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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 on Proposed and Pending Rules of Criminal Procedure**

DATE: **May 7, 1996**

I. INTRODUCTION.

At its meeting April 29, 1996, the Advisory Committee on the Rules of Criminal Procedure acted upon proposed amendments to Rules of Criminal Procedure 5.1, 16, 26.2, 31, 33, 35, and 43. The Committee decided not to take any further action on a proposed amendment to Rule 24(a), which would have provided for attorney-conducted voir dire.. This report addresses those proposals and recommendations to the Standing Committee.

Copies of the proposed rules and the accompanying committee notes are attached. A copy of the minutes of the April meeting is also attached.

II. ACTION ITEMS

A. Rule 5.1. Preliminary Examination & Rule 26.2. Production of Witness Statements.

The proposed amendments to Rule 5.1 and Rule 26.2 would require production of a witness' statement after the witness has testified at a preliminary hearing. The amendments parallel similar changes made in 1993 to Rules 32, 32.1, 46, and Rule 8 of the Rules Governing Proceedings Under § 2255. The proposed amendments are attached.

Recommendation: The Advisory Committee recommends that the amendments to Rules 5.1 and 26.2 be published for public comment.

B. Rule 16. Discovery and Inspection; Disclosure of Expert's Testimony.

At its July 1995 meeting, the Standing Committee approved for transmittal to the Judicial Conference two key amendments to Rule 16. The first amendment would have required the government to provide the names of its witnesses to be called at trial seven days before the trial. The second, would have required the parties to disclose summaries of expert testimony offered on the issue of the defendant's mental condition. The amendment requiring pretrial disclosure of names of government witnesses was the subject of pro and con discussion and was ultimately rejected by the Judicial Conference. Although there was no controversy and no discussion concerning the expert testimony amendment, it was rejected at the same time by the Judicial Conference.

At its January 1996, meeting, in light of this history, the Standing Committee asked whether the Advisory Committee wished to reconsider the amendment governing expert testimony and during its April 1996 meeting, the Advisory Committee did reconsider this proposal and voted to resubmit it to the Standing Committee.

The amendment, as it was forwarded to the Judicial Conference, is attached.

Recommendation: The Advisory Committee recommends that the amendments to Rule 16 regarding expert testimony be resubmitted to the Judicial Conference without further public comment.

C. Rule 31. Polling of Jurors.

The Advisory Committee has proposed an amendment to Rule 31, which would require that the jurors be polled individually whenever any polling occurs after the verdict, either at a party's request or on motion of the court. The Committee agreed with the view that there are distinct advantages to individual polling and that the practice should be required. Individual polling, for example, should reduce the likelihood of a post-trial attack on the verdict on the ground that one of the jurors disagreed with the verdict. The amendment leaves to the courts the exact method of conducting the individual polling in cases involving multiple defendants or multiple counts.

Recommendation: The Advisory Committee recommends that the proposed amendment to Rule 31 be published for public comment.

D. Rule 33. Motion for New Trial.

The proposed amendment to Rule 33 is intended to provide some consistency to the amount of time for filing a motion for new trial based upon newly discovered evidence. As written, the defendant has two years from the "final judgment" to file such a motion. Because the courts interpret final judgment to mean the decision of the appellate court, the disparity in the actual amount of time available to file a motion for new trial can be great. The amendment shifts the triggering event from appellate action to the trial court's verdict or finding of guilty. That is currently the triggering event for motions for new trial based on grounds other than newly discovered evidence Because the amendment does not change the current two year limit, in effect it shortens the actual time for filing the motion. The Committee considered,. but rejected, a proposed change which would have extended the time to three years. The consensus of the Committee was that two years from the verdict or finding of guilty was sufficient time to file the motion.

Recommendation: The Committee recommends that the amendment to Rule 33 be published for public comment.

