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AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE

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HEARINGS

BEFORE THE

SUBCOMMITTEE ON CRIMINAL JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

NINETY-FOURTH CONGRESS

FIRST SESSION

ON

AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE

FEBRUARY 26 AND MARCH 24 AND 26, 1975

Serial No. 6



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AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE

WEDNESDAY, FEBRUARY 26, 1975

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIMINAL JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:05 a.m., in room 2226, Rayburn House Office Building, Hon. William L. Hungate [chairman of the subcommittee] presiding.

Present: Representatives Hungate, Mann, Holtzman, Russo, Wiggins, and Hyde.

Also present: Thomas W. Hutchison, counsel; Robert L. Brown, assistant counsel; and Michael W. Blommer, associate counsel.

Mr. HUNGATE. The subcommittee will be in order.

The Subcommittee on Criminal Justice is meeting to hear testimony about the proposed amendments and additions to the Federal Rules of Criminal Procedure promulgated by the Supreme Court on April 22, 1974. Under the terms of Public Law 93-361, these amendments and additions will become effective on August 1, 1975, unless Congress acts to modify or change any or all of them.

Last September, the subcommittee heard testimony about these amendments from the following: The Judicial Conference, represented by Judges J. Edward Lumbard, Roszel Thomsen, and William H. Webster, and by Prof. Frank J. Remington; the Justice Department; and the Center for Law and Social Policy.

The subcommittee's goal is to finish hearings next month and then to consider possible legislation. If legislation is necessary, the subcommittee hopes to complete House action on it before the Memorial Day recess. It is important that we adhere to this schedule if the Senate is to have an adequate opportunity to consider the proposed amendments. If no legislation is passed by August 1, 1975, and signed by the President, the amendments will become effective as originally promulgated.

Our witnesses today are from the American Civil Liberties Union and the National Legal Aid and Defender Association. Our first witness is Prof. Leon Friedman, of Hofstra University Law School, who will testify on behalf of the ACLU. We will then hear from Charles Sevilla, chief trial attorney, Federal Defenders of San Diego, Inc. He will testify on behalf of the National Legal Aid and Defender Association.

Professor Friedman, we are pleased to have you with us today, and you may proceed.

TESTIMONY OF LEON FRIEDMAN, PROFESSOR OF LAW, HOFSTRA UNIVERSITY SCHOOL OF LAW

Mr. FRIEDMAN. Thank you, Mr. Chairman.

On behalf of the American Civil Liberties Union, I appreciate the committee's invitation and the opportunity to comment on the proposed amendments to the Federal Rules of Criminal Procedure.

I have a prepared statement which we have submitted for the record.

Mr. HUNGATE. Without objection, that will be made part of the record at this point.

[The prepared statement of Prof. Leon Friedman follows:]

STATEMENT ON BEHALF OF AMERICAN CIVIL LIBERTIES UNION ON THE PROPOSED AMENDMENTS TO THE PROPOSED RULES OF CRIMINAL PROCEDURE

PREPARED BY PROFESSOR LEON FRIEDMAN, HOFSTRA UNIVERSITY SCHOOL OF LAW

On behalf of the American Civil Liberties Union, I appreciate the Committee's invitation and the opportunity to comment on the proposed amendments to the Federal Rules of Criminal Procedure submitted to the Congress by the Chief Justice on April 22, 1974. The American Civil Liberties Union, a nationwide organization with 280,000 members, has been especially concerned about the requirements of due process and the use of fair procedures in the criminal justice system. It welcomes the constant review of the governing rules in the federal system and applauds some of the changes which have been suggested by the proposed amendments. However it is extremely concerned about the suggested rules on prosecutorial discovery of evidence from the defendant. These proposals, found in amended rules 12.1 and 16 are ill-advised, unfair and probably unconstitutional.

In my testimony today I would like to touch briefly on the suggested changes in Rules 4, 9, 11, 32 and 43, which we endorse for the most part. We would recommend only a few changes in some of these rules. The main thrust of my testimony will be in opposition to the amendments that would permit prosecutors to have broad discovery of an accused's defense, evidence and witnesses. We feel that these proposals are unwise and in direct violation of the fifth and sixth amendments.

Rule 4

We endorse the proposed change which would make a summons the normal procedure for formally initiating the criminal justice process instead of an arrest warrant. Among other reasons, we believe that this change is desirable in order to cut down on the wide number of warrantless searches which are made incident to an arrest. The Supreme Court held in *Chimel* v. *California*, 395 U.S. 752 (1969), that the police, acting without a warrant, may search a person after he is arrested and the immediate area in which the arrest is made.

In *United States* v. *Robinson*, 414 U.S. 218 (1973), the Court held that even an arrest for a traffic violation may justify a warrantless search of the person. These decisions and numerous others in the lower federal courts have made a serious inroad into the requirements of the fourth amendment which call for the issuance of a warrant by a neutral magistrate before a search of a person or his effects can be made.

The current situation allows police officers or other federal agents to arrange for an arrest at any place they desire—a person's home or his office or some other convenient location—and then search the immediate area under the *Chimel* doctrine without securing a warrant. If the summons were made the normal method of initiating the criminal process, federal agents would be forced to secure a warrant before they could search, in accordance with the fourth amendment.

The proposed rule allows for the use of an arrest warrant upon a showing of need by the authorities. Presumably, the "valid reason" required by the rule would be the danger of flight or an equally important reason. Police officers always have the right to arrest a person when they observe him committing a crime, or have reasonable grounds for thinking so.

As a general proposition we believe that anytime the authorities seek to restrict the freedom of an individual, that decision should be made by a neutral magistrate upon a showing of probable cause presented to him and should not be made by the prosecutor or the police. This is true whether an arrest warrant is sought or a wiretap or a search warrant or any other kind of invasion of a citizens rights. For these reasons we endorse the recommended changes in Rule 4.

Rule 9

Our comments in response to Rule 4 are equally applicable to Rule 9.

Rule 11

The proposed amendments are an attempt to deal with the anarchy that pervades the negotiation and acceptance of guilty pleas. Since the overwhelming number of cases in the criminal justice system are terminated through a negotiated plea of guilty, rigorous and fair rules are absolutely vital in this area.

For the most part, amended Rule 11 is a fair attempt to regulate the plea bargaining process. However, some changes are desirable in the rules as presently drafted.

Rule 11(c) specifies those matters about which the court must advise the defendant before a plea of guilty is accepted. For some inexplicable reason, the court is not required to tell the defendant that he has the Fifth Amendment privilege against self-incrimination, that he has a right to a jury trial, that he has the right to secure his own witnesses and confront the witnesses against him and that he has the right to have a lawyer appointed for him through all steps of the process. The general words in Rule 11(c)(4) that "there will not be a further trial of any kind," is not sufficient to bring to the attention of a defendant what rights he is giving up. Most federal judges do in fact give these warnings. Since they would take about three minutes of additional time, there is no reason why they cannot be added to rule 11(c). The Supreme Court in *Boykin* v. *Alabama*, 395 U.S. 238 (1969) underlined the importance of a full statement of rights before a plea is accepted and its suggestion should be adopted in the proposed rules.

Rule 11(e) is an attempt to place on the record the actual plea bargain entered into between the prosecution and the defense. In the past defendants have been forced to deny that their plea of guilty was entered into because of a promise of a recommendation for a specific sentence by the prosecutor when everyone in the courtroom knew that such a bargain had taken place. By requiring the bargain to be put on the record, the rule would eliminate any doubts or confusion as to what the terms of the arrangement was.

More important, Rule 11(e) would allow the defendant to withdraw his plea if the judge does not accept the bargain. This provision is absolutely necessary to insure the fairness of the process. However under no circumstances should any part of the bargaining process be used against the defendant at the trial if the judge rejects the bargain. Rule 11(e)(6) provides the proposed plea or any statements made in connection with it "is not admissible . . . against the person who made the plea . . ." The prohibition should be made absolute and the rule should be clarified to insure that any withdrawn plea or connected statement cannot be used in any way at a later trial, whether as direct evidence, for impeachment purposes or at sentencing. It is not difficult to imagine that a defendant might be persuaded to plea guilty in exchange for a specific sentence even though he insisted he was not guilty. See *North Carolina* v. *Alford*, 400 U.S. 25 (1970). If the judge refuses to accept the plea because of a defendant's insistence that he did not in fact commit the crime, or for any other reason, the offer to plead guilty cannot be held against the defendant in any way. Recent Supreme Court cases dealing with the use for impeachment purposes of statements or evidence which could not be used directly against the defendant illustrate that the problem is a real one. See *Harris* v. *New York*, 401 U.S. 2 (1971). It should be made clear that impeachment use of offers to plead guilty cannot be allowed.

Rule 12.1, and Rule 16 will be discussed following my discussion of Rule 32 and 43.

Rule 32

The proposed amendment would make clear that counsel for the defendant could inspect the presentence report and can comment upon it. However, we believe that (1) the right of counsel to inspect the report should be made absolute; and (2) if

there are factual disputes relating to anything in the report, the defendant should be entitled to a hearing on the matter.

The current proposal allows a judge to bar disclosure of the report if there was a danger of disclosing confidential sources or a physical or other danger to third persons. Rule 32(c)(3)(A). Even in these situations, the report should be made available to the attorney, with a protective order imposed against further disclosure. If the other protections in the rule are to mean anything, someone in the defendant's camp should be allowed to view the report.

Secondly, the information in a presentence report can be inaccurate with serious consequences to the defendant. If he challenges any factual assertions in the report, he should be able to present evidence and argue in support of his claims. There are a number of recent cases in which inaccurate and questionable information was found in a presentence report and was accepted as true by the sentencing judge.

For example, in *United States* v. *Weston*, 449 F.2d 626 (9th Cir. 1971), the District Judge increased the sentence from five to twenty years on the basis of reports by the FBI and the Narcotics Bureau that defendant was a major narcotics dealer. The sentencing judge commented:

"Well, as I commented, Mr. Kempton, in the companion case, the Jackson case, this Court has great respect for the probation service in this and other districts, and I believe as a whole they are a group of officers who are extremely objective, very concerned with the welfare of the defendants, who they report upon, and also are attentive to their duties as officers of the Court.

"And when statements are made categorically as they are made here, the Court has no alternative, in the face of contrary factual information, rather than simply a vehement denial, but to accept as true the information furnished the Court which in turn was obtained by the probation officer from the officers of the Federal Bureau of Narcotics and Dangerous Drugs."

When the Court of Appeals for the Ninth Circuit reviewed the confidential information submitted to support the allegation that defendant was a major narcotics dealer, it concluded:

"To say that it corroborates the very broad charges contained in the presentence report is an over-statement. Moreover, it contains nothing to show, rather than to assert, that the informant was reliable, or otherwise to verify the very serious charge made against Weston. It appears in the record in this case that Weston's house was searched after her arrest and nothing was found, nor was any narcotic found on her person or in her purse." (448 F.2d at 630).

See also *State* v. *Pohlabel*, 61 N.J. Super. 242. 160 A.d 647 (App. Div. 1960).

We also believe that Rule 32(f) should be amended to insure that a defendant is represented by counsel in all probation revocation hearings in accordance with the Supreme Court's decision in *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973).

Rule 43

Rule 43(b)(2) is wholly objectionable. That provision specifies that a defendant will be deemed to have waived his right to be present at the trial if he "engages in conduct which is such as to justify his being excluded from the courtroom." This proposal attempts to implement the holding of the Supreme Court in *Illinois* v. *Allen*, 397 U.S. 337 (1970). That decision laid out specific preconditions before a defendant can be removed from court. These should be incorporated in the rule. Furthermore, as the co-author of a recent book on the subject of *Disorder in the Court*, I can assure this Committee that the amount of courtroom disorder in the federal courts is so insignificant that it is not worthwhile dealing with by a rule change of this nature. In addition, the rule is too broad in still another respect. If a defendant misbehaves and is removed from the courtroom, will he be allowed to return to testify in his own behalf? It is one thing to say that a defendant can be removed while the rest of the trial continues and his counsel tells him what is happening. It is quite another to bar him from any further participation in the trial, especially when he wishes to tell his side of the story to the jury. A recent Ninth Circuit decision has specifically held that a defendant can be barred from testifying because of his own misconduct. *United States* v. *Ives*, 504 F.2d 935 (9th Cir. 1974). Some attention must be given to this problem which is wholly at odds with the requirements of the sixth amendment.

Rules 12.1 and 16

Our main difficulty with the rules as presently proposed lies in the fact that they would require a broad range of discovery from the defendant by the prosecutor. We believe that these discovery proposals violate a number of constitutional safeguards and are unnecessary and unwise as a matter of policy.

Rule 12.1 would require a defendant to notify the prosecution at a very early stage of the proceedings that he intends to rely upon an alibi in his defense. After the prosecutor tells him when and where the offense was committed, the defendant must inform the prosecutor of the names and addresses of the witnesses upon whom he intends to rely to establish his defense. Prior witnesses before this Committee have testified concerning the manner in which alibi witnesses have been approached and questioned by the police:

Policeman: "We have John Jones on a charge of robbery on June 25. He says you were with him that night."

Alibi witness: "Oh no. I never saw him that night."

If the witness testifies for the defendant at the trial, his conversation with the police officer can be devastatingly used against him. This is not to say that every police officer will try to trick an alibi witness into withdrawing his support of a defendant. But it does point out that the prosecution has an enormous advantage in interviewing defense witnesses. The use of policemen, FBI agents or other federal officers to check out defense witnesses is always potentially intimidating to the average citizen. There is always the possibility of subtle, or not so subtle, pressure being exerted on these witnesses, especially if they have been in difficulty with the law themselves. There has been absolutely no showing that the federal criminal justice system has had serious difficulties in securing convictions because prosecutors could not meet alibi testimony presented at trial.

Furthermore it is unthinkable that a defendant could be forbidden to present evidence of his innocence at the trial because he did not comply with a notice of alibi requirement.

The Sixth Amendment to the Constitution guarantees defendants the right "to have compulsory process for obtaining witnesses in his favor". This right to compulsory process includes the right to actually have the witness testify at trial. In *Washington* v. *Texas*, 388 U.S. 14 (1967), the Supreme Court held (388 U.S. at 19):

"The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as the accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense; this right is a fundamental element of due process of law."

Rule 12.1 would impinge on this right to call witnesses. If the defendant does not supply the names and addresses of his alibi witnesses he may not call them at the trial. But this approach conflicts directly with the sixth amendment right mentioned above. The Constitution does not say that he shall have the right to call witnesses only if he lets the prosecution know who they are in advance. The Supreme Court expressly left open this point in *Williams* v. *Florida*, 399 U.S. 78, fn.14 (1970). Because of the constitutional difficulties involved in the notice of alibi rule, the California Supreme Court has recently refused to establish one by judicial decision. See *Reynolds* v. *Superior Court*, 16 CrL 2226 (Cal. Sup. Ct. Nov. 22, 1974).[1]

Rule 16 contains more sweeping provisions for discovery by the prosecution. Under Rule 16(b) the prosecution would have an absolute right to discover documents and intangible objects from the defendant as well as reports of examinations and tests. (Such discovery is presently permitted under the rules but only if the defendant elects to request similar discovery from the prosecution.) The prosecution would also be able to discover the list of witnesses whom the defendant intends to call at trial. If he fails to supply such a list, the witnesses will not be able to testify on his behalf.

[1] In addition, Rule 12.1 does not have a provision similar to that found in Rule 11 forbidding the use at trial of the withdrawal of a notice of alibi. If such a rule is established contrary to our recommendation, the prosecutor should not be permitted to refer to the fact that a notice of alibi had been filed but withdrawn by the defendant.

It has been claimed that the Fifth amendment is not violated since the defendant will be called upon to disclose only that information which he will disclose later at trial. But Professor Charles Alan Wright, in 1 *Wright*, Federal Practice and Procedure (Criminal) sec. 256, points out the weakness of this argument:

"But this appealing argument may not be a complete answer. Defendant will shortly reveal those things he intends to produce only if the government has first made a case against him sufficient to survive a motion for directed verdict. Unless the government can prove a case sufficient to go to the jury, a defendant need prove nothing. There is nothing in Rule 16, as amended, which prevents the government from using material which it has obtained by discovery as part of its own case-in-chief and thus it may be that there will be cases where the government is able to make a *prima facie* case only with the aid of evidence it has obtained by discovery."

It is clear that the information which the defendant is obliged to produce is testimonial in nature. It is not like a blood sample, or a fingerprint or a voice exemplar. The list of witnesses may well furnish "testimony" to the prosecutor which he could not secure through his own investigative resources. Furthermore, the documents which might have to be produced could include material written by the defendant, which would clearly be testimonial. Producing other physical evidence would inform the prosecutor that an item existed and that it had some relevance to the case. It has long been the law that a person need not respond to a subpoena by producing certain described pieces of evidence if the act of producing the item would itself create a link with the defendant and thus tend to incriminate him. For example, a defendant is not obliged to respond if he is asked to produce a diary entitled "Robberies I have committed." See *United States* v. *Bennett*, 409 F. 2d 888 (2d Cir. 1969).

Furthermore, the rule violates the Fifth amendment prohibition against compulsory self-incrimination because, the defendant is "compelled" to give information. He discloses the information only because section 16(d)(2) provides that the court may prohibit the use at trial of evidence not disclosed. And, the rule would allow the government to discover information which is essential in the establishment of a *prima facie* case against the accused. Documents or other evidence may tend to incriminate him on one element of a crime while exonerating him on another.

The following example illustrates the self-incriminating nature of the proposed rule.

A defendant accused of murder knows of an eyewitness who will testify that the act was done in self defense. Ordinarily, the defendant will not introduce that testimony unless the government succeeds in establishing a *prima facie* case against him. Under the proposed rule, the defendant is compelled to disclose the existence of this witness because, if he doesn't, and the government establishes its case against him, his testimony may be barred. But the government might not have a *prima facie* case against the defendant before its examination of the witness. If this witness provides information which does establish the government's case, then the defendant has been compelled to incriminate himself.

Justice Black's dissent, joined by Justice Douglas, in *Williams* v. *Florida*, 399 U.S. 78 (1970) is difficult to challenge. Both Justices felt that defendant's fifth amendment rights were violated by requiring pre-trial disclosure of an alibi defense, but were particularly alarmed at the rationale of the decision. Black wrote, at 107–08:

"Although this case itself involves only a notice-of-alibi provision, it is clear that the decision means that a State can require a defendant to disclose in advance of trial any and all information he might possibly use to defend himself at trial. This decision, in my view, is a radical and dangerous departure from the historical and constitutionally guaranteed right of a defendant in a criminal case to remain completely silent, requiring the State to prove its case without any assistance of any kind from the defendant himself."

In *United States* v. *Fratello*, 44 FRD 444, 449 (S.D.N.Y. 1968), District Judge Pollack wrote:

"The right of a defendant in a criminal case to remain silent in the face of accusations against him, even at the discovery stage, seems clear . . . If, therefore, the items sought from defendants are of a class of evidence which would ordi-

narily be privileged from disclosure under the 5th Amendment, the defendants might not be required to disclose them prior to the establishment on trial of the government's *prima facie* case."

Justice Burke, of the Supreme Court of California, wrote in *Prudhomme* v. *Superior Court*, 466 P. 2d 673 (1970):

"It is apparent that the principal element in determining whether a particular demand for discovery should be allowed is not simply whether the information sought pertains to an 'affirmative defense', or whether defendant intends to introduce or rely upon the evidence at trial, but whether disclosure thereof conceivably might lighten the prosecution's burden of proving its case in chief. Although the prosecution should not be completely barred from pretrial discovery, defendant must be given the same right as an ordinary witness to show that disclosure of particular information could incriminate him. . . ."

For a similar view of the proposed rule, see: "Prosecutional Discovery under Proposed Rule 16," 85 *Harv. Law Rev.* 994.

In addition, the rule would violate the sixth amendment right to present witnesses on one's own behalf. See *Washington* v. *Texas*, 388 U.S. 14 (1967), discussed above.

The amendment to Rule 16(d) would impinge on this right to present witnesses. If the defendant refuses to submit a list of witnesses prior to trial, he may be denied the right to call witnesses at the trial. If he refuses to assist the prosecution by furnishing it with documents and physical evidence prior to trial, he may be barred from offering such items as evidence at the trial. It is not enough to say the choice is that of the defendant since he may call the witness or introduce the evidence if he makes pretrial disclosure to the prosecution. The Constitution contains no provision affording a right to call witnesses only if the defendant cooperates with the prosecution, even to the point of incriminating himself. The right to a defense is fundamental to due process and may not be so conditioned. See *Chambers* v. *Mississippi*, 93 S. Ct. 1038 (1973).

As a practical matter, the prosecution has no need for extensive pre-trial discovery of the defendant. With the investigative capability of the FBI behind him, the federal prosecutor can secure extensive evidence of the crime. More important he has one of the most effective discovery devices ever invented for obtaining evidence: the grand jury. A federal prosecutor can use a grand jury to obtain testimony from every person remotely connected with a crime. On a minimal showing, he can subpoena a wide range of evidence before an indictment is returned. A defendant cannot claim that a prosecutor has obtained enough evidence for an indictment and is using the grand jury process for further discovery. See *United States* v. *Sweig*, 441 F. 2d 114 (2d Cir. 1971). Even after an indictment is returned, a grand jury may continue to sit and gather evidence relevant to the earlier case if its investigations are directed to another crime. *United States* v. *Doe* (Ellsberg) 455 F. 2d 1270 (1st Cir. 1972).

A grand jury may indict on the basis of incompetent evidence. *United States* v. *Costello*, 350 U.S. 359 (1956) or on the basis of illegally seized evidence or evidence that violates the fifth amendment. *United States* v. *Calandra*, 414 U.S. 338 (1974). Witnesses must answer questions which may be based on such illegally obtained evidence since the exclusionary rule does not apply to the grand jury. *United States* v. *Calandra*, supra.

The balance of advantage at the discovery stage of the process is so overwhelmingly in favor of the state that there is no justification to require the defendant to aid the prosecution by furnishing evidence against himself.

The analysis suggests that we cannot equate the prosecution and the defense after indictment and say that each should be entitled to the same discovery from that point forward. The prosecution has already secured discovery through the FBI, government informers, and the grand jury. To bring them back to the point of equality it is necessary to allow extensive discovery by the defense without any further discovery by the prosecution. To allow the prosecutor to obtain further evidence is to perpetuate the advantage which he already has.

Justice Peters, dissenting in *Jones* v. *Superior Court*, 483 P. 2d 1240 (1970), argues this point most convincingly. "The simple fact is that our system of criminal procedure is founded upon the principle that the ascertainment of the facts is a 'one-way street.' It is the constitutional right of the defendant, who is presumed to be innocent, to stand silent while the state attempts to meet its burden of proof, that is, to prove the defendant's guilt beyond a reasonable

doubt . . . While, of course, a criminal trial should be 'fair' to the prosecution as well as to the defense, it should not be forgotten that the defendant has additional constitutional and statutory rights not given to the prosecution. The right not to incriminate himself, the right to remain absolutely mute until a *prima facie* case has been established, the right to the presumption of innocence until proved guilty beyond a reasonable doubt are a few of these rights that completely refute the 'one-way street' argument."

