TO: Hon. Robert E. Keeton, Chairman
Standing Committee on Rules of Practice
and Procedure

FROM: Hon. Wm. Terrell Hodges, Chairman
Advisory Committee on Rules of Criminal Procedure

SUBJECT: Report on Proposed and Pending Rules of
Criminal Procedure and Rules of Evidence

DATE: December 18, 1990

I. INTRODUCTION

At its November 1990 meeting the Advisory Committee on the Rules of Criminal Procedure acted upon proposed or pending amendments to a number of Rules of Criminal Procedure and one Rule of Evidence. This report addresses those proposals and the recommendations to the Standing Committee. The minutes of that meeting, a GAP report and copies of the rules and the accompanying Committee Notes are attached. In summary, the rules and the recommended actions are as follows:

A. Rules of Criminal Procedure Circulated for Public Comment.

Four rules previously considered and approved by the Standing Committee for circulation to the bench and the bar have been reviewed by the Advisory Committee. The Committee recommends that they be approved by the Standing Committee and forwarded to the Judicial Conference.

1. Rule 16(a)(1)(A). Statement of Defendant.

2. Rule 24(b). Peremptory Challenges.

3. Rule 35(b). Reduction of Sentence.

4. Rule 35(c). Correction of Sentence.

B. Rules of Evidence Circulated for Public Comment.

One Rule of Evidence has been circulated to the bench and the bar for comment. After considering the public comments, the Committee recommends that it be approved by the Standing Committee and forwarded to the Judicial Conference.

1. Fed. R. Evid. 404(b). Notice Provision.

C. Proposed Technical Amendments to Rules of Criminal Procedure and Rules of Evidence.

The Advisory Committee recommends that technical amendments be made in the following Rules, as discussed infra,

1. Rule 32 . Technical Amendments.

2. Rule 32.1. Technical Amendment.

3. Rule 46. Technical Amendment.

4. Rule 54(a). Technical Amendment.

5. Rule 58. Technical Amendment.

6. Rule 58, et al. Changing of the term "Magistrate"

7. Fed. R. Evid. 1102. Technical Amendment.

II. RULES OF CRIMINAL PROCEDURE CIRCULATED FOR PUBLIC COMMENT.

In January 1990, the Standing Committee approved amendments in Rule 16(a)(1)(A), Rule 24(b), and Rule 35(a) for circulation to the public. In July 1990, the Standing Committee approved the circulation of a new provision, Rule 35(c), on an expedited basis. Comments were received on all of these rules and considered by the Advisory Committee at its November 1990 meeting. A GAP report setting out the minor changes to either the Rules or the accompanying Committee Notes are attached to this report.

The Advisory Committee recommends that the Standing Committee approve these four amendments and forward them to the Judicial Conference.

III. RULE OF EVIDENCE CIRCULATED FOR PUBLIC COMMENT.

In January 1990, the Standing Committee approved the publication of a proposed amendment to Federal Rule of Evidence 404(b) which would add a notice provision in criminal cases. At its November 1990 meeting, the Advisory Committee considered the written comments it had received. A GAP report explaining the minor changes in the Advisory Committee Note to that Rule is attached.

The Advisory Committee recommends that the Standing Committee approve the amendment to Rule 404(b) and forward it to the Judicial Conference.

IV. PROPOSED TECHNICAL AMENDMENTS TO RULES OF CRIMINAL PROCEDURE AND RULES OF EVIDENCE.

Although the Advisory Committee has no proposed amendments to be published for circulation to the bench and bar at this time, a number of technical amendments are in order. The Advisory Committee therefore recommends that the Standing Committee approve the following technical amendments to the Rules of Criminal Procedure and Rules of Evidence.

A. Rule 32(c)(2)(A). Mr. Edward F. Willet, Law Revision Counsel, U.S. House of Representatives, has suggested several technical changes to Rule 32(c)(2)A). The Advisory Committee recommends that the Standing Committee approve the following technical changes in that Rule and present them to the Judicial Conference. The page and footnote references are to the December 1, 1990 copy of the Federal Rules of Criminal Procedure published by the United States Printing Office, for the House Committee on the Judiciary.

1. Page 32: A semicolon should be added after "defendant" -- the last word in the sentence under (A). See Footnote.

2. Page 33: Strike comma after "opinions" -- eighth line, comma should follow the word "which", ninth line. See Footnote.

B. Rule 32.1. Mr Willet, supra, suggests that a technical change be made in subdivision Rule 32.1(a)(1), on page 34 by deleting the "s" from "grounds" in the third line. See Footnote.

C. Rule 46(h). The reference in Rule 46(h), on page 45, to 18 U.S.C. 3142(c)(2)(K) is incorrect. Public Law 99-646 changed the references in 3142(c); the new provision is 18 U.S.C. 3142(c)(1)(B)(xi).

D. Rule 54(a). Because of changes in legislation, the Advisory Committee recommends that appropriate technical changes be made in Rule 54(a). That rule addresses the applicability of the Rules of Criminal Procedure. As noted in the Advisory Committee Note accompanying the amendment, changes proposed by the Committee would clarify the ability of the District Courts in the Virgin Islands to begin criminal prosecutions through the indictment process. The Advisory Committee

TO: Hon. Robert E. Keeton, Chairman
Standing Committee on Rules of Practice and Procedure

FROM: Hon. W. Terrell Hodges, Chairman
Advisory Committee on Rules of Criminal Procedure

SUBJECT: GAP Report: Explanation of Changes Made Subsequent to the Circulation for Public Comment of Rules 16, 24, 35, and Fed. R. Evid. 404(b)

DATE: December 18, 1990

In January 1990, the Standing Committee approved the circulation for public comment of proposed amendments to Rules of Criminal Procedure 16(a)(1)(A), 24(b), Rule 35(b) and Federal Rule of Evidence 404(b). At its July 1990 meeting the Committee approved the circulation of Rule 35(c) on an expedited basis. The Advisory Committee has considered all of the written submissions from the members of the public who responded to the request for comments. The Rules, Committee Notes, and summaries of the comments on each Rule are attached.

1. Rule 16(a)(1)(A). Statement of Defendant. The proposed amendment would expand slightly the duty of the prosecution to disclose a defendant's oral statements. Almost every commentator was in favor of the change although a number of individuals encouraged the Advisory Committee to further expand federal criminal discovery. The Committee made no changes to either the Rule or the Committee Note.

2. Rule 24(b). Peremptory Challenges. The proposed amendment would equalize the number of peremptory challenges: 20 for each side in a capital case, 6 for each side in a felony case, and 3 each in a misdemeanor case. A similar provision for equalizing the number of peremptory challenges was considered by the Senate during the last session of Congress but was not included in the final 1990 Crime Control Act. The Senate version would have equalized the number of peremptory challenges in felony cases at 8 challenges for each side. The majority of those commenting on the proposed change were opposed to the amendment; most of the comments were submitted by federal public defenders. For reasons noted in the Advisory Committee Note, the Committee determined to go forward with the proposed change. At the suggestion of Judge Keeton, a minor change was made in the wording of the proposed language to break one long sentence into two shorter sentences. Language was also added to the Note to demonstrate the consistency of the Judicial Conference's position on equalization and reduction of peremptory challenges.

3. Rule 35(b). Reduction of Sentence. Almost all of those commenting on the proposed change to Rule 35(b) were in favor of it. The proposed amendment would lengthen the time during which the prosecution could move the sentencing court to reduce the ~~defendant~~'s sentence for substantial assistance. After considering the public's comments, the Advisory Committee made no change in the language of the rule or in the accompanying Note.

4. Rule 35(c). Correction of Sentence. The proposed addition of subsection (c) to Rule 35, which was based upon a recommendation by the 1990 Federal Courts' Study Committee, met with general public approval. Several commentators noted the potential for jurisdictional problems if a sentencing court attempted to correct a sentence after the notice of appeal had been filed. A number of commentators encouraged the Committee to go further and to adopt the Federal Courts' Study Committee's proposal to permit a defendant to seek modification of his or her sentence at any time with 120 days of sentencing. After carefully considering the issue, the Committee decided to make no changes to the rule as published. Several minor changes were made in the Note, however, to reflect the Committee's view that if the time for correcting a sentence under Rule 35(c) had elapsed, a defendant could still seek relief under § 2255.

The Committee also recommends that the Standing Committee refer to the Appellate Rules Committee the question of whether Federal Rule of Appellate Procedure 4 should be amended to provide that notice of appeal shall not divest the District Court of the jurisdiction to act within the seven (7) day period provided in Rule 35(c), and whether such a notice of appeal shall continue to be effective if the District Court does act under the rule.

5. Federal Rule of Evidence 404(b). The proposed addition of a notice requirement in Rule 404(b) for criminal cases was widely approved by those commenting on it. A number of commentators (primarily defense counsel) urged the Committee to require more specific notice. The Committee considered the suggestions and determined not to change the language of the proposed rule. Some changes were made to the Note to clarify the Committee's intent to provide for generalized notice and the ability of the trial court to require an in limine showing by the prosecution of the specifics of the

offered 404(b) evidence. Language was also added to note that the notice provision does not apply to acts intrinsic to the offense charged.