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

If a defendant has provided substantial assistance to the government *before* sentencing, the court may reduce the sentence in accordance with the Sentencing Guidelines, § 5K1.1. Rule 35(b) provides a mechanism for the government to seek a reduction in the defendant's sentence if the defendant provides "substantial assistance" *after* sentence is imposed. The proposed amendment to Rule 35(b) is an attempt to fill a gap which may exist where a defendant's pretrial and post-sentencing assistance, when considered separately, does not amount to substantial assistance, but is substantial when combined.

As reflected in the Committee Note, the amendment is not intended to provide "double dipping." The Committee believed that in practice, the likelihood that double dipping might occur would be rare because the government decides whether to file a Rule 35(b) motion.

Recommendation: The Advisory Committee recommends that the amendment to Rule 35 be published for public comment.

F. Rule 43(c)(4). Presence of Defendant.

The amendment to Rule 43(c) is necessary to address specifically the issue of the defendant's presence at a reduction of sentence hearing or a correction of sentence hearing conducted under § 3582(c). Amendments made to Rule 43 in 1995 addressed the question of in absentia sentencing of a defendant and the presence of a defendant at a "correction" of sentence proceeding. In light of those amendments and caselaw interpretation of Rule 35 (which addresses correction and reduction of sentences), it has become clear that a more comprehensive treatment of the issue is required. In addition, Rule 43 makes no mention of resentencing conducted under 18 U.S.C. § 3582(c) which may result from retroactive changes in the sentencing guidelines or from a motion by the Bureau of Prisons to reduce a sentence based on extraordinary and compelling reasons.

The proposed amendment provides that a defendant need not be present a correction or reduction of sentence under Rule 35(b) or (c) or at a resentencing conducted under 18 U.S.C. 3582(c). A defendant's presence would be required at a resentencing following a remand, under Rule 35(a).

Recommendation: The Advisory Committee recommends that the proposed amendment to Rule 43(c)(4) be published for public comment.

III. INFORMATION ITEM

A. Rule 24(a). Attorney Conducted Voir Dire.

The Standing Committee published for comment proposed amendments to Criminal Rule 24(a) in September 1995. The amendment, which addressed attorney-conducted voir dire of the jurors, generated considerable comment. Counting the letters and comments received before publication, the Committee received written comments from over 160 individuals or organizations and heard the testimony of 12 witnesses. The overwhelming number of negative comments on the proposed amendment came from the bench; virtually all other commentators favored the amendment.

After further discussion, the Committee decided not to pursue the amendment at this time. Instead, the Committee believes that the most appropriate step is to increase the awareness of the bench and the bar to the issue through the development and implementation of judicial workshop programs and specific training for newly appointed judges.

B. Minutes of April 1996 Meeting (Draft).

The draft Minutes of the Criminal Rules Committee meeting on April 29, 1996 are also attached to this report. Please note that the minutes have not yet been approved by the Advisory Committee.

Attachments:

Rules and Committee Notes
Draft Minutes

Rule 16. Discovery and Inspection[1]

(a) GOVERNMENTAL DISCLOSURE OF EVIDENCE.

(1) Information Subject to Disclosure.

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(E) EXPERT WITNESSES. At the defendant's request, the government shall disclose to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) of this rule and the defendant complies, the government shall, at the defendant's request, disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703, and 705 as evidence at trial on the issue of the defendant's mental condition. ~~This~~ The summary provided under this subdivision shall ~~must~~ describe the witnesses' opinions, the bases

[1]. New matter is underlined and matter to be omitted is lined through.

and the reasons for those opinions ~~therefor~~, and the witnesses' qualifications.

(2) *Information ~~Not Subject~~ to Disclosure*. Except as provided in paragraphs (A), (B), (D), and (E) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or any other government agent ~~agents in connection with the investigation or prosecution of~~ investigating or prosecuting the case. Nor does the rule authorize the discovery or inspection of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.

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(b) THE DEFENDANT'S DISCLOSURE OF EVIDENCE.