Conversely, it is not necessary to deny discovery to a criminal defendant simply because that right is unavailable to the prosecution. Some discovery for the benefit of the defendant is necessary in order to insure a fair trial under the Due Process Clause, see, for example, *Brady* v. *Maryland*, 373 U.S. 83 (1963).

This analysis suggests that it is perfectly consistent with the realities of the criminal justice system to allow the defense all the discovery provided for in amended rule 16(a) while denying the prosecution any more discovery than it can now obtain under present rule 16(b). In fact, rule 16(a) should be further refined to make clear that the defendant is entitled to obtain certain material at the earliest stage of the process in order to prepare for trial. This includes the following material:

(1) *Jencks Act material:* Written statements of government witnesses should be furnished to the defense before trial. This may encourage defendants to plead guilty at an earlier stage of the proceedings. It will also stop extensive delays at trial when defense counsel must take a recess to look at Jencks Act statements for the first time.

(2) *Brady material:* The Supreme Court has held that the prosecution must disclose to the defense any exculpatory material in its possession. *Brady* v. *Maryland*, 373 U.S. 83 (1963). This requirement should be codified and the precise limits of *Brady* and the method for implementing it should be laid out in the rules. Now the various circuits have conflicting views of the way in which Brady is to be applied and waste much time in determining when or how particular material must be handed over to the defense. Congress should take this opportunity to codify Brady and offer a uniform rule on how it is to be applied.

(3) *Prior criminal records:* For some inexplicable reason the rules are inconsistent with respect to the production of arrest and conviction records. Rules 16(a)(1)(B) and (E) use different language when dealing with the prior felony convictions of witnesses or prior criminal record of the defendant. Rule 16(a)(1)(B) requires discovery of the defendant's prior criminal record "*as is then available to the attorney for the federal government.*" Rule 16(a)(1)(E) requires discovery of prior felony convictions of prosecution witnesses "*which is within the knowledge of the attorney for the government*". The Advisory Committee notes do not explain the different language between subsections (B) and (E) and subsections (A) and (D).

(4) *Work product:* The prohibition against securing the work product of the prosecution is far too general. Rule 16(a)(2) specifies that the rule "does not authorize the discovery of reports, memoranda, or other internal government documents made by the attorney for the government . . . in connection with the investigation or prosecution of the case . . ." This definition would allow the prosecution to intermix factual matters and legal opinion and keep them both from being discovered by the defense. A far better definition of legal work product is found in the Proposed Uniform Rules of Criminal Procedure of the National Conference of Commissioners on Uniform State Laws. It reads as follows:

Rule 22(b) Exceptions.

(1) *Legal work product.* The prosecuting attorney need not allow access to:

(i) Legal research; or

(ii) Those portions of records, correspondence, reports, or memoranda which are only the opinions, theories, or conclusions of the prosecuting attorney or members of his legal staff.

In conclusion, the basic theory of our constitutional system is that the state must gather its own evidence of crime and present its proof before the defendant must come forward to refute the charges. We do not put the state to its test if we require the defendant to aid it in gathering evidence. On the other hand there must be some balancing of the advantage which the prosecutor now possesses in its use of federal agents and the grand jury. As the Harvard Law Review has recently noted, "The fears of those who criticize broad defense discovery are either unfounded, marginal, or go altogether unremedied by the provision of prosecutorial

discovery. Because prosecutorial discovery appears to infringe the fifth amendment privilege, the Judicial Conference should reject the grant of discovery to the state, but should revise the judgment of its Advisory Committee and extend defense discovery notwithstanding." Note, "Prosecutorial Discovery Under Proposed Rule 16," 85 Harv. L. Rev. 994, 1023 (1972).

Mr. FRIEDMAN. Thank you, Mr. Chairman. I would just like to touch briefly on some of the high points of the prepared statement, and answer any questions that the committee might have.

For the most part, the American Civil Liberties Union is happy with the rule changes in rules 4, 9, 11, 32, and 43, which we endorse with some recommended changes. Our big objection is to the discovery provisions in rules 12.1 and 16, and I would like to divide——

Mr. HUNGATE. Pardon me, rule 12 and rule 1?

Mr. FRIEDMAN. No; rule 12.1 and rule 16.

Mr. HUNGATE. Rules 12.1 and 16.

Mr. FRIEDMAN [continuing]. And I would like to briefly touch on our suggested changes in the earlier rules, and then devote most of my testimony to the discovery provisions.

As far as rule 4 is concerned, we endorse the proposed change which would make a summons a normal procedure for formally initiating the criminal justice process instead of an arrest warrant; and our primary reason is because of the high number of warrantless searches that are made incident to an arrest. The Supreme Court in *Chimel* v. *California* said that a search may be made without a warrant if it's incident to an arrest. And there have been wide numbers of cases which permit a fairly wide range of searches made incident to that arrest.

Now, if the rule were changed and make a summons the normal method of proceedings, starting the process, we might get over some of these problems of searches without a warrant. Now, the fourth amendment does require that a neutral magistrate pass upon the request for a search, and to the extent that the requirements of the fourth amendment are undermined by these exceptional situations, we think that the fourth amendment guarantees are seriously eroded.

So, rule 4 which would require a summons, or provide that a summons start the process, we think is a good step forward; and my comments also apply to rule 9.

Mr. HUNGATE. Now, you stated "with some changes," but you are not addressing any changes to rule 4.

Mr. FRIEDMAN. Rule 4 is fine as drafted. In some of the other rules, we would recommend certain changes be made.

As far as rule 11 is concerned, this is another welcome change for the most part——

Mr. HUNGATE. Pardon me just a moment, Professor. The ACLU endorses rules 4, 9, 11, and 43.

Mr. FRIEDMAN. Rule 32.

Mr. HUNGATE. Pardon me, it's a good thing I asked you; 4, 9, 11, and 32—not 43.

Mr. FRIEDMAN. Well, on 43 I have a series of qualifications.

Mr. HUNGATE. All right, 4, 9, 11, 32. Are there changes in those?

Mr. FRIEDMAN. Some changes.

Mr. HUNGATE. Not in rule 4.

Mr. FRIEDMAN. Not in rule 4.

Mr. HUNGATE. Pardon me, go ahead.

Mr. FRIEDMAN. As far as rule 11 is concerned, the proposed changes in the plea bargain, we think it's very important to lay out some reality in the plea bargaining process. The current rule is far too vague and doesn't recognize what in fact has been happening. And to the extent that rule 11 deals with what the practice is, it's a welcome step forward. I think there are only two changes that we would recommend in rule 11 as it is currently drafted.

The first, I think, is a perfectly straightforward one. Rule 11 (c) specifies those matters about which the court must advise the defendant before a plea of guilty is accepted. And for some mysterious reason the drafter has not incorporated the requirement that the Supreme Court laid down in *Boykin* v. *Alabama*. And I think the rights which are being surrendered should be very carefully laid out to the defendant before he accepts the guilty plea.

And the rule as currently drafted does not require the judge to tell the defendant that he is giving up his privilege against self-incrimination; he is giving up his right to a jury trial; he is giving up the right to secure his own witnesses and confront witnesses against him, and the fact that he has a right to a lawyer appointed through all steps of the process.

Mr. HUNGATE. Now, pardon me, you are saying that rule 11(c) enumerates certain things that must be explained personally to the defendant.

Mr. FRIEDMAN. That's correct.

Mr. HUNGATE. You are outlining other things that are not included in the proposed rules, but that you feel *Boykin* v. *Alabama* has said must be included. Is that a correct statement?

Mr. FRIEDMAN. As I read Boykin——

Mr. HUNGATE. Is that our Boykin, Frank?

Mr. FRIEDMAN. I don't think it's our Boykin.

There is a general provision in rule 11(c)(4) which says there will not be any further trial of any kind. And presumably the drafters of this rule think that this subsumes all the rights which I just mentioned. That is the right to have a lawyer appointed; the right to have a jury trial; the right to confront witnesses; and that if you indicate to the defendant there will not be any further rights—there will not be any further trial, then that's enough.

But it just takes another few minutes for a judge to explain to the defendant exactly what rights he is yielding by not having a trial. And it seems, since the Supreme Court laid such importance on the articulation of these rights, that this advice should be given to the defendant.

Mr. HUNGATE. I'm trying to see if I understand this. You are saying that a defendant should be warned of such things as having a right to an appointed attorney.

Mr. FRIEDMAN. That's correct.

Mr. HUNGATE. I would almost think that's implicit, I'm with you there. If he did this without an attorney, I think in Missouri you would have trouble making your plea stick anyway, if it were a serious offense.

Mr. FRIEDMAN. There is nothing in the rule currently that requires the judge—the defendant may come up for trial, be prepared to plead guilty right then and there; and the judge doesn't have to tell him he has the right to a lawyer before he pleads guilty.

Mr. HUNGATE. You are assuming he's without a lawyer.

Mr. FRIEDMAN. It could happen.

Mr. HUNGATE. All right. And then the defendant should be told of the right to call witnesses and the right to have a jury trial.

Mr. FRIEDMAN. That's right. And the right to confront witnesses against him. There is no reason why that can't be done in 2 or 3 minutes that it takes for the judge to tell the defendant his rights that he is yielding, those should be included in the specifications of rights.

Mr. WIGGINS. I have a question. The court of course would not take a plea in advance of the defendant being arraigned on the charges.

Mr. FRIEDMAN. That's right.

Mr. WIGGINS. And isn't it customary procedure at the time of arraignment, preceding the plea of guilty or not guilty, the court at that time, if not before, advises the defendant of the full panoply of rights to which he is entitled?

Mr. FRIEDMAN. Well, at the arraignment he is given his Miranda warning—he is given his Miranda warning when he is first arrested, that he has a right to an attorney, at the arraignment. But then there comes a time when he is taking a plea, and there is no indication that the earlier warning at the arraignment will carry over to the trial. We are assuming there may be people that are just not aware of the criminal justice system. We assume he has one lawyer for the police station, another lawyer for arraignment. There is nothing at the trial, this is a totally new step in the process, and there is no reason why the warning shouldn't be given at that step.

Mr. WIGGINS. Well, the plea may come at several points in the criminal proceeding. It may come immediately following arraignment. I take it that at the time of arraignment the defendant most typically is fully advised with respect to his rights by counsel, and the other rights to which he is entitled.

Mr. FRIEDMAN. If I could just take one point. When you say arraignment, the term "arraignment" could be a preliminary examination, there are two or three steps in the process.

Mr. WIGGINS. Well, when a defendant first appears before a judicial officer, however the proceeding is described, the customary practice in my experience is that at that time the judicial officer advises the defendant, even if he appears with counsel, of the full scope of his constitutional rights.

Now, it is possible that because that information had previously been given to the defendant, he voluntarily would waive those rights, and proceeds to trial as his own attorney. At the time of the trial, without counsel, he may elect to change his plea as a result of some discussions he previously had with the prosecutor.

Your thought is that, notwithstanding the fact that a defendant has been previously advised, before the plea was accepted, whenever that issue comes up, that he should be readvised of those rights that he is waiving.

Mr. FRIEDMAN. Absolutely

Mr. WIGGINS. All right.

Mr. FRIEDMAN. And for the following reasons. The Supreme Court has said in a number of cases that, for example, if he is given his Miranda warning by State officers, and then he is handed over to

Federal officers and they start asking about a different crime, he has to be given his warnings all over again. Every time there is a new step in the process, these things have to be brought home to the defendant.

Mr. WIGGINS. I wouldn't expect, if we were to adopt your suggestion, that we are casting any undue burden on the judiciary. It takes 3 or 4 minutes to run through the rights the defendant may have.

Mr. HUNGATE. Yes, it doesn't strike me you are adding a great burden.

Go ahead.

Mr. FRIEDMAN. The other recommended change that we would make in rule 11 is to make sure that if the plea is withdrawn, or if the judge does not accept the plea, that the offering of the plea and any statements made in connection with the plea should not be used against him in any way in a later proceeding.

Now, there is a provision in 11(e)(6) which talks about the inadmissibility of plea discussion, but it's far too narrowly drafted. It says, "It is not admissible in any criminal or civil proceeding against the person who makes the plea, or offer." The problem there is that it may be used for impeachment purposes.

Now, let me just give you a brief scenario. The defendant insists he is not guilty of the crime. His lawyer says, "Plead guilty because all you are going to get is 1 year, or 6 months, or whatever, and that's the best deal you can have, there is a lot of evidence against you."

He goes and offers the plea of guilty, but insists that he is not guilty, in which case the judge will not accept the guilty plea, as might very well happen. Then later on the stand, when he is testifying on his own behalf, his offering the plea of guilty earlier may be used for impeachment purposes. It can't be used by the prosecution in his case in chief, but it might be used for impeachment purposes against the defendant.

Now, the Supreme Court has a couple of cases before it right now in which warnings, in which certain evidence which could not be used, can nevertheless be used for impeachment purposes.

And I would strongly recommend that subparagraph (6) have a prohibitory clause that it is not admissible in any civil or criminal proceedings, either in the case in chief, or for impeachment purposes; so that the plea discussion, plea statement cannot be used in any way in the case in chief, and I think it is very important not to allow this material to come in the back door, in effect, by allowing that——

Mr. HUNGATE. Pardon me, "Evidence of the plea of guilty, later withdrawn," and then it goes on "is not admissible in any civil or criminal proceedings against the person that made the plea or offer."

Mr. FRIEDMAN. That's correct.

Mr. HUNGATE. Now, give me an example how that can be used for impeachment.

Mr. FRIEDMAN. He gets on the stand and says he didn't commit the crime. Then the prosecution says, "Didn't you offer to plead guilty at an earlier time to committing the crime, and doesn't that show that you did commit it?"

And there is nothing in the rule as presently provided that would forbid that; and that is a real problem.

Mr. HUNGATE. Pardon me. You are talking about offering a plea?

Mr. FRIEDMAN. That's correct. In other words, the defendant gets up there and offers a plea of guilty, and then, for one reason or another the judge doesn't accept the arrangement, or for whatever reason, the plea is not accepted.

Mr. HUNGATE. Yes.

Mr. FRIEDMAN. Now, the prosecution could never show this as evidence in its case in chief, but it could use it to impeach the witness when he gets on the stand.

Mr. HUNGATE. Do you have cases where that has happened?

Mr. FRIEDMAN. I have Harris against New York, which is a case in which the Miranda warning—a statement was taken in violation of Miranda. Now, the prosecution could never introduce that statement in its case in chief, it violated Miranda. But what they did do was impeach the witness when he got up on the stand; they used a statement taken in violation of Miranda for impeachment purposes. And the Supreme Court said that's OK, *Harris* v. *New York*. They have two cases now pending in which the same issue is there.

Mr. WIGGINS. I want to distinguish between the two factual situations. One factual situation is when a defendant who enters into discussions with the prosecutor, leading to plea bargaining, in which he makes certain admissions. And that discussion may not be couched in some conditional language as is often done by counsel, that it may not hereafter be used for any purpose, only the purpose of plea bargaining itself. That's one fact situation, which is an out-of-court admission of guilt.

The other fact situation is a defendant appearing before a judge, fully advised, and the court extracting certain admissions from him such as, "You are pleading guilty to the offense because you, in fact, committed the offense, isn't that true?"—and so forth, as you know judges often do in court on the record.

Do you think that we should deal differently with those two factual situations if the plea is later withdrawn?

Mr. FRIEDMAN. Well, I think the theory of this rule is that in order to hold discussions, in order to allow a lot of discussion, negotiation to arrange for plea bargaining, everybody should feel free to say whatever they can in the plea discussion, and not have that held against them at a later time. And you offered a situation in which he said in fact, "I did commit the crime"——

Mr. WIGGINS. In court.

Mr. FRIEDMAN. Suppose he said, "I didn't commit the crime." He offers a plea of guilty because he thinks he is going to get a good deal anyhow, and it doesn't make any difference. That happened in *Alford* v. *North Carolina*, where the defendant insisted he didn't commit the crime, but nevertheless offered to plead guilty.

Mr. WIGGINS. And the offer was accepted?

Mr. FRIEDMAN. The offer was accepted.

Mr. WIGGINS. And he asserted to the judge he was innocent of the offense, and the judge accepted the plea?

Mr. FRIEDMAN. He certainly did.

Mr. HUNGATE. What was the consequence, how did this get to the Supreme Court?

Mr. FRIEDMAN. The Supreme Court said, "Can you accept that kind of guilty plea?"

Mr. WIGGINS. And what did they say?

Mr. FRIEDMAN. Yes, you could, *Alford* v. *North Carolina*.

My problem is, why did the Judicial Conference put in this clause to begin with? Because they thought there was something wrong in having all these plea discussions being laid out in a later point in the trial, to be used against the defendant; you are not going to have free discussion if it can later be used against the defendant if it's withdrawn, or the judge refuses to accept it for one reason or another, and all that material that came out of the plea bargaining is used against him.

My problem is that they didn't go all the way—that inadvertently or otherwise they didn't cover a very real situation that can come up, namely the difference between introducing evidence as a case in chief, and using it for impeachment purposes.

Mr. HUNGATE. Now, Mr. Wiggin's question, as I understood it, distinguishes between plea agreement statements made out of court and those made in court and under oath in response to the judge's questioning. The latter seems to me to be a harder case.

Mr. FRIEDMAN. Well, it may be harder, but the Judicial Conference itself didn't distinguish between the two situations.

Mr. WIGGINS. The rules of evidence statute enacted last year did draw that distinction in rule 410, which permits on-the-record admissions to be used for impeachment purposes, even though they were in connection with a later withdrawn guilty plea.

Mr. FRIEDMAN. Was that enacted in the rules of evidence?

Mr. WIGGINS. I believe that is correct.

Mr. HUTCHISON. There was a dispute between the House and Senate versions of that rule. The Conference Committee compromise was to deal with the provision in connection with the Federal Rules of Criminal Procedure, and it did this by accepting the Senate amendments to rule 410 but deferring the effective date of rule 410.

Mr. HUNGATE. The rule is not effective until August, 1975.

Mr. HUTCHISON. And rule 410 is not effective then if it is inconsistent with any provision of the Federal Rules of Criminal Procedure.

Mr. HUNGATE. Let me ask another question on this topic. Suppose the charges are such that you can draw 10 years. The defendant offers to plead in return for a $100 fine. Is it your thought that under the section we are discussing here, 11(e)(6), that offer would be admissible for impeachment?

Mr. FRIEDMAN. Absolutely. He offered to plead guilty of the crime, it could be a serious bank robbery because his lawyer tells him it would be a $100 fine. The judge refuses to accept the penalty because it's too small. Then he goes up on the stand and denies that he ever had anything to do with the crime.

The prosecutor can impeach him by saying, "Didn't you offer to plead guilty to this at an earlier time?" That's exactly what this rule would allow.

Mr. WIGGINS. But why in the world should we condone a rule that would perjury in some cases?

Mr. FRIEDMAN. Well, perjury—you can always get a man for perjury. If he swears—that's another area. If he swears in any kind of proceeding and that is later found to be perjury, then you can get him. This is not a question of perjury, it's a question of the offer of a plea of guilty, and even though he had nothing to do with the crime that's a reality of the plea bargaining process—the offer of a plea, not because you admit the charges, but because a certain deal is offered to you, and should not be held against you at a later time.

I just think the Judicial Conference overlooked the problem of impeachment, and the way they phrased it didn't cover the situation of impeachment. If we sent it back to them they probably would include such a provision.

Mr. HUNGATE. Pardon me, I suggest that we let you finish and then ask questions. Go ahead.

Mr. FRIEDMAN. Fine. I want to get to the discovery a little bit and come back, and just cover very quickly rule 32 and rule 43.

Rule 32, we think, is a fine improvement over the present situation. It would allow defense counsel to see a presentence report. There are too many situations where a presentence report contains erroneous information, inaccurate information, and the defense counsel should have an opportunity to check out the material in a presentence report, and to challenge it.

The problem with rule 32(c) is that it doesn't permit an evidentiary hearing. That is to say, if the defendant challenges some factual assertion made in the presentence report, does he have an opportunity—he has an opportunity to make a statement, but there is no indication in the rule whether he may offer information. That is to say, there may be a factual fight whether he can submit evidence, submit material challenging something in the presentence report.

Although the defendant may look at the report, he should have an opportunity to challenge it if there is some factual dispute on something appearing in the report. He should have had this right here, but I just can't put my finger on it right now.

If I could turn to rule 43.

Mr. HUNGATE. Is that on page 20, (3)(a), rule 32—is it rule 32(3)(a) on page 20?

Mr. FRIEDMAN. I'm sorry, that's right. "The court shall afford the defendant or his counsel an opportunity to comment thereon," that is to say, if the report is submitted he can say, "Well, it is true," or "It isn't true," but there is nothing in the rule that would permit him to offer evidence.

Suppose there were a claim, as in the *Weston* case, which I cite in my statement, that he is a notorious narcotic dealer on the west coast, and that is in the presentence report. And he gets up there and says, "I'm not a notorious narcotics dealer on the west coast"——

Mr. HUNGATE. Just the east coast.

Mr. FRIEDMAN. Well, what does he do at that point? The rule under (3)(a) simply says he can comment. Well, can he offer some evidence, affirmative evidence, and challenge the statement at that time? Suppose it says he beats his wife all the time. Can he offer his wife and put her on the stand and say, "Is it true that I beat you, or don't beat you?"

All the rule would provide is to let him comment on something in the presentence report, rather than to offer affirmative evidence on something that may be in factual dispute. So, I think the rule should say, "To comment and submit evidence thereon."

Mr. WIGGINS. Would the consequence of adopting a rule that would permit an evidentiary hearing force presentence reports to contain only that material which was admissible in evidence, as distinguished from hearsay information which is now present in the presentence report?

Mr. FRIEDMAN. But most presentence reports don't have factual assertions, they may have something about where the person works. In other words, that is the kind of issue that doesn't come up very often in presentence reports. And the problem is that sometimes presentence reports have accusations of other crimes, and because of that the sentence may be a severe one.

Mr. HUNGATE. But isn't there a burden-of-proof problem? Taking your narcotics allegation in the presentence report, wouldn't it be the sort of thing where the defendant might say, "Well, that is nothing but a lie?"

Customarily when a statement or charge is denied, the burden then shifts to the other party to establish the fact.

Mr. FRIEDMAN. Well, presentence reports are very peculiar animals because the Supreme Court back in *Williams* v. *New York* says you really don't have to show it to the defendant at all, it's just an aid, it's not really the kind of thing that the defense has to look at, he wants a general sense of what the defendant is all about, and he wants people to be free to comment to probation officers.

Mr. HUNGATE. I'm sorry to keep interrupting you, but the defendant's situation is rather impossible. Someone can make any allegation in the world against you and put you to the burden of disproving it. That, it seems to me, would be contrary to the normal procedure.

Mr. FRIEDMAN. But if he wanted to, if he wanted to put on some factual assertion to disprove some elements in the presentence report, perhaps he should have that opportunity, maybe it should be restricted, maybe in the judge's discretion.