Attachments:

Rule 16(a)(1)(A) and Summary of Comments
Rule 24(b) and Summary of Comments
Rule 35(b), (c) and Summary of Comments
Fed. R. Evid. 404(b) and Summary of Comments

Rule 16. Discovery and Inspection

(a) DISCLOSURE OF EVIDENCE BY THE GOVERNMENT.

(1) Information Subject to Disclosure.

(A) STATEMENT OF DEFENDANT. Upon request of a defendant the government shall ~~permit the defendant to inspect and copy or photograph~~ disclose to the defendant and make available for inspection, copying or photographing: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; any written record containing the substance of any relevant oral statement ~~which the government intends to offer in evidence at the trial~~ made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury

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* New matter is underlined; matter to be omitted is lined through.

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which relates to the offense charged. The government shall also disclose to the defendant the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known by the defendant to be a government agent if the government intends to use that statement at trial.

COMMITTEE NOTE

The amendment to Rule 16(a)(1)(A) expands slightly government disclosure to the defense of statements made by the defendant. The rule now requires the prosecution, upon request, to disclose any written record which contains reference to a relevant oral statement by the defendant which was in response to interrogation, without regard to whether the prosecution intends to use the statement at trial. The change recognizes that the defendant has some proprietary interest in statements made during interrogation regardless of the prosecution's intent to make any use of the statements.

The written record need not be a transcription or summary of the defendant's statement but must only be some written reference which would provide some means for the prosecution and defense to identify the statement. Otherwise, the prosecution would have the difficult task of locating and disclosing the myriad oral statements made by a defendant, even if it had no intention of using the statements at trial. In a lengthy and complicated investigation with multiple interrogations by different government agents, that task could become unduly burdensome.

The existing requirement to disclose oral statements which the prosecution intends to introduce at trial has also been changed slightly. Under the amendment, the prosecution must also disclose any relevant oral statement which it intends to use at trial, without regard to whether it intends to introduce the statement. Thus, an oral statement

by the defendant which would only be used for impeachment purposes would be covered by the rule.

The introductory language to the rule has been modified to clarify that without regard to whether the defendant's statement is oral or written, it must at a minimum be disclosed. Although the rule does not specify the means for dislosing the defendant's statements, if they are in written or recorded form, the defendant is entitled to inspect, copy, or photograph them.

ADVISORY COMMITTEE ON
FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENT TO RULE 16(a)(1)(A)

I. SUMMARY OF COMMENTS: Rule 16(a)(1)(A)

The Committee received written comments from five individuals or organizations. Four were in favor of the proposed amendment. One, a US Attorney, was opposed to the amendment because it would give an unfair advantage to the defendant by providing the defense with an opportunity to neutralize the use of pretrial statements which could be used for impeachment. Of those favoring the amendment, several urged the Committee to expand defense discovery.

II LIST OF COMMENTATORS: Rule 16(a)(1)(A)

1. John J. Cleary, Esq., San Diego, CA, 5-23-90
2. William J. Genego & Peter Goldberger, Wash. D.C., 8-31-90
3. Fredric F. Kay, Esq., Tucson, Ariz., 5-18-90
4. P. Raymond Lamonica, Esq., Baton Rouge LA, 8-22-90
5. Elisabeth Semel, Esq., Wash., D.C., 8-30-90

III. COMMENTS: Rule 16(a)(1)(A)

John J. Cleary
Private Practice
San Diego, California
May 23, 1990

Mr. Cleary considers the amendment to Rule 16 to be the most modest salutary change; this slight change, he says, does not address the real issue of meaningful discovery in federal criminal trials. In a footnote he suggests that the Committee forge ahead with proposing changes to federal discovery even if prosecutors threaten to take the issue to Congress -- to do otherwise would abdicate its judicial responsibility.

William J. Genego & Peter Goldberger
NADCL
Washington, D.C.
August 31, 1990

Mr. Genego and Mr. Goldberger, who are co-chairs of the NADCL's Committee on Rules of Procedure, endorse the change to Rule 16. They believe that the slight expansion will reduce delays and confusion caused by surprise at the trial and will increase the "likelihood of non-trial disposition of the case."

Mr. Fredric F. Kay, Esq.
Federal Public Defender
Tucson, Arizona
May 18, 1990

Mr. Kay supports the amendment because it is an improvement over the present rule. He adds that federal criminal discovery is virtually non-existent and at the grace of the prosecutor and he sees no reason why "present cat and mouse games continue."

Mr. P. Raymond Lamonica, Esq.
U.S. Attorney
Baton Rouge, Louisiana
August 22, 1990

Mr. Lamonica is opposed to the amendment and states that it will take away one of the most significant methods of impeaching a defendant -- the inconsistent statement. The amendment in his view will cause a profound change in practice. Discovery in criminal practice, he asserts, should not be viewed in the abstract. In reality, if the defense has in its possession the prior statements of the defendant, it will be able to sidestep or explain the inconsistencies and thus perjury will be encouraged. The ability of the prosecution to deal with a lying defendant will be hampered, without fostering any legitimate interest of the defendant; there is no legitimate interest, he maintains, in telling the defendant about possible impeachment statements so that he can mold his testimony. Given the fundamental nature of this change, he recommends that no further steps should be taken to amend the Rule "without focused and extensive publication and study."

Elisabeth Semel, President
California Attorneys for Criminal Justice
San Diego, California
August 30, 1990

Ms. Semel, speaking as President of the California Attorneys for Criminal Justice (CACJ)(2,500 members), supports the slight expansion of Rule 16 but urges the Committee to completely rewrite that rule, to include provisions for Rovario, Giglio and Brady material. The organization's members practice in both federal and state courts and see the trials in federal court as trial by ambush. She notes that many California prosecutors are pleased to be cross-designated to try a case in federal court because of the prosecution oriented discovery rules. She notes that pre-plea discovery of guideline sentencing factors is also important. Any concerns that the prosecution has about the safety of its witnesses could be handled by pretrial motion to limit discovery.

Advisory Committee on Criminal Rules
Proposed Rule 24(b)

Rule 24. Trial Jurors

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(b) PEREMPTORY CHALLENGES. If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, ~~the government~~ each side is entitled to 6 peremptory challenges. ~~and the defendant or defendants jointly to 10 peremptory challenges.~~ If the offense charged is punishable by imprisonment for not more than one year or by fine or by both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow each side additional peremptory challenges. In that event, however, the government shall not have more challenges than the total allocated to all defendants. The court may permit multiple defendants to exercise peremptory challenges separately or jointly.

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COMMITTEE NOTE

The amendment to Rule 24(b) equalizes the number of peremptory challenges normally available to the prosecution and defense in a felony case. Under the amendment the number of peremptory challenges available to the prosecution would remain the same; the number available to the defense would

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be reduced by four. The number of peremptory challenges available in capital and misdemeanor cases remains unchanged.

It has been suggested that abolition of peremptory challenges might be warranted. See Batson v. Kentucky, 476 U.S. 79, 102 (1986)(Marshall, J. concurring); Note, "The Case for Abolishing Peremptory Challenges in Criminal Trials," 21 Harv. C.R.- C.L. L. Rev. 227 (1986). The Committee believes, however, that peremptory challenges do serve a valid function and should be retained but that they should be reduced and equalized in felony cases. The position of the Judicial Conference has consistently been toward reduction and equalization of peremptory challenges in criminal cases. As early as 1943, the Conference approved a study of the federal jury system which had concluded that with regard to peremptory challenges, the number of challenges available to the defendant should be reduced from ten to six in all but capital cases. See Report of the Proceedings of the Judicial Conference of the United States, September 1943 at 16.

In 1976, the Supreme Court adopted and forwarded to Congress, in accordance with the Rules Enabling Act, amendments to Rule 24(b) which would have significantly reduced and equalized the number of peremptory challenges. Under that amendment, each side would have had 20, 5, and 2 peremptory challenges respectively in capital, felony, and misdemeanor cases. Order, Amendments to Federal Rules of Criminal Procedure, 44 U.S.L.W. 4549 (1976). The reasons for the amendments were three-fold. First, under the 1968 Jury Selection and Service Act, there were more representative panels which would reduce the need for the defense to have an advantage in the number of peremptory challenges. Second, the proposed change would make it more difficult to make systematic exclusions of a class of persons. And third, the reduction in the number of peremptory challenges would shorten the time spent on voir dire and also reduce jury costs. Congress ultimately rejected the changes but recommended that the Judicial Conference study the matter further. The chief concern expressed by Congress was that in most federal courts, trial judges conduct the voir dire, thus making it difficult for counsel to identify biased jurors. S. Rep. 354, 95th Cong., 1st Sess. 9, reprinted in [1977] U.S. Code Cong. & Ad. News 1477, 1482-83. Congress however, has recently indicated a willingness to reconsider changes to the number of peremptory challenges. See Senate Bill No. 1711 and 1970, 101st Congress.

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The Committee believes that the three reasons supporting the proposed amendments in 1976 are at least as valid today as they were then. In particular, the decision in Batson v. Kentucky, 476 U.S. 79 (1986), supports one of the reasons for the amendment, the need to reduce the opportunity for systematic exclusion of a class of persons. Although Batson addressed systematic exclusion by the prosecution, an argument could be made that under some circumstances systematic exclusion of classes of persons by the defense should also be limited. For example, in United States v. DeGross, 913 F.2d 1417 (9th Cir. 1990), the court extended Batson to the defendant's attempted peremptory strike of a male from the jury. There is also growing concern about delays in disposing of cases in the federal courts. Reduction of the number of peremptory challenges would be cost effective, both in terms of time and expense. On balance, the Committee believes that the reduction of the number of peremptory challenges available to a single defendant in a felony case would not unfairly deprive that defendant of a representative and unbiased jury.

