind would reject the amendment. If the defendant is present at the sentence reduction proceeding, the sentencing judge is best able to ensure that the court is fully advised about all relevant factors before deciding whether to reduce the sentence, and, if so, by what amount. Similarly, in a sentence "correction" proceeding the defendant should be present. In light of the original sentence, the defendant may have elected to forego appeal. The correction may change this, but there is no certainty the defendant would learn of the correction in time to perfect an appeal.

Ms. Carol A. Brook (CR-015)
Federal Defender Advisory Committee's Subcommittee on Legislation
Northern District of Illinois
February 13, 1997

Ms. Brooks strongly opposes the amendment. Where a person is to be deprived of liberty, for whatever reason, fundamental principles of our criminal justice system require that the defendant at least be given the opportunity to be present.

Mr. George E. Tragos (CR-017)
Chairman of the Federal Court Practice Committee's Subcommittee on Criminal Rules
Florida Bar Association
Feb 10, 1997

Mr. Tragos supports the amendment to 43(c)(4) on behalf of the Florida Bar Association.

Carol A. Brook and William J. Genego (CR-018)
Co-Chairs, National Association of Criminal Defense Lawyers Committee on Rules of Procedure
Washington, DC
Feb. 14, 1997

Ms. Brook and Mr. Genego are opposed to the amendment with respect to each of the four circumstances in which it would allow a sentencing proceeding to be conducted in the defendant's absence, because

the amendment does not require that the defendant consent to the proceedings being conducted in his or her absence. Such proceedings may have substantial consequences for a defendant. Furthermore, contrary to Committee Note, the amendment will perpetuate, not eliminate an inconsistency that is "at odds with sound practice". The Note observes that the current Rule does not require defendant's presence for a proceeding to correct a sentence under Rule 35(a), but would for a sentence reduction under Rule 35(b). The perceived inconsistency would best be resolved by not allowing either proceeding to be conducted in the defendant's absence, unless he or she consents.

Hon. Dana E. McDonald (CR-019)
President, Federal Bar Association
Washington, DC
Feb. 12, 1997

Judge McDonald indicates that the Federal Bar Association supports the proposed amendment. The amendment clarifies that the defendant need not be present when the sentence is reduced under Rule 35(b). Because proceedings to reduce or correct a sentence under Rules 35(b) and (c) can only inure to the benefit of the defendant, the necessity of his personal appearance seems superfluous.

Mr. David C. Long (CR-020)
Director, Office of Research,
State Bar of California
March 4, 1997

Mr. Long's committee endorses the amendment if it is modified to require that the defendant be afforded the opportunity to appear at the reduction/correction hearing..

E. S. Swearingen (CR-021)
United States Magistrate Judge
President, Federal Magistrate Judges Association
March 7, 1997

Judge Swearingen indicates support of the amendment. The amendment would correct the "illogical result" that currently exists--"that potential result seemed at odds with sound practice".

GAP Report--Rule 43

The Committee made no changes to the draft amendment as published.

III. Action Items--Recommendations to Publish Proposed Amendments for Public Comment

At its April 1997, meeting the Advisory Committee considered proposed amendments to Rules 6 (Grand Jury), Rule 11 (Pleas), Rule 24(c) (Alternate Jurors), Rule 30 (Instructions), and Rule 54 (Application and Exception). As noted in the following discussion, the Committee recommends that these proposed amendments be published for comment by the bench and the bar.

A. Summary and Recommendations

1. ACTION ITEM--Rule 6. The Grand Jury.

The Committee has proposed two amendments to Rule 6. The first, in Rule 6(c) would make provision for interpreters for deaf jurors to take part in the deliberations; under the current rule, no persons other than the jurors themselves may be present. The second amendment would change Rule 6(f) regarding the return of an indictment. Under current practice the entire grand jury is required to return the indictment in open court. The proposed change would permit the grand jury foreperson to return the indictment in open court--on behalf of the grand jury. In drafting the amendment, the Committee incorporated some of the suggested style changes submitted by the Subcommittee on Style; one change, which would have made a substantive change regarding the return of an indictment if a complaint or information was pending, was not accepted.

Recommendation: The Advisory Committee recommends that the proposed amendments to Rule 6 be published for public comment by the bench and bar.

2. ACTION ITEM--Rule 11. Pleas

The proposed amendments to Rule 11 reflect the Committee's discussion over the last year concerning the interplay between the sentencing guidelines and plea agreements and the ability of a defendant to waive any attacks on his or her sentence.

Specifically, Rule 11(a) has been changed slightly to conform the definition of organizational defendants and Rule 11(c) would be amended to require the trial court to determine if the defendant understands any provision in the plea agreement waiving the right to appeal or to collaterally attack the sentence.

The proposed change in Rule 11(e)(1) is intended to distinguish clearly between (e)(1)(B) plea agreements--which are not binding on the court--and (e)(1)(C) agreements--which are binding. Other language has been added to those subdivisions to make it clear that a plea agreement may include an agreement as to a sentencing range, sentencing guideline, sentencing factor, or policy statement. The proposed language includes suggested changes by the Subcommittee on Style.

The Committee considered but ultimately decided to defer proposing an amendment which might address the issue raised in *United States v. Hyde*, 82 F.3d 319 (9th Cir. 1996), as amended at 92 F.3d 779 (9th Cir. 1996). In that case, the Court concluded that until the trial court accepts or rejects both the plea and the plea agreement, the plea is not final. In the Committee's view, that holding directly conflicts with the clear language of Rules 11 and 32 concerning acceptance of pleas. The Supreme Court granted cert. and has heard oral arguments on the case.

Recommendation: The Advisory Committee recommends that the proposed amendments to Rule 11 be published for public comment by the bench and bar.

3. ACTION ITEM--Rule 24(c). Alternate Jurors

The proposed amendment to Rule 24(c) would permit the trial court to retain alternate jurors--who during the trial have not been selected as substitutes for regular jurors--during the deliberations in case any other regular juror becomes incapacitated and can no longer take part. Although Rule 23 makes provision for returning a verdict with 11 jurors, the Committee believed that the judge should have the discretion in a particular case to retain the alternates, a practice not provided for under the current rule. The proposed amendment also includes changes suggested by the Style Subcommittee.

Recommendation: The Advisory Committee recommends that the proposed amendments to Rule 24(c) be published for public comment by the bench and bar.