Mr. WIGGINS. Would you extend this as well to the sort of informal presentence report submitted by the defendant, letters of recommendation and commendation, some of which prosecutors think are out-and-out lies?

Mr. FRIEDMAN. That's fine, let the prosecutor submit something on the other side.

Mr. WIGGINS. To what extent?

Mr. FRIEDMAN. I would think that both sides should be able to put it in. The trouble now is that presentence reports go up there, there are all kinds of inaccuracies, false accusations, and up until rule 32 was proposed, he couldn't even see it.

Mr. HUNGATE. At present, a defendant doesn't even see the presentence report. At least under the amendment, he will get an opportunity to see it and comment on it.

Ms. HOLTZMAN. May I ask a question?

I think that is a very fundamental question, whether the presentence report ought to contain in it to begin with. I don't know whether it is relevant that a defendant beats his wife, necessarily, to a sentence.

Mr. FRIEDMAN. Well, everything goes into a presentence report, how he relates to neighbors, how he treats his children, how he works on a job, everything is in it. And the probation officer goes out and makes a total investigation to find out what the man is.

Ms. HOLTZMAN. I guess my question is whether that rule really begs the question as to what information ought to be in a presentence report, and is it relevant to the issue of the sentence; and they talk about his characteristics, should it supply information about his characteristics, does he or she get up early in the morning, or go to bed late at night, what is relevant; and should we leave it up to the particular probation officer and the particular judge.

I don't know whether there ought to be some standard with respect to that. Perhaps you wish to comment.

Mr. FRIEDMAN. Well, I agree it's running away from that problem entirely. And the probation report, up until now, has contained all kinds of rumors, allegations which are never substantiated. The probation service for the most part is a well-trained organization that goes out and tries to find out something about the defendant as a human being, but all kinds of garbage gets into it, and that's a whole other area.

Mr. HUNGATE. As you can see, our skill is putting things off, like we did in rule 410 of the Rules of Evidence. It seems to me that now we are getting into the whole question of sentencing, which probably should be dealt with in our work on revision of the criminal code.

Ms. HOLTZMAN. My question is, has there to be a presentence report, and the question——

Mr. HUNGATE. What's in it. Go ahead.

Mr. FRIEDMAN. Let me touch very briefly on rule 43, only because I had some experience in dealing with one small problem. Rule 43(b)(2) deals with the problem of the defendant who is disorderly, disruptive, and then gets thrown out of the courtroom, and this is an attempt to codify the decision of the Supreme Court in *Illinois* v. *Allen*.

Now, I was the author of a report, coauthor of a report to the New York City Bar Association on disorder in court, and I can assure you that disorder in the court is so rare an occurrence in the Federal court that there really is no point in dealing with it in a general rule of this kind. There is no need for it in this particular situation.

Mr. HUNGATE. What section of rule 43 are you addressing?

Mr. FRIEDMAN. 43(b)(2).

Mr. HUNGATE. All right.

Mr. FRIEDMAN. "Engages in conduct such as to justify being excluded from the courtroom." Now, the Supreme Court has said in *Illinois* v. *Allen* in an extraordinary situation the judge in order to control his courtroom can remove someone, whoever he is, including the defendant, he gets his warning, and other things ahead of time. And it's there, the inherent power is there. And I think by putting it in the rule it's too handy a weapon for the judges. There really is no point in trying to deal with it in a general rule of this kind, it's such a rare occurrence.

Mr. HUNGATE. Last year, we received a comment on this rule that I think is pretty good. The defendant, before he could be excluded, certainly would have to be warned about his conduct, and warned that his misbehavior could occasion his exclusion.

Mr. FRIEDMAN. Absolutely, it should incorporate what the Supreme Court said in *Illinois* v. *Allen*.

Mr. HUNGATE. Although you don't favor it at all.

Mr. FRIEDMAN. I don't think it's necessary, really, it just doesn't happen. And let me just add one other problem——

Mr. HUNGATE. But it has happened.

Mr. FRIEDMAN. It happened half a dozen times, and that's about it. In other words, in the Federal court there are so few occurrences of this kind—and the Chicago case was about the only notorious Federal case in which it happened, it occasionally happens with a disturbed defendant in a State court action, but it's a very rare occurrence.

Mr. HYDE. The *Manson* case.

Mr. HUNGATE. Mr. Hyde?

Mr. HYDE. I was just suggesting the *Manson* case.

Mr. FRIEDMAN. That was a State court case.

Mr. HYDE. I understand that.

Mr. HUNGATE. It does happen.

Mr. HYDE. Yes.

Mr. FRIEDMAN. Let me just offer one other problem. There is a recent 9th circuit decision, *United States* v. *Ives*, which I mentioned in my statement; the citation is 504 F. 2d 935, and there there was an obstructive defendant and the judge kicked him out of the courtroom; and there he wouldn't let him come back to testify in his own behalf.

It's one thing to say the defendant has to leave when other people are testifying because he is making so much noise, but in the *Ives* case the Federal judge kicked him out, and when he wanted to come back to testify himself to tell his story to the jury, the judge wouldn't let him back in.

So, I think, if there is going to be such a rule, which really is not, I think, necessary, it should clearly allow the defendant to come back and testify on his own behalf before the jury. That's just so fundamental a right, to tell your own version of the crime, that you can't allow the rules to be so general as to kick him out for the rest of the trial. In other words, the prosecutor may put on his case, the defendant is very disturbed and starts making noise, and then he gets kicked out and can't even come back when it's time for him to present his side of the story.

I think if you have such a rule it should clearly have a specific—well, another excluding clause that would say that he can return for the purposes of presenting his case to the jury.

That is another area where the rule just doesn't seem to cover that kind of situation.

Mr. BLOMMER. Mr. Chairman, if I could.

Mr. HUNGATE. Yes.

Mr. BLOMMER. Apparently your testimony is that you believe the rule as drafted will change the *Allen* case, is that correct?

Mr. FRIEDMAN. No; I don't at all.

Mr. BLOMMER. If you are giving us the *Ives* situation, with the *Allen* case in this rule, the result would have to be according to the teaching in *Allen*, which would require a warning and some standard as to the appropriateness of making the guy leave the courtroom, and then allowing him back in.

Mr. FRIEDMAN. Well, *Allen* is a perfectly reasonable case, it says certain warnings have to be given. *Allen* does not involve a defendant trying to testify. In *Illinois* v. *Allen* it wasn't an issue whether he had to leave the courtroom when it came time for him to testify; that's what happened in *Ives*.

Mr. HUNGATE. Before we leave *Allen*, if we are going to stay with that case we should, don't you think, add language making the rule clearer?

Mr. FRIEDMAN. Absolutely.

Mr. HUNGATE. OK, go ahead.

Mr. FRIEDMAN. But *Allen* did not deal with the situation where the defendant was trying to testify. And I think it's just a terrible thing to say to a defendant. "You can't tell your story to the jury because you have been too disorderly."

Mr. WIGGINS. Was that really the factual situation in Ives?

Mr. FRIEDMAN. Absolutely.

Mr. WIGGINS. Didn't it involve the defendant's misbehavior during the course of his own testimony?

Mr. FRIEDMAN. What happened in *Ives*, he tried to testify once—he was disorderly in earlier times—he then went on the stand, he tried to present his evidence, and he started to be disorderly at that point; and the judge said, "Under *Allen* I can kick you out."

It's true that he started to be disorderly when he started to testify, but it seems to me the judge has to explore other alternatives to make sure that his story gets before the jury.

Mr. HUNGATE. Mr. Hyde?

Mr. HYDE. In the event the defendant persists to be disorderly, even while on the stand, saying all kinds of things and conducting himself so as to disrupt the administration of justice, what about having a proviso for his deposition?

Mr. FRIEDMAN. That's fine, absolutely fine. I think it's one thing to say a man can't be present in the courtroom when other people are testifying; and it's another thing to say that "Your story will never get to the jury because you are too disorderly."

Mr. HYDE. So, if the court makes a finding that the defendant's story on the witness stand is so disruptive as to interfere with the administration of justice, then an opportunity shall be afforded, for example, to "At two o'clock in the jail to take your evidence deposition, counsel shall be present."

Mr. FRIEDMAN. Absolutely.

Mr. HYDE. And let it go at that. I can agree with that.

Mr. HUNGATE. Ms. Holtzman.

Ms. HOLTZMAN. Is your basic point, Mr. Friedman, that this language is broader than *Allen*?

Mr. FRIEDMAN. It's broader than *Allen* in two respects. It's broader than *Allen*, No. 1, because the warnings that are necessary now haven't been discussed; and it's broader than *Allen* because it may cover situations where the man wants to testify, not merely his presence at the trial.

Ms. HOLTZMAN. So, your point is, if we are going to have such a provision we track *Allen*.

Mr. FRIEDMAN. Absolutely.

Ms. HOLTZMAN. And preferrably not have the provision because this is an implicit power of the court in any event, now.

Mr. FRIEDMAN. That's right.

Now, if I could get back to the discovery provision, I think this raises the most serious policy problem——

Mr. HUNGATE. Are you discussing rule 12.1 and rule 16 now?

Mr. FRIEDMAN. Yes, Mr. Chairman.

Rule 12.1 deals with the notice of an alibi requirement. That is to say, the defendant must notify the prosecution at an early point that he is going to rely on alibi. The prosecution then tells the defendant where and when the crime was committed; and the defendant must then tell the prosecution what witnesses he has to show that he was at a certain point, that he was where he said he was, and wasn't where the crime was committed.

And rule 12.1 runs then and requires the defendant, on pain of not being able to present any evidence of his alibi at the trial, to submit the names of witnesses ahead of time.

Now, this goes to the very heart of what the due process clause and the sixth amendment is all about because it will require a defendant to incriminate himself because there is no other way—in fact, it's two constitutional provisions. If he must supply the prosecution with the names of witnesses, then he is helping the prosecution in finding him guilty; there is no other way to interpret that kind of a provision.

No. 1, he does supply the name of witnesses. These people will immediately be interviewed by the FBI, or by other Federal agents. And a witness who—I have a little dialog in my testimony as to the kind of way this kind of interview can take place. Federal Agent.—"We have John Jones on a charge of robbery on June 25, he says you were with him that night."

And the alibi witness who thinks he is being accused of a crime is saying, "Oh, no, I wasn't with him."

And then, at a later point he may offer his alibi and say he was in fact with John Jones at a different point, then the testimony can be used against him.

If a witness, a defense witness is interviewed by the police, or by Federal authorities, by the FBI, it necessarily can be a very intimidating situation. It's not like when a defense lawyer tries to interview a prosecution witness, the prosecution witness says, "I don't have to talk to you, goodby."

But if an FBI agent comes by and says, "We want to check out a story that was told, you were supposed to be with John Jones that night," it's necessarily an intimidating kind of situation. Besides which, the alibi witness can be called before a grand jury and required to answer.

Now, you know the black-letter law is after an indictment is handed down the Federal Government, Federal prosecutors are not supposed to use the grand jury to gather further evidence on the crime for which the person was indicted. But in the *Ellsberg* case, what they did was convene a new grand jury up in Boston, which investigated the Pentagon Papers case, and said, "We are not gathering evidence for the Los Angeles case, we have another crime that we are investigating, we think other things were happening; and we have a right to con-

vene the grand jury and call people, even if they might have evidence relating to the earlier case."

Now, in a drug conspiracy, for example, there might be an indictment handed down—or any other kind of conspiracy—the indictment is handed down and the Government finds other witnesses related to the conspiracy in some way, and start bringing in these witnesses before a grand jury; they must answer the questions, and they start gathering evidence on the earlier indictment.

Mr. HUNGATE. Let me intervene briefly, is there any constitutional objection to the alibi defense requirement?

Mr. FRIEDMAN. Well, the Supreme Court in Williams against Florida said it is reciprocal on both sides, that it will pass constitutional——

Mr. HUNGATE. Wisconsin has had a similar statute for 20 years, maybe longer, I believe.

Mr. FRIEDMAN. Well, the problem there is, the Supreme Court expressly left open one question in the *Williams* case and said, "OK, the alibi rule can pass constitutional muster, except, suppose he doesn't submit the notice, and at the trial he wants to put on an alibi witness." Now, the Supreme Court said there may be a sixth amendment violation there. The sixth amendment says a man shall have the right to confront witnesses against him, and to present witnesses on his own behalf, and if you are saying, "We are not going to allow you to present this witness on your behalf because you didn't file a notice of alibi as required in the rules," aren't you in effect taking away a right that the sixth amendment confers?

The Supreme Court left that issue open. So, that one is a constitutional matter and still an open question.

Now, I have a problem there, what other sanction do you have if you don't file a notice of alibi. You see, the way in which this happens, if he doesn't file a notice of alibi, you can't submit witnesses on that.

Mr. HUNGATE. Does 12.1(d) take care of that? He may learn of additional witnesses during the trial.

Mr. FRIEDMAN. But he has to file the notice ahead of time. If he never files a notice, then he is in trouble.

Mr. RUSSO. Would it be all right, or would it be better if we then require the prosecution to request from the defendant whether or not he intends to use an alibi defense, and if so, then submit the names of the witnesses?

Mr. FRIEDMAN. Well, that would be better, except you still have the same problem, if he doesn't comply with the rules, then he can't submit a legitimate defense at a later time, and once the witnesses——

Mr. RUSSO. I guess that switches the burden to the prosecution. You know, at that point the prosecution has the right to request he furnish the information, he gives them the list of witnesses, and at that point—it seems to me, if we are going to expand the rules of discovery that are here, that we ought to expand the rules for both sides, and make the case proceed as quickly as possible.

Mr. FRIEDMAN. Well, the problem with reciprocal discovery is that before the indictment is handed down, the Government, the FBI agent is investigating a crime; it has Government informants; it has a grand jury, the greatest discovery device ever devised; and then an indict-

ment is handed down, the Government has done all this discovery, it's done enough to convince a grand jury that there is probable cause to believe he committed the crime.

Then you say, "Well, you are both at the same point now, and from this point on you share the same kind of discovery." They are not at the same point. The Government is 20 miles ahead of the defendant because it already has all its discovery through the grand jury. That's the problem there that the Government resources are not the same as the defendant's. To say that they both should be treated the same way is to just——

Mr. RUSSO. Except the defendant is in the best position to know whether or not he committed the crime.

Mr. FRIEDMAN. But it requires the State to be put to a test. In other words, the due process clause, and the self-incrimination clause, say the defendant must do nothing at all until the Government has proved a prima facie case. He doesn't have to offer 1 ounce of evidence either way until the Government has proven its case.

And now you are saying, "Well, maybe we can't prove our case; we'll ask the defense to help us prove our case by requiring——"

Mr. RUSSO. Are you saying by submitting the list of alibi witnesses you are in effect testifying against yourself?

Mr. FRIEDMAN. It's not as strong in the alibi situation; it is as strong in the rule 16(b). An alibi defense is a kind of affirmative defense, in effect, in which it's only after the position has been proved, after the Government's case has been proved, that he comes forward with other evidence. But, if I could just turn to rule 16——

Mr. HUNGATE. Before we move on, I'm still interested in the constitutional question. The Wisconsin law has been in existence since 1955 or 1956—maybe longer. I would think over this long period of time some ingenious attorney would have raised a constitutional challenge to the statute. If all I had was an alibi—and that can happen—I would come right up to trial and say, "I want to call some alibi witnesses." The judge would say, "No," and I would raise a sixth amendment argument.

I can't see why the Wisconsin statute wouldn't have hit that constitutional test long ago.

Mr. FRIEDMAN. Well, the Supreme Court had two cases on it, and in the *Williams* case it expressly left that issue open that, "We are not going to pass on that issue now." If there were lower court decisions on it, I don't know too many. It hasn't reached the Supreme Court yet.

Mr. HUNGATE. You wanted to take up rule 16.

Mr. FRIEDMAN. I wanted to go to rule 16, and there really is a fundamental issue in the rule; it's not a question of specific language——

Mr. HUNGATE. I'm sorry to interrupt again. For the benefit of the new members of the subcommittee, I think U.S. attorneys dislike rule 16 as much as the ACLU does. We have received a lot of letters about the rule, and when you read them, you find that prosecutors don't like the discovery that the proposed rule would require them to give. Their argument is that a defendant can file a notice and force them to reveal their case ahead of time. They don't talk about FBI agents

intimidating defense witnesses, but they think that there is a risk that Government witnesses may be intimidated.

Ms. HOLTZMAN. How would this rule work in a conspiracy case where you are charged both with a conspiracy, and a particular crime, and the alleged coconspirators will be, possibly, alibi witnesses; how would that work? I mean, do you have a serious problem of self-incrimination here?

Mr. FRIEDMAN. Absolutely, absolutely. In other words, in a conspiracy you would have a series of overt acts, you would have the agreement itself which would have to be proved; you would have the overt act to further the conspiracy, and you would have the substantive crime toward which the conspiracy was directed.

Now, if he has to offer an alibi that he wasn't at a certain point at any time, but was elsewhere, he may supply the names of coconspirators, people that he was with, that would in fact show evidence to show the conspiracy.

So, it's entirely possible since there are so many in the Federal area, so many conspiracy cases being brought, that he would have to offer evidence of witnesses that the Government didn't know about, in order to dispute the fact that he was at a certain point at a certain time.

I mean, there may have been two conspirators that were together, the overt act doesn't necessarily name him, he may not have been there, but he still has to offer a witness to the fact that he wasn't at a certain point when the other conspirators were there; and therefore he may offer the names of witnesses that the Government didn't know about, thereby tightening the noose around him.

I think that the drafters of the rule in 1970 and 1971 didn't have one important factor, one important legal development in front of them, and that is the way in which the grand jury powers expanded in the last 5 years. Grand juries are now so free to go to so many different areas, they don't have to show any reason at all to call a witness; they can investigate all kinds of things without any kind of showing at all. The Supreme Court last year in the *Calandra* case said that they could have illegally seized evidence in front of them; they can require someone to come in and violate his fifth amendment right, and if the fifth amendment right is violated they can indict him nevertheless.

Grand jury power has just gone far beyond what I think the Judicial Conference has anticipated when they put this rule together. So, now a Federal grand jury can go so far and can get so much evidence in front of it, and complete its discovery in such a total way that after it's over and the indictment is returned it's just unfair to turn to the defendant and say,

> We want some more, we want a list of witnesses; we want documentary evidence that you may want to submit that we didn't get enough from the grand jury; we want everything that you have in your favor.

So, I think the whole discovery approach that is being made in rule 16(b) ignores the development in grand jury law over the last 5 years. And the Supreme Court has said in the *Dinezio* case we can get fingerprints, and voice exemplars, and all kinds of things out of a defendant; we can require him to speak; we can get a handwriting sample out of him. They can do everything in the grand jury that they want.

Why do they need further discovery in light of this expansion of grand jury power? Why do they have to turn to a defendant and say,

We want every witness you are going to rely on in your defense, we want every documentary evidence that we couldn't get through the grand jury, we want everything.

That's what I meant when I said they don't start at the same point after an indictment is handed down. Let's not make discovery a one-way street. It's been a one-way street for the Government through the grand jury stage.

Now, if we want to realistically make things even, you've got to give the defendant the same opportunity to discover that the prosecution had through the grand jury. And thereforeI don't think you can say, "Well, let's treat everything the same way from that point forward," it ignores the way in which the grand jury has proceeded.

And furthermore, on the point of self-incrimination, there is an example in the Supreme Court of California offered in the *Prudhomme* case in which they say, suppose there is someone accused of murder, and the defense has a witness who says it's self-defense, the only eye witness to the crime; to require the defense to hand over the name of the witness is to allow the Government to prove its case in chief, namely that the man in fact committed the crime. In other words, the witness may have both incriminating evidence and exculpatory evidence. If he offers the name of the witness to the Government, they are going to be able to get the witness and get him to offer the incriminating evidence, so that the defendant can offer the exculpatory evidence at a later point.

The Government may never have been able to prove the murder if it didn't get the name of this witness. The defendant has to give the name of the witness if he wants to offer self-defense in the case; and the Government could never get to the jury with that issue until it had this witness in front of them.

So, for this reason offering the name of a witness can very well incriminate the defendant and get the case to the jury in a way that the prosecution couuld never have been able to do on its own resources.

Mr. WIGGINS. Would you be less concerned if evidence which happened to be the fruit of the discovery were limited to rebuttal, and could not be used in the case in chief?

Mr. FRIEDMAN. That's what the Supreme Court of California did in two cases, the *Jones* case and the *Prudhomme* case where in an affirmative defense, for example in the case of rape it was impotence, they had to prove rape; and only in that case he offered the defense of impotence, and the Government wanted that kind of a defense, the information relating to that defense offered up to it. And the California Supreme Court said, if there was any element the defense had to offer up to the prosecution that would help them to prove the rape, then you couldn't require them to do it. It's only because this is an affirmative defense, after the main charge is proven, that we will allow that defense to take place. So, that's a big improvement, that's a help; the problem is it's often not as clear-cut what's an affirmative defense.

For example, in a conspiracy case where you may want to prove, want an affirmative defense to show that you withdrew from the con-

spiracy at a certain point. Well, that may be an affirmative defense, or you may consider it as part of the case in chief, the evidence may be a little equivocal in certain areas as to whether something is part of an affirmative defense, or it's part of the Government's case in chief. So, there are some areas in which the line gets blurred. But, you know, in a clearly affirmative defense it's easier to deal with it.

But, we just object to any situation in which the defendant must offer a link in a chain of evidence which will tend to prove the Government's case in chief, that's just not fair to require that under the 5th amendment.

Now, if I can go on with rule 16, there are a series of situations in which the Government is obliged to offer evidence to the defendant, which is a one-way street, without question; and I think those areas should be clarified.

Number one, the Jencks Act material. Under the prevailing rules of the Jencks Act you are not supposed to get any statement from the witness until after he testifies. Now, most jurisdictions around the country do not hold to the strict requirements of the Jencks Act. In New York, I know, it's 24 hours ahead of time. Some Federal judges in the Eastern District offered it before trial. So, the defense is going to get Jencks Act material, and to hold the defense from getting that during the trial is just going to call for all kinds of delays in the trial when the defense looks it over; and if he got the material ahead of time, it may be that the defendant is going to plead guilty if he sees all the evidence ahead of time.

So, Jencks Act material clearly should be the kind of discoverable material which is offered to the defense ahead of time.

Mr. HUNGATE. Considering the time, and the fact that we have another witness to hear could we proceed under the 5 minute rule here to make sure that all the members get a chance to get their questions in? Ms. Holtzman.

Ms. HOLTZMAN. Well, I planned to ask you about another area, so I'll take this opportunity. I'm concerned about the whole plea-bargaining process, procedure in which rule 11 condones, sanctions, institutionalizes, solidifies, the like. I think we have seen, at least in recent years, a general national awareness of the problems in hearing plea-bargaining. And I would like to know your comments as to whether or not we ought to provide some limitations on the plea-bargaining system in the Federal courts. What would happen if we eliminated this, and do you have any suggestions to modifying its use?