The amendment expands the ability of the trial court to grant additional peremptory challenges where there are multiple defendants by permitting the court to grant additional challenges to the prosecution. Although the prosecution is potentially entitled to as many challenges as the total provided to the multiple defendants, the court is not required to equalize the number of challenges.

ADVISORY COMMITTEE ON
FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 24(b)

I. SUMMARY OF COMMENTS: Rule 24(b)

Twenty nine (29) individuals or organizations have filed written comments on the proposed amendments to Rule 24(b). Almost all of them are opposed to the amendment as presented although several commentators indicate approval of "equalization" of the number at eight per side in a felony case involving a single defendant. One commentator, a federal district judge, agrees with the amendment, noting that he has observed defense counsel using the peremptories to exclude classes of individuals. Those opposing the change generally cite the historical right of peremptory challenges, the overwhelming resources of the government, the lack of meaningful voir dire by the defense, the whittling away at defense rights, and the absence of any empirical data supporting the Committee's view that reduction of the number of peremptories is warranted. One commentator, Mr. Levine, a federal public defender from Hawaii presents the most complete arguments opposing the change and a number of commentators have simply noted that they agree with his analysis. Several note that the arguments against a reduction of peremptories would be lessened if defense counsel were permitted greater leeway in voir dire.

II. LIST OF COMMENTATORS: Rule 24(b)

1. Michael L. Bender, Esq., Wash. D.C., 8-31-90
2. Robert A. Brunig, Esq., Minneapolis, Minn, 4-26-90
3. Thomas A. Campbell, Esq., Tacoma, Wash., 8-10-90

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4. Colia F. Cheese, Esq., St. Paul, Minn., 4-20-90

5. John J. Cleary, Esq., San Diego, CA, 5-23-90

6. John P. Erickson, Esq. Minneapolis, MN, 5-14-90

7. David R. Freeman, Esq., St. Louis MO, 7-13-90

8. William J. Genego & Peter Goldberger, Wash. D.C., 8-31-90

9. Carol Grant, Esq, Minneapolis, Minn., 4-23-90

10. Bruce H. Hanley, Esq., Minneapolis, Minn.,5-9-90

11. Thomas W. Hiller, Esq., Seattle, Wash., 7-13-90

12. Fredric F. Kay, Esq., Tucson, Ariz., 5-24-90

13. Michael R. Levine, Esq., Honolulu, Haw., 5-17-90

14. David S. Marshall, Esq., Seattle, Wash., 8-8-90

15. Joe M. Quaintance, Esq., Tacoma, Wash., 8-8-90

16. Miring S. Raeder, Prof., Los Angeles, CA., 8-29-90

17. Larry E. Reed, Esq., Minneapolis, Minn., 4-24-90

18. Ronald Rosenbaum, Esq., St. Paul, Minn., 4-30-90

19. Elisabeth Semel, Esq., San Diego, CA., 8-30-90

20. Neal J. Shapiro, Esq., Minneapolis, Minn, 4-23-90

21. Thomas H. Shiah, Esq., Minneapolis, Minn., 4-25-90

22. Walter S. Smith, Judge, Waco, Tx., 4-10-90

23. Richard C. Tallman, Esq., Seattle, Wash., 8-20-90

24. Peter Thompson, Esq., Minneapolis, Minn., 4-24-90

25. Judge J.P. Vukasin, San Francisco, CA, 5-17-90

26. Alan W. Weinblatt, Esq., St. Paul, Minn., 5-9-90

27. James C. Whelpley, Esq., Roseville, Minn, 4-27-90

28. John R. Wylde, Esq., Minneapolis, Minn., 4-24-90

29. Jay P. Yunek, Esq., I, Minn., 4-20-90

III. COMMENTS: Rule 24(b)

Michael L. Bender, Esq.
Chairperson, ABA Crim. Just. Section
Washington, D.C.
August 31, 1990

Writing on behalf of the American Bar Association's Criminal Justice Section, Mr. Bender notes that the ABA has "championed the equalization of challenges for prosecutors and defense counsel" and attaches applicable ABA policy (which incidentally at one point suggests five (5) challenges for each side in a felony case). Without suggesting specific numbers, Mr. Bender believes that the amendments to Rule 24(b) being considered by Congress would not only equalize the number of challenges but also maintain the total number of challenges by both sides. It would also reduce by only two the number of challenges currently available to the defense. He also suggests that working with 8 peremptory challenges for now would permit empirical studies to determine the actual impact of the amendments.

Robert A. Brunig, Esq.
Private Practice
Minneapolis, Minn.
April 26, 1990

Mr. Brunig views the proposed change to be ill-advised and unfair. He notes that there is an imbalance in the number of minority judges and in the number of minority jurors. He also notes the tendency to dismiss a juror for cause who exhibits any hostility toward the government and notes that the judge's voir dire is perfunctory and never probing; even those judges permitting defense voir dire, dramatically limit the time for doing so. He adds that jurors who have sat on a criminal case are included in the venire of consecutive criminal cases. Finally, he notes that the resources available to the government overwhelm the resources available to the defense.

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Thomas A. Campbell, Esq.
Private Practice
Tacoma, Washington
August 10, 1990

Mr. Campbell briefly writes to indicate that he concurs with the views of Mr. Hiller, infra., in opposing the amendment to Rule 24(b).

Colia F. Cheese, Esq.
Private Practice
Saint Paul, Minnesota
April 20, 1990

Ms. Cheese believes that the historical distribution of peremptory challenges should be maintained and is opposed to the amendment. The current number reflects the real need for differences between the prosecution and the defense; the prosecution generally does not face the same prejudices that face the defendant.

John J. Cleary, Esq.
Private Practice San Diego, California
May 23, 1990

Mr. Cleary states that the "chutzpa" of the federal judiciary to reduce the number of challenges when most federal judges preclude attorney voir dire is startling. It would thus be both unseemly and inappropriate for the judiciary to push for further reductions in the number of challenges. The argument for protecting against racial bias is ludicrous in light of established precedent -- he cites a personal example of his attempt to ask voir dire questions concerning whether a juror would be biased against his client because of his race. He believes that greater voir dire is needed and that the Committee should take the initiative.

John P. Erickson, Esq.
Private Practice
Minneapolis, Minnesota
May 14, 1990

Mr. Erickson believes that the opportunity for a defendant to obtain a fair trial is fast becoming an extinct species in light of the many recent substantive and procedural changes. Although he understands that politically it is popular to be tough on criminals, he sees more and more innocent people being caught up in the

hysteria created by politicians. To make his point he recounts a recent experience he had defending a 70-year old man accused of shoplifting a $2.99 item. He tells this "war story" to make the point that "[i]ndividuals in authority, such as [the Committee], must now recognize that the pendulum has swung way too far and must come back in the direction of the rights of the accused." He concludes that a drop in the number of peremptory challenges is something he cannot tolerate.

David R. Freeman, Esq.
Federal Public Defender
St. Louis, Missouri
July 13, 1990

Mr. Freeman vigorously opposes the proposed amendment to Rule 24(b) because it is "ill advised...lacks a rational basis and reflects a failure to consider the history and function of the peremptory challenge." Citing historical precedent and Supreme Court language which notes the essential right of exercising a peremptory challenge, Mr. Freeman notes that when he reads the Committee's rationale for amending Rule 24(b) he is struck with the "appalling ease with which baseless assertions can be turned into facts and given the presumption of validity." He notes that there is no support for the statement that the defendant might systematically exclude a class of persons. He also indicates that the 1968 Jury Selection Act has not resulted in more representative panels. Finally, he questions whether the reduced number of challenges will actually save time and expense, given the great control exercised by federal judges over voir dire. He challenges the notion of the need for a level playing field by outlining the distinct advantages that the government has in the prosecution of a case. In short, the Committee has not offered a sufficient rationale for the amendment.

William J. Genego & Peter Goldberger
NADCL
Washington, D.C.
August 31, 1990

Mr. Genego and Mr. Goldberger, writing in their capacity as co-chairs of the NADCL Committee on Rules of Procedure, generally favor equalization of peremptory challenges but do not support the "arbitrary" number of six (6) challenges for felony cases; instead they would support an amendment to equalize the number at eight (8) in felony cases involving single defendants. In their view there is no empirical support for the proposition that reducing the

number will save time in the voir dire procedures which are already streamlined. Any any financial reasons for doing so would be outweighed by the interest in insuring that the defendant and the public perceive the process to be fair. They suggest that where there are multiple defendants, each defendant should be entitled to at least two peremptories; in a megatrial it is possible that the number of defendants would exceed the number of peremptory challenges. The defendant should not be deprived of his or her ability to challenge a juror simply because the government has decided to join a large number of defendants in a single trial. **[NOTE: These commentators later filed a corrected position noting that NADCL does <u>not</u> support equalization of peremptory challenges]**

Carol Grant, Esq.
Private Practice
Minneapolis, Minnesota
April 23, 1990

Ms. Grant opposes the amendment. The current number of challenges reflects the need of the defense to strike jurors who often possess predisposition or biases that they often do not admit. To reduce the number would be detrimental to the criminal justice system.