4. ACTION ITEM--Rule 30. Instructions.

The proposed amendment to Rule 30 would permit the trial court, in its discretion, to require or permit the parties to file any requests for instructions before trial. When it studied the local rules last year, the Committee noted that a number of courts currently include such a provision in their rules. Instead of adopting a national rule which would require pretrial filing of requests in all cases,

the Committee proposes that the matter be left to court's discretion. The draft includes changes suggested by the Style Subcommittee.

Recommendation: The Advisory Committee recommends that the proposed amendments to Rule 54 be published for public comment by the bench and bar.

5. ACTION ITEM--Rule 32.2. Forfeiture Procedures.

The Committee proposes adoption of a new rule dedicated solely to the question of forfeiture proceedings. Over the last several years the Committee has discussed the jury's role in criminal forfeiture. Under existing rules provisions, once a verdict is returned on any count involving forfeiture of property involved in the crime, the jury is asked to decide questions of ownership or property interests vis a vis the defendant(s). However, in *Libretti v. United States*, 116 S.Ct. 356 (1995), the Supreme Court indicated that criminal forfeiture constitutes an aspect of the sentence imposed in the case and that the defendant has no constitutional right to have a jury decide any part of the sentence. Accordingly, the Department of Justice recommended a streamlined process which would leave the issue of criminal forfeiture to the court. The Committee finally settled on proposing one new rule. The adoption of this new rule would require the abrogation of Rules 7(c)(2), 31(e), and 32(d)(2). Rule 38(e) would be amended by striking "3554" and striking "Criminal Forfeiture" in the rule's heading. The draft includes changes suggested by the Style Subcommittee.

Recommendation: The Advisory Committee recommends that the proposed Rule 32 be published for public comment by the bench and bar.

6. ACTION ITEM--Rule 54. Application and Exception

The proposed amendment to Rule 54 is a minor change reflecting the fact that the Canal Zone court no longer exists. The Committee considered, but deferred, a proposal from one of the members of the Style Subcommittee to delete the references to the Supreme Court and the Courts of Appeals as being obsolete.

Recommendation: The Advisory Committee recommends that the proposed amendments to Rule 54 be published for public comment by the bench and bar.

B. Proposed Draft Amendments and Advisory Committee Notes to Rules 6, 11, 24, 30, 32.2 and 54.

Rule 6. The Grand Jury

* * * * *

(d) WHO MAY BE PRESENT

(1) While Grand Jury is in Session. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session~~,~~.

(2) During Deliberations and Voting. ~~but no~~ No person other than the jurors, and any interpreter necessary to assist a deaf juror, may be present while the grand jury is deliberating or voting.

* * * * *

(f) FINDING AND RETURN OF INDICTMENT. A grand jury may indict ~~An indictment may be found~~ only upon the concurrence of 12 or more jurors. The indictment must ~~shall~~ be returned by the grand jury ,or through the foreperson or deputy foreperson on its behalf, to a federal magistrate judge in open court. If a complaint or information is pending against the defendant and 12 jurors do not vote to indict ~~concur in finding an indictment~~, the foreperson shall so report to a federal magistrate in writing as soon as possible ~~forthwith~~.

COMMITTEE NOTE

Subdivision 6(d). As currently written, Rule 6(d) absolutely bars any person, other than the jurors themselves, from being present during the jury's deliberations and voting. Accordingly, interpreters are barred from attending the deliberations and voting by the grand jury, even though they may have been present during the taking of testimony. The amendment is intended to permit interpreters to assist any deaf persons who may be serving on a grand jury. Although the Committee believes that the need for secrecy of grand jury deliberations and voting is paramount, permitting such interpreters in the process seems a reasonable accommodation. *See also United States v. Dempsy*, 830 F.2d 1084 (10th Cir. 1987) (constitutionally rooted prohibition of non-jurors being present during deliberations was not violated by interpreter for deaf petit jury member). The subdivision has also been restyled and reorganized.

Subdivision 6(f). The amendment to Rule 6(f) is intended to avoid the problems associated with bringing the entire jury to the court for the purpose of returning an indictment. Although the practice is long-standing, in *Breese v. United States*, 226 U.S. 1 (1912), the Court rejected the argument that the requirement was rooted in the Constitution and observed that if there were ever any strong reasons for the requirement, "they have disappeared, at least in part." 226 U.S. at 9. The Court added that grand jury's presence at the time the indictment was presented was a defect, if at all, in form only. *Id.* at 11. Given the problems of space, in some jurisdictions, the grand jury sits in a building completely separated from the courtrooms and in those cases, moving the entire jury to the courtroom for the simple process of presenting the indictment may prove difficult and time consuming. Even where the jury is in the same location, having all of the jurors present can be unnecessarily cumbersome in light of the fact that filing of the indictment requires a certification as to how the jurors voted.

The amendment provides that the indictment must be presented either by the jurors themselves, as currently provided for in the rule, or by the foreperson or the deputy foreperson, acting on behalf of the jurors. In an appropriate case, the court might require all of the jurors to be present if it had inquiries about the indictment.

Rule 11. Pleas

(a) ALTERNATIVES.

(1) *In General.* A defendant may plead ~~not~~ guilty, not guilty, or nolo contendere. If a defendant refuses to plead, or if a defendant ~~corporation~~ organization, as defined in 18 U.S.C. § 18, fails to appear, the court shall enter a plea of not guilty.

* * * * *

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

* * * * *

(6) the terms of any provision in a plea agreement waiving the right to appeal or to collaterally attack the sentence.

* * * * *

(e) PLEA AGREEMENT PROCEDURE.

(1) *In General.* The attorney for the government and the attorney for the defendant--or the defendant when acting pro se-- may discuss ~~engage in discussions with a view toward reaching~~ an agreement that, upon the defendant's entering ~~of~~ a plea of guilty or nolo contendere to a charged offense, or to a lesser

or related offense, the attorney for the government will: ~~do any of the following:~~

(A) move to dismiss ~~for dismissal of~~ other charges; or

(B) recommend, ~~make a recommendation,~~ or agree not to oppose the defendant's request, ~~for~~ a particular sentence , or sentencing range, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable to the case. Any such ~~with the understanding that such~~ recommendation or request is ~~shall~~ not ~~be~~ binding on ~~upon~~ the court; or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case ,or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable to the case. Such a plea agreement is binding on the court once it is accepted by the court.

The court shall not participate in any such discussions.

* * * * *

COMMITTEE NOTE

Subdivision (a). The amendment deletes use of the term "corporation" and substitutes in its place the term "organization," with a reference to the definition of that term in 18 U.S.C. § 18.