Mr. FRIEDMAN. Well, the prosecutors and defense counsel——

Ms. HOLTZMAN. Perhaps you haven't thought about this area, in which case I would like to have your comments at a later time; but if you have thought about it, I would like to have your comments now.

Mr. FRIEDMAN. Well, I would like to make just two comments. The prevailing system is total anarchy because in too many jurisdictions the defendant after his lawyer and the prosecution have worked out what they think is a deal, the defendant gets up there and is required to lie to the judge saying that his plea was not induced by any promise of any sentence, when in fact it was induced by such a promise.

He thinks he is getting a certain deal, when in fact he is totally confused as to the deal he is getting.

The judge may participate in the deal in a certain way and in fact push him into accepting a plea that he doesn't want to accept.

We have had cases where because of the long delay in the trial he may plead guilty even though he asserts his innocence simply because it's the only way of getting out of jail; he can't raise bail, and the delay in trial is a long one. It gets to the point where the lawyer tells him he can walk out with time served if he pleads guilty to the charge. He says, "I'm innocent, but that's the only way I can get out."

Ms. HOLTZMAN. Is that true in Federal Court, too?

Mr. FRIEDMAN. Not as much, in the Federal court you don't have the long delay, and you get out on bail under the Bail Reform Act.

Ms. HOLTZMAN. What about the charade part that you are talking about, does that happen in Federal court, too?

Mr. FRIEDMAN. Absolutely.

Ms. HOLTZMAN. And it's untrue when people say they haven't been induced to a particular plea on the basis of a particular promise?

Mr. FRIEDMAN. It happens all the time.

Ms. HOLTZMAN. It's a charade.

Mr. FRIEDMAN. It really is a charade because he thinks he has a certain deal; he may not have the deal he thinks; the lawyer may have been confused about the exact terms; the prosecutor may not be able to deliver what he promises to deliver. And what happens is that he pleads guilty, and the judge gives him a much longer sentence than he thinks he is getting, and he is stuck with it, that's the current situation.

Now, rule 11(e) is an attempt to deal with this, and we've got a halfway measure by laying all the doubt on the table, by requiring the deal to be laid out so that everyone understands what it is, and if he doesn't get what he bargains for, he withdraws the plea.

Ms. HOLTZMAN. I'm thinking more about the public interest in having trials in certain circumstances, and for example I would bring to your attention the original trial of the original "Watergate eight," who were going to plead guilty to avoid the exposure of the truth; and we have seen that in some other instances in the Watergate prosecution, and there have been some articles dealing with that matter as well, that the use of the plea bargaining prevented the public from an exposure of the truth through the trial process. And I think there are serious questions about the use of plea bargaining, and perhaps it should not be used in instances where public officials are charged with criminal offenses. I would like you to comment on that.

Mr. FRIEDMAN. Well, in the Watergate trial they pleaded guilty to the charges of which they were accused, so there was no bargain. They were indicted for certain things that they pleaded guilty to. You can't require them to go to trial when they pleaded guilty to the maximum.

I saw some statistics from England, and England has no problem at all about the court calendar; 70 percent of the people plead guilty anyhow; they do. I mean, the charge comes up, they say, "I'm guilty," and there is no bargaining in effect at all. The problem comes up because prosecutors often overindict. That is to say, they will indict someone who robs a mailbox, there may be four or five technical charges, each of them a 5-year sentence; the prosecutor indicts on all five of them.

Now, the judge knows, or everyone knows, that the fair sentence is really a single act, and he should only be prosecuted for a single act and only get 2, or 3 years. So, someone has to come and negotiate and make sure that that is what the man gets. You can't deal with a plea-bargaining problem—the plea-bargaining situation can't deal with overindictment. That is to say, if the prosecutor just decides to push every conceivable charge and requires the man to go to trial on every conceivable charge. There should be some process whereby the charges that should be dismissed get dismissed; and that's a negotiation of some sort with counsel. And I see no reason why that can't go forward where everyone knows the final point you are going to arrive at, why you can't do that through negotiation ahead of time.

I agree there are some exceptional situations when the judge should not accept the plea, but that's in the judge's discretion, he can always say, "I refuse to accept the plea," he doesn't have to. That may be one way of getting out of the problem.

Mr. HUNGATE. Your time has expired. Mr. Hyde?

Mr. HYDE. I have no questions, just a very brief comment. I think from the defendant's point of view he would hate to have the presentence investigation limited to strict rules of evidence because when your man is guilty, you want to prove that he was an altar boy; he was a Vietnam veteran; he was an Eagle Scout; he gives money to the church, all this extraneous information is all you have going for him at that point. So, if you limited it to the strict rules of evidence, why, I think you are hurting the defendant as much as you are helping him.

I think if you permit a hearing on the presentence report and challenging the material in it, you are further pushing off the finality of the judicial process, which is a big fault today. I think you just have to leave it to the discretion of the judge. If there is some flagrant, outrageous statement that the man was convicted in Hempstead, N.Y., and he's never been in Hempstead, you have to leave it to the fairness of the judge to permit some showing on that.

But to formalize another hearing from which there ought to be an appeal is just further obstructing justice in the long run.

I would be very careful in limiting the presentence investigation because it helps probably more than it hurts the average defendant.

Mr. FRIEDMAN. I agree with you, Mr. Hyde, I don't think anyone was suggesting that. I just think that in a situation you described, where he was never in Hempstead, N.Y., he should have some opportunity to show that; and there is nothing in the rule that would allow that.

Mr. HYDE. Other than the discretion of the judge. But if you formalize that, you are getting into another trial, and possibly an appeal from that, and I think you create an awful problem.

Ms. Holtzman mentioned the relevance of what was in the presentence report, and from my point of view, if I was the defendant, I would want it as irrelevant as posible. If your man is guilty, you need all the irrelevancy you can muster, so I would think.

Mr. HUNGATE. Mr. Russo?

Mr. RUSSO. Just to follow up a little bit on what Ms. Holtzman was talking about, when you referred to the 70 percent of the cases

in England that plead guilty anyhow, that is much different than the plea-bargaining situation we are talking about.

For example, you take the Agnew case, there was plea bargaining there. In my particular circumstance, I would have rather had that one going to trial, and not take plea bargaining because we could have found out things that may be more relevant, more important. There are other cases of that, involving public officials.

Getting back to discovery, it's been my practice as a former prosecutor in the State courts back home, that the State courts make just about every iota of evidence available to the defense; but in the Federal court it's just absolutely different. You know, what would you like to have expanded in the Federal court as far as discovery procedure?

Mr. FRIEDMAN. Well, just on Monday the U.S. attorney for the eastern district, David Trager, announced that his policy from now on would be to open up his prosecuting file, complete discovery, the entire prosecutor file goes to the defendant right after the indictment. And Mr. Sevilla was telling me that is the practice in San Diego as well, and other places in California. The State prosecutors do it because it saves time.

Mr. RUSSO. Obviously it's not something that is uniform throughout the districts.

Mr. FRIEDMAN. That's right.

Mr. RUSSO. That is something I think we ought to get to, it ought to be uniform, not only in discovery matters, but also as much as we possibly can in sentencing, and I don't want to get involved in that now.

But, as far as the discovery end of it, you being on the defense side, where do you see the problems as far as you defending individuals?

Mr. FRIEDMAN. Well, I think that the material which the Supreme Court said should be handed over, Brady material, Jencks Act material, should be handed over at the earliest point in the process. Statement from Government witnesses they are planning to make should be handed over as early as possible because it would really help to dispose of the case.

Brady material, exculpatory material, there should be a uniform rule on that. The circuits are all over the lot on what is Brady material. The second circuit has a tripartite rule on material which is clearly exculpatory; not clearly exculpatory, or may be exculpatory. And, depending on the kind of material it is you get it, if you ask for it, get it before the trial. There is something like six or seven subdivisions on when you get your Brady material. You have to get it at some point, but exactly when you get it is all over the lot.

Now, here is an opportunity to lay out in the Federal rules material that must be handed over. It's not like saying it should, or should not be handed over. The Supreme Court said it must be handed over, and the only issue is when and how.

Now, if that material were handed over in a uniform way, provided by the Federal Criminal Rules, it would really push the whole process forward, it would encourage prosecutors to do what they have done in the eastern district and San Diego.

Mr. RUSSO. Can I just go to another question? On a motion to suppress, do you feel we should have a more expanded delineation of when

the motion to suppress is being used? For example, in my region you can use it only prior to trial; back home you can use it during trial.

Mr. FRIEDMAN. Well, there is some value in determining it as far ahead as you can because sometimes you don't want to go to trial. If some particular evidence is not going to be admitted, the man is going to plead, and he should know that as early as possible in order for anyone to adequately prepare for trial.

Mr. RUSSO. What about a provision for substitution of judges, not just from the districts; do you feel that would—say, for example, in the first case it would be automatic. Do you see that as a helpful thing?

Mr. FRIEDMAN. That would be a helpful thing. In other words, the California system where you can challenge a judge for cause once, and that is it.

Mr. RUSSO. I can tell you, back home, if you make a challenge for substitution, you are in a lot of trouble; and that's why I think we ought to have a provision in here, on a first case.

Mr. FRIEDMAN. Well, some States, I know in California, and I think Illinois and Indiana they allow a one-shot challenge of a judge.

Mr. RUSSO. In the Northern District of Illinois it's automatic.

Mr. FRIEDMAN. There are some judges that don't try very many cases that way, and people get the picture. I think it serves a useful disciplinary method as well. I think some of the judges will want to comment on that one.

Mr. RUSSO. I'm sure they would. I don't have any further questions.

Mr. HUNGATE. Mr. Wiggins?

Mr. WIGGINS. I don't have any.

Mr. HUNGATE. Mr. Mann?

Mr. MANN. No questions, thank you, Mr. Chairman.

Mr. HUNGATE. There are some things I want to touch on here. The subcommittee received a suggestion about rule 43. You suggested that subsection (b) should be redrafted. Would the following language be an improvement—"Persists, after having been warned that disruptive conduct will cause him to be removed from the courtroom, in behavior which obstructs the progress of trial."

Mr. FRIEDMAN. Partly.

Mr. HUNGATE. That would take your problem away.

Mr. FRIEDMAN. It would take one-half of it away, but then I'm still dealing with the problem——

Mr. HUNGATE. I understand. I'm finding U.S. attorneys have the same objections to some of the other rules that you do, they think giving the names of Government witnesses is going to make conviction more difficult, and will not improve the administration of criminal justice.

The subcommittee has received some objection to that part of rule 16 making discovery mandatory on request, rather than controlled by the court's discretion. I take it that you would favor that part of the rule.

Mr. FRIEDMAN. Now, you see, my answer to that is, what I do is give them the Jencks Act statement ahead of time. In other words, don't give them the list of witnesses, but give them the Jencks Act statement, and not just 24 hours ahead of time, some appreciable time.

Any prosecutor is going to say when he hands over Jencks Act material, he really has an awful lot of pleas because then the lawyer goes to the defendant and says, "Look what they've got against you", and the guy says, "Well, all right, let's plead for something."

And it really will push the whole process, as well as help the defense to appear at trial. I mean, eventually they are going to know the names of the witnesses, as soon as they are going to get the Jencks Act material. So, I would answer the problems of the U.S. attorneys by doing what the eastern district does, which is handing over the statements of the witnesses against them. They have been able to live with it, and they think it improves the administration of justice from their point of view.

Mr. HUNGATE. When it comes to the alibi defense provisions, you'd just as soon they weren't there.

Mr. FRIEDMAN. I think I would just as soon drop them altogether. And as I say, I think the way to improve rule 16 is to require the category of things, Jencks Act material, Brady material, clearly specified when it is supposed to be handed out; and the criminal record of the witnesses, and the defense. There is one last technical problem, and that has to do with attorney work product. I think there is some bad drafting in some of these rules. If I can just turn to one last issue, rule 16(b)(2)——

Mr. HUNGATE. 16(b)(2), yes.

Mr. FRIEDMAN. 16(b)(2), information not subject to disclosure. This is at the top of page 16.

Mr. HUNGATE. Yes.

Mr. FRIEDMAN. "This subdivision does not authorize the discovery or inspection of reports, memorandums, or other internal defense documents made by the defendant, or his attorneys, or of statements made by the defendant, or by Government or defense witnesses."

In other words, this deals with work product, and I think it's not a clear definition as the Uniform Rules of Criminal Procedure, which the State National Commissioners on Uniform State Law have a better definition of work product, I think, which makes clear what it is. I have it on page 20 of my statement, and I think that's a better technical definition of what they are trying to get at.

Mr. HUNGATE. You think the definition of work product cited in your statement is a better technical definition?

Mr. FRIEDMAN. That's right because the problem is, sometimes factual material and legal material are intermixed, and you don't get anything under this rule. But under the State rule they very clearly specify what it is, what is factual and what is legal; and they require the factual elements to be offered up.

Mr. HUNGATE. One last question. The amended rules prefer the summons over the warrant. Do you think the rules should define "valid reason," or should the courts work out a definition of "valid reason"?

Mr. FRIEDMAN. Well, I know Mr. Wiggins, and I had a dispute before the Kastenmeier subcommittee on "probable cause," and "reasonable cause" to justify a wiretap, and "founded suspicion," "valid reason," we had a lot of words which involved slightly different tests; I think we may have to let the court decide what a "valid reason" is.

Mr. HUNGATE. And not attempt to define that in the rule?
Mr. FRIEDMAN. I think that's probably right.
Mr. HUNGATE. Thank you very much, you have been very helpful.

HOFSTRA UNIVERSITY,
Hempstead, N.Y., March 14, 1975.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, Congress of the United States, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN: Thank you for your letter of February 27, 1975 in which you ask me to send you a statement of exactly which changes the A.C.L.U. would like to see made in the pending amendments to the Federal Rules of Criminal Procedure.

The changes we would recommend are as follows:

Rule 4.—No change.

Rule 9.—No change.

Rule 11.—Renumber present Rule 11(c)(4) as Rule 11(c)(5) and add a new paragraph 11(c)(4) as follows:

> . . . that he has the right to an attorney or to have an attorney appointed for him through all steps of the legal process; that he has the right to secure and present his own witnesses in his defense and confront the witness against him; that he has a 5th Amendment right not to incriminate himself; and that he has a right to trial by jury.

Rule 11(e)(6) should be amended as follows:

> Evidence of a plea of guilty, later withdrawn . . . is not admissible *for any purpose* in any civil or criminal proceeding against the person who made the plea or offer.

Rule 12.1.—Delete the entire rule.

Rule 16.—In Rule 16(a)(1)(E) eliminate the phrase: "within the knowledge of the attorney for the Government."

Add a new paragraph, Rule 16(a)(1)(F) as follows:

> Upon request of a defendant the Government shall furnish to the defendant any material which is required to be furnished to the defendant pursuant to 18 U.S.C. § 3500.

Add a new paragraph 16(a)(1)(G) as follows:

> Upon request of the defendant the Government shall furnish to the defendant those portions of grand jury minutes containing testimony of the accused and relevant testimony of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial.

Add a new paragraph 16(a)(1)(H) as follows:

> Upon request of the defendant the Government shall furnish to the defendant any material or information within its possession or control which tends to negate the guilt of the accused as to the offense charged or would tend to reduce his punishment therefor.

Add a new paragraph 16(a)(1)(I) as follows:

> The prosecuting attorney shall inform defense counsel: (i) whether there is any relevant recorded grand jury testimony which has not been transcribed; and (ii) whether there has been any electronic surveillance (including wiretapping) of conversations to which the accused was a party or of his premises.

Eliminate proposed Rule 16(b) and substitute the present rule 16(c).

Rule 16(d)(2): At the end of the first sentence, add the following:

> . . . except that the defendant shall never be prohibited from introducing evidence that would tend to negate his guilt or would tend to reduce his punishment therefor.

Rule 32(c)(3)(A): Add at the end of the paragraph:

> . . . or, at the reasonable discretion of the court, to introduce testimony or evidence relating to any alleged factual inaccuracy contained in the presentence report.

Rule 43.—Eliminate Rule 43(b)(2), or in the alternative, substitute the following paragraph:

> After being warned by the court of the consequences, engages in conduct which is such as to justify his being excluded from the courtroom, except that the defendant shall be permitted to return for the purpose of testifying in his own behalf.

I believe the reasons for these recommended changes were outlined in my testimony and do not have to be repeated now.

Thank you for your courtesy and interest in our suggestions.

Sincerely yours,

LEON FRIEDMAN,
Professor of Law.

Mr. HUNGATE. Our second witness today is Mr. Charles Sevilla, chief trial attorney, Federal Defenders of San Diego, Inc., testifying on behalf of the National Legal Aid and Defender Association. I appreciate your being here. Do you have a prepared statement?

TESTIMONY OF CHARLES M. SEVILLA, CHIEF TRIAL ATTORNEY, FEDERAL DEFENDERS OF SAN DIEGO, INC.

Mr. SEVILLA. Yes, sir.

Mr. HUNGATE. Without objection it will be made part of the record at this point, and you may read it, or proceed from it, however you see fit.

[The prepared statement of Charles Sevilla, follows:]

STATEMENT ON BEHALF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION

(By Charles M. Sevilla, Chief Trial Attorney, Federal Defenders of San Diego, Inc.

On 1 August 1975, the proposed amendments to the Federal Rules of Criminal Procedure will become law unless there is intervening congressional action by way of amendment. While many of these rules announced by the Supreme Court of the United States on 22 April 1974 initiate needed reforms of the Federal Rules of Criminal Procedure, Congress should give particular attention to several sections of dubious merit. This statement is directed toward offering amendments to the rules as now proposed with a view toward insuring justice to all sides in criminal litigation.

Proposed Rule 11

In amending Rule 11 to recognize and deal with plea bargaining, the proposed amendment makes a pragmatic recognition of reality in the busier criminal courts. Requiring the plea bargain to be of record insures that the court is apprised of all understandings between the prosecution and defense as to the defendant's *quid pro quo* for his plea of guilty. The plea agreement procedure [11(e)(1-6)] is in general the proper means to accomplish this goal. However, that section which requires the trial court not to participate in any plea discussions should be omitted from the proposed rule. This provision was no doubt drafted to prevent the trial court from strong-arming defendants into pleas of guilty. However, there are strong off-setting reasons for allowing the trial court to participate when both parties wish the trial court to do so. In cases where a judge rejects a plea bargain, without some indication of the range of sentence (and given the enormous maximums within which federal judges may sentence defendants), defendants will be forced to needless trials and subsequent appeals. This prospect could be eliminated by a simple conference between the prosecutor, defense counsel and the trial court to discuss a reasonable sentence.

Another example of the impropriety of this rule is where a defendant draws a prosecutor who refuses to engage in plea bargaining, or offers only to "remain silent" at sentencing. A defendant is entitled to know the general range of his sentence in return for entering a plea of guilty. Unless the trial court is given

the opportunity of participating in plea discussions, many defendants will find themselves given no alternative but to put the government to proof at a trial and subsequent appeal.

Rule 15

The broad expansion of Rule 15 to allow for government depositions should be limited only to the situation in which the government wishes to depose a material witness incarcerated due to inability to make bail. This provision would allow for incarcerated material witnesses to give testimony and gain a speedy pre-trial release. The deposed witness would then be given a subpoena for trial. Only upon failure to appear at trial would the deposition be used.

The expansion of Rule 15 to allow for unlimited depositions by the government is a dangerous step toward trial by deposition. Many federal cases involve testimony by key government witnesses who are paid government informants. Often, these government witnesses are of unsavory character. The government, wishing to bury the unsavory demeanor of the witness in a deposition, would move the court to depose the informant arguing that a pre-trial deposition will insure the safety of the witness, and upon subsequent disappearance of the government witness the deposition would save the government's case. Such cases should not be saved. The government deposition right should be limited only to those cases where material witnesses are incarcerated.

Rule 16

What has been said above with respect to Rule 15 also applies to the provision under Rule 16 allowing the perpetuation of the testimony of government witnesses when a list of such witnesses has been provided to the defense.

Rule 16(a)(1)(E)

Unfortunately, the amendment to Rule 16 maintains the prohibition of 18 U.S.C. § 3500 (The Jencks Act). Maintaining this rule within the rules of criminal procedure is totally inconsistent with other sections of the act, such as the notice of alibi and sanity defense sections, which seek to avoid needless delay and surprise at trial. The Jencks Act, in requiring the government to turn over witness statements only after their direct testimony, is a source of constant delay and surprise within the trial courts. Should the Jencks Act statement include information necessitating a defense investigation, a trial is unnecessarily delayed because of the dilatory production of this statement by the government. To maintain internal consistency, proposed Rule 16 should specifically abolish the continuation of the Jencks Act.

Through amended Rule 16(b), the proposed rules inaugurate an unprecedented opening of the defense case to government discovery. This provision was appended to Rule 16 to provide for the sanguine objective of mutuality of discovery. This is in reality a theoretical objective rather than a practical one. There can never be parity between the position of the United States and that of a defendant. The former, with unlimited investigative resources available, is simply an overpowering opponent to the vast majority of defendants, especially the indigent. Most government witnesses are well aware of their right to refuse to discuss a case with a defense investigator. However, few defense witnesses would exercise this option to refuse to talk to an investigating federal agent for fear that they might be considered as implicated in the underlying offense and soon find themselves before a grand jury. Since Rule 15 may not be used as a deposition device for discovery, the defense will in most cases find itself simply with a list of government witness names. On the other hand, the government will find a rich source of discovery in the names of defense witnesses and their subsequent interviews. This situation is inconsistent with the government's constitutional burden to prove its case beyond a reasonable doubt unaided by the defense in any manner.

The proposed mutuality of discovery proposition is also unrealistic in failing to consider the unpredictability of the trial process. Often, a defendant may simply choose to put the government to its proof and not present any evidence at all. This strategy may change with the testimony of the last government witness who injects a devastating blow to the defense strategy. Under the proposed rule, the defendant would be precluded from calling any witnesses for failure to provide the government with a witness list. Even if a defense is antic-

ipated, it is often impossible to predict the exact nature of government testimony which will need to be rebutted during a defense case. Under these circumstances, last minute witnesses will need to be called by the defense without any opportunity to provide advance notice to the government.

With a few exceptions, discovery in the context of a criminal case is a one-way street. When a sanity or alibi defense is anticipated, it may be fair to require the defendant to provide notice of this defense and a list of witnesses. However, this is not cause to abandon several hundred years of procedural evolution with respect to the criminal trial process by flinging the doors of discovery wide-open to the prosecution. It is submitted that this is an area best left to experimentation in the states. Through observation and study, a workable discovery procedure concerning the defense case may prove workable. At this time, it is not.

Rule 32

Rule 32(a)(2) should be expanded to allow for appeals of motions to suppress evidence after a plea of guilty. Under the rules today, a defendant is forced to a needless trial in order to preserve for appeal the trial court's ruling during a motion to suppress evidence. If there is anything the federal criminal justice system does *not* need, it is a trial all sides wish to avoid. By simply amending this rule to allow for appeals of rulings on motions to suppress following a plea of guilty, this horrendous waste of resources may be avoided. The California experience in this matter is commended to the attention of the Committee as an intelligent approach to the problem. See Calif. Penal Code § 1538.5.