Bruce H. Hanley, Esq.
Private Practice
Minneapolis, Minn.
May 9, 1990

Mr. Hanley is strongly opposed to the amendment and notes that although there are still jury trials, there seems to be a concerted effort to whittle away at constitutional rights. His experience with federal juries in Minnesota is that the jurors are strongly biased in favor of the government and see themselves as an extension of the prosecution. The current number of 10 peremptories helps the defense a little in attempting to empanel a fair jury. He also points out that lack of defense voir dire hampers the defense greatly.

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Thomas W. Hiller, II, Esq.
Federal Public Defender
Seattle, Washington
July 13, 1990

Mr. Hiller fully supports the position of Mr. Michael Levine, infra, a federal public defender in Hawaii, who has submitted extensive comments on the proposed change to Rule 24(b). Mr. Hiller notes that given the potentially heavier sentences facing federal defendants, it is essential that counsel be given the opportunity to screen the jury; every reduction in the number of challenges lessens the chance for impaneling a fair jury.

Mr. Fredric F. Kay, Esq.
Federal Public Defender
Tucson, Arizona
May 24, 1990

Mr. Kay is opposed to any reduction of peremptory challenges for the defendant. In his view there is a greater need for insuring fairness for the defendant. He recognizes that concerns would not be as serious if defense counsel were given greater latitude in conducting voir dire.

Michael R. Levine, Esq.
Federal Public Defender
Honolulu, Hawaii
May 17, 1990

Mr. Levine has submitted extensive commentary opposing the amendment to Rule 24(b), which he believes is ill-advised. First, he notes that the current number of peremptory challenges (10) has been in effect since 1865 and therefore there is a heavy burden on the proponents of the amendment. He notes that the Committee Note which suggests that Batson could be used by the defense is flawed. He believes that in an appropriate case, it would be permissible for the defense to exclude an entire class of persons, leaving aside racial classifications. It is the prosecution, not the defense, he argues that systematically exclude classes of individuals. Concerning delays in selecting jurors, he notes that Congress has expressly rejected the argument that savings of time in itself would warrant a reduction. Finally, he notes that there may be superficial appeal to the suggestion that the new numbers will level the playing field. But Congress in 1977 questioned that reasoning and in the last five years have seen an enormous increase in the government's power so that the notion of proportionality is even less tenable. In

summary, he believes that the Committee has not justified the amendment.

Mr. Levine also notes the lack of public knowledge and hostility toward the system, the increasing percentage of defendants who are being convicted, and the fact that challenges for cause are inadequate. He adds that as long as the Committee tolerates judge-alone voir dire, the arguments in support of a reduction of challenges carry little force.

David S. Marshall, Esq.
Private Practice
Seattle, Washington
August 8, 1990

Mr. Marshall briefly notes that Mr. Levine's comments, supra, express his thoughts "extremely well."

William M. Orth, Esq.
Private Practice
Bloomington, Minnesota
May 3, 1990

Mr. Orth believes that the proposed amendment is "wrong, unfair, unnecessary, and unconstitutional." Because there is no meaningful voir dire in federal courts, the additional challenges available to the defense provide the only input by the defense to trial by an impartial jury. He notes that in joint trials, the number of challenges per defendant would be reduced. He also cited an example of jurors who sat on consecutive criminal cases and who were peremptorily struck after they asked the judge if the defense could determine their home addresses.

Joe M. Quaintance, Esq.
Private Practice
Tacoma. Washington
August 8, 1990

Mr. Quaintance concurs in the comments by Mr. Levine and Mr. Hiller and strongly believes that defense peremptory challenges should not be restricted further. State courts, which provide for fewer challenges, fairly balance the process by permitting greater involvement by the parties in conducting voir dire. The federal jury selection process is already so abbreviated that reduction of the number of challenges will be unfair.

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Myrna S. Raeder, Professor
Southwestern Univ. School of Law
Los Angeles, California
August 29, 1990

Although she supports the equalization of peremptory challenges, she believes that fairness concerns mandate a more cautious approach by equalizing the number of challenges in a felony case at eight (8). If the drafters were starting with a clean slate, six challenges might be appropriate. But a reduction by four of the number available to the defense will appear to be "an effort to whittle away a right that the defense currently enjoys." Given the fact that voir dire is conducted by the judge, the peremptory challenge is still the best way to insure a fair jury.

Larry E. Reed, Esq.
Private Practice
Minneapolis, Minn.
April 24, 1990

He is opposed to the proposed amendment. Because there is little interaction between the defendant and the jury in voir dire, it is necessary for the defense to have extra challenges.

Ronald S. Rosenbaum, Esq.
Private Practice
St. Paul, Minn.
April 23, 1990

He is strongly opposed to the amendment to Rule 24(b). From his experience the balance against the defense has shifted dramatically. The proposed reduction would be "one more nail in the coffin." He notes the lack of defense voir dire and urges the Committee to maintain the current number of challenges.

Elisabeth Semel, President
California Attorneys for Criminal Justice
San Diego, California
August 30, 1990

Ms. Semel, writing on behalf of the 2,500 members of the CACJ, strenuously objects to the reduction of peremptory challenges in Rule 24(b). She notes that there is simply no

statistical evidence of exclusions of classes of persons by the defense and the amount of time saved, in an already abbreviated voir dire, would be miniscule. The reduction of peremptories might involve more time because of the need to more carefully exercise them. Any change in the number should not be considered until federal judges permit voir dire (CACJ concurs with the position of Mr. Levine, supra).

Neal J. Shapiro, Esq.
Private Practice
Minneapolis, Minn.
April 24, 1990

He opposes the amendment, noting that the federal jury selection procedures weigh in favor of the prosecution; today when the public is fearful of crime, jurors tend to favor the government. He urges the Committee to retain the current number of challenges.

Thomas H. Shiah, Esq.
Private Practice
Minneapolis, Minn.
April 25, 1990

Mr. Shiah briefly notes that he is opposed to the proposed amendment because the deck is already "stacked" enough against the defense and the prosecution needs no additional "trump cards."

Hon. Walter S. Smith
US Dist. Judge
Waco, Texas
April 10, 1990

Judge Smith is very much in favor of the amendments. He has never understood why the defense is entitled to more strikes and believes that the amendment will result in saving a great deal of money over the years and will be more fair.

Richard C. Tallman, Esq.
Seattle, Washington
Aug. 20, 1990

Mr. Tallman is opposed to the proposed amendment. Noting the increase in minimum sentences, the pretrial restraints on assets and the risk of forfeiture, the jury system is one of the few remaining checks on governmental

abuse. It is essential that the perception of fairness and impartiality remain. Considering the limited opportunities for the defense to conduct voir dire, the proposed reduction of the number of peremptory challenges would not be sufficient to offset the damage of reducing public confidence in the judicial process.

Peter Thompson, Esq.
John W. Lundquist, Esq.
Robert D. Sicilian, Esq.
Private Practice
Minneapolis, Minn.
April 24, 1990

These three commentators (law partners who deal exclusively with federal criminal defense) are opposed to the proposed amendment. There is no meaningful voir dire in the federal system and the proposal only makes matters worse. The apparent imbalance in the current rule is really not an imbalance; first, in joint trials each defendant gets fewer challenges than the government and having four more challenges tends to result in better chances for a fair trial.

The Hon. J.P. Vukasin, Jr.
U. S. District Judge
San Franciso, California
May 17, 1990

Judge Vukasin is in favor of the amendment as written. The current number of peremptories is "unfair, inequitable, and lends itself to abuse." He indicates that he has repeatedly seen defense counsel use the extra peremptory challenges for purposes other than obtaining a fair jury and that he has seen the extra challenges used to exclude classes of persons. In his view, the jury panels today are more representative and that there is no reason to give either side an advantage in the numbers. And it is obvious to him that by reducing the number of challenges, there will be a savings of time and expense.

Alan W. Weinblatt, Esq.
Private Practice
St. Paul, Minn.
May 9, 1990

He is opposed to the amendment. He indicates that there is no voir dire by counsel in the federal courts in Minnesota, that he has not seen systematic exclusion of

classes of jurors by the defense, maintaining the current number of challenges does not cause delay or increased costs, and the current Minnesota rule governing challenges recognizes the need for additional defense challenges. Finally, he cites the maxim, "If it aint' broke, don't fix it."

James C. Whelpley, Esq.
Private Practice
Roseville, Minn.
April 27, 1990

Noting the absence of voir dire by the defense, he opposes the change. If savings of time and money is important, he asks, why not simply eliminate the jury altogether. He also inquires as to what sorts of classes of persons would be excluded by the defense.

John R. Wylde, Esq.
Private Practice
Minneapolis, Minn
April 24, 1990

Mr. Wylde is "outraged" at the proposal to take away defense peremptory challenges. It is bad enough that there is no defense voir dire in federal courts.

Jay P. Yunek, Esq.
Private Practice
I, Minn.
April 20, 1990

He is outraged at the proposed change. It is "ridiculous" to believe that there is a need to create equal footing. He reminds the Committee that the defendant is stigmatized by his presence in the courtroom. Because the jurors are often of a different race or creed, reducing the number of peremptory strikes will take the defendant out of the ball game. He urges the Committee to either leave the numbers the way they are or give the defense an opportunity to conduct voir dire.