(1) *Information Subject to Disclosure*.

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(C) EXPERT WITNESSES. Under the following circumstances, the defendant shall, at the government's

request, disclose to the government a written summary of testimony that the defendant intends to use under Rules 702, 703, and 705 of the Federal Rules of Evidence as evidence at trial: (i) if ~~If the~~ defendant requests disclosure under subdivision (a)(1)(E) of this rule and the government complies, or (ii) ~~if~~ the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition. ~~the defendant, at the government's request, must disclose to the government a written summary of testimony the defendant intends to use under Rules 702, 703 and 705 of the Federal Rules of Evidence as evidence at trial.~~ This summary ~~must~~ shall describe the witnesses' opinions ~~of the witnesses~~, the bases and reasons for those opinions ~~therefor~~, and the witnesses' qualifications.

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COMMITTEE NOTE

Subdivision (a)(1)(E). Under Rule 16(a)(1)(E), as amended in 1993, the defense is entitled to disclosure of certain information about expert witnesses which the government intends to call during the trial as well as reciprocal pretrial disclosure by the

government upon defense disclosure. This amendment is a parallel reciprocal disclosure provision which is triggered by a government request for information concerning defense expert witnesses as to the defendant's mental condition, which is provided for in an amendment to (b)(1)(C), *infra*.

Subdivision (b)(1)(C). Amendments in 1993 to Rule 16 included provisions for pretrial disclosure of information, including names and expected testimony of both defense and government expert witnesses. Those disclosures are triggered by defense requests for the information. If the defense makes such requests and the government complies, the government is entitled to similar, reciprocal discovery. The amendment to Rule 16(b)(1)(C) provides that if the defendant has notified the government under Rule 12.2 of an intent to rely on expert testimony to show the defendant's mental condition, the government may request the defense to disclose information about its expert witnesses. Although Rule 12.2 insures that the government will not be surprised by the nature of the defense or that the defense intends to call an expert witness, that rule makes no provision for discovery of the identity, the expected testimony, or the qualifications of the expert witness. The amendment provides the government with the limited right to respond to the notice provided under Rule 12.2 by requesting more specific information about the expert. If the government requests the specified information, and the defense complies, the defense is entitled to reciprocal discovery under an amendment to subdivision (a)(1)(E), *supra*.

Criminal Rules Committee
Proposed Amendent: Rule 5.1
May 1996

Rule 5.1. Preliminary Examination

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(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.

Criminal Rules Committee
Proposed Amendent: Rule 26.2
May 1996

Rule 26.2. Production of Witness Statements

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(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.

Criminal Rules Committee
Proposed Amendment: Rule 31
May 1996

Rule 31. Verdict

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(d) POLL OF JURY. When a verdict is returned and before it is recorded , the court, at the request of any party or upon its own motion, shall 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 retire for further deliberations or it may ~~be discharged~~ discharge the jury.

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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." *United States v. Miller*, *supra*, 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.

Criminal Rules Committee
Proposed Amendment: Rule 33
May 1996

Rule 33. New Trial.

The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for new trial based on the ground of newly discovered evidence may be made only before or within two years after ~~final judgment~~, the verdict or finding of guilty. ~~but if~~ If an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 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.

Criminal Rules Committee
Rule 35(b)
May 1996

Rule 35. Correction or Reduction of Sentence

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(b) REDUCTION OF SENTENCE FOR CHANGED CIRCUMSTANCES. The court, on motion of the Government made within one year after the imposition of the sentence, may reduce a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense, in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code. The court may consider a government motion to reduce a sentence made one year or more after imposition of the sentence where the defendant's substantial assistance involves information or evidence not known by the defendant until one year or more after imposition of sentence. 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 reduce such sentence to a level below that established by statute as a minimum sentence.

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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.

Criminal Rules Committee
Proposed Amendment: Rule 43
May 1996

Rule 43. Presence of the Defendant

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(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.