Mr. RUSSO. Excuse me, Mr. Chairman, I have another subcommittee meeting and have to go.

Mr. HUNGATE. We certainly appreciate your attendance here; I know you have a conflict. Thank you, Mr. Russo.

Mr. SEVILLA. Mr. Chairman, committee members, I speak on behalf of the National Legal Aid and Defender Association. Before I embark on a cursory review of the proposed amendments, I might indicate from whence I come. Federal Defenders of San Diego is one of the largest Federal defender organizations in the United States. Our caseload runs about 2,000 appointed cases per year for a staff of 12 attorneys, and includes at least as many noncompensable case appointments. I supervise 10 full-time trial attorneys on a full-time basis. We are engaged solely in handling Federal criminal cases.

We handle trial appearances, appeals to the ninth circuit, and on occasion to the Supreme Court of the United States. Our district has five full-time district judges, three full-time magistrates, and two part-time magistrates.

I might add that the Southern District of California was the generator of what is now known as the omnibus form, which is relevant in considering the proposals for discovery in rule 16 and rules 12.1 and 12.2. We have been working under some of the proposed rules, to a a certain extent, for a number of years. I think our experience may be helpful to the committee in discussing how some of these procedures work.

For instance, with respect to plea bargaining, we have always maintained that plea bargaining must be of record so that there is no charade, as Ms. Holtzman alluded to, as happens in other districts where the defendant has to indicate that he is pleading guilty, but not because of any promise made to him. In fact, in our district the plea bargaining is made a matter of the record, the judge will ask whether or not the defendant is pleading guilty because in fact he is guilty,

or merely because he wants the benefit of a plea bargain. That is made part of the record, and I will have some further comments on the other proposals with respect to rule 11.

With respect to rule 12, the omnibus procedure in our district has a rule 12.1 and 12.2 in our omnibus form, which includes the notice of alibi and notice of an insanity defense.

The omnibus agreement is memoralized by a five-page omnibus hearing form, which is submitted to a magistrate at an omnibus hearing. The omnibus hearing is the stage at which all discovery is to be completed; this takes place within a week of arraignment. The omnibus form is not attached to the statement submitted to the committee, but if the committee is desirous of having a copy, we will be happy to provide it.

Mr. HUNGATE. We would appreciate it if you would furnish that to us, please.

Mr. SEVILLA. The omnibus hearing form details the extent of the Government discovery that it has provided, or that it promises to provide to the defense; it is usually most extensive. It includes basically all of the material that is required in the proposed rule 16(a), the Government disclosures to the defense.

As far as what the defense must disclose to the Government, our limitation is strictly to the affirmative defenses in 12.1 and 12.2. We do not have the "open door" discovery which proposed rule 16(b) requires the defense to disgorge, such as witness lists and tangible evidence.

Mr. HUNGATE. When you say you have rules 12.1 and 12.2, are they the same words, or substantially the same?

Mr. SEVILLA. Basically, the defense must indicate whether it will rely on an alibi defense, and if so, whether it will provide the prosecution the witnesses for that alibi. That is stated on the omnibus form 1 week after arraignment, which may be a month or two prior to trial. The same would apply to the insanity defense.

I think there is some reason for this type of discovery being required for an affirmative defense. I would, however, echo Professor Friedman's comment on discovery in the rule 16(b) proposal.

With respect to the proposed rule 32 and the presentence report, that has been basically the rule with respect to discovery of presentence report in our district for at least the 4 years that I have been in practice there.

My position with respect to the other proposals is that we have no problem at all with rules 4 or 9. I think rules 4 and 9 simply bring internal consistency between the Bail Reform Act of 1966, and rules 4 and 9. It is somewhat ironic under the present system where an individual is arrested, taken from his job during the middle of the day on an arrest warrant based upon a complaint or indictment, then brought to the county jail, or the Federal correctional facility, made to wait in custody for a day or two pending initial arraignment, and finally allowed to go free under the presumptive personal recognizance bond that is mandated by the Bail Reform Act of 1966.

A person is entitled to a presumption of a personal recognizance bond, or nonmonetary-type bond. It is inconsistent to arrest him, put

him in jail, and then indicate that he is entitled to the personal recognizance bond. I think the presumption in favor of a summons is the preferable procedure. We have had this problem in our own district on probation revocations, where a probation officer sees the district court judge, and indicates that he has probable cause to believe that the probationer has committed a violation. An arrest warrant is issued. The probationer is yanked off his job—and I speak from personal experience where I have represented clients who have been in this situation—and taken to jail. A hearing is set in a week or two for a probation violation hearing. At that time there is certain evidence presented, and the individual may be reinstated to probation. When they are freed, they have lost their job. Few employers are going to welcome probationers with open arms after they have had FBI agents come and pull them off their jobs in the middle of the day.

I think that the presumption for a summons is a giant step in the right direction, a giant step toward bringing internal consistency between the Bail Reform Act and rules 4 and 9.

With respect to rule 11, it is an excellent idea to memorialize the plea bargain on the record. I would again echo Professor Friedman's reservations with respect to 11(c), the required advice to the defendant. If we do not want to generate a great number of post conviction attacks, the judge should take the extra 20 seconds to advise the pleading defendant of the three *Boykin* rights, the right to jury trial, cross-examine witnesses, and to produce witnesses on his own behalf.

This is no great burden on the trial courts of the country, and it may eliminate many time-consuming post conviction attacks by way of 2255 petitions.

I would also add that since a defendant should be cognizant of the consequences of the plea, that when in addition to a maximum penalty there is a consecutive sentence possibility, that the defendant should be advised of it by the trial court. For instance, in our circuit we have a case by the name of *United States* v. *Meyers*, 451 F.2d. 402 (9th Cir. 1972), where a defendant came before the trial court already in State custody, and pleaded guilty to a Federal crime such as bank robbery where there is a maximum possibility of 25 years.

If the judge sentences the defendant to 25 years, the defendant may go out and think, well, I'm starting service of my 25-year sentence. That is not correct. The service of that sentence will not start until the Federal authorities have custody of the body of the defendant, which would not be until the defendant completes the sentence of his time owed to the State. Therefore, I think it's paramount that consequence be made plain to the defendant at the time of the plea.

Another problem I have with rule 11, although I am in general agreement with the majority of the proposed amendments to the rules, is rule (e)(1). Many courts have their own particular attitude toward plea bargaining, some do not wish to participate, and some do. The last sentence of (e)(1) reads, "The court shall not participate in any such discussions." I think that is a mistake.

For instance, I notice Ms. Holtzman has Judge Frankel's book, "Criminal Sentencing," which speaks to the anarchy of criminal sentencing in the Federal courts. We have so many different judges

with different sentencing attitudes, and no criteria for sentencing, that a defendant could receive a sentence within a wide range. For instance with respect to drug cases such as cocaine convictions for no matter what amount may result in a sentence up to 15 years on one count.

A prosecutor plea bargaining in such a case, may tell the defense attorney, "Well, tell you what I'm going to do, I have four counts here"—because as Professor Friedman stated, it is a practice to inflate or puff up charges. For instances, in our district somebody importing 2 grams of cocaine with somebody else in the car would be charged with four counts, importation, possession with intent to distribute, conspiracy to possess with intent to distribute, and conspiracy to import with the person who was in the car.

If you add up the total of all these charges, it's 60 years. The prosecutor says, "I tell you what I'm going to do, I'm going to drop three charges and let you plead to one, but I'm going to remain silent on sentencing, I'm not going to make any recommendations. I'll just remain silent." I would submit that a defendant is entitled to have some idea of what sort of sentence he is going to receive. If the prosecutor simply remains silent, that doesn't tell the defendant much. If a judge is willing to say, given your client's background, "I would usually sentence an individual to a year and a day under that circumstance," I don't think that the system has been compromised one bit by having the prosecutor and the defense attorney ask the judge what the judge will give under those circumstances.

Mr. WIGGINS. In San Diego, do the Federal judges there operate under an individual calendar arrangement that such a discussion would take place before the very judge scheduled to try the matter?

Mr. SEVILLA. That's true.

Mr. WIGGINS. Does that problem bother you, by involving the judge in exposure of information that would prejudice his ability to sit as a judge?

Mr. SEVILLA. It has a potential for bothering me had I not known my own judges, but not in the southern district. Our five judges are all reasonable men, and do not hold trial over a defendant's head like a bludgeon, for example, indicating that if the defendant goes to trial instead of accepting a certain deal, he is going to get 5 years extra on top of the sentence. This does not happen in our district. However, I would say that for those judges who do engage in that practice, eliminating them from plea bargaining isn't going to stop it. I think the bar is cognizant of where a particular judge hates going to trial, and that trial for your client is going to mean an extra couple of years upon conviction.

Mr. WIGGINS. Well, as an alternative it's possible to have some sort of master calendar arrangement, and State courts do, where all of the discussions would be between the judge in advance being assigned to the trial.

Mr. SEVILLA. That's a possibility.

Mr. WIGGINS. I, for example, would find a judge would possibly be prejudiced during the course of a plea bargaining discussion, a certain admission was made to the judge in private, and then to listen to that defendant state to the contrary under oath; it would be very

difficult to keep one's sense of fairness, and balance, and perspective under those circumstances.

Mr. SEVILLA. That's correct. However, in my experience—the defendant would never participate directly in those discussions, only the prosecutor and the defense attorney and the judge are involved.

That problem isn't one that I have experienced. The judge is not so much looking in terms of what sort of incriminating material occurred in this case which might arise during the trial, he is looking from the Government and the defense attorney for the client's background, assuming that the client is going to plead guilty. There is no necessity for going into the details of the case and explaining exactly what happened. Usually it's a matter of portraying to the trial judge the defendant's background, his arrests and convictions; although the prosecutor may indeed discuss the extent of involvement in a case.

There is that possibility that you raised, but I think on balance there is more to be gained than lost because given the situation where a prosecutor refuses to make a recommendation for sentence, and given the vast discretion that the trial courts have in sentencing—for instance, in the drug charge from zero to 15 years per count and in a bank robbery it's zero to 25—the defendant has a right to an expectation of the sentence he will receive after a plea. By simply painting the picture to the trial judge and asking what the range of sentence the client would normally receive in his circumstance, we are not compromising the criminal justice system at all.

Mr. WIGGINS. I understand in a different provision there is discussion of the presentence report; and there is a statement that presentence information should not be made available to the judge in advance of sentencing without the written consent of the defendant. And I gather the kind of discussion which you envision would include a conversation of presentence material.

Mr. SEVILLA. It might.

Mr. WIGGINS. And I guess in order to harmonize the section, that we might require some written agreement on the part of the defendant in some cases, or perhaps abandon it in some others.

Mr. SEVILLA. Certainly, it would have to be with the defendant's consent that the defense attorney conduct the plea bargaining. If there is a desire that we insure that the defendant is cognizant of what might be happening, a provision for requiring it in writing, it would certainly not hurt the procedure.

But I know Judge Nielson, who was a member of the Federal Rules Committee of the Judicial Conference that went over these rules was adamantly opposed to this provision. In our district, which is a very busy one, many cases are resolved this way—not because of any bludgeoning by the judges—counsel come to the judge voluntarily in our district, they are not invited in for coercion to be applied.

Mr. HUNGATE. Let me inquire just a moment. Do I understand, that rule 11(e)(1) precludes the court from participation in plea bargaining discussions and that you think this is probably unwise—that the court should be permitted to participate?

Mr. SEVILLA. Yes; that provision should be eliminated, the last sentence.

Mr. HUNGATE. This is by Judge Spears:

> I got right in the middle of a big plea bargaining session one time since I have been a judge. I did this because I was persuaded that the public interest required my participation. I found out too late that this was a bunch of hogwash, and I have personally resolved never to mix the judicial functions with those of the prosecutors again, unless I am forced by some rule to do it. "A burned child is scared of fire."

He had a rather lasting experience, I don't know what it was.

Mr. SEVILLA. By eliminating that sentence, we are not going to be requiring judges to participate. The judge would always have the right to refuse.

Mr. HUNGATE. It would permit judges to participate if they wanted.

Mr. SEVILLA. Exactly. I think the sentence should be eliminated because it mandates that judges not participate; but the change would not mandate that they do.

Mr. HUNGATE. In view of your experience, let me ask you a question that relates to a couple of comments the subcommittee has received. This is from Judge Bartels:

> [I]n any metropolitan or thickly populated area the U.S. Attorney does not have time to review each case and make his recommendation. Instead, from my experience, he leaves this task to the Assistant U.S. Attorney, who is generally a young man with 1 to 4 years experience at most and who has no particular expertise, experience, or judgment to make a reasonable recommendation in connection with the offense charged. In fact, he has already in most cases reduced the charged offense to a lesser or related offense carrying a much lesser penalty. This would seem to be sufficient bargaining power to any U.S. Attorney to induce a plea of guilty.

Would you comment about that?

Mr. SEVILLA. The problem, as I mentioned before, and as Professor Friedman has stated, we have this fractional division of every charge. Practically, when a man is arrested he is not charged with——

Mr. HUNGATE. As I understand this judge, he is saying that bargaining by dropping charges is done already.

Mr. SEVILLA. That's right.

Mr. HUNGATE. If the charges are reduced to one, that's enough plea bargaining for that attorney to have, he says. I don't think you agree with that.

Mr. SEVILLA. Not at all. I don't think that is plea bargaining at all because we are dealing with, as I said before, such wide maximums allowable for a sentence. If the client came in and pleaded to every single count, as opposed to pleading to one count and the others being dismissed, he would probably receive the same sentence. That is all that the client wants to know.

We are dealing with a system where the vast majority of people plead guilty. The only question that is critical to them is, "What am I going to get for a sentence", and not the number of counts that he is convicted of, or how many were dismissed, but, "What am I going to get."

A defendant is entitled to know, within a certain range if possible, what sentence he is going to receive in return for his plea. Asking the judge beforehand is the way to do it, and it should be done.

Mr. HUNGATE. What about the attack on the qualifications of the Assistant U.S. Attorneys. Has your experience been similar to the judge's?

Mr. SEVILLA. Justice Burger has commented about the "Bush Pilots flying 747's in the courtroom." I would say that both on the defense side and the prosecutors——

Mr. HUNGATE. They never bail out over there, do they?

Mr. SEVILLA. That's right.

On both sides we have younger people involved, but usually in command we have older people doing the training; I don't think that is a consideration for adding this provision. I'll leave rule 11 with that.

With respect to rule 15, I want to leave——

Mr. HUNGATE. Counsel has a question.

Mr. BLOMMER. Let me interrupt. As proposed, rule 11 would allow a defendant to enter a plea bargain by himself, without counsel. Do you think it's wise to allow the defendant to waive constitutional rights without counsel?

Mr. SEVILLA. Well, first he has to waive counsel. The requirements for waiving counsel are not easy. Most judges, first of all, have a presumption against it; they do not want defendants to waive counsel at all because there is a feeling he would be better represented if they had counsel.

Therefore, usually only the most adamant defendants proceed under their own banner without counsel. If the person is adamant, he has a constitutional right to represent himself. If they are persistent, they should have that right.

If they are unrepresented by counsel, they do have a right to participate in plea bargaining, meaning a direct confrontation with the prosecutor. It is unfortunate, but necessary.

Mr. BLOMMER. Do you see any constitutional waiver problem, then? In other words, do you believe that someone can waive a constitutional right in this sense, without counsel?

Mr. SEVILLA. Waive what type of constitutional right?

Mr. BLOMMER. Well, the right to understand not only what the law is, but how the facts apply to the law and knowingly enter plea bargaining, after waiver of all his fifth and sixth amendment rights involving trial. Can it be done in such an informed way, without counsel, that it will be voluntary?

Mr. SEVILLA. It can be done, but I would say that it is so limited in its occurrence in the Federal court system that it is not worthy of a rule to deal with the situation. If a person waives counsel, the court will be very clear to explain to the individual what he is waiving, and the problems he may have. The defendant will go into the situation with his eyes open. The rule in rule 11, which applies to the rejection of plea bargaining and the inadmissibility of evidence discovered during negotiations, would apply to a defendant dealing with the prosecutor, just as they would with defense counsel dealing with the prosecutor.

Mr. BLOMMER. Let me ask one other question. Would a U.S. attorney in San Diego enter into a plea agreement with a defendant who doesn't have counsel?

Mr. SEVILLA. I can say in the 4 years I have been in San Diego I have not heard of a plea bargain between a defendant unaided by counsel and a prosecutor. I know that prosecutors do not wish to deal with defendants.

Mr. HUNGATE. If we may, we will go forward with your remarks, Mr. Sevilla, because I want to get to Mr. Mann for some questions. We will go as long as we can, but the bells may cut us off.

Mr. SEVILLA. With respect to rule 15, depositions. Currently depositions are only allowed on motion of the defendant, and the Government through 18 U.S.C. 3503, is allowed to call for depositions when a case is labeled "one involving organized crime." I think that is sufficient. I do not believe that the Government, either through rule 16(a), or rule 15 should have the right to depose witnesses as a rule in so many narcotics cases, the Government is dealing with an informant who is earning his wages by working off another case. These individuals are commonly narcotics addicts, of unsavory character, and the Government would like to depose them and forget about them. We would be left with a record of the deposition introduced at trial against the defendant, rather than the testimony of this informant who, for example, may have participated in the sale to bring the defendant to justice.

The defendant is entitled to demeanor evidence of this individual; there is no substitute for the actual presence of an individual during the moment of truth, cross-examination before a jury. Having a deposition read of such a witness simply deprives the defendant of the right to confront the witness; it certainly does as to demeanor evidence of such an individual.

I think that is basically the purpose behind the adjustments in rule 15, and I would oppose that.

The same statement would apply to the amendment to rule 16(a)(1)(E) which states, if the Government supplies a witness list, then it is entitled to depose its witnesses. I have a fear that if they produce the witness list, they are going to depose such witnesses as these informant types; and that means that is the last we see of these individuals.

Mr. HUNGATE. If the procedures available in the rules are followed, the Government must reveal its list of witnesses; is that correct?

Mr. SEVILLA. Yes.

Mr. HUNGATE. The Government argues that it fears the rules because it would have to reveal the names of informants in advance, and there is a risk that these informants might disappear.

Mr. SEVILLA. I heard that many times, but in practice, we do not see that problem very often in the southern district. What is the purpose of rule 16(d) if not the regulation of discovery and issuance of protective orders. If the Government has this problem, why doesn't it go to the judge and say, "Judge, we've got this problem. We have an informant witness. If we reveal him, we are certain that certain overtures are going to be made by the defendant, or his partners; and the witness is likely to be endangered, or his testimony will be endangered."

Mr. HUNGATE. What section of rule 16?

Mr. SEVILLA. (d)(1), concerning the protective order. We have trial judges, and provisions for protective orders which are currently in

rule 16, to provide for this kind of situation where there is danger to government witnesses.

The trial court can order the Government to reveal, for instance, the name of the individual only to the defense attorney, with an order that he not reveal the name to anyone else, including his own client, until the date of trial. An interview of this individual under a protective order may be ordered. This is the purpose of protective orders to protect people in this type of exceptional circumstance.

The Government in one of its statements to this committee indicated that providing the defense with witness lists will cause coerced witness perjury. This does not happen. We receive Government witness statements as a matter of course in the southern district, and it's a rare occasion when there is any overture by a defense witness or by a defendant to a Government witness to try to change testimony. It simply doesn't happen except on the rarest of occasion. When the Government has that fear it can resort to the protective order.

I have no problem with the requirement of 16(a), for the requirement for Government-produced witness lists.

Again, echoing Professor Friedman's comments, that the Jencks Act should be jettisoned as rule 16(a)(2). There is simply no reason to continue this protection of Jencks Act statements, it is inconsistent with the entire purpose of rule 12.1, 12.2, and rule 16. We are trying to eliminate surprise, and its by-product, continuances during trial. This is why alibi witnesses are to be provided ahead of trial to the Government. But here we have Jencks Act statements given to the defense after the direct testimony of the particular witness.

If that Jencks Act statement contains new material the defense needs to investigate, we have a continuance necessary so that the defense may conduct an investigation.

I cannot state firmly enough my opposition to rule 16(b); it completely reverses 600 years of criminal procedure evolution by having the defendant open the doors of discovery to the prosecution.

Mr. HUNGATE. Pardon me, is subsection (b) on page 15 what you are talking about?

Mr. SEVILLA. Disclosure of evidence by the defendant, the entire section.

Mr. HUNGATE. Oh, disclosure of evidence by the defendant, all right. I have several "b's," that's why I have trouble with that.

Mr. SEVILLA. I understand.

I think the current rule which conditions prosecution discovery under 16(b) is adequate; that is all the discovery the Government is entitled to receive. We run into great self-incrimination problems, as Professor Friedman indicated in his statement.

I know time is running short. By reference, I will incorporate his comment. I agree with him completely.

Mr. Hyde mentioned the problems with respect to probation hearings, which were covered in rule 32. I agree with him that we should not limit probation reports strictly by the rules of evidence, that goes without saying. However, when the probation officer includes information which is damaging to a client, it seems to me that there has to be a right to a due process hearing to rebut that information. The *Weston* case that Professor Friedman cited involved an allegation that

Janice Weston was the largest heroin dealer in the western district of Washington. I don't care what the crime she was convicted of, when a judge reads that kind of inflammatory statement in a probation report which may come through second-hand hearsay through a government informant addict, there has to be an opportunity at least to meet the contention. I, myself, have had similar problems with probation reports, where similar statements were made by probation officers——

Ms. HOLTZMAN. In a presentence report by a probation officer?

Mr. SEVILLA. In a presentence report by a probation officer, I rebutted that charge through polygraph evidence to the benefit of my client. However, if I were precluded from coming forth with evidence to rebut it, and only had my client say, "Well, it didn't happen," or, "I'm not that big a dealer" that will not do the defendant any good at all.

Mr. HYDE. Would you formalize the proceeding, or would you leave it to the discretion of the judge?

Mr. SEVILLA. I would think that in the extraordinary circumstance where it arises—in my experience it only happened a few times—the defendant should have the right to call witnesses and attempt to rebut the evidence. In my case where an allegation was made that my client was a big heroin distributor, I simply subjected him to a polygraph test on a certain number of issues, and submitted that evidence. The judge relied on that evidence and did not follow the recommendation of the probation department.

Mr. HYDE. Once you formalize that, though, you really get into an unending chain of further hearings, and maybe the Government wants to go into something that the probation officer found. Can't you just leave that to the fairness of the judge by saying, "Your Honor, this particular statement is so wrong, and so inflammatory, I would like to have an opportunity to rebut it," once you formalize it, you'll have another trial.

Mr. SEVILLA. It's already formalized in our circuit by *Weston*, where it states that the defendant has the right to rebut this type of evidence.

Mr. HUNGATE. When you say "this type of evidence," do you confine it to allegations of crimes other than those charged?

Mr. SEVILLA. Basically, that is the usual context where the situation arises.