(c) Correction of Sentence by Sentencing Court.-- The court, acting within 7 days after the imposition of sentence, may correct a sentence that was imposed as a result of arithmetical, technical, or other clear error.

COMMITTEE NOTE

Rule 35(b), as amended in 1987 as part of the Sentencing Reform Act of 1984, reflects a method by which the government may obtain valuable assistance from defendants in return for an agreement to file a motion to reduce the sentence, even if the reduction would reduce the sentence below the mandatory minimum sentence.

The title of subsection (b) has been amended to reflect that there is a difference between correcting an illegal or improper sentence, as in subsection (a), and reducing an otherwise legal sentence for special reasons under subsection (b).

Under the 1987 amendment, the trial court was required to rule on the government's motion to reduce a defendant's sentence within one year after imposition of the sentence. This caused problems, however, in situations where the defendant's assistance could not be fully assessed in time to make a timely motion which could be ruled upon before one year had elapsed. The amendment requires the government to make its motion to reduce the sentence before one year has elapsed but does not require the court to rule on the motion within the one year limit. This change should benefit both the government and the defendant and will permit completion of the defendant's anticipated cooperation with the government. Although no specific time limit is set on the court's ruling on the motion to reduce the sentence, the burden nonethelss rests on the government to request and justify a delay in the court's ruling.

The amendment also recognizes that there may those cases where the defendant's assistance or cooperation may not occur until after one year has elapsed. For example, the defendant may not have obtained information useful to the government until after the time limit had passed. In those instances the trial court in its discretion may consider what would otherwise be an untimely motion if the government establishes that the cooperation could not have been furnished within the one-year time limit. In deciding

CORRECTION

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whether to consider an untimely motion, the court may, for example, consider whether the assistance was provided as early as possible.

Subdivision (c) is intended to adopt, in part, a suggestion from the Federal Courts Study Committee 1990 that Rule 35 be amended to recognize explicitly the ability of the sentencing court to correct a sentence imposed as a result of an obvious arithmetical, technical or other clear error, if the error is discovered shortly after the sentence is imposed. At least two courts of appeals have held that the trial court has the inherent authority, notwithstanding the repeal of former Rule 35(a) by the Sentencing Reform Act of 1984, to correct a sentence within the time allowed for sentence appeal by any party under 18 U.S.C. 3742. See United States v. Cook, 890 F.2d 672 (4th Cir. 1989)(error in applying sentencing guidelines); United States v. Rico, 902 F.2d 1065 (2nd Cir. 1990)(failure to impose prison sentence required by terms of plea agreement). The amendment in effect codifies the result in those two cases but provides a more stringent time requirement. The Committee believed that the time for correcting such errors should be narrowed within the time for appealing the sentence to reduce the likelihood of jurisdictional questions in the event of an appeal and to provide the parties with an opportunity to address the court's correction of the sentence, or lack thereof, in any appeal of the sentence. A shorter period of time would also reduce the likelihood of abuse of the rule by limiting its application to acknowledged and obvious errors in sentencing.

The authority to correct a sentence under this subdivision is intended to be very narrow and to extend only to those cases in which an obvious error or mistake has occurred in the sentence, that is, errors which would almost certainly result in a remand of the case to the trial court for further action under Rule 35(a). The subdivision is not intended to afford the court the opportunity to reconsider the application or interpretation of the sentencing guidelines or for the court simply to change its mind about the appropriateness of the sentence. Nor should it be used to reopen issues previously resolved at the sentencing hearing through the exercise of the court's discretion with regard to the application of the sentencing guidelines. Furthermore, the Committee did not intend that the rule relax any requirement that the parties state all objections to a sentence at or before the sentencing hearing. See, e.g., United States v. Jones, 899 F.2d 1097 (11th Cir. 1990).

The subdivision does not provide for any formalized method of bringing the error to the attention of the court

and recognizes that the court could sua sponte make the correction. Although the amendment does not expressly address the issue of advance notice to the parties or whether the defendant should be present in court for resentencing, the Committee contemplates that the court will act in accordance with Rules 32 and 43 with regard to any corrections in the sentence. Compare United States v. Cook, supra (court erred in correcting sentence sua sponte in absence of defendant) with United States v. Rico, supra (court heard arguments on request by government to correct sentence) The Committee contemplates that the court would enter an order correcting the sentence and that such order must be entered within the seven (7) day period so that the appellate process (if a timely appeal is taken) may proceed without delay and without jurisdictional confusion.

Rule 35(c) provides an efficient and prompt method for correcting obvious technical errors that are called to the court's attention immediately after sentencing. But the addition of this subdivision is not intended to preclude a defendant from obtaining statutory relief from a plainly illegal sentence. The Committee's assumption is that a defendant detained pursuant to such a sentence could seek relief under 28 U.S.C. § 2255 if the seven day period provided in Rule 35(c) has elapsed. Rule 35(c) and § 2255 should thus provide sufficient authority for a district court to correct obvious sentencing errors.

The Committee considered, but rejected, a proposal from the Federal Courts Study Committee to permit modification of a sentence, within 120 days of sentencing, based upon new factual information not known to the defendant at the time of sentencing. Unlike the proposed subdivision (c) which addresses obvious technical mistakes, the ability of the defendant (and perhaps the government) to come forward with new evidence would be a significant step toward returning Rule 35 to its former state. The Committee believed that such a change would inject into Rule 35 a degree of post-sentencing discretion which would raise doubts about the finality of determinate sentencing that Congress attempted to resolve by eliminating former Rule 35(a). It would also tend to confuse the jurisdiction of the courts of appeals in those cases in which a timely appeal is taken with respect to the sentence. Finally, the Committee was not persuaded by the available evidence that a problem of sufficient magnitude existed at this time which would warrant such an amendment.

ADVISORY COMMITTEE ON
FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 35(b)

I. SUMMARY OF COMMENTS: Rule 35(b)

The Committee has received seven (7) comments on the amendments to Rule 35(b) and all of them are in support of the proposed changes. Almost all of them suggest that the Committee go further, however, and either amend Rule 35 to read as it originally existed (modification of sentence within 120 days) or modify it to permit the defense to file similar motion for relief. One commentator suggested a title change. Most of the commentators cited the need to prevent injustice and gave hypotheticals to show how such injustice might result if the sentence could not be modified. One commentator noted that there might be a jurisdictional problem with permitting the government to file such a motion after an appeal had been perfected.

II. LIST OF COMMENTATORS: Rule 35(b)

1. Thomas A. Campbell, Esq., Tacoma, Wash., 8-10-90
2. John J. Cleary, Esq., San Diego, CA, 5-23-90
3. William J. Genego & Peter Goldberger, Wash. D.C., 8-31-90
4. Thomas W. Hillier, Esq., Seattle, Wash., 7-13-90
5. Fredric F. Kay, Esq., Tucson, Ariz., 5-24-90
6. Elisabeth Semel, Esq., San Diego, CA., 8-30-90
7. Richard C. Tallman, Esq., Seattle, Wash., 8-20-90

III. COMMENTS: Rule 35(b)

Thomas A. Campbell, Esq.
Private Practice
Tacoma, Washington
August 10, 1990

Mr. Campbell states briefly that he concurs fully with the views of Mr. Hillier, infra, who had suggested that he express his views on the proposed amendment.

John J. Cleary, Esq.
Private Practice
San Diego, California
May 23, 1990

Mr. Cleary believes that the proposed amendment is most solicitous of the needs of the government. He believes that the amendment should be expanded to include motions by the defendant where extraordinary conduct or circumstances warrant a sentence reduction. He notes, example the hardened criminal who is able to get a reduced sentence for being a "snitch" but a young man raped in prison cannot. Rule 35, he maintains, is a "symptom of a degenerate judicial system, which affords reduction only for Government-sponsored informants."

William J. Genego & Peter Goldberger, Esq.
NADCL
Washington, D.C.
August 31, 1990

Mr. Genego and Mr. Goldberger, who are the co-chairs of the NADCL's Committeee on Rules of Procedure, believe that the proposed changes to Rule 35(b) are salutary but do not go far enough in the Congressional mandate in § 3582(c) that the Committee develop substantive grounds for sentence modification. They also suggest that the title of Rule 35 be changed to "Modification of Sentence." With regard to the requirement of "substantial cooperation" they indicate that the Rule is too narrow to reflect the policies underlying it. The time frames are not "realistic" and the fact that only the government can file the motion is unfair to defendants and derogatory of the ability of the courts to administer the process impartially. They note that sometimes the cooperation comes much later and there may be good reasons for defendants to forego immediate cooperation with the government; where for example they are seeking a new trial and are reluctant to make incriminating comments

to the prosecutor until that motion is resolved. With regard to their proposal that defendants be permitted to file Rule 35 motions, they note that the trial courts would give the appropriate weight to such motions. These commentators note that there may be jurisdictional problem with the Rule if the case is currently on appeal when the motion is made; they suggest that the Rule be amended to provide for the appellate court's temporary relinquishment of jurisdiction for motions arising during appeal. See Rule 33. Finally, the commentators add a number of suggestions to expand Rule 35(b) to permit modification of sentences on changed conditions. Although they note that the Committee has rejected similar proposals to expand Rule 35(c) (which they will comment on separately), they believe that an amendment to Rule 35(b) to permit the defendant to seek sentence modification for medical, personal, or legal reaons (including incompetency of defense counsel) would reduce the need for seeking relief under § 2255. They believe that it would be appropriate to include mention in Rule 35(b) of 18 U.S.C. § 3582, which specifies grounds for relief by the Bureau of Prisons.