Subdivision (c)(6). Rule 11(c) has been amended specifically to reflect the increasing practice of including provisions in plea agreements which require the defendant to waive certain appellate rights. The increased use of such provisions is due in part to the increasing number of direct appeals and collateral reviews challenging sentencing decisions. Given the increased use of such provisions, the Committee believed it was important to insure that first, a complete record exists

regarding any waiver provisions, and second, that the waiver was voluntarily and knowingly made by the defendant. The amendment provides no specific guidance on the content of the court's advice. That is left to the court's discretion and judgment.

Subdivision (e). Amendments have been made to Rule 11(e)(1)(B) and (C) to reflect the impact of the Sentencing Guidelines on guilty pleas. Although Rule 11 is generally silent on the subject, it has become clear that the courts have struggled with the subject of guideline sentencing vis a vis plea agreements, entry and timing of guilty pleas, and the ability of the defendant to withdraw a plea of guilty. The amendments are intended to address two specific issues.

First, both subdivisions (e)(1)(B) and (e)(1)(C) have been amended to recognize that a plea agreement may specifically address not only what amounts to an appropriate sentence, but also a sentencing guideline, a sentencing factor, or a policy statement accompanying a sentencing guideline or factor. Under an (e)(1)(B) agreement, the government, as before, simply agrees to make a recommendation to the court, or agrees not to oppose a defense request concerning a particular sentence or consideration of a sentencing guideline, factor, or policy statement. The amendment makes it clear that this type of agreement is not binding on the court. And under an (e)(1)(C) agreement, the government and defense have actually agreed on what amounts to an appropriate sentence or have agreed to one of the specified components. The amendment also makes it clear that this agreement is binding on the court once the court has accepted it.

Rule 24. Trial Jurors

* * * * *

(c) ALTERNATE JURORS.

(1) *In General.* The court may empanel no ~~direct that not~~ more than 6 jurors, in addition to the regular jury, ~~be called and impanelled~~ to sit as alternate jurors. An alternate juror, ~~Alternate jurors~~ in the order in which they are called, shall replace a juror ~~jurors~~ who, ~~prior to the time the jury retires to consider its verdict,~~ becomes or is found ~~become or are found~~ to be unable or disqualified to perform juror ~~their~~ duties. Alternate jurors must ~~shall~~ (i) be drawn in the same manner, ~~shall~~ (ii) have the same qualifications, ~~shall~~ (iii) be subject to the same examination and challenges, and ~~shall~~ (iv) take the same oath as regular jurors. An alternate juror has ~~and shall have~~ the same functions, powers, facilities and privileges as a regular juror. ~~the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict.~~

(2) *Peremptory Challenges.* In addition to challenges otherwise provided by law, each ~~Each~~ side is entitled to 1 additional peremptory challenge ~~in addition to those otherwise allowed by law~~ if 1 or 2 alternate jurors are empaneled ~~to be impanelled~~, 2 additional peremptory challenges if 3 or 4 alternate jurors are to be empaneled ~~impanelled~~, and 3 additional peremptory challenges if 5 or 6 alternate jurors are empaneled ~~to be impanelled~~. The additional peremptory challenges may

be used to remove ~~against~~ an alternate juror only, and the other peremptory challenges allowed by these rules may not be used to remove ~~against~~ an alternate juror.

(3) *Discharge*. When the jury retires to consider the verdict, the court in its discretion may retain the alternate jurors during deliberations. If the court decides to retain the alternate jurors, it must ensure that they do not discuss the case with any other person unless and until they replace a regular juror during deliberations.

COMMITTEE NOTE

As currently written, Rule 24(c) explicitly requires the court to discharge all of the alternate jurors--who have not been selected to replace other jurors--when the jury retires to deliberate. That requirement is grounded on the concern that after the case has been submitted to the jury, its deliberations must be private and inviolate. *United States v. Houlihan*, 92 F.3d 1271, 1285 (1st Cir. 1996), *citing United States v. Virginia Election Corp.*, 335 F.2d 868, 872 (4th Cir. 1964).

Rule 23(b) provides that in some circumstances a verdict may be returned by less than twelve jurors. There may be cases, however, where it is better to retain the alternates when the jury retires, insulate them from the deliberation process, and have them available should one or more vacancies occur in the jury. That might be especially appropriate in a long, costly, and complicated case. To that end the Committee believed that the court should have the discretion to decide whether to retain or discharge the alternates at the time the jury retires to deliberate.

In order to protect the sanctity of the deliberative process, the rule requires the court to take appropriate steps to insulate the alternate jurors. That may be done, for example, by separating the alternates from the deliberating jurors, instructing the alternate jurors about with any other person until they replace a regular juror. *See, e.g.*, *United States v. Olano*, 113 S.Ct. 1770 (1993) (not plain error to permit alternate jurors to sit in during deliberations); *United States v. Houlihan*, 92 F.3d 1271, 1286-88 (1st Cir. 1996) (harmless error to retain

alternate jurors in violation of Rule 24(c); in finding harmless error the court cited the steps taken by the trial judge to insulate the alternates). If alternates are used, the jurors must be instructed that they must begin their deliberations anew.

Finally, the rule has been reorganized and restyled.

Rule 30. Instructions

Any party may request in writing that the court instruct the jury on the law as specified in the request. The request may be made ~~At~~ at the close of the evidence, or at ~~such~~ any earlier time that ~~as~~ the court reasonably directs. ~~, any party may file written requests that the court instruct the jury on the law as set forth in the requests~~. At the same time, a copy of the request must be furnished to all other parties. ~~copies of such requests shall be furnished to all parties.~~ Before closing arguments, the ~~The~~ court shall inform counsel of its proposed action on the requests ~~upon the requests prior to their arguments to the jury~~. The court may instruct the jury before or after the arguments are completed, or at both times. No party may appeal from ~~assign as error~~ any portion of the charge or from anything omitted, ~~omission therefrom~~ unless that party objects ~~thereto~~ before the jury retires to consider its verdict and states ~~, stating~~ distinctly the matter to which objection is made ~~that party objects~~ and the grounds for ~~of~~ the objection. An opportunity must ~~Opportunity shall~~ be given to object ~~make the objection~~ out of the jury's hearing ~~of the jury~~ and, on request ~~of any party~~, out of the jury's presence ~~of the jury~~.