Mr. WIGGINS. In the ninth circuit, are you permitted to insist upon the right to examine those persons who may have had their statements or observations included in the presentence report, or are you merely able to supply rebuttal information, such as polygraph examinations?

Mr. SEVILLA. We would have the right to call witnesses.

Mr. WIGGINS. Would you have the right to call a person who made a statement like the one who said your client was a narcotics dealer, and submit him to cross-examination?

Mr. SEVILLA. I would think so, yes. I think if someone is going to make a statement like that and it is included in a probation report, I do not see any objection that any party would have to having that witness come before the court and state the basis for his conclusion.

Mr. WIGGINS. Well, I understand your point of view, but there is a

difference between having an adversary hearing with respect to the truth of the matter, and simply offering your own series of hearsay observations that are contrary to what the Government said, or the probation officer said.

Mr. SEVILLA. Well, if we were precluded from bringing witnesses, that is the only defense one could resort to, simply saying,

> Well, your Honor, my client says he isn't a dealer, and I've got four friends here who will also say that they don't know anything about him being a big dealer.

I don't want to paint a bigger picture than actually exists because this isn't a problem that comes up every day; it is a rare instance where a probation officer is going to report something like that. I am saying that when it does happen, the defendant should not be precluded from rebutting it through evidence.

Mr. HUNGATE. Mr. Mann?

Mr. MANN. I would like to ask the witness to give us an outline of the procedures that you do use, or that you have had experience with, in rebutting presentence reports.

Mr. SEVILLA. First of all, when it does come up, the first question I'll ask——

Mr. MANN. I'm suggesting that you do it in writing, some study, and maybe some reference to the cases.

Mr. SEVILLA. Very well. I will say briefly, though, that our judges have found a way to avoid the problem entirely. Once the issue is raised, unless the judge has some serious question about it, the judge simply strikes it from the probation report and says, "I'm not going to consider that, I don't think it's relevant; let's go on to what's really relevant in the case." I would say that 9 times out of 10, this is what occurs.

We really don't go into the issue. When it is so inflammatory, however, that I believe that the comment by the trial court does not wash out the damage that has been done, I have used a polygraph with some success in a couple of cases. It is not admissible as evidence in a trial on the merits before a jury; but certainly at a sentencing hearing where the rules of evidence do not apply with all the usual strict exclusions of certain types of evidence, it is receivable.

Mr. MANN. I would like to hear your thoughts briefly on 12.1.

Mr. SEVILLA. Well because it is an affirmative defense I have less problems with 12.1 than I would with 16(b), which I think is patently unconstitutional. As a procedural device 12.1 is proper. My problem comes in those cases where the defendant does not provide the notice to the prosecutor and comes to trial with alibi witnesses.

There is a constitutional problem which the courts probably will have to decide, rather than the committee. I would be hard-pressed to see a judge exclude exonerating testimony at the time of trial because of the failure to comply with the notice of alibi statute. I know the problem is if there are no sanctions within the statute, it will not be complied with. I would like to think of some other sanctions, but I can't at this time.

Perhaps the way to do it is to apply the contempt sanction on either the defense attorney, or the client, and hold a separate hearing on the

punishment, but allow the defense to go forward. I think that is the way to avoid the problem.

Mr. HUNGATE. You referred to clients and attorneys.

Mr. SEVILLA. The defense attorney would have some explaining to do as to why notice was not provided. I think that is the way to avoid the sixth amendment problem of denying the defendant the right to present evidence. And that may not be the only sanction available.

Obviously, there have to be some teeth in the statute by way of sanctions. The sanction that is not appropriate is excluding the defense entirely.

Mr. MANN. I believe that's all.

Mr. HUNGATE. If I may, I'll go to Ms. Holtzman.

Ms. HOLTZMAN. Thank you, Mr. Chairman.

I would also like to get some comments from you, and perhaps you are not fully prepared now, but in writing would be fine, with respect to the plea bargaining system and its desirability.

Professor Friedman talked about the need to arrive at a fair sentence in view of the fact that prosecutors often overindicted. And I'm not sure the way to rectify initial mistakes is to perpetuate them in this way. I am sure you have lived with this system for a long time and are trying to ameliorate it. But I think it's worthwhile taking a look to see whether it is desirable at all. Maybe it's necessary, and maybe you can escape it. But I would certainly like to have you comment on that.

Mr. SEVILLA. Right. I think Marshall Hartman, the director of the defenders service for NLADA has a stronger position than mine. He is adamant in his opposition to plea bargaining. I will try to have him provide written comments.

From a practical point of view, and in my experience, I have found the worst aspect of plea bargaining to be the following situation. You have a client saying, "I'm innocent of any wrongdoing." The government attorney says, "All right, here is what I'm offering. I'm offering a misdemeanor, a dismissal of four felony counts, and a recommendation of probation."

The client is in custody and replies, "I'm innocent, but I want out." That is a very tempting offer. The alternative is to go to trial on four felony counts before the hardest sentencing judge in the district with a guarantee that upon conviction your client is going to be sentenced to anywhere from 1 to 5 years.

This is a situation we face on a regular basis in our district, and it is the worst aspect of plea bargaining because in addition to the problem of burying the truth in public servant cases, this is the one I have moral problems with—going to a client who is professing innocence, and trying to convince him of the advisability of taking the offer. I can't do it because the client has to profess guilt before I can offer a plea of guilty to the trial court.

This leads us down the road toward the *nolo contendere* pleas, or the *Alford* plea where the client says, "I'm pleading guilty only because I want the recommendation that the Government is going to give, and my attorney advised me I'm going to get 5 years if I go to trial and am convicted."

It's really a morally coercive atmosphere in this situation, one that I have a lot of moral problems with.

On the other hand, when I take a broad perspective of the plea bargaining system, I see for those clients that are guilty, certain advantages in plea bargaining. There are definite advantages for the Government in not having to prosecute so many cases through trial and appeal.

There are advantages to the system through plea bargaining, but there are also moral implications that really bother me. I will provide something in writing for you.

Mr. WIGGINS. Your clients, I take it, are not subjected to the further pressure that many others are, that is that they are confronted with private attorneys that extract a very substantial fee from them if they go to trial. I assume that you operate on different principles.

Mr. SEVILLA. That's correct, we are compensated under the Criminal Justice Act and do not have to worry about that.

Ms. HOLTZMAN. I was going to follow up Congressman Wiggins' question, the point that he raised with respect to State courts. I'm not raising it with respect to your defender operation, but when we get a legal aid system that is so over-burdened by case loads, in many instances it has an interest in a guilty plea of a defendant in order to keep its own head above the water.

And there is institutional pressure from both sides on the defendant, and I'm not sure that society in the long run isn't the loser here, both in terms of requiring the Government to come forward and prove, and requiring the Government to prosecute charges that it legitimately wants to see the defendant brought to trial on and dealing with him that way, rather than to go ahead on that.

Mr. SEVILLA. I think the "devil's advocate" would say to that, "That's true, and we have to deal with things as they are, rather than as we wish them to be." In a utopian society, it would be the ideal that every case go to trial; there should not even be pleas of guilty; the client should not even be able to plead guilty. Every case should go to trial and the Government should be put to its proof. If that happened, or if we eliminated plea bargaining so that many, many more cases go to trial, as they would, we would see interminable backlogs in the criminal courts. Under the new Speedy Trial Act that was passed by Congress last year, within a short number of months there is going to be a 90-day requirement for trial in Federal cases. That would be impossible, totally impossible if plea bargaining were eliminated.

Ms. HOLTZMAN. But there is something wrong, it seems to me, if somebody has committed a heinous crime and ought to be prosecuted for that crime, that because of some kind of backlog the Government settles for a very minor charge, and the person doesn't have to serve any sentence as a result. Who benefits in that case?

Mr. SEVILLA. The defendant, obviously, by pleading guilty.

Ms. HOLTZMAN. I think there are a lot of problems, and I would appreciate your thoughts and comments in some length on this.

Mr. HUNGATE. It all depends. If you procrastinate, witnesses die or move away, so the backlog is a godsend. Society may benefit from taking the little ones, and holding onto the big ones, too.

Mr. SEVILLA. There are undoubtedly benefits from plea bargaining on all sides in certain circumstances. There are also detriments to all sides in certain circumstances. You can't make a basic generalization. It's a very difficult proposition.

Mr. HUNGATE. Any further questions?

I want to thank you very much, you have been most helpful, indeed, in bringing practical experience to us on this subject, it's been invaluable to us.

Mr. SEVILLA. I enjoyed it very much.

Mr. HUNGATE. And I thank the subcommittee and counsel.

[Discussion off the record.]

Mr. HUNGATE. The subcommittee stands adjourned.

[Whereupon, at 12:10 p.m. the subcommittee adjourned, subject to the call of the Chair.]

[The following documents were supplied for the record by Mr. Sevilla:]

FEDERAL DEFENDERS OF SAN DIEGO, INC.,
San Diego, Calif., March 14, 1975.

Mr. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, House of Representatives, Rayburn Building, Washington, D.C.

DEAR CONGRESSMAN HUNGATE: Enclosed please find the supplemental statement on behalf of the National Legal Aid & Defender Association concerning the proposed amendments to the Federal Rules of Criminal Procedure. Attached as appendices you will find a flow chart of a typical federal criminal case from arrest through sentencing and appeal, an advisement of rights form for the entry of a plea of guilty, two statements on plea bargaining, the omnibus form used in the Southern District of California and a history of the evolution of the omnibus hearing procedure in the Southern District of California.

I hope you find these materials of use to you and your committee in your very difficult assignment of amending the Federal Rules of Criminal Procedure. On behalf of the National Legal Aid & Defender Association, I would like to express our appreciation in being able to provide input to your committee in its most important work.

Yours truly,

CHARLES M. SEVILLA,
Chief Trial Attorney.

Enclosures.

SUPPLEMENTAL STATEMENT ON BEHALF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION ON THE PROPOSED AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE

(PREPARED BY CHARLES M. SEVILLA, CHIEF TRIAL ATTORNEY)
FEDERAL DEFENDERS OF SAN DIEGO, INC.

On behalf of the National Legal Aid and Defender Association, on 26 February 1975 I had the opportunity to comment on the proposed amendments to the Federal Rules of Criminal Procedure submitted to the Congress by Chief Justice Burger on 22 April 1974. At the conclusion of the session, it was suggested that a supplemental statement be submitted to the committee with a focus upon the effect of the proposed amendments on criminal justice in the federal courts.

The Congress is to be commended for intercepting the proposed amendments to the Federal Rules of Criminal Procedure prior to their automatically taking effect. To a large extent, the amendments to the rules as proposed by the Judicial Conference of the United States mark progressive steps toward modernizing the federal rules to make them fair to all parties in federal criminal litigation. However, some of the proposed amendments will mark significant changes in the manner in which criminal litigation will be conducted. These rules, promulgated by the Judicial Conference and approved by the Supreme Court of the United States

on 22 April 1974, amount to legislation. The proper place for legislative reform is within the Congress and not the Judicial Conference of the United States. The only maner in which a balanced appraisal of the new rules may be made is through the holding of congressional hearings and inviting feedback from all interested parties who will practice under the adopted rules. This is the major weakness of rule-making by the Judicial Conference since the latter body lacked the needed informational feedback from all sides. This weakness is reflected in the rules, some of which are of questionable constitutional validity and others of dubious practical merit. The Congress is to be commended for intercepting them prior to their automatic promulgation as law.

Proposed Rules 4 and 9

We favor the adoption of the amendments to Rules 4 and 9 which seek to give priority to the issuance of a summons rather than a warrant upon a complaint, indictment or information. Since the overwhelming majority of defendants are released pre-trial under some form of bail pursuant to 18 U.S.C. § 3146 of the Bail Reform Act of 1966, the proposed amendments to Rules 4 and 9 bring into harmony federal laws concerning pre-trial apprehension and release. Just as with bail, the initial decision as to whether a defendant should be arrested or summoned to appear in court is best left with a neutral and detached magistrate rather than a prosecutor. The determination as to standards for the issuance of a summons rather than an arrest warrant are best left to case law evolution; however, it is anticipated that the courts will utilize the factors in 18 U.S.C. § 3146 in considering whether or not a "valid reason" for the issuance of an arrest warrant exists.

The proposed amendments to Rules 4 and 9 are in accord with the *ABA Standards Relating to Pre-Trial Release* §§ 3.1 and 3.4. The practical effect of these amendments will be to eliminate needless, humiliating arrests of defendants at their homes or work. If an individual is reliable enough to warrant pre-trial release on a low bond, it is a needless expenditure of time and money to arrest such persons, put them in jail, and then release them within one or two days after bail is set. Such needless arrests interpose a disruption of the defendant's family life as well as a threat to employment. Perhaps no phase of the criminal justice process is as counterproductive to the rehabilitation of a defendant than the surprise interruption of the suspect's family and employment by such summary arrests. The adoption of the proposed rules will mark one step toward eliminating this arbitrary procedure.

Proposed Rule 11

Most defendants charged with federal crimes plead guilty. Thus, it is important that the rules provide a procedure by which there is an insurance that the defendant's plea is knowingly and intelligently made with a full understanding of the consequences flowing from judicial confessions of guilt. The current proposed amendments to Rule 11 are a step backward from this goal. Proposed subsection 11(c) delineates the specific admonitions the court is required to give a defendant desirous of pleading guilty or *nolo contendere*. Regrettably, the proposed amendment does not include admonitions constitutionally required to be on the record by *Boykin* v. *Alabama*, 395 U.S. 238 (1969); *cf. McCarthy* v. *United States*, 394 U.S. 459 (1969). In order to bring finality to the criminal process and to ensure against endless federal habeas corpus petitions under 28 U.S.C. § 2255, Rule 11 should specifically require the trial court to question the defendant pleading guilty as to the latter's understanding of the constitutional rights waived by entering such a plea. At a bare minimum, defendants should be apprised that they waive rights to a speedy and public jury trial, the right to confront and cross-examine the witnesses against them, the right to call witnesses in their own behalf, and their privilege against self-incrimination. The few seconds consumed in advising the defendant of these rights will save the judiciary thousands of hours litigating § 2255 petitions of defendants contending they were not fully advised of the consequences of their pleas of guilty.

In the Southern District of California, all five district court judges give such advice to defendants pleading guilty. This has greatly reduced the number of 2255 petitions in an already overworked district. Attached to this statement as Appendix B is a copy of the advisement of rights form used by staff attorneys at Federal Defenders of San Diego, Inc. Each attorney in the office is required to

fill out and explain the material in the form with the defendant prior to entry of a plea of guilty. The form, once completed, is entered in the attorney's case file. While not required by the district courts, the form does memorialize the advisement of rights given by the district courts and thus may be instructive to this committee in selecting required admonishments to Rule 11.

The provisions of the amendments to Rule 11 dealing with plea bargaining bring order to an area of lawlessness in the federal courts. Plea bargaining is as controversial an area of the criminal justice process as any, and attached to this statement as Appendix C is one view of this Association concerning the topic. Because the Association has as its membership the majority of the defender offices in the nation, it is safe to conclude that virtually every attorney in these offices engages in plea bargaining on a daily basis. Plea bargaining is the natural by-product of a criminal justice system characterized by too many prosecutions involving too many charges, an overworked judiciary, and a backlog of cases awaiting trial. Added to this recipe is the natural negotiating inclination of the attorney involved. The result is not unexpected—the settlement of criminal litigation by negotiation and compromise. It is this writer's position that plea bargaining is an essential element of the criminal justice system in need of regulation and not eradication.

The recognition of plea bargaining as an integral part of the criminal justice process by the court's and the practicing bar is the condition precedent to bringing order out of chaos. *See Santobello v. New York*, 404 U.S. 257 (1971); *ABA Standards Relating to Pleas of Guilty*, § 1.8. With a few significant exceptions, the proposed amendment to Rule 11 is a progressive step toward regulation of the plea bargaining process. The requirement that the plea bargain be made of record in 11(e)(2) has been the procedure of the district court judges in the Southern District of California for many years, and has operated with great success. However, for the reasons stated in this writer's testimony on 26 February 1975 before the House Subcommittee on Criminal Justice, the last sentence of 11(e)(1) requiring the trial courts not to participate in plea discussions should be eliminated.

Proposed Rule 12

The trust of proposed Rule 12 is to encourage the pre-trial disposition of evidentiary motions at a single hearing. This is the procedure followed in the Southern District of California and has worked successfully for the past four years. Although the Southern District of California does have an "omnibus hearing" for discovery purposes at the magistrate level, a single hearing is held at the district court level to cover evidentiary motions. By having a discovery hearing at the magistrate court level, counsel on both sides are given sufficient time to investigate leads and prepare pre-trial evidentiary motions before the district court. This is the thrust of proposed Rule 12. A flow chart of the procedures within the Southern District of California is submitted as Appendix A to demonstrate the practice and timing in the Southern District for the discovery hearing ("omnibus hearing") and the date for pre-trial motions before the district court.

The provision of proposed Rule 12(d) which establishes the mechanism by which the government makes known its intention to use certain evidence at trial allows the defendant the opportunity to bring a motion pre-trial to suppress that evidence. This is an excellent approach to ensuring that the defense knows of all evidence which it may choose to suppress and thus raise at the consolidated motion hearing.

Proposed Rule 12(h) which allows a defendant to be held in custody or that his bail be continued for a specific time after the *dismissal* of an indictment at a motion hearing is both unneeded and unconstitutional. Without a charge pending, there is no basis or jurisdiction for a federal district court judge to hold a citizen in custody. The effect of such a rule may be to encourage defense counsel to bring such motions at the close of the government's case-in-chief as part of a Rule 29 motion for judgment of acquittal. The dismissal of the indictment at this stage may (although it is by no means clear) bar a subsequent reindictment and prosecution on double jeopardy principles. Subsection (h) will discourage the bringing of such motions pre-trial because it may not affect the custodial status of the client; thus, it is out of harmony with the balance of the provisions of this amendment and should be stricken.

Proposed Rules 12.1 and 12.2

The Omnibus discovery procedure in the Southern District of California has required a notice of alibi and notice of sanity defense for at least the past seven years. See Appendix B, §§ D(2), (5), (6). This procedure calls for defense counsel to state the general nature of the defense such as insanity, entrapment, alibi or a general denial. Another portion of the form requires counsel to indicate whether or not he will supply the names of expert and lay witnesses on the issue of sanity at the time of the offense. A section indicating the willingness to supply alibi witnesses is also provided under section B. If defense counsel refuses to indicate a willingness to disclose this information, the government may move before the magistrate to require defense discovery of this information. See section C, subsection (2) (a), (b), (c). General Order 150 in the Southern District of California, reprinted on page 4 of the Omnibus Form, states that if these discovery orders are not complied with such surprise evidence "may not be used at trial, unless such denial would result in manifest injustice."

As an orderly means of guaranteeing efficiency and continuity of trial time, proposed Rules 12.1 and 12.2 are adequate. This procedure has worked well in the Southern District of California to prevent surprise witnesses at trial and lengthy continuances in order to allow the government to investigate the affirmative defense of alibi or insanity. The problem here concerns the appropriate sanction to use where the defense has not disclosed witness lists according to the mandate of the rules. Whether or not the trial court may prohibit the defense from producing such affirmative defenses when there is a lack of compliance is in open constitutional question. *Williams v. Florida*, 399 U.S. 78, n. 14 (1970). It is submitted that the appropriate sanction is *not* the denial of the right to produce the defense. Rather, a short continuance should be allowed so that the government might rebut the defense, if possible. Further, the trial court may require defense counsel to state why no notice of the affirmative defense was made as required by the Rules. If the explanation is inadequate, a contempt hearing may be held after the trial to determine where the fault lies and the appropriate sanction. Defense counsel may have a very good reason for failing to comply with these notice requirements when the witnesses in support of the affirmative defense issue both incriminate and exonerate the defendant. For instance, a sanity defense in a bank robbery prosecution (not uncommon in the Southern District of California) may involve lay witnesses who viewed the defendant commit the robbery but also believe his behavior to be bazaar. Such witnesses would undoubtedly support expert testimony for an insanity defense. However, if the defense is required to list such witnesses pre-trial, it is also indisputable that the government would use them in its case-in-chief to establish the *prima facie* elements of the bank robbery. This is a patently unconstitutional requirement since the government is required to shoulder the entire burden of establishing its case. *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964).

Thus, at post-trial hearing showing that such witnesses for the alibi or insanity defense might reasonably have been used by the government, no sanction at all it appropriate. Any time delay necessary to allow the government to prepare to meet the affirmative defense is a necessary inconvenience in a constitutional framework which requires the prosecution to prove its case unaided in any way by the defendant. Thus, the proposed amendments to Rules 12.1 and 12.2 should be amended to withdraw the requirement of a witness list where such witnesses might reasonably be called by the government.

A further question concerning the notice of insanity defense in Rule 12.2(c) concerns the question of whether a defendant can be compelled to undergo a psychiatric examination and whether any statements made during such an examination may be used against him. The argument here is analagous to that discussed above with respect to lay witnesses: may the government gain evidence to support its case-in-chief from the mouth of the defendant simply because the defendant raises an affirmative defense of insanity? The Rule should specifically require that court-ordered psychiatric examinations of a defendant raising an insanity defense include an order barring any use of the defendant's statements in support of the government's case-in-chief.

Proposed Rule 15

The amendments to Rule 15 should not be adopted. The Confrontation Clause of the Sixth Amendment was enacted to prevent trial-by-deposition depriving the jury of an opportunity to assess a witness' live testimony and demeanor. The

proposed amendment to Rule 15 would effectively undermine this constitutional guarantee.

The weaknesses of the amendments to this Rule are many. It unnecessarily interjects the right of the government to take depositions; the condition precedent to the taking of depositions is totally vague ("whenever . . . it is in the interest of justice") and could easily be read to mean any time; there is no requirement that depositions be before a neutral third party who would lend order and efficiency to the proceeding; there is no requirement that a defendant waiving his right to be present at a deposition only make such waiver upon advice of counsel; the definition of the term "unavailable" is so broad as to encourage trial-by-deposition; the result subverts the role of the jury in evaluating credibility of witnesses through the demeanor observation; and, by failing to include time requirements, it undermines effective cross-examination of a deponent where the deposition takes place at an early stage in a criminal proceeding when counsel is without full discovery. The broadening of Rule 15 to allow government depositions in any criminal case is a mistake. The government will undoubtedly resort to the deposition procedure for its more unsavory witnesses such as narcotic addict informants who have a propensity to "get lost" for trial. Instead of the flesh-and-blood presence of these unsavory characters, a jury is left with a cold deposition read by a court clerk. Demeanor evidence is not only lost in the shuffle but it may even be enhanced by the reading. Experienced practicing attorneys know the crucial value of demeanor evidence in assessing the credibility of witnesses. Louis Nizer, the famed trial attorney, has spoken to this issue:

> Jurors usually watch every mannerism of the witness, every inflection of voice, every reaction under stress. They are not unlike the cross-examiner, whose antennae are alert to every signal which the witness sends out. Witnesses who scissor their legs at certain questions; or look up at the ceiling for help at some inconsequental question although they have been untroubled by difficult ones; or become unduly emphatic, abandoning previous equanimity; or are assertive though their eyes register doubts; or substitute nastiness for indignation; or pretend they didn't hear the question to stall for time; or are affectedly obsequious; or pass their hands over their mouths before answering, in a gesture which might mean "I wish I didn't have to say what I am about to say" (particularly if repeated whenever the same subject matter is posed); or claim to have been tricked by the questioner, instead of candidly admitting error; or go out of their way to express their spleen, thus exposing the hypocrisy of benignity; or, in a moment of anger, reveal a crude streak of language or attitude which contradicts a proffered cultured manner; or accept signals from others in the courtroom; or seek to elicit sympathy for being badgered; or engage in sarcastic sallies with the tormenting cross-examiner; or repeatedly induce irrelevancies to sidetrack the persistent questioner; or dress elegantly or poorly but in apparent unaccustomed style; or are so determined to balk the examiner that they won't admit the most obvious fact; or seek to gain favor with the jury by fawning on them; or, well, who are not themselves in a thousand ways—may forfeit the jury's confidence. Yet none of this can be recorded in the printed record.—Nizer, *The Implosion Conspiracy*, (1973).