Thomas W. Hillier, Esq.
Private Practice
Seattle, Washington
July 13, 1990

Although Mr. Hillier agrees that the amendment to Rule 35(b) is a good one, he believes that it does not go far enough. Noting the recent proposals from the Federal Courts Study Committee, he indicates that sentencing injustices frequently come to light after sentence is imposed. It is a simple fact, he states, that many defendants are serving longer sentences than they should because relevant sentencing information was not discovered until after the fact.

Fredric F. Kay, Esq.
Federal Public Defender
Tucson, Arizona
May 24, 1990

Mr. Kay supports the amendment to Rule 35(b) but urges the Committee to amend Rule 35 to permit correction or reduction as it used to. The current procedure of relying upon an appellate court mandate is wasteful of time and money.

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Elisabeth Semel, President
California Attorneys for Criminal Justice
San Diego, California
August 30, 1990

Ms. Semel, writing on behalf of the 2,500 members of the CACJ, supports the amendment to Rule 35(b) but believes that the Rule unfairly places complete power in the hands of the Executive. Both sides should be permitted to present a motion for reduction or modification.

Richard C. Tallman, Esq.
Private Practice
Seattle, Washington
Aug. 20, 1990

Mr. Tallman, a former DOJ trial attorney and Asst. US Attorney, who now defends business crimes, notes that the federal sentencing guidelines have removed much of the discretion that judges had and expansion of Rule 35 "remedies" is a check against abuses which are "inherent in a formula-based sentencing grid."

ADVISORY COMMITTEE ON
FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED ADDITION OF RULE 35(c)

I. SUMMARY OF COMMENTS: Rule 35(c)

Eleven individuals or organizations have submitted written comments on the proposed Rule 35(c) which would permit the trial court to correct errors in sentencing within seven days of sentencing. The overwhelming majority generally approves of the new provision. A number, however, suggest that the words "other clear error" be omitted because of ambiguity, that some provision be made for possible jurisdiction problems, and that the seven-day limit is too short. A number also recommend that Rule 35 be amended to permit modifications to sentences within 120 days of sentencing.

II. LIST OF COMMENTATORS: Rule 35(c)

1. Sara Sun Beale, Prof., Durham, NC, 8-1-90
2. Michael Brennan, et al, Prof., Los Angeles, CA, 10-31-90
3. John J. Cleary, Esq., San Diego, CA, 10-24-90
4. Neil E. Falconer, Esq., San Franciso, CA, 10-29-90
5. Daniel V. Flatten, Esq., Beaumont, TX, 8-28-90
6. William J. Genego & Peter Goldberger, Esq., NADCL, 10-31-90
7. Steele Lanphier, Esq., Stockton, CA, 9-5-90
8. Jan Nielsen Little, Esq., San Fran., CA.,8-28-90
9. Elisabeth Semel, Esq., San Diego, CA., 8-30=90
10. John D. Vandevelde, Esq., Los Angeles,CA, 10-23-90
11. Harold D. Vietor, J., Des Moines, IA, 8-14-90

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III. COMMENTS: Rule 35(c)

Sara Sun Beale
Prof., School of Law, Duke Univ.
Durham, North Carolina

In addressing the 7-day provision in the proposed Rule, Professor Beale indicates that to her knowledge the Federal Courts Study Committee did not consider anything other than a 120-day limit. Although she agrees that the Rule take into account potential jurisdictional problems, she does not believe that a 7-day period best meets those problems. She notes that there are some problems with being too narrow on a time limit; it may actually increase the burdens on the trial courts which may be faced with additional habeas actions. As written, the Rule may not take care of all of the jurisdictional problems. For example, a defendant could still seek relief under 35(c) even though an appeal had been filed. Only a rule which prohibits 35(c) correction after an appeal is filed would solve that problem. Jurisdictional problems may still exist even if the Rule 35(c) motion is timely filed but the court has not yet ruled before the time for filing an appeal has elapsed. And another problem may arise where the court sua sponte discovers an error within the 7 day time limit but the defendant has already filed an appeal. On the other hand, she notes, the Rule is too broad in that it prevents meritorious corrections if the 7 days have elapsed and the defendant has no intention of appealing the sentence.

In her view, restricting the availability of 35(c) relief will increase the number of habeas actions, which are entirely new actions and are often filed pro se, or increase the number of appeals. She suggests that the answer may rest in extending the time period to 120 days, provided that if an appeal has been filed the Rule 35(c) motion should be directed in the first instance to the appellate court for action or remand to the district court for its consideration.

Michael Brennan,
Dennis Curtis,
Judith Resnick,
Charles Weisselberg, &
Charles Whitebread,
Professors of Law, Univ. of So. Cal.
Los Angeles, CA
Octboer 31, 1991

Five law professors from the University of Southern

California generally favor the amendment but suggest that the language " other clear error" be omitted and that Rule 4(b) of the Appellate Rules be changed to address those cases where a notice of appeal has been filed before a sentence is corrected under Rule 35(c).

These commentators believe that the rule would create an "efficient and inexpensive" way of correcting obvious errors in sentencing. Therefore, they endorse the change. They also approve of the strict time limitations but suggest that the Note reflect the fact that after seven days, even arithmetical errors could not be corrected by the trial court except as through the Sentencing Reform Act or by action under section 2255. They state that the words "other clear error" create a dangerous loophole in an otherwise narrowly drawn rule and cite several possible readings of that language. They suggest that if the Committee does not believe that the remaining language is not sufficient, a reference to a sentence "not authorized by law" would cover what is apparently not covered in the words "other clear error."

The commenators also note the jurisdictional problems that are likely to result from the proposed amendment. To that end they recommend that Rule 4(b)(which addresses appeals in criminal cases) should be amended to reflect that a notice of appeal filed before the timely filing of a Rule 35(c) motion shall have no effect and that the time for filing a notice of appeal would begin again after the district court's disposition of that motion.

Finally, the commentators take exception to the shortened time for commenting on the amendment and in not holding hearings. They do not believe that the reasons offered by the committee for expedited comments on the rule change are convincing; any benefit in consolidating the two amendments to Rule 35 is outweighed by the interest in obtaining public comments through the normal manner.

John J. Cleary, Esq.
Private Practice
San Diego, CA
October 24, 1990

The proposed amendment, says this commentator is a "band aid adjustment that has a potential for serious abuse far beyond that envisioned by the drafters..." He believes that a Rule 35(c) correction process in absentia creates a "loop hole for abuse." He suggests that the language "other clear error" be omitted; a section 2255 or a writ of error coram nobis can always be used to address such issues if they are not raised in the appeal. He also recommends that some provision for correcting legal errors at any time be included, like in old Rule 35(a). He also indicates that

the defendant should receive notice and be provided an opportunity to be present if a Rule 35(c) motion is made. Finally, he notes that the Rule is "lopsided and biased" in favor of the prosecution.

Neil E. Falconer, Esq.
Private Practice
San Francisco, CA
October 29, 1990

Mr. Falconer believes that the 7-day period in the proposed amendment is too short and provides virtually no time to correct mistakes. Citing the fact that federal courts are often closed on three and four day holidays, he urges that a 15-day time limit would be more appropriate.

Daniel V. Flatten, Esq.
Private Practice
Beaumont, Texas
August 28, 1990

Mr. Flatten very briefly indicates that although he has little experience in federal criminal trials, the proposed amendment seems appropriate.

William J. Genego, Esq.
Peter Goldberger, Esq.
NADCL
Washington, D.C.
October 31, 1990

These two commentators, who are co-chairs of the NADCL Committee on Rules of Procedure, generally support the proposed amendment to Rule 35(c). They suggest that the language "other clear error" be deleted, that Rule 4(b) of the Federal Appellate Rules be amended to avoid jurisdictional problems, and that the Committee amend Rule 35 as recommended by the Federal Court's Study Committee (permit modification of sentence within 120 days of sentencing based upon new information). The comments supporting these changes are nearly verbatim with the letter submitted by Professors Brennan, et al, supra. As with that letter, these two commentators object to the abbreviated comment period.

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Steele Lanphier, Esq.
Private Practice
Stockton, California
September 5, 1990

Noting that although he has had little experience with Federal Criminal procedure, he believes that it would make more sense to permit the defendant to request a correction in the sentence prior to or until the time that he/she has appealed or the time for appealing has run. The 7-day time frame places the defense under severe pressure. Given the confusion, United States v. Cook should be followed.

Jan Nielsen Little, Esq.
Private Practice
San Francisco, California
August 28, 1990

Ms. Little notes that there is an apparent conflict between Rules 36 and the proposed Rule 35(c) in that there may some doubt whether a sentencing mistake was an arithmetic error which must be corrected within 7 days or a clerical error which may be corrected at any time. She suggests that it would be more appropriate to simply amend Rule 36 by adding the phrase, " except that errors relating to sentencing must be corrected within 7 days after imposition of sentence."