COMMITTEE NOTE

The amendment addresses the timing of requests for instructions. As currently written, the trial court may not direct the parties to file such requests before trial without violating Rules 30 and 57. While the amendment falls short of requiring all requests to be made before trial in all cases, the amendment now permits a court to do so in a particular case or as a matter of local practice under local rules promulgated under Rule 57.

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

32.2. Criminal Forfeiture

(a) *INDICTMENT OR INFORMATION.* No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or information alleges that a defendant has a possessory or legal interest in property that is subject to forfeiture in accordance with the applicable statute.

(b) *HEARING AND ENTRY OF PRELIMINARY ORDER OF FORFEITURE.* As soon as practicable after entering a guilty verdict or accepting a plea of guilty or nolo contendere on any count in the indictment or information for which criminal forfeiture is alleged, the court must determine what property is subject to forfeiture because it is related to the offense. The determination may be based on evidence already in the record, including any written plea agreement, or

on evidence adduced at a post trial hearing. If the property is subject to forfeiture, the court must enter a preliminary order directing the forfeiture of whatever interest each defendant may have in the property, without determining what that interest is. Deciding the extent of each defendant's interest is deferred until any third party claiming an interest in the property has petitioned the court to consider the claim. If no such petition is timely filed, and the court finds that a defendant had a possessory or legal interest, the property is forfeited in its entirety.

(c) *PRELIMINARY ORDER OF FORFEITURE.* When the court enters a preliminary order of forfeiture, the Attorney General may seize the property subject to forfeiture; conduct any discovery as the court considers proper in identifying, locating or disposing of the property; and commence proceedings consistent with any statutory requirements pertaining to third-party rights. At sentencing--or at any time before sentencing if the defendant consents--the order of forfeiture becomes final as to the defendant and must be made a part of the sentence and included in the judgment. The court may include in the order of forfeiture whatever conditions are reasonably necessary to preserve the property's value pending any appeal.

(d) *ANCILLARY PROCEEDING.*

(1) If, as prescribed by statute, a third party files a petition asserting an interest in the forfeited property, the court must conduct an ancillary proceeding. In that proceeding, the court may consider a motion

to dismiss the petition for lack of standing, for failure to state a claim upon which relief can be granted, or for any other ground. For purposes of the motion, the facts set forth in the petition are assumed to be true.

(2) If a Rule 32.2(d)(1) motion to dismiss is denied, or not made, the court may permit the parties to conduct discovery in accordance with the Federal Rules of Civil Procedure to the extent that the court determines such discovery to be necessary or desirable to resolve factual issues before conducting an evidentiary hearing. After discovery ends, either party may ask the court to dispose of the petition on a motion for summary judgment in the manner described in Rule 56 of the Federal Rules of Civil Procedure.

(3) After the ancillary proceeding, the court must enter a final order of forfeiture amending the preliminary order as necessary to account for the disposition of any third-party petition.

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

(e) *STAY OF FORFEITURE PENDING APPEAL.* If the defendant appeals from the conviction or order of forfeiture, the court may stay the order of

forfeiture upon terms that the court finds appropriate to ensure that the property remains available in case the conviction or order of forfeiture is vacated. The stay will not delay the ancillary proceeding or the determination of a third party's rights or interests. If the defendant's appeal is still pending when the court determines that the order of forfeiture must be amended to recognize a third party's interest in the property, the court must amend the order of forfeiture but must refrain from directing the transfer of any property or interest to the third party until the defendant's appeal is final, unless the defendant consents in writing, or on the record, to the transfer of the property or interest to the third party.

(f) *SUBSTITUTE PROPERTY.* If the applicable statute authorizes the forfeiture of substitute property, the court may at any time consider a motion by the government to order forfeiture of substitute property. If the government makes the requisite showing, the court must enter an order forfeiting the substitute property, or must amend an existing preliminary or final order to include that property.

COMMITTEE NOTE

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

Subsection (a). Subsection (a) is derived from Rule 7(c)(2) which provides that notwithstanding statutory authority for the forfeiture of property following a criminal conviction, no forfeiture order may be entered unless the defendant was given notice of the forfeiture in the indictment or information. As courts have held, subsection (a) is not intended to require that an itemized list of the property to be forfeited appear in the indictment or information itself; instead, such an itemization may be set forth in one or more bills of particulars. *See United States v. Moffitt, Zwerling & Kemler, P.C.*, 83 F.3d 660, 665 (4th Cir. 1996), *aff'g* 846

F. Supp. 463 (E.D. Va. 1994) (*Moffitt* I) (indictment need not list each asset subject to forfeiture; under Rule 7(c), this can be done with bill of particulars). The same applies with respect to property to be forfeited only as "substitute assets." *See United States v. Voight*, 89 F.3d 1050 (3rd Cir. 1996) (court may amend order of forfeiture at any time to include substitute assets).

Subsection (b) Subsection (b) replaces Rule 31(e) which provides that the jury in a criminal case must return a special verdict "as to the extent of the interest or property subject to forfeiture." *See United States v. Saccoccia*, 58 F.3d 754 (1st Cir. 1995) (Rule 31(e) only applies to jury trials; no special verdict required when defendant waives jury right on forfeiture issues). After the Rule was promulgated in 1972, changes in the law created several problems.

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

Even before *Libretti*, lower courts had determined that criminal forfeiture is a sentencing matter and concluded that criminal trials therefore should be bifurcated so that the jury first returns a verdict on guilt or innocence and then returns to hear evidence regarding the forfeiture. In the second part of the bifurcated proceeding, the jury is instructed that the government must establish the forfeitability of the property by a preponderance of the evidence. *See United States v. Myers*, 21 F.3d 826 (8th Cir. 1994) (preponderance standard applies because criminal forfeiture is part of the sentence in money laundering cases); *United States v. Voight*, 89 F.3d 1050 (3rd Cir. 1996) (following *Myers*); *United States v. Smith*, 966 F.2d 1045, 1050-53 (6th Cir. 1992) (same for drug cases); *United States v. Bieri*, 21 F.3d 819 (8th Cir. 1994) (same).

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

For these reasons, the proposal replaces Rule 31(e) with a provision that requires the court alone, as soon as practicable after the verdict in the criminal case, to hold a hearing to determine if the property was subject to forfeiture, and to enter a preliminary order of forfeiture.

The second problem with Rule 31(e) concerns the scope of the determination that must be made prior to entering an order of forfeiture. This issue is the same whether the determination is made by the court or by the jury.