Rule 15 should be left unaltered.

Proposed Rule 16

With respect to the amendments to Rule 16(a), which concerns defense discovery of prosecution evidence, we are in agreement with the statements made to this subcommittee by the Public Defender Service for the District of Columbia on 7 June 1974. See "Commentary: Proposed Amendments, Federal Rules of Criminal Procedure, *"Subcommittee on Criminal Justice of the Committee on the Judiciary, House of Representatives*, 93d Cong., 2d Sess. 55–58 (July 1974). We are also in agreement with the statement made on behalf of the American Civil Liberties Union by Professor Leon Friedman on this subsection presented to the subcommittee on 26 February 1975.

However, we disagree with the comments of the Public Defender Service for the District of Columbia concerning prosecution discovery of defense evidence set forth in proposed Rule 16(b). We endorse the position presented by the American Civil Liberties Union, *supra* on 16(b). Prosecution discovery cannot be broadened wider than that now obtainable under present Rule 16(b) and remain consistent with a defendant's constitutional guarantee against self-incrimination.

The experience in the Southern District of California demonstrates the practicality of this position. The Omnibus Form attached to this statement as Appendix D indicates the broad disclosure required by the government in subsection A of the Form. The evolution of this innovative concept is traced in Appendix E.

The government is required to disclose all evidence favorable to the defendant on the issue of guilt, its investigative reports, statements of the defendant to government officers and third parties, a list of government witnesses and their statements, subject only to discretionary invocation of 18 U.S.C. § 3500 (the Jencks Act), the nature of any prior similar acts or convictions which the government will seek to introduce as evidence in its case-in-chief, the names of its expert witnesses and the subject matter of their testimony, the right to copy any books, papers, documents taken from the defendant which will be used at trial, the prior convictions of its witnesses, any prior felony convictions of the defendant, evidence indicating entrapment, whether or not an informant was involved in the case, whether or not electronic surveillance has taken place and whether or not grand jury proceedings were recorded. Except to the extent that it is broader, the procedure in the Southern District of California tracks the proposed amendment broadening defense discovery under proposed Rule 16(a).

In contrast, the practice in the Southern District of California requires the defendant to disclose *only* whether an insanity defense or alibi defense is contemplated, a list of lay witnesses in support of sanity or alibi defenses, the names of expert and character witnesses and the subject of the testimony of expert witnesses. Unlike the proposed amendment to Rule 16(b), there is no requirement for the defense providing a general witness list in every case. The discovery practice under the omnibus hearing procedure in the Southern District of California is thus almost, but not quite, a one-way street in which defense discovery of the prosecution case is full, open and complete. It should be noted, however, that in rare cases, the government reserves the right to withdraw from the omnibus hearing procedure and force the defendant to rely on Rule 16 for discovery. These instances are quite limited since it usually behooves the prosecution to disgorge all of its information in order to induce guilty pleas. The open prosecution discovery practice in the Southern District of California has proved successful in inducing guilty defendants to plead after discovery of the case against them. The lack of mutual discovery benefits to the prosecution has not encumbered the efficiency or effectiveness of prosecutions in the Southern District. Based on our experience in the Southern District of California, which is one of the three busiest federal criminal courts in the United States, it is suggested that the amendments to Rule 16(a) be adopted with slight modifications and that the proposed amendments to Rule 16(b) be rejected *in toto*.

Proposed Rules 17, 20 and 29.1

We endorse the amendments to these rules as written.

Proposed Rule 42

In general, the amendments to this rule are salutary; however, the following provisions should be amended. Section (c)(3)(A) should be amended to make defense inspection of presentence reports an absolute right as to the *entire* report. There is absolutely no indication of abuses by defense counsel in reading presentence reports and one should not be presumed. If there is any portion of a presentence report which the court believes the defendant should not have knowledge of, by simply issuing a protective order barring disclosure by the defense counsel to the client, this information will not be communicated. There is no reason to exclude any information from defense counsel including the recommendation as to sentence as is now provided by this section. The experience in the Southern District of California, where complete disclosure of presentence reports has been the rule for years and where defense counsel have the right to read the entire report inclusive of recommendations for sentence, is that there has been no abuse at all of this privilege. On the contrary, defense counsel by being made aware of the basis for the recommendations of the probation department is better able to intelligently address the court at the sentencing hearing. Language in this section which would prevent the defense from inspecting any particular portion of a presentence report should be deleted. The protective order alternative will safeguard against any abuse. Adoption of these suggested alternatives would require that section (c)(3)(B) also be deleted.

Subsection (c)(3)(D) is both unnecessary and unwise. By preventing copies of presentence reports from being made by any party, the rule sets forth too

broad an exclusion. In the Southern District of California, the probation department sends a copy of the presentence report to the United States Attorneys office as a matter of course in each case. This copy is kept in the file of the prosecuting attorney. Defense counsel are allowed to read the entire report and, if they wish, dictate the report in its entirety. Since both sides have complete access to the report, there is no reason for a rule barring duplication nor has there been a history of any abuse. There are occasions when it is in the interest of the administration of justice to duplicate a presentence report. Thus, when a client is facing multiple charges in several federal district courts, rather than conducting numerous presentence investigations, either counsel may simply duplicate the first presentence report and send it to the court of the other federal district. Rather than a blanket rule barring duplication, the section should be amended to bar copying of presentence reports only upon order of the judge.

Finally, subsection (f) should be amended to guarantee the probationer the right to counsel at a probation revocation hearing. *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973). This is the practice in the Southern District of California which routinely appoints indigent defendants counsel. As a practical matter, it makes more expeditious the probation revocation hearing.

Proposed Rule 43

We object to the language of proposed Rule 43 which mandates that a defendant be treated as having waived his right to be present at trial whenever he engages in conduct which will justify exclusion from the courtroom. This provision, (b)(2), is objectional in that it would allow a trial court to forfeit a defendant's right to participate in his own trial when the latter participates in unruly conduct. In our experience in the Southern District of California, such conduct is quite rare and may be handled by the trial court without exclusion. At a bare minimum, the trial court should be required to warn the defendant that continued disruptive conduct will warrant rejection from the courtroom. If such conduct persists, the trial court may have the defendant removed to another area in the court building where he may be allowed to participate in the court proceedings by a monitoring device.

In sum, this subsection is unnecessary in light of the infrequent occurrence of courtroom misconduct by the defendant. It would be best to leave this area to case law evolution, e.g., *Illinois v. Allen*, 397 U.S. 337 (1970).

We appreciate having this opportunity to supplement our views on the proposed amendments to the Federal Rules of Criminal Procedure. If we may be of further assistance, please do not hesitate to ask.

Sincerely,

CHARLES M. SEVILLA, *Chief Trial Attorney,*
Federal Defenders of San Diego, Inc.

SHOULD PLEA BARGAINING BE ABOLISHED?

(This Public Broadcasting Service (PBS) program is produced by WGBH–Boston, and is a transcript of "The Advocates" taped in Boston on October 16, 1973 and broadcast over PBS on Thursday, October 18 at 8 p.m.)

Participants: *Advocate Alan Dershowitz (pro)*: Arlen Specter, district attorney, Philadelphia; and Marshall Hartman, district defender, National Legal Aid. *Advocate Marshall Simonds (con)*; Judge Reuben Lurie, Massachusetts Superior Court, (ret.); Richard Kuh, attorney, New York.

Moderator. Evan Semerjian.

ANNOUNCER. Good evening, ladies and gentlemen, and welcome to "The Advocates," the PBS Fight of the Week. Tonight's debate is coming to you from Boston's historic Faneuil Hall.

SEMERJIAN. Ladies and gentlemen, may I have your attention, please.

ANNOUNCER. Moderator Evan Semerjian has just called tonight's meeting to order.

SEMERJIAN. Good evening, ladies and gentlemen. Tonight we examine a common practice in criminal cases, recently brought about by the dramatic resignation of the Vice-President. The practice is called "plea bargaining," and tonight's

question is whether plea bargaining should be abolished. Advocate Alan Dershowitz, Professor at Harvard Law School, says "Yes."

DERSHOWITZ. Plea bargaining unfairly punishes people for exercising their constitutional right to a fair trial. Supporting its abolition, I have with me tonight Mr. Arlen Specter, the District Attorney of Philadelphia, and Mr. Marshall Hartman, National Director of Defender Services.

SEMERJIAN. Advocate Marshall Simonds, a Boston attorney, says "No."

SIMONDS. The process of negotiation that we call plea bargaining is an important part of the criminal justice system. Properly administered, that process can protect the interests of the defendant and the interests of the public. I hope to show that through the testimony of Judge Reuben Lurie and Attorney Richard Kuh.

SEMERJIAN. Thank you, gentlemen. Before we proceed, let me explain that for those of you who expected a debate of American-Soviet trade, the war in the Middle East as well as the sudden resignation of the Vice-President caused us to make this change in our schedule. And now a word of introduction on tonight's issue.

Plea bargaining is a common practice in most criminal courts in the United States. By plea bargaining we mean negotiations between the prosecutor and the defendant's attorney before or during trial, leading to an agreement by the defendant to plead guilty. This recently occurred between the Justice Department and Mr. Agnew's lawyers. In exchange for the plea of guilty, the prosecutor may agree to reduce the charge, for example, from murder to manslaughter, thereby reducing the possible sentence, or he may agree to recommend a lighter sentence, for example, probation instead of jail. It is, of course, up to the judge to decide whether to follow the prosecutor's recommendation. There are many variations in this practice, but there is one common result: in each case the defendant gives up his right to trial in expectation of getting a lesser sentence than he might have received if he were convicted of the original charge. And now to the cases. Mr. Dershowitz, you have the floor.

DERSHOWITZ. Thank you. Plea bargaining should be eliminated for two basic reasons. It's unfair to those defendants who exercise their constitutional right to put the government to its proof at trial. Such defendants, as we will show, are given higher sentences than similar defendants who plead guilty. What this means, in effect, is that defendants are punished for exercising rights given to them by the United States Constitution. Plea bargaining is also unfair to the public because under plea bargaining, those defendants who plead guilty generally receive lower sentences—often, as in the case of the former Vice-President, no prison sentence at all. And many of those defendants who negotiate a plea, unlike Mr. Agnew, are among the most seasoned and dangerous criminals coming before the courts. The thoughts that they are daily rewarded for their pleas by sentences well below what they deserve and well below what our safety requires is not a comforting one. Despite the fact that plea bargaining is against the public interest, it continues to thrive because it is the easiest system for those who participate in it—the prosecutors, the defense atorneys and the judges. But we should end this process by which sentences are determined by hallway horse-trading rather than by the defendant's dangerousness, degree of guilt, and the need for deterrence. To explain further how the public is harmed by plea bargaining, I call the District Attorney of Philadelphia, Mr. Arlen Specter.

SEMERJIAN. Mr. Specter, welcome to THE ADVOCATES.

SPECTER. Thank you. Nice to be here.

DERSHOWITZ. Mr. Specter has been the District Attorney of Philadelphia since 1965, and no other big city D.A. has been as successful in curtailing the practice of plea bargaining. Mr. Specter, why do you think plea bargaining should be abolished?

SPECTER. I think it should be abolished because the critical process in the prosecution is the sentence. I think if the entire procedure, in terms of arrest and prosecution, is to make any sense, then I think we have to have appropriate sentencing—tough sentences for tough criminals in the public interest—and if you're going to start off with the District Attorney giving up what should be the proper sentence, then I think it makes a shambles of the entire prosecution process.

DERSHOWITZ. And how does plea bargaining affect society generally?

SPECTER. It affects society in a number of ways. One way is that hardened criminals are released sooner than they should be released. For example, if you

have someone who was charged with armed robbery—that is, a robbery at gunpoint—the prosecuting attorney may be compelled by a crushing backlog to accept a plea to aggravated assault and battery in exchange for probation, and that threatens public safety, and it also undermines the constitutional rights of the defendant.

DERSHOWITZ. And what impact does plea bargaining have on the morale of the police?

SPECTER. It has a very substantial impact because they see the arrests they make on serious charges watered down in order to save the time of the court, the judge, the lawyers on both sides.

DERSHOWITZ. It's often argued that plea bargaining is a necessary evil, that one can't conceive of having a system without some plea bargaining because of the backlog in the courts.

SPECTER. Well, I think that's untrue, Mr. Dershowitz. I think it is possible to have a court system which accommodates the serious trials. I think that requires some basic changes in the criminal process. To start off, by diverting away the unimportant cases which should not be tried. For example, we have a couple of programs in Philadelphia: one where Assistant District Attorneys are at police stations twenty-four hours a day to eliminate the minor cases where they will not stand up in court; we also have diversionary programs where you have somebody charged with a lesser offense who is a first offender, a nonviolent charge, and we move those out of the criminal justice system at the outset. And then you have a system—you should have enough courtrooms and judges and personnel to support that system—which can then accommodate those cases which require sentencing to be tried. Now that is the way that you do justice in the American criminal system.

DERSHOWITZ. And has the Philadelphia system worked?

SPECTER. Yes, I think it has. We have a very low guilty plea rate, and I would like to emphasize that every defendant has a right to plead guilty, and my assistants will make recommendations on sentencing, but we will not discount that recommendation on sentencing in order to induce that guilty plea. We have a low guilty plea rate; we do have a backlog, but we have gotten the support of our general assembly to add new judges in Philadelphia, and we are gearing up our system to try cases promptly and to get the appropriate sentencing.

DERSHOWITZ. Well, it's often argued that plea bargaining is necessary to help individualize justice, to help tailor the sentence to the particular needs of the defendant. Do you agree with that?

SPECTER. I do not agree with that. I think that it is important to try the case so you really know what goes on in the case. The way to tailor the system to the individual needs of the defendant is to give him his day in court; if he is, in fact, not guilty, let that determination be made; if he is, in fact, guilty, let that evidence come forward, and then let the judge impose the appropriate sentence depending upon the facts of the case without trying to compress it into a bargain plea under very hasty circumstances where the only interest served is the accommodation of the court. I think our system has to function to serve the people in terms of appropriate sentences on crimes of violence and not to make it easy for the lawyers and for the judges and for the whole court system.

SEMERJIAN. One quick question and answer, Mr. Dershowitz.

DERSHOWITZ. It's often proposed that really the problem is not plea bargaining but the abuses of plea bargaining. Do you think we can solve the problem by reforms, or do we have to abolish plea bargaining?

SPECTER. Mr. Dershowitz, I believe the whole system has to be abolished because I think the essence of plea bargaining is the negotiation—that is, for the prosecutor to drop his charge or sentence recommendation to try to talk the defendant into pleading guilty, and think as soon as you start haggling and bargaining, you demean the entire system of criminal justice.

EMERJIAN. Okay, thank you, Mr. Dershowitz. Mr. Simonds, your witness.

SIMONDS. Mr. Specter, I'd like to ask you an initial question that really goes to definitions. I suppose you and I would agree that if, at some stage in the criminal prosecution, you as a District Attorney, find out that, in fact, the defendant is innocent, you have an obligation at that point to come forward to the court and to dismiss those charges.

SPECTER. Absolutely.

SIMONDS. And that procedure is not plea bargaining as we are discussing it tonight.

SPECTER. Not at all.

SIMONDS. And in my questions I want to carve out that duty of the prosecutor from any inclusion. You understand that.

SPECTER. I do.

SIMONDS. Now, as I understand your procedure in Philadelphia, you have achieved the reduction in guilty pleas, and you've reduced your backlog in part by diverting cases—unimportant cases, I believe was your phrase.

SPECTER. In part by diverting cases, and in part by expanding our courts.

SIMONDS. Staying with the diversion for a moment, as I understand that, you mean that a crime but a minor crime, is not prosecuted. That's what diversion means, isn't it?

SPECTER. That would be one situation. Another situation would be where the evidence was obtained unconstitutionally, where it wouldn't stand up in court.

SIMONDS. That's really not diversion. That's recognition by the prosecutor that there's been an error in the process that has to be corrected by a release of the defendant, isn't it?

SPECTER. It is a screening out of cases as well as diversion.

SIMONDS. But let's stay with the first point. You, in fact, divert. You do not prosecute certain kinds of crimes on the theory that they're too minor to bother with.

SPECTER. That's correct.

SIMONDS. Now, you are then taking upon yourself as District Attorney the problem of exercising the discretion and judgment to identify through your assistants those crimes that, despite the fact that they exist in the statutes, and have been identified as social wrongs, shall not be prosecuted. Do I understand you correctly?

SPECTER. Well, it is not solely my discretion and the discretion of my assistants; it works as well through a rule of our state Supreme Court, and it is judicially supervised.

SIMONDS. Excuse me. Let me understand. Does a judge supervise each district attorney or assistant in his decision to divert, or not to prosecute, a case?

SPECTOR. No, a judge supervises . . .

SIMONDS. So it is not supervised by a court.

SPECTER. No, it is supervised by a court because . . .

SIMONDS. At what stage?

SPECTER. At the stage where the case is concluded. There is a selection of a list; that is presented to a judge in court; the judge then sits there in a conference room atmosphere, he hears the charge, he hears the basic facts, and he makes a decision as to whether that is an appropriate case for dismissal without trial.

SIMONDS. But I understood from your earlier testimony that your assistant district attorneys in the stationhouse twenty-four hours a day make decisions on the spot that certain charges shall not be brought, certain persons shall be released. Is that correct?

SPECTER. That is one phase of our program . . .

SIMONDS. That is done, is it not, without judicial review or supervision?

SPECTER. That is true, but that turns principally on an initial decision that the evidence was gathered in a way which is basically unconsttiutional, although . . .

SIMONDS. That is done, is it not, without judicial review or supervision?

SPECTER. That is true, but that turns principally on an initial decision that the evidence was gathered in a way which is basically unconstitutional, although . . .

SIMONDS. That's the only instance? It never turns on the decision that the crime just isn't important enough to prosecute?

SPECTER. No, on occasion it is, if it is a matter such as disorderly conduct or gambling on the highway, something very minor.

SIMONDS. Well, let me go forward. Now, in implementing that process you are trusting the judgment, skill, experience, and discretion of your assistants, aren't you?

SPECTER. I am.

SIMONDS. And you trust exactly those qualities at almost every stage in the criminal process, do you not?

SPECTER. I do. I have very able assistant district attorneys.

SIMONDS. I'm sure you do, but I suppose that there is a difference in the skills and experience of the men on your staff, as would be the case with any district attorney's staff.

SPECTER. Well, that's true.

SIMONDS. And when you come to the trial of a case, you again personally, or someone on your behalf, makes a judgment that a particular case will be tried by a particular assistant.

SPECTER. That's correct.

SIMONDS. One assistant may be more able than others, is that not right?

SPECTER. Yes, sir.

SIMONDS. And you exercise your discretion in that choice, do you not?

SPECTER. I do.

SIMONDS. To the best of your ability to serve the public interest.

SPECTER. At all times.

SEMERJIAN. One more question.

SIMONDS. Now, isn't it a fact that if that same discretion in judgment is exercised in the plea bargaining process by competent prosecutors, competent defense counsel, and in front of a competent judge, it can be done properly and effectively?

SPECTER. I don't think so, and the reason I think not is because plea bargaining is entered into in order to avoid a crushing backlog, and I think that traditionally district attorneys' offices have been under the gun to eliminate the backlog and to give away cases. Facing squarely up to the fact that they cannot try all their cases, too many prosecutors' offices will agree to probation where there ought to be a jail sentence.

SIMONDS. But you're saying they are not doing their job, are you not?

SPECTER. I'm saying that the system does not permit them to do a job when the backlog is so crushing that it is accommodated by accepting lesser sentences than the facts of the case really call for.

SEMERJIAN. Okay, thank you, Mr. Simonds. Mr. Dershowitz, you have one question.

DERSHOWITZ. Mr. Simonds seems to have based his entire cross-examination on the assumption that discretion is something that's practiced only by your office and only in jurisdictions which have no plea bargaining. Is it not a fact that every district attorney in the United States exercises discretion every day not to prosecute crimes such as home gambling, adultery and other crimes which are simply not prosecutable?

SPECTER. Well, I don't want to embrace your entire categories there, Mr. Dershowitz, but I would say that discretion is a very basic part of the prosecuting attorney's responsibility. It has been established in the common law for centuries, and it is practiced daily by district attorneys.

DERSHOWITZ. And it has nothing to do with plea bargaining.

SPECTER. It doesn't need to.

SEMERJIAN. Okay, thank you. Mr. Simonds.

SIMONDS. Mr. Specter, isn't it a fact that what you've done in Philadelphia is to move the very process of plea bargaining to an earlier point in the criminal enforcement, to a point where it's less visible, where it's less subject to review either by defense counsel or by the judge?

SPECTER. No, Mr. Simonds, I don't think we have for a very basic reason, and that is that we have attempted to siphon off the cases which do not really pose a threat to the community, either in terms of crimes of violence or crimes of major corruption. We have then tried to expand our trial facilities by getting new judges with pressure generated from backlog, and we have then tried to make sentence recommendations to fit the crime, and that has resulted in our position in opposition to plea bargaining where as a conscious policy we refuse to cut the charge and we refuse to cut the sentence on the cases that are important.

SIMONDS. And you can do it . . .

SEMERJIAN. OK, thank you. I'm sorry to interrupt, Mr. Simonds. Thank you very much, Mr. Specter, for appearing with us on THE ADVOCATES. Okay, Mr. Dershowitz, your next witness, please.

DERSHOWITZ. We've heard from a distinguished prosecutor how plea bargaining affects negatively the public interest because it makes it unsafe for us in light of the criminals that are released and who manage to get plea bargains. I would now like to call as my second witness a distinguished defense attorney to explain to us the evils of plea bargaining from the defendant's perspective. I call Mr. Marshall Hartman.

SEMERJIAN. Welcome to THE ADVOCATES, Mr. Hartman.

HARTMAN. Thank you.