Elisabeth Semel, President
California Attorneys for Criminal Justice
San Diego, California
August 30, 1990

Ms. Semel, writing on behalf of the 2,500 members of CACJ, supports the amendment to permit correction of a sentence within 7 days. But she believes that the Committee has not gone far enough and should amend Rule 35 to its former language which permitted reconsideration with 120 days. Such an amendment would restore important discretion to the sentencing court and encourage defendant's to abandon sentencing appeals in return for an earlier reconsideration of a sentence.

John D. Vandevelde, Esq.
LA County Bar Assn.
Los Angeles, CA
October 23, 1990

Writing on behalf of the Los Angeles County Bar

Association's Criminal Practice Subcommittee, this commentator favors the proposed amendment but suggests that the rule provide for a 30-day time limit; he notes that often trial judge do not routinely provide a copy of the written judgment. That time limit would also coincide with the time permitted to the government to appeal in Rule 4(b) of the Appellate Rules. He suggests specific language which would reflect a 30-day limit and also remedy the possible jurisdictional problems; he believes that it is appropriate for the trial court to make technical or arithmetical corrections in a sentence at any time.

The Hon. Harold D. Vietor
Chief Judge, SD, Iowa
Des Moines, Iowa
August 14, 1990

Judge Vietor agrees with the proposed addition of Rule 35(c) but believes that the Study Committee's proposal of permitting the defendant to seek modification of the sentence within 120 days is better and should be implemented.

RULES OF CRIMINAL PROCEDURE

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); 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 ~~all offenses shall continue to be prosecuted in the District Court of Guam and in the District Court of the Virgin Islands by information as heretofore except such as may be required by local law to be prosecuted by indictment by grand jury.~~ the prosecution of offenses in the District Court of the Virgin Islands shall be by indictment or information as otherwise provided by law.

COMMITTEE NOTE

The amendment to Rule 54(a) conforms the Rule to legislative changes affecting the prosecution of federal cases in Guam and the Virgin Islands by indictment or information. The "except" clause in Rule 54(a) addressing the availability of indictments by grand jury in Guam has

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* New matter is underlined; matter to be deleted is lined through.

been effectively repealed by Public Law 98-454 (1984), 48 U.S.C. § 1424-4 which made the Federal Rules of Criminal Procedure (including Rule 7, relating to use of indictments) applicable in Guam notwithstanding Rule 54(a). That legislation apparently codified what had been the actual practice in Guam for a number of years. See 130 Cong. Rec., D. H25476 (daily ed. Sept. 14, 1984). With regard to the Virgin Islands, Public Law 98-454(1984) also amended 48 U.S.C. §§ 1561 and 1614(b) to permit (but not require) use of indictments in the Virgin Islands.

FEDERAL RULES OF EVIDENCE*

Rule 404. Character Evidence not Admissible to Prove Conduct; Exceptions; Other Crimes

* * * * *

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident/, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

COMMITTEE NOTE

Rule 404(b) has emerged as one of the most cited rules in the Rules of Evidence. And in many criminal cases evidence of a accused's extrinsic acts is viewed as an important asset in the prosecution's case against an accused. Although there are a few reported decisions on use of such evidence by the defense, see, e.g., United States v. McClure, 546 F.2d 670 (5th Cir. 1990)(acts of informant offered in entrapment defense), the overwhelming number of cases involve introduction of that evidence by the prosecution.

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*New matter underlined; matter to be omitted is lined through.

FEDERAL RULES OF EVIDENCE

The amendment to Rule 404(b) adds a pretrial notice requirement in criminal cases and is intended to reduce surprise and promote early resolution on the issue of admissibility. The notice requirement thus places Rule 404(b) in the mainstream with notice and disclosure provisions in other rules of evidence. See, e.g., Rule 412 (written motion of intent to offer evidence under rule), Rule 609 (written notice of intent to offer conviction older than 10 years), Rule 803(24) and 804(b)(5) (notice of intent to use residual hearsay exceptions).

The Rule expects that counsel for both the defense and the prosecution will submit the necessary request and information, respectively, in a reasonable and timely fashion. Other than requiring pretrial notice, no specific time limits are stated in recognition that what constitutes a reasonable request or disclosure will depend largely on the circumstances of each case. Compare Fla. Stat. Ann. § 90.404(2)(b)(notice must be given at least 10 days before trial) with Tex. R. Evid. 404(b)(no time limit).

Likewise, no specific form of notice is required. The Committee considered and rejected a requirement that the notice satisfy the particularity requirements normally required of language used in a charging instrument. Cf. Fla. Stat. Ann. § 90.404(2)(b)(written disclosure must describe uncharged misconduct with particularity required of an indictment or information). Instead, the Committee opted for a generalized notice provision which requires the prosecution to apprise the defense of the general nature of the evidence of extrinsic acts. The Committee does not intend that the amendment will supersede other rules of admissibility or disclosure, such as the Jencks Act, 18 U.S.C. § 3500, et. seq. nor require the prosecution to disclose, directly or indirectly, the names and addresses of its witnesses, something it is currently not required to do under Federal Rule of Criminal Procedure 16.

The amendment requires the prosecution to provide notice, regardless of how it intends to use the extrinsic act evidence at trial, i.e. during its case-in-chief, for impeachment, or for possible rebuttal. The court in its discretion may, under the

facts, decide that the particular request or notice was not reasonable, either because of the lack of timliness or completeness. Because the notice requirement serves as condition precedent to admissibility of 404(b) evidence, the offered evidence is inadmissible if the court decides that the notice requirement has not been met.

Nothing in the amendment precludes the court from requiring the government to provide it with an opportunity to rule in limine on 404(b) evidence before it is offered or even mentioned during trial. When ruling in limine, the court may require the government to disclose to it the specifics of such evidence which the court must consider in determining admissibility.

The amendment does not extend to evidence of acts which are "intrinsic" to the charged offense, see United States v. Williams, 900 F.2d 823 (5th Cir. 1990)(noting distinction between 404(b) evidence and intrinsic offense evidence). Nor is the amendment intended to redefine what evidence would otherwise be admissible under Rule 404(b). Finally, the Committee does not intend through the amendment to affect the role of the court and the jury in considering such evidence. See United States v. Huddleston, _____ U.S. _____, 108 S.Ct 1496 (1988).

ADVISORY COMMITTEE ON
FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENT TO FEDERAL RULE OF EVIDENCE 404(b)

I. SUMMARY OF COMMENTS: Fed. R. Evidence 404(b)

Of the sixteen (16) commentators who submitted their written views on the proposed amendment, only two are opposed to the amendment. One, a retired state trial judge, sees no need to condition the admissibility of evidence upon providing notice. The other, a federal judge, believes that the proposal will not solve the problems typcially associated with Rule 404(b) evidence. All of the remaining commentators encourage a requirement that the prosecution give specific notice of the details of the 404(b) evidence. A number of reasons are advanced for requiring specifity. One noted that to encourage plea bargaining the prosecutor may make vague threats or references to a number of uncharged acts without giving the defense an opportunity to determine the actual strength of that evidence. One commentator suggested adoption of the specificity for federal charging instruments while most of the commentators simply urged that information such as dates, times, and places be included. Several specifically mentioned the need to determine the names of pertinent witnesses.

Several commentators suggested a specific time limit. One indicated that notice should be given at least 30 days prior to trial and another suggested a minimum of four weeks notice.

One commentator expressed concern that the Committee Note suggests that 404(b) could be used for impeachment and that that might lead to similar notice requirements for other impeachment evidence.

Finally, several suggested that the Rule be amended to provide minimum standards of admissibility, e.g., clear and convincing evidence.

II. LIST OF COMMENTATORS: Fed. R. Evidence 404(b)

1. John C. Burgin, Esq., Knoxville, KY, 4-12-90
2. Thomas A. Campbell, Esq., Tacoma, Wash., 8-10-90
3. John J. Cleary, Esq., San Diego, CA, 5-23-90

4. William J. Genego, Esq. & Peter Goldberger, Esq., Wash. D.C., 8-31-90

5. Ralph B. Guy, Judge, Ann Arbor, Mich., 4-17-90

6. Thomas W. Hillier, II Esq., Seattle, Wash., 7-13-90

7. Leon Karelitz, Esq., Raton, NM, 5-21-90

8. Fredric F. Kay, Esq., Tuscon, Ariz., 5-18-90

9. Peter Lushing, Prof., New York, NY, 4-4-90

10. David S. Marshall, Esq., Seattle, Wash., 8-8-90

11. Donald F. Paine, Esq., Knoxville, TN, 4-6-90

12. Joe M. Quaitance, Esq., Tacoma, Wash., 8-8-90

13. Myrna S. Raeder, Prof., Los Angeles, CA., 8-29-90

14. Walter A. Reiser, Jr., Esq.,Columbia, SC, 5-16-90

15. Elisabeth Semel, Esq., San Diego, CA., 8-30-90

16. Richard C. Tallman, Esq., Seattle, Wash., 8-20-90

III. COMMENTS: Fed. R. Evidence 404(b)

John C. Burgin, Esq.
Judicial Law Clerk
Knoxville, Tenn.
April 12, 1990

Mr. Burgin supports the proposed amendment but points out what he believes to be an inconsistency between the proposed Rule and the Committee Note. While the Rule itself only requires the prosecution to give notice, the Committee Note indicates that the "prosecution and the defense will submit the necessary request and information in a reasonable and timely fashion." He indicates that the language in the Note may indicate that Committee believes that the defense should also produce information about Rule 404(b) evidence.