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

The notion that the "extent" of the defendant's interest must be established as part of the criminal trial is related to the fact that criminal forfeiture is an *in personam* action in which only the defendant's interest in the property may be forfeited. *United States v. Riley*, 78 F.3d 367 (8th Cir. 1996). When the criminal forfeiture statutes were first enacted in the 1970's, it was clear that a forfeiture of property other than the defendant's could not occur in a criminal case, but there was no mechanism designed to limit the forfeiture to the defendant's interest. Accordingly, Rule 31(e) was drafted to make a determination of the "extent" of the defendant's interest part of the verdict.

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

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

The notice provisions regarding the ancillary proceeding are equivalent to the notice provisions that govern civil forfeitures. *Compare* 21 U.S.C. § 853(n)(1) *with* 19 U.S.C. § 1607(a); *see United States v. Bouler*, 927 F. Supp. 911 (W.D.N.C. 1996) (civil notice rules apply to ancillary criminal proceedings).

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

Thus, the ancillary proceeding has become the forum for determining the extent of the defendant's forfeitable interest in the property. It allows the court to conduct a proceeding in which all parties can participate and which ensures that the property forfeited actually belongs to the defendant.

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

A more sensible procedure would be for the court, once it determines that property was involved in the criminal offense for which the defendant has been convicted, to order the forfeiture of whatever interest a defendant may have in the property without having to determine exactly what that interest is. If third parties assert that they have an interest in all or part of the property, those interests can be adjudicated at one time in the ancillary proceeding.

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

drug/money laundering case who is not alleged to be the owner of the property is considered a third party for the purpose of challenging the forfeiture of the other co-defendant's interest).

The new Rule resolves these difficulties by postponing the determination of the extent of the defendant's interest until the ancillary proceeding. Under this procedure, the court, as soon as practicable after the verdict in the criminal case, would determine if the property was subject to forfeiture in accordance with the applicable statute, e.g., whether the property represented the proceeds of the offense, was used to facilitate the offense, or was involved in the offense in some other way. The determination could be made by the court alone based on the evidence in the record from the criminal trial or the facts set forth in a written plea agreement submitted to the court at the time of the defendant's guilty plea, or the court could hold a hearing to determine if the requisite relationship existed between the property and the offense. It would not be necessary to determine at this stage what interest any defendant might have in the property. Instead, the court would order the forfeiture of whatever interest each defendant might have in the property and conduct the ancillary proceeding. If someone files a claim, the court would determine the respective interests of the defendants versus the third party claimants and amend the order of forfeiture accordingly. On the other hand, if no one files a claim in the ancillary proceeding, the court would enter a final order forfeiting the property in its entirety only after the court makes a finding that one of the defendants had a possessory or legal interest in the property. This corresponds to the requirement under current law, at least as it is interpreted in some courts, in instances where Rule 31(e) applies.

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

Because it is not uncommon for sentencing to be postponed for an extended period to allow a defendant to cooperate with the government in an ongoing investigation, the Rule would allow the order of forfeiture to become final as to the defendant before sentencing, if the defendant agrees to that procedure. Otherwise, the government would be unable to dispose of the property until the sentencing took place.

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

governing motions practice or discovery such as would be available in ordinary civil case.

Experience has shown, however, that ancillary hearings can involve issues of enormous complexity that require years to resolve. *See United States v. BCCI Holdings (Luxembourg) S.A.*, 833 F. Supp. 9 (D.D.C. 1993) (ancillary proceeding involving over 100 claimants and $451 million); *United States v. Porcelli*, CR85-00756 (CPS), 1992 U.S. Dist. LEXIS 17928 (E.D.N.Y Nov. 5, 1992) (litigation over third party claim continuing 6 years after RICO conviction). In such cases, procedures akin to those available under the Federal Rules of Civil Procedure should be available to the court and the parties to aid in the efficient resolution of the claims.

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

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

Finally, subsection (e) provides a rule to govern what happens if the court determines that a third-party claim should be granted but the defendant's appeal is still pending. The defendant, of course, is barred from filing a claim in the ancillary proceeding. *See* 18 U.S.C. § 1963(l)(2); 21 U.S.C. § 853(n)(2). Thus, the court's determination, in the ancillary proceeding, that a third party has an interest in the

property superior to that of the defendant cannot be binding on the defendant. So, in the event that the court finds in favor of the third party, that determination is final only with respect to the government's alleged interest. If the defendant prevails on appeal, he or she recovers the property as if no conviction or forfeiture ever took place. But if the order of forfeiture is affirmed, the amendment to the order of forfeiture in favor of the third party becomes effective.

Subsection (f). Subsection (f) makes clear, as courts have found, that the court retains jurisdiction to amend the order of forfeiture to include substitute assets at any time. *See United States v. Hurley*, 63 F.3d 1 (lst Cir. 1995) (court retains authority to order forfeiture of substitute assets after appeal is filed); *United States v. Voight*, 89 F.3d 1050 (3rd Cir. 1996) (following *Hurley*). Third parties, of course, may contest the forfeiture of substitute assets in the ancillary proceeding. *See United States v.Lester*, 85 F.3d 1409 (9th Cir. 1996).

Rule 54. Application and Exception

(a) COURTS. These rules apply to all criminal proceedings in the United States District Courts; in the District of Guam; in the District Court for the Northern Mariana Islands, except as otherwise provided in articles IV and V of the covenant provided by the Act of March 24, 1976 (90 Stat. 263); and in the District Court of the Virgin Islands; ~~and (except as otherwise provided in the Canal Zone) in the United States District Court for the District of the Canal Zone;~~ in the United States Courts of Appeals; and in the Supreme Court of the United States; except that the prosecution of offenses in the District Court of the Virgin Islands must ~~shall~~ be by indictment or information as otherwise provided by law.

COMMITTEE NOTE

The amendment to Rule 54(a) is a technical amendment removing the reference to the court in the Canal Zone, which no longer exists.

IV. Action Items--Recommendation to Amend 18 U.S.C. 3060(c)

The Advisory Committee has received a suggestion from Magistrate Judge Ervin S. Swearingen who recommended, on behalf of the Federal Magistrate Judges Association (FMJA) that Rule 5(c) and 18 USC § 3060 be amended. His

IV. Action Items--Recommendation to Amend 18 U.S.C. 3060(c)

The Advisory Committee has received a suggestion from Magistrate Judge Ervin S. Swearingen who recommended, on behalf of the Federal Magistrate Judges Association (FMJA) that Rule 5(c) and 18 USC § 3060 be amended. His

proposal and the accompanying materials are at Attachment A. Those materials include proposed language for the rule.

The proposed amendment would address current language in Rule 5(c) regarding the ability of a magistrate judge to grant a continuance for the preliminary examination. As the rule currently reads, a magistrate judge's authority to grant a continuance extends only to those cases where the defendant or accused has consented to the delay. In those cases where the defendant does not consent to the delay, only a district judge may grant the continuance and then only in those cases where the "delay of the preliminary hearing is indispensable to the interests of justice." The attached materials explain the reasons for amending the rule to permit the magistrate judge to grant continuances even in those cases where the defendant does not consent. Chief among the reasons is the argument the magistrate judge's lack of authority can result in unnecessary loss of time.

Assuming that the proposal has merit, the current rule clearly tracks the statutory language in 18 USC § 3060. As stated in § 3060(c), only the district judge may grant a contested request for a continuance of the preliminary examination. Thus, any proposed amendment to Rule 5(c) would be inconsistent with the clear language of the statute.

The Advisory Committee believes that there is merit in the proposal. But in the face of clear statutory language to the contrary, the Committee does not believe it is appropriate to recommend an amendment to Rule 5(c). Nonetheless, the Committee believed the matter should be referred to the Standing Committee with a recommendation that the appropriate parties seek an amendment to 18 U.S.C. 3060(c).

The Committee recommends that the Standing Committee take steps to have 18 U.S.C. 3060(c) amended to permit magistrate judges to grant continuances in preliminary examinations whether or not the defendant consents.

V. Information Items

A. Proposed Amendment to Rule 26. Taking of Testimony

The Committee has considered an amendment to Rule 26 which would conform that rule to Civil Rule 43 regarding the taking of testimony in court through means other than oral testimony. After discussing the rule, however, the Committee decided to defer further consideration of that amendment until it has had an opportunity to discuss further the possibility of receiving testimony by

V. Information Items

A. Proposed Amendment to Rule 26. Taking of Testimony

The Committee has considered an amendment to Rule 26 which would conform that rule to Civil Rule 43 regarding the taking of testimony in court through means other than oral testimony. After discussing the rule, however, the Committee decided to defer further consideration of that amendment until it has had an opportunity to discuss further the possibility of receiving testimony by

electronic transmission from outside the courtroom. A subcommittee will be appointed to address that issue.

B. Pending Amendments to the Criminal Rules; Crime Control Act.

Several provisions in pending legislation would amend the Rules of Criminal Procedure, e.g., Rule 23 regarding the size of juries. The Committee believes strongly that any proposed amendments to the Rules of Criminal Procedure should first go through the process provided for in the Rules Enabling Act. The Committee will continue to monitor any such proposed changes and will discuss any such changes at its October 1997 meeting.

Attachments:

A. Proposal to Amend 18 U.S.C. § 3060(c)
B. Draft Minutes of April 1997 Meeting

EXHIBIT A

FEDERAL MAGISTRATE JUDGES ASSOCIATION

35th Annual Convention – Denver, Colorado
July 8-11, 1997

October 28, 1996

96-CV- C

96-CR-[redacted] F

Peter McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, DC 20544

RE: **Proposed Amendment to Rule 68 of the Federal Rules of Civil Procedure and Rule 5(c) of the Federal Rules of Criminal Procedure.**

Dear Pete:

The Federal Magistrate Judges Association (FMJA) submits two proposed rules changes to the Rules Advisory Committee. These matters were first considered by the Rules Committee of the FMJA chaired by Hon. Carol E. Heckman. The committee members are: Hon. Nancy Stein Nowak, Hon. Anthony Battaglia, Hon. Paul Komives, Hon. Andrew Wistrich, Hon. Thomas Phillips, Hon. Patricia Hemann, Hon. John L. Carroll, and Hon. B. Waugh Crigler. The committee members come from several kinds of districts and have varying types of duties. Many of them consulted with their colleagues in the course of preparing these proposals. The proposals were then reviewed and approved by the Officers and Directors of the FMJA. They reflect the considered position of the magistrate judges as a whole.

The first proposal is an amendment to Rule 68 of the Federal Rules of Civil Procedure, which relates to offers of judgment. The proposal allows the rule to be equally available to plaintiffs and claimants, adds expert witness fees and expenses to costs recoverable under the rule, and advances the timing from more than 10 days before the trial to more than 30 days before trial to reduce last minute settlements.

The second proposal is to amend Rule 5(c) of the Federal Rules of Criminal Procedure as well as 18 U.S.C. § 3060(c). These amendments relate to the ability of a magistrate judge to continue a preliminary examination absent the consent of the defendant. Currently, both of these provisions require a district court, and not a magistrate judge, to make such determinations.

Comments are included with both proposals. We are pleased to have this opportunity to present our proposals for your committee's consideration.

Sincerely,

Ervin S. Swearingen
United States Magistrate Judge
President, FMJA

ESS/gmc
enclosures

Committee Note Re: Proposed Amendments to Rule 5(c), Fed. R. Crim. P, and 18 U.S.C. § 3060 (c)

The proposed amendments to Criminal Rule 5(c) and 18 U.S.C. § 3060 (c) relate to the ability of a magistrate judge to continue the preliminary examination absent the consent of the defendant.

Rule 5 of the Federal Rules of Criminal Procedure entitles a defendant in a felony case to a preliminary examination before a magistrate judge, within a specified period of time. The time for the examination can be continued by a magistrate judge on the consent of the defendant, or in the alternative, upon the order of a district judge showing that extraordinary circumstances exist and that the delay is indispensable to the interests of justice.

Magistrate judges in most districts are frequently called upon to extend the time for the preliminary hearing to allow the parties to discuss pre-indictment disposition. In fact, in many districts, very few preliminary examinations are actually conducted. Under the current statutory provisions, in the circumstances where a defendant is unwilling to consent to a continuance of the hearing date, and the prosecution moves to continue the hearing, the magistrate judge is required to transfer the matter to a district judge for purposes of the contested motion. The motion to continue typically arises on the date set for the preliminary hearing. As a result, a district judge must address the matter that same day. This procedure results in a great consumption of time for the judges, the judicial staff, the marshals, the attorneys, the court interpreters, and the pre-trial service officers. Realistically, providing magistrate judges jurisdiction to hear and determine the contested motion to continue will facilitate the handling of Rule 5 proceedings and conserve the resources of the judiciary and the associated individuals and agencies.