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Thomas A. Campbell, Esq.
Private Practice
Tacoma, Washington
August 10, 1990

In a brief letter, Mr. Campbell indicates that he concurs in the views of Mr. Hillier, infra.

John J. Cleary, Esq.
Private Practice
San Diego, California
May 23, 1990

Mr. Cleary favors the amendment to Rule 404(b) but believes the Committee should go farther. First, notwithstanding its disclaimer in its Note, the Committee should establish some minimum criteria for the admissiblity of 404(b) evidence. Second, the proposed notice requirement should specifically overrule the Jencks Act, and not "genuflect" to the current policy of nondisclosure until the time of trial. And, third, the notice should be given a minimum of four (4) weeks prior to trial.

Mr. William J. Genego, Esq. &
Mr. Peter Goldberger, Esq.
NADCL
Washington, D.C.
August 31, 1990

These two commentators, writing in their capacity as co-chairs of NADCL's Committee Rule of Procedure, support the amendment to Rule 404(b) but urge the Committee to require the prosecution to provide notice which comports with the specifity of indictments (Rule 7(c)(1)), i.e., a statement of the essential facts. This change, they state, would not be burdensome on the government and would provide substantial benefits. It would enhance the court's ability to rule accurately and would permit the defendant a fair opportunity to investigate and challenge the evidence.

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Hon. Ralph B. Guy, Jr.
United States Court of Appeals
Sixth Circuit
Ann Arbor, Mich.
April 17, 1990

Judge Guy is opposed to the proposed amendment because it does not address the real problems with Rule 404(b) evidence and instead create grounds for "pretrial squabbles" over the adequacy of notice, etc. He prefers that the problems associated with the Rule be solved by "judicial gloss" which would reflect the requirement to conduct a 403 balancing test. One of the real problems is the lack of preciseness by the government in introducing the evidence and often the prosecution is left with justifying inadvertent references to 404(b) evidence by its witnesses. He notes that the problem of disclosure will exacerbate the issue of what prior acts are admissible against members of a conspiracy. Finally, he notes that it will be particularly onerous on the prosecution to provide pretrial notice of evidence which may be offered in rebuttal.

Thomas W. Hillier, II, Esq.
Federal Public Defender
Seattle, Washington
July 13, 1990

Mr. Hillier believes that the proposed notice requirement in Rule 404(b) is a good one but adds that it does no good to require notice if the defendant is not advised of the particulars of the evidence. As written, the notice requirement does not put the defendant in a better position; in fact it places the defendant in a worse position because the prosecutor can use vague threats of using Rule 404(b) evidence to intimidate the defendant. He adds that there is really no reason for the Committee Note because the government should have no interest in secreting 404(b) information. If it does, protective orders can be sought on a case by case basis. The Committee Note, he urges, should require information concerning the date, etc.

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Fredric F. Kay, Esq.
Federal Public Defender
Tucson, Arizona
May 18, 1990

Mr. Kay supports the amendment because it is in conformity with modern practices but suggests that the proposal should be changed to require more specific notice.

Leon Karelitz, Esq.
Private Practice
Raton, New Mexico
May 21, 1990

Mr. Larelitz, a retired state district court judge, believes that Rule 404(b) should remain unchanged. He notes that there is no sound reason for conditioning the admissiblity of evidence on doing something -- giving pretrial notice. Surprise, he indicates, should not be built into the Rules; if a party is surprised by evidence the appropriate remedy is a continuance. With regard to the Committee's view that the amendment will promote pretrial resolution, he believes that prudent judges will wait until they see how the 404(b) evidence comes out during the actual trial, even if it means a little delay. Finally, he notes that although other evidence rules include a notice provision, that is not sufficient reason to amend Rule 404(b) by including a pretrial notice provision.

Peter Lushing
Professor of Law, Yeshiva Univ.
New York, N.Y.
April 4, 1990

Professor Lushing points out that the word "admissible" is mispelled in the title of the Rule.

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David S. Marshall, Esq.
Private Practice
Seattle, Washington
August 9, 1990

Mr. Marshall indicates that providing notice without the specifics of the 404(b) evidence will not benefit either the court or the defense. The Committee Note should therefore indicate that the notice must include information such as dates, time, etc.

Donald F. Paine, Esq.
Private Practice
Knoxville, Tenn.
April 11, 1990

Mr. Paine believes the proposal is a good one but points out that the word "admissible" is misspelled in the title of Rule 404(b) and that the word "supersede" is misspelled in the Committee Note.

Joe M. Quaintance, Esq.
Private Practioner
Tacoma, Washington
Aug. 8, 1990

Mr. Quaintance concurs with the views of Mr. Levine and Mr. Hillier, who have submitted written comments to the Committee. He emphasizes that permitting the prosecutor to avoid giving details of the 404(b) evidence will result in office policy that such information will never be submitted to the defense prior to trial. Thus, the rule change will have no practical effect and trial judges will be reluctant to compel disclosure before trial despite defense motions requesting the information. The truth, he states, will be obscured and trial by ambush promoted. The Rule should clearly require notice of the specifics of the 404(b) evidence.

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Myrna S. Raeder, Professor
Southwestern Univ. School of Law
Los Angeles, California
August 29, 1990

Professor Raeder notes that the ABA's Criminal Justice Section Committee on Rules of Criminal Procedure suggested a similar amendment several years ago in a new proposed Rule 405A(d) in order to insure fairness and reduce surprise. The Committee's proposal does not go far enough because it does not provide the defense with sufficient information to identify potential witnesses. She supports the language which permits the prosecutor to provide notice, for good cause shown, after the trial has started. That will help insure that the notice provision does not become a pitfall for the "already burdened prosecutors."

Walter A. Reiser
Prof of Law, Univ. of South Carolina
Columbia, South Carolina
May 16, 1990

Professor Reiser questions the language in the Committee Note which suggests that Rule 404(b) evidence may be used for impeachment. He is concerned that that reference may be interpreted to mean that the prosecution must also give notice of any evidence that might be used under Rule 609 (prior conviction) or Rule 608 (prior acts).

Elisabeth Semel, President
California Attorneys for Criminal Justice
San Diego, California
August 30, 1990

Writing on behalf of the 2,500 members of CACJ, Ms. Semel generally supports the amendment to Rule 404(b) but urges that the notice be given 30 days before trial unless good cause is shown. Further, the government should be required to provide specifics such as date, time, place, and identity of the witnesses involved. She also urges the Committee to amend the Rule to overrule Huddleston by requiring a clear and convinving evidence standard. Without some additional protection, there is a danger of misuse of the Rule.

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Richard C. Tallman, Esq.
Private Practice
Seattle, Washington
Aug. 20, 1990

Mr. Tallman suoports the amendment to Rule 404 but believes strongly that the language in the Committee Note which suggests that the notice need not include time, place, or date would emasculate the rule. Without more specific information the defendant in a white collar crime case is typically awash in a "sea of paper" involving hundreds or thousands of transactions. He notes that in such cases there is rarely danger to the prosecution witnesses or unfairness to the prosecution in requiring specific information. Early disclosure may lead to earlier plea bargains. Both the Rule and the Note, he states, should clearly require that information concerning dates, times, and places of 404(b) evidence should be disclosed.

M E M O R A N D U M

DATE: November 30, 1990

TO: Hon. Wm. Terrell Hodges

FROM: Hon. Harvey E. Schlesinger

RE: Amendments to Federal Rules of Criminal Procedure

Congress passed H.R. 5316 on October 27, 1990, and it now sits on the President's desk with a deadline for passage of December 1, 1990. Part of that Bill provides that upon enactment, "... each United States Magistrate appointed under Section 631 of Title 18, United States Code, shall be known as a United States Magistrate Judge, and any reference to any United States Magistrate or Magistrate that is contained in Title 28, United States Code, and any other federal statute ... shall be deemed to refer to United States Magistrate Judge...."

There are approximately one hundred twelve places in Rules 1, 3, 4, 5, 5.1, 6, 9, 17, 32.1, 40, 41, 44, 49, 54, 55, 57, and 58, when it becomes effective December 1, where the word "magistrate(s)" appears. Rule 54 uses the term "magistrate" in three different definitions; that is, (a) Federal magistrate, (b) magistrate, and (c) United States magistrate. These three variations are necessary because certain Rules allow different judicial officers, and in some instances State officers, to handle various procedures.

To comport with this new change in title, I believe it is technical only and we do not have to follow the regular rules enabling procedure. Rather than transmitting forward the present variations in each of the Rules with a lined-through deletion and underlined additions, I recommend one basic proposal as follows:

> "To conform with the title change for United States magistrate to United States magistrate judge as contained in Public Law 101-???, these Rules are hereby amended as follows:
>
> (1) In all places where the word "magistrate" appears, immediately following there should be inserted the word "judge"; and
>
> (2) In all places where the word "magistrates" appears, the "s" shall be deleted changing the word to the singular and

immediately following there should be inserted the word "judges."

Copies to:

Mr. James E. Macklin, Jr., Secretary
Committee on Rules of Practice & Procedure
Judicial Conference of the United States
Administrative Office of the U. S. Courts
Washington, DC 20544

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