While the committee found no case law specifically limiting magistrate judges from exercising jurisdiction to grant the contested motion to continue, contemporary federal jurisprudence seems to indicate that the decision is outside the jurisdiction of the magistrate judge. This premise is supported by the notes of the Advisory Committee on Rules regarding the 1972 amendments to Fed. R. Crim. P. 54(c)[1] stating that the phrase "judge of the United States" does not include an United States magistrate. This premise is also reflected in The Legal Manual for United States Magistrate Judges, Vol. 1, § 7.02.b, published by the Administrative Office of the Courts, Magistrate Judges Division. Citing 18 U.S.C. § 3060(c) and Fed. R. Crim. P. 5(c), the Legal Manual states, "absent the defendant's consent, the preliminary examination may be continued only upon the order of a United States district judge. The district judge must find that extraordinary circumstances exist and that the delay of the preliminary examination is indispensable to the interests of justice."

The Legal Manual does point out that by local rules a district court could empower a magistrate judge to conduct the hearing on a request for a continuance of the preliminary examination and submit a report and recommendation to a district judge. This, of course, does nothing to save the resources of the involved entities and agencies, or expedite the process, and is not a practical solution to the problem.

In terms of other published works, Kent Sinclair, Jr., Practice Before Federal Magistrates (1995) confirms the contemporary position that "in the absence of defendants consent, a district judge may no less extend these dates" (for preliminary examination). Id. at §409. The cited authority in this instance is again, Fed. R. Crim. P. 5(c). The current statutory framework for this issue has been in effect since 1968. In 1968, 18 U.S.C. § 3060 (c) was amended[2] to clarify procedures with regard to the preliminary examination. Prior to that time, the only statutory

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[1] Fed. R. Crim. P. 54 deals with the application of these rules. Paragraph (c) defines many of the terms used throughout the rules including "federal magistrate judge," "magistrate judge," and "judge of the United States."

[2] The amendment was part of a bill to amend the Federal Magistrates Act, 28 U.S.C. § 631 et seq., with a stated purpose to "abolish the office of U.S. Commissioner and reform the first echelon of the Federal Judiciary into an effective component of a modern scheme of justice by establishing a system of U.S. Magistrates. H.R. 90-1629, 1968 U.S.C.C.A.N. 4252, 1968 W.L. 5307 [Leg. Hist. at *2].

guidance regarding the time for preliminary examination was the reference in Fed. R. Crim. P. 5 which provided that the preliminary examination must be held "within a reasonable time following the initial appearance of an accused". HR 90-1629, 1968 U.S.C.C.A.N. 4252, 1968 WL 5307 [Leg. Hist., at *13 ("House Report")]. The 1968 amendment to 3060(c) introduced the specific outside time limits of 10 (for defendants in custody) and 20 (for defendants on bond or otherwise released) days from the initial appearance for holding the preliminary examination. At that time the amendment also added the provisions with regard to continuances.

The 1968 amendment to 18 U.S.C. § 3060(c) was the subject of discussion in the case of United States v. Green, 305 F. Supp. 125 (S.D.N.Y. 1969).[3] In Green, the Court highlighted that the amendment was precipitated by the routine continuances of the preliminary examination by commissioners (the predecessor of the magistrate judge), under the "reasonable time" standard. Congress moved to insure that a determination on probable cause is made soon after a person is taken into custody.

Review of 18 U.S.C. § 3060 (c) shows a distinction in contrasting the circumstances concerning a continuance by the magistrate judge with the defendant's consent and a continuance absent consent only on an order of a "judge of the appropriate United States district court". This distinction in the statutory language may well be the genesis of the current interpretation. Viewed in light of the 1972 amendments to Fed. R. Crim. P. 54(c) and its definitions, this premise is provided support.

In 1972, in concert with amendments to the Federal Magistrates Act (28 U.S.C. § 631 et seq.), Rule 54(c), Rule 5 was amended to be consistent with 18 U.S.C. §3060(c) concerning the timing of the preliminary examination. As amended in 1972, Rule 5(c) also, specifically discusses the role of the magistrate judge regarding a continuance of the preliminary examination with defendant's consent versus disposition absent consent by "a judge of the United States," supporting the distinction and the limitation in the power of the magistrate judge to grant the opposed continuance.

Interestingly, however, the published Advisory Committee Notes regarding the 1972 amendment to Rule 5 state that the time limits of Rule 5(c) were taken directly from Section 3060 with two exceptions:

> The new language allows delay to be consented to by the defendant only if there is 'a showing of good cause, taking into account the public interest and the prompt disposition of criminal cases'...*The second difference between the new rule and 18 U.S.C.A. §3060 is that the rule allows the decision to grant a continuance to be made by United States magistrate as well as by a judge of the United States.* This reflects the view of the advisory committee that the United States magistrate should have sufficient judicial competence to make decisions such as that contemplated by subdivision (c).

While an argument can be made that the 1972 amendments to Rule 5, and as explained by the Advisory Committee Notes, did confer full jurisdiction to the magistrate judge to continue the preliminary examination, with or without the defendant's consent, this statement is in conflict with the 1972 Advisory Committee notes to Rule 54(c) and the legal culture has maintained the distinction in the authority between magistrate judges and district judges regarding Rule 5(c).

This is an anomaly since the magistrate judge sets the preliminary examination on his or her calendar at the initial appearance in each case,[4] and is the judicial officer rendering the determination of probable cause resulting in the defendant's release or requirement that the defendant proceed

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[3] This case involved an appeal of the district courts dismissal of a criminal complaint for failure of the government to afford the defendant an opportunity for preliminary examination under the former "reasonable time" standard for the hearing of a preliminary examination.

[4] Fed. R. Crim. P. 5(c).

toward trial in the case.[5] While the magistrate judge is empowered to hear and determine probable cause[6] as well as other liberty interest issues[7], this same judicial officer cannot make the decision with regard to the extraordinary circumstances or the interests of justice in an issue where the need for the continuance of a proceeding on this judicial officer's calendar is disputed. Like the Preliminary Examination itself, the magistrate judges order would be reviewable by a district judge.[8]

For all of the foregoing reasons, the proposed amendments would be consistent with the utilization of magistrate judges envisioned by the Congress, would serve in the best interests of judicial economy, and would be consistent with the pre-indictment management of criminal proceedings envisioned in developing the role of United States Magistrate Judge.

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[5] Fed. R. Crim. P. 5.1.

[6] "This procedure is designed to insure that a determination of probable cause is made– by either the magistrate, some other judicial officer, or the grand jury– soon after a person is taken into custody. No citizen should have his liberty restrained, even to the limited extent of being required to post bail or meet other conditions of release, unless some independent judicial determination has been made that the restraint is justified." U.S. v. Green, 305 F. Supp. 125, 132, fn.5 (S.D.N.Y. 1969).

[7] This would include bail determinations and pre-trial detention, 18 U.S.C. § 3142 et. seq.

[8] See United States v. Florida, 165 F. Supp. 318, 331 (E.D.Ark. 1958) and United States v.Vassallo, 282 F. Supp. 928, 929(E.D. Pa. 1968).

§ 3060. Preliminary examination.

(c) With the consent of the arrested person, the date fixed by the judge or magistrate judge[9] for the preliminary examination may be a date later than that prescribed by subsection (b), or may be continued one or more times to a date subsequent to the date initially fixed therefor. In the absence of such consent of the accused, the date fixed for the preliminary hearing may be a date later than that prescribed by subsection (b), or may be continued to a date subsequent to the date initially fixed therefor, only upon the order of a United States magistrate judge or other judge of the appropriate United States district court after a finding that extraordinary circumstances exist, and that the delay of the preliminary hearing is indispensable to the interests of justice. . . .

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[9] This statute was last amended in 1968, prior to the change of name of United States Magistrate to United States Magistrate Judge, effective December 1, 1990. The proposed amendment to section (c) should also include correction so that the term United States magistrate judge is replaced whereever the former term magistrate is used in section (c) and throughout Rule 5.

RULE 5. Initial Appearance Before the Magistrate Judge

(c) **Offenses Not Triable by the United States Magistrate Judge.** . . . With the consent of the defendant and upon a showing of good cause, taking into account the public interest in the prompt disposition of criminal cases, time limits specified in this subdivision may be extended one or more times by a federal magistrate judge. In the absence of such consent by the defendant, time limits may be extended by a United States magistrate judge or other judge of the United States only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice.

§ 3060. Preliminary examination

(a) Except as otherwise provided by this section, a preliminary examination shall be held within the time set by the judge or magistrate pursuant to subsection (b) of this section, to determine whether there is probable cause to believe that an offense has been committed and that the arrested person has committed it.

(b) The date for the preliminary examination shall be fixed by the judge or magistrate at the initial appearance of the arrested person. Except as provided by subsection (c) of this section, or unless the arrested person waives the preliminary examination, such examination shall be held within a reasonable time following initial appearance, but in any event not later than—

(1) the tenth day following the date of the initial appearance of the arrested person before such officer if the arrested person is held in custody without any provision for release, or is held in custody for failure to meet the conditions of release imposed, or is released from custody only during specified hours of the day; or

(2) the twentieth day following the date of the initial appearance if the arrested person is released from custody under any condition other than a condition described in paragraph (1) of this subsection.

(c) With the consent of the arrested person, the date fixed by the judge or magistrate for the preliminary examination may be a date later than that prescribed by subsection (b), or may be continued one or more times to a date subsequent to the date initially fixed therefor. In the absence of such consent of the accused, the date fixed for the preliminary hearing may be a date later than that prescribed by subsection (b), or may be continued to a date subsequent to the date initially fixed therefor, only upon the order of a judge of the appropriate United States district court after a finding that extraordinary circumstances exist, and that the delay of the preliminary hearing is indispensable to the interests of justice.

(d) Except as provided by subsection (e) of this section, an arrested person who has not been accorded the preliminary examination required by subsection (a) within the period of time fixed by the judge or magistrate in compliance with subsections (b) and (c), shall be discharged from custody or from the requirement of bail or any other condition of release, without prejudice, however, to the institution of further criminal proceedings against him upon the charge upon which he was arrested.

(e) No preliminary examination in compliance with subsection (a) of this section shall be required to be accorded an arrested person, nor shall such arrested person be discharged from custody or from the requirement of bail or any other condition of release pursuant to subsection (d), if at any time subsequent to the initial appearance of such person before a judge or magistrate and prior to the date fixed for the preliminary examination pursuant to subsections (b) and (c) an indictment is returned or, in appropriate cases, an information is filed against such person in a court of the United States.

(f) Proceedings before United States magistrates under this section shall be taken down by a court reporter or recorded by suitable sound recording equipment. A copy of the record of such proceeding shall be made available at the expense of the United States to a person who makes affidavit that he is unable to pay or give security therefor, and the expense of such copy shall be paid by the Director of the Administrative Office of the United States Courts.

(June 25, 1948, c. 645, 62 Stat. 819; Oct. 17, 1968, Pub.L. 90–578, Title III, § 303(a), 82 Stat. 1117.)

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December 23, 1996

Honorable Ervin S. Swearingen
United States Magistrate Judge
President, FMJA
P.O. Box 1049
Florence, South Carolina 29503

Dear Judge Swearingen:

Thank you for your letter on behalf of the Federal Magistrate Judges Association proposing amendments to Rule 68 of the Federal Rules of Civil Procedure and Rule 5(c) of the Federal Rules of Criminal Procedure. A copy of your letter will be sent to the chairs and reporters of the Advisory Committees on Civil and Criminal Rules for their consideration.

From 1992 to 1995, the Advisory Committee on Civil Rules spent substantial time studying proposed revisions of Rule 68. A draft proposed amendment together with an extensive Committee Note was prepared, which would have extended the rule to both parties and permitted the shifting of attorney fees under a capped formula. The committee also requested the Federal Judicial Center to survey the bar on their reaction to the proposed amendments to Rule 68. During its many discussions on this subject, the committee considered more modest proposals, including variations of the California offer-of-judgment procedure.

The committee concluded that the proposed amendments and the more modest alternative proposals were subject to abusive gamesmanship. In the end, the committee decided to defer indefinitely further consideration of a proposed revision of Rule 68. For your information, I am enclosing the following committee materials on Rule 68: (1) a copy of the Federal Judicial Center survey; (2) draft proposed amendments to Rule 68 and excerpts of minutes of various committee

meetings on Rule 68 ; and (3) a discussion of the problems with Rule 68 and the many suggested proposals amending it prepared by Professor Edward H. Cooper, the committee's reporter.

We welcome the Federal Magistrate Judges Association's suggestions and appreciate your interest in the rulemaking process.

Sincerely,

for Peter G. McCabe
Secretary

cc: Chairs and Reporters,
Advisory Committees on Civil and Criminal Rules
Agenda and Policy Subcommittee