DERSHOWITZ. Mr. Hartman is a National Director of Defender Services for the National Legal Aid and Defender Association. He was the former President of the Illinois Public Defender Association. Now, Mr. Hartman, you've spent many years

as a public defender. What's wrong with plea bargaining from the defendant's point of view?

HARTMAN. Well, I think it penalizes the defendant when he wants to exercise his constitutional right to a trial. Now, let's understand that we're not talking about a few months difference, but it's not uncommon in some jurisdictions for a defendant who might get one to five years in a penitentiary for an armed robbery if he plead guilty to receive five to ten years if he takes a bench trial, or ten to twenty years if he actually exercises his right to a jury trial.

DERSHOWITZ. Can you give us some examples of this?

HARTMAN. A client that I had once was offered on a plea of guilty one to ten years for an armed robbery. He said, "No, I'm innocent, Mr. Hartman. I want to go to trial." So he went to trial and the state's attorney put on their case, and after the state's witnesses concluded, the client said to me, "Mr. Hartman," he said, "you know they're very convincing. I think I'm going to lose. I'd like to take that plea of guilty now and get my one to ten." So I so informed the court, and the court said to me, "Oh no. We've used up two days of trial. Now it's three to ten."

DERSHOWITZ. That's one year for about each day?

HARTMAN. I went back to tell the defendant that. He couldn't believe it. He said, "What do you men? I've only used up two days of time, and I'm now to suffer two more years? Forget it! I'm going ahead." He went ahead, and he was convicted and received seven to fifteen years. That's the dimension of the problem, and that's the price people pay for exercising their constitutional right to jury trial in this country.

DERSHOWITZ. Well, perhaps the defendant who doesn't play the game—that is, who doesn't plead guilty—gets a bad deal, but doesn't the defendant who pleads guilty get a real bargain?

HARTMAN. I don't really think so. I spent a long time studying this view, and perhaps not every public defender or defense lawyer in the country agrees, but in my opinion the system shifts so that actually a person who now pleads guilty and plea bargains doesn't get any less time than he would have if we didn't have the plea bargaining system at all. It's only in contrast to his more unfortunate brethren who have decided to take a trial that it looks as if he has gotten less time. Secondly, he gives up, as in the Agnew case, the right to cross-examine his accusers. On paper, many people seem very credible, but in the crucible of the courtroom they may not come out so clear. Thirdly, he surrenders the right, in many jurisdictions, to assert constitutional rights which the police may have violated. For example, a police officer may have made an illegal search of a person's home or his car; there may be an unfair line-up, or confession may have been taken without the proper warnings. Usually, if the defendant is going to plead guilty, all these rights are waived, and they're never teseted. And so not only does the defendant not benefit, but the public suffers as well.

DERSHOWITZ. If a defendant has a chance of winning, will he ever plead guilty?

HARTMAN. Well, that is the worst problem perhaps—that is that some innocent defendants are actually coerced by the system to plead guilty. A person who is innocent might be afraid to take a chance on a trial if he's going to get a lot more time. For example, suppose there has been a mistake in identification; he knows he's innocent, but he's afraid that the people in the courtroom may believe the mistaken women who's identifying him, or man. Secondly, the person might have committed an act—for example, he may have committed a killing; he feels the act was in self-defense; he may be afraid that the jury would not believe him. If he's going to suffer a lot more time for taking a trial, he may decide to forego his constitutional right to test these witnesses and these defenses and accept a sentence and plea bargain.

SEMERJIAN. All right, thank you very much. Mr. Simonds, your witness.

SIMONDS. Mr. Hartman, your career is that of a defense counsel, is that right?

HARTMAN. Yes, sir. I've been a public defender for . . .

SIMONDS. And your duty as a defense counsel is to obtain the best possible result for your defendant client, is that not right?

HARTMAN. Yes.

SIMONDS. Now, is it your assertion that you will always obtain the best result for your client by going to trial?

HARTMAN. Well, we have to look at it in terms of a system.

SIMONDS. No, I'd rather look at it in terms of you as an attorney representing an individual client. I'm trying to make a judgment about that client's best interest.

HARTMAN. Okay. When the system of plea bargaining exists, I have plea bargained because that's what I did within that system.

SIMONDS. And that's what got you the best result, is that correct?

HARTMAN. Yes, when I was a lawyer in the courtroom.

SIMONDS. Now, in that bargain, Mr. Hartman, which you entered into because you were looking for the best result for your client, you were not abused, or did not permit yourself to be threatened or buffaloed, by the prosecutor, did you?

HARTMAN. Oh, I don't think that's true. I think that when I was afraid that my client would get a lot of time because he took a trial, I had to convey that to him and he was buffaloed.

SIMONDS. But did you change your advice to your client because you were being threatened by a prosecutor?

HARTMAN. Sure.

SIMONDS. You changed your advice?

HARTMAN. Sure. Here is a case where a client is charged with sale of narcotics. Under Illinois law he could go to jail for life if he was convicted. The prosecutor says to me, "If the man pleads guilty, we'll give him probation. He'll walk out the door. If we convict him after a jury trial, he'll get straight life." When the client talks to me, I'm worried about whether I can win that case, and I would advise him to plead guilty.

SIMONDS. Is that situation a problem of the law or a problem of the prosecutor's conduct?

HARTMAN. Well, I think . . .

SIMONDS. If the Illinois statute provides for that kind of punishment, don't you confront that problem every time you represent a defendant, and don't you have to think about whether or not you want to approach the prosecutor to buy the certainty of a lighter or more lenient disposition?

HARTMAN. I think that the abuse is built into the system. It is not the problem of that prosecutor; he was following the law. I think that when we have plea bargaining, we get away from trying to do law reform and trying to reduce sentences in the legislature to make them more meaningful because we always have an out: we just plea bargain, and that's what we ought not do.

SIMONDS. But isn't it a fact, Mr. Hartman, that you, in the process of negotiating with a prosecutor on behalf of an individual client, have an opportunity to tailor that result to the client's needs and circumstances that does not exist after you've incurred the risks of trial?

HARTMAN. When there's a plea bargaining system, that is true, but if—what I believe is that there should be individualized justice for each client irrespective of whether he pleads guilty. It should be based on his need to be rehabilitated and not whether or not he plead guilty and agreed to the bargain.

SEMERJIAN. Let me interrupt for a minute, Mr. Simonds. Mr. Hartman, doesn't plea bargaining serve a specific purpose, among other things, of freeing up the courts for prosecutions that have to go to trial, and if we abolish plea bargaining, wouldn't that clog the courts so that the rights to speedy trial would be jeopardized?

HARTMAN. I think that the American jury trial is the hallmark of our criminal justice system, which is the hallmark of our democracy. We go abroad and we try to export our form of democracy. If we don't practice it at home—if we say to people, "You can't have a jury trial because there isn't enough time or enough judges or enough lawyers, then what are we doing to our American citizens who are charged with crime? That is not democracy, and that's not justice.

SEMERJIAN. All right, Mr. Simonds, go ahead.

SIMONDS. Mr. Hartman, what is your personal backlog as a defense counsel, current?

HARTMAN. Well, when I was a public defender, I used to handle perhaps four hundred felonies at one time in a year, and that was too high.

SIMONDS. How many of those cases went through full trial?

HARTMAN. At that time, twenty.

SIMONDS. How many public defenders were there with your kind of backlog?

HARTMAN. All the public defenders in our office.

SIMONDS. What progress has been made since then?

HARTMAN. Well, we've attempted with the National Legal Aid and Defenders Association to set national standards, suggesting that case loads . . .

SIMONDS. What progress has been made in the backlog?

HARTMAN. The backlog . . .

SIMONDS. In Chicago, if you know.

HARTMAN. The backlog is still there.

SIMONDS. How many years would it take to correct that?

HARTMAN. Well, they're attempting to have more judges; they've doubled the number of public defenders, and doubled the prosecutors . . .

SIMONDS. What would happen to the rights of defendants and to the rights of society during whatever protracted period may be necessary to reach your utopian world?

SEMERJIAN. Make this a quick answer, Mr. Hartman.

HARTMAN. I think that it can be accomplished within time, and I think if we don't try to do that, then we might as well just give up now and close the courtrooms.

SEMERJIAN. Okay, thank you, Mr. Simonds. Mr. Dershowitz, one question.

DERSHOWITZ. You've said that within the current system of plea bargaining where defendants are punished for going to trial you will often capitulate and plead your defendant, but from the point of view of the defense attorney, you would much prefer not to have a system of plea bargaining, isn't that true?

HARTMAN. Having left the courtroom now and having had a chance to reflect upon the system that I was part of, I now think it ought to be abolished so that that threat of forcing people to plead guilty lest they be punished for exercising their right to trial should be abolished.

SEMERJIAN. All right, thank you. Let's go to Mr. Simonds again.

SIMONDS. Mr. Hartman, if you were the defense counsel in a particular case and Mr. Specter was the prosecutor and Judge Lurie was the presiding supervising judge, would you be concerned that the process of plea bargaining would be abused?

HARTMAN. If I would know that my defendant would not get any more time for taking a trial, I would take him to trial and not worry.

SIMONDS. If you have confidence in the integrity of the people with whom you're dealing in that system, then you have confidence in the process, is that your answer?

HARTMAN. No, plea bargain by definition means that he's going to get more time for taking a trial, and that's what I oppose.

SEMERJIAN. All right, thank you, Mr. Simonds. Mr. Hartman, thank you very much for being with us tonight. Mr. Dershowitz.

DERSHOWITZ. If all judges and all prosecutors were men of great integrity such as those you've mentioned, we wouldn't need laws. Laws are designed to protect us against men of lesser degrees of integrity. We have heard that plea bargaining is often unfair and ineffective. You will now hear various proposals for reform short of outright abolition. As you listen to these arguments, don't be misled into thinking that the reform will cure the fundamental evil of plea bargaining. The fundamental evil is that the system punishes defendants for having the temerity to take seriously the guarantees of our American Constitution while it rewards those who are induced to forego their constitutional rights. No system of plea bargaining, whatever its label, can work without this combination of carrot and stick, and no system which relies on these factors can ever be fair. Thank you.

SEMERJIAN. Okay, thank you. For those of you who may have joined us late, Mr. Dershowitz and his witnesses have presented the case in favor of plea bargaining being abolished. And now for the case against, Mr. Simonds, the floor is yours.

SIMONDS. At every stage from arrest to sentencing the fairness and effectiveness of our criminal justice system depends on the wisdom, judgment, experience and integrity of the people who administer that system. Plea bargaining, like the process of arrest, charging, and sentencing, may be subject to abuse. Properly administered, however, plea bargaining is an essential way of vesting the criminal justice system with the flexibility and the sensitivity that will best serve the needs of the defendant, the interests of the public, and the ends of justice. To prove this I call as my first witness Judge Reuben Lurie.

SEMERJIAN. Judge Lurie, welcome to THE ADVOCATES.

SIMONDS. Judge Lurie has been Chairman of the Parole Board and Commissioner of Corrections here in Massachusetts, and for nearly twenty years has been a trial judge in the Massachusetts Superior Court. Judge Lurie you understand that by negotiated pleas I mean a system in which the defense and

prosecution join to seek joint recommendation to present to the judge for disposition of a particular defendant's case.

LURIE. I do.

SIMONDS. Do you approve of that system based on your experience with it?

LURIE. I do.

SIMONDS. In connection with the process by which plea bargaining has been handled in your courtroom, have you involved yourself personally in the negotiations and discussions between defense and prosecution?

LURIE. Never.

SIMONDS. Have you undertaken, when a plea is presented you, to obtain information that you feel necessary to enable you to make a judgment about the fairness of a suggested plea?

LURIE. Always.

SIMONDS. And will you tell me briefly what process we have followed to obtain that information?

LURIE. Well, the determination that the District Attorney and defense counsel are in accord relative to the proposed plea results in my going onto the bench when I was a judge, prior to my retirement, and then addressing a series of questions. We don't take—at least I never took—a formal plea of guilty; what I did was to regard the matter as a tentative plea, and the defendant would be asked, "Do you offer to plead to so such as charged thus and so?" and then he would come to the witness stand, and he would be sworn, and I would ask him a series of elementary questions to determine what his education was, what his ability to speak English was, whether he had a history of past mental difficulties so as to determine whether phychiatrists would be necessary and in connection with the ability to speak English whether an interpreter should be needed, and then I would begin to inquire relative to whether or not he was aware of the matter that he was offering to plead guilty to, and then I would inquire as to his knowledge of the penalties and whether any promise had been made to him which in any way extended to me as the presiding justice. . . .

SIMONDS. Do I understand, Judge Lurie, that you undertook to explain to the defendant that he had no assurance of gaining leniency from you by entering this plea?

LURIE. Yes. He would be told flatly that, of course, he knew that I had in no way agreed to anything because as a matter of fact I did not know anything about the case, and then the question would be put as to whether anybody coerced him or threatened him, intimidated him, and whether this was of his own free will, and whether he respected and had been advised by his client, and then I would swing around and I would say to him, "Now tell me what you did." And when he told me what he did, I would then compel the appearance of whatever record he was involved in, and if it took time, it took time, and we would get it from the Department of Corrections.

SIMONDS. This would be in order to determine in your mind what a fair disposition would involve?

LURIE. And whether or not to accept the recommendation which the District Attorney would be asked to give and to explain.

SIMONDS. Did you feel, Judge Lurie, that this process that you've described to us fairly protected the defendant against the loss of his rights or any misunderstanding by the defendant of the process he was involved in?

LURIE. I not only feel so, I like to think that it did, but who am I to testify that it did?

SIMONDS. Judge Lurie, did you feel on your experience in criminal trials that you were able to protect the public interest and not bargain that away?

LURIE. Well, I wasn't engaged in the question of protecting the interest of the public at that time. At the moment I was concerned about protecting the interests of the defendant; the public would come in on connection with the question of disposition.

SEMERJIAN. Make this a quick question, Mr. Simonds.

SIMONDS. And when you came to disposition, were you able to protect that public interest?

LURIE. Oh yes. Whatever I did, I did openly with an explanation when I believed it necessary.

SEMERJIAN. Okay, thank you, Mr. Simonds. I don't know whether Judge Lurie has been examined by a lawyer before, but here comes Mr. Dershowitz.

DERSHOWITZ. Thank you. As a Massachusetts lawyer, I just want to say how pleased I am that you're here, having just completed many, many years of extraordinarily distinguished service on the bench of Massachusetts.

LURIE. Don't cut my throat.

DERSHOWITZ. Now, Judge, in general, would you say, does a defendant do better—or did he do better in your court—if he copped a plea than if he was convicted after trial?

SEMERJIAN. Before you answer that, Judge, can you tell us what you mean by "cop a plea"?

DERSHOWITZ. Negotiated a bargain, pleaded guilty, rather than went to to trial.

LURIE. It becomes very difficult to answer that with candor because frankly I don't know.

DERSHOWITZ. Well, let me ask you this question: in asking the defendant a series of questions, as you said you did, did you ever ask him the following question: "Has your plea been in any way affected by your expectation that you will probably receive a lower sentence if you plead guilty?"

LURIE. That is a—I haven't used those exact words, but I have undertaken to examine with regard to what he was told by his attorney in the presence of the District Attorney as to what the proposed recommendation would be.

DERSHOWITZ. So in other words, you think it would be wrong, don't you, for a defendant to be punished for going to trial?

LURIE. I not only think it would be wrong, I think it's reprehensible.

DERSHOWITZ. And it would also be reprehensible to reward a defendant for foregoing a constitutional right.

LURIE. Ah, the question isn't a question of a reward; the question is the circumstances in a given case. Let me put a question to you if I may with all due deference.

DERSHOWITZ. You certainly may.

LURIE. A defendant is one of a group, and he is the most innocent one from the point of view of the rationale of guilt. Why shouldn't that matter be brought to the attention of the District Attorney so as to cause the District Attorney to say, "I'm prepared to recommend a lesser sentence in his case."

DERSHOWITZ. It certainly should, by all means. It should be brought to the attention of the District Attorney whether the defendant pleads guilty or not guilty, if he's the least guilty.

LURIE. Well, maybe so, but the question is that then information may come that may result in a conviction of others.

DERSHOWITZ. But what if you have two people who are roughly equally guilty; the only difference is that one of them pleads guilty and the other exercises his constitutional rights and goes to trial—should their sentences be essentially the same?

LURIE. Well, I would say that in Solomonic justice the question really is as to whether or not one can detect and punish, as you have used the phrase, a man because he insists on trial. I never believed is punishment because a man insisted on trial.

DERSHOWITZ. So actually, the way you ran your court, there were no basic inducements or coercions to plead guilty by the expectation of either being punished if you go to trial or being rewarded if you forego the trial?

LURIE. If I detected it, I would have blushed.

DERSHOWITZ. Well, that's marvelous. I submit that Judge Lurie is our witness, not your witness.

LURIE. Oh, I disclaim the admission because I am completely opposed to the abolition. I would ask myself: how are you going to effect the abolition—by statute or by rule of court?

DERSHOWITZ. But isn't it clear from what you've said that you have run a courtroom in which guilty pleas have not been induced by the threat of harsh punishment. You have run a courtroom—and a very effective courtroom—without giving rewards to pleas of guilty. Doesn't that prove that we can run an effective and humane system without plea bargaining?

LURIE. No, it doesn't. It only means in that particular case I was so affected, but to rule in the broad this way, but I come back to the question I'm throwing at you impolitely: How do you propose to impose sanctions? Is it to be by statute or by rule of court?

DERSHOWITZ. Oh, I'm delighted simply to have a rule which says no judge may take into account a plea of guilty or a plea of innocent in determining sentence, just as you said you haven't taken it into account over the years.

LURIE. But hold on a minute. What about the prosecutor and defense counsel? Are they to be penalized if they confer together?

DERSHOWITZ. Oh, they can confer together. What they can't do is to recommend harsher sentences for people who go to trial and lesser sentences for people who don't go to trial.

LURIE. That is another matter.

DERSHOWITZ. So we agree on that.

LURIE. I would say that the constitutional right of trial is guaranteed, and when it is waived, it should be waived without coercion, without fear, without oppression and after advice by competent counsel.

SEMERJIAN. Let me ask this question, Mr. Dershowitz. Judge, do you agree that judges differ as to how they treat plea bargaining?

LURIE. Sir, you place me at a disadvantage. I can't comment with regard to that because I've only seen myself in operation, but I will say that there is a great deal of difference of opinion among judges: some don't approve it and will have nothing to do with it.

DERSHOWITZ. Well, let me cite you some figures from other judges here in Massachusetts which demonstrate that around Massachusetts twenty-six percent of those who go to trial and are found guilty get jail sentences whereas eleven percent of those who plead guilty get jail sentences.

SEMERJIAN. Make this very quick, please.

DERSHOWITZ. In the federal courts, moreover, you have almost as good a chance of going to jail and going to jail for a year or more if you plead not guilty than if you plead innocent. Isn't it clear then that defendants are being punished all over the country for exercising their rights?

LURIE. Well, I think it is clear that those particular defendants may indeed be, but this is no basis, I suggest, for deference for the abolition of the system. It may be improved, but I would oppose that policy.

DERSHOWITZ. If all our judges were like you, I would favor its non-abolition as well.

LURIE. I say blessings upon thee.

SEMERJIAN. Thank you, Mr. Dershowitz. Mr. Simonds, another question?

SIMONDS. Judge Lurie, in 1968 there were some thirteen thousand untried criminal cases in this Commonwealth. In 1972 the number is thirty-three thousand. What in your judgment would occur to justice in this Commonwealth if plea bargaining were abolished?

LURIE. Well, I think it would result in an enormous and increasing backlog, the same difficulty that the Supreme Court of the United States has already made penchant of with Chief Justice Burger and Douglas agreeing, which is an interesting thing and approving plea bargaining. Now, the result is you would have a basic injustice because men could be waiting and waiting and waiting; you would have to have additional judges, you would have to have additional court personnel, and you would have to have time to persuade the legislature to give the approval for additional judges and the result is that it would simply be judicial chaos.

SEMERJIAN. Okay, thank you. I'm sorry. Thank you, Mr. Simonds. Let's go to Mr. Dershowitz for some more questions.

DERSHOWITZ. Well, it's true of course that the vast majority of defendants who come before your court do, in fact, plead guilty even though you had never threatened or coerced the defendant into pleading guilty. Doesn't that prove that even if we were to abolish plea bargaining, the vast majority would still continue to plead guilty if we had humane judges like you?

LURIE. Oh, come now, my friend. You . . .

DERSHOWITZ. Then why do they plead guilty?

LURIE. Sir, you are assuming that the vast majority would plead guilty in the past before me, and then you're assuming that they do it because you describe me as a humane judge. It's a very restrained description, but nevertheless, the fact is I cannot answer with regard to that. I do not know why people used to plead guilty before me.

DERSHOWITZ. Well, let me make this suggestion . . .

SEMERJIAN. Thank you. Thank you, Mr. Dershowitz. I'm sorry to cut you off.

DERSHOWITZ. I only wanted to find out.

SEMERJIAN. Thank you, Judge Lurie, for being with us. Okay, Mr. Simonds, your next witness, please.

SIMONDS. To give a perspective from a defense attorney's view, somewhat different than that you've heard before, I call as my next witness Richard Kuh.

SEMERJIAN. Mr. Kuh, welcome to THE ADVOCATES.

SIMONDS. Mr. Kuh was an Assistant District Attorney in New York City for eleven years and is now, and has been for some seven years, a defense counsel specializing in the defense of criminal indictees. Mr. Kuh, you've heard the testimony to date. Based on your experience from both sides of the fence, and in that of your present role as defense counsel, are you in favor of the retention of plea bargaining?

KUH. I am, strongly.

SIMONDS. And will you tell me why?

KUH. Basically, the calendar congestion that we've spoken of, in my mind, is secondary. The prime need of plea bargaining is we have laws that create broad categories of crime—armed robbery, murder, manslaughter, and what have you. We're dealing with individuals, that if we're to have a just system, we must recognize that it is individuals that are going through that system and we must have a way of tailoring the law to the individual and tailoring the sanctions of the law to the individual, and plea bargaining gives that opinion.

SIMONDS. Can you give me an example of what you refer to?

KUH. Well, we spoke before of two people jointly involved in an armed robbery: one of them—the ring leader, if you will—may be a dyed-in-the-wool S.O.B., a man with a long record, a man who's evil, a man who's violent, and he may have convinced—and this happens and happens in any area of crime—a younger, more intelligent, more naive person to follow through. Indeed, to me be very specific. Technically, they both will have been charged with the same crime. A case in which a young black, aged seventeen, got involved in an armed robbery that finally was followed with a shoot-out with police. He was not personally involved in the shoot-out. Both were charged with attempted murder of a policeman, maximum penalty life imprisonment. The young black had absolutely no prior record for violence or anything else. He was disillusioned. One gets into his whole social history: his mother died when denied admission to a white hospital, and he turned to black militancy. He got involved with a ringleader, if you will, of black militants who led him into this armed robbery supposedly to raise money for the cause. Now, here you have them both facing life imprisonment. Should they both be treated equally? If you say, as some might, well, let the sentencing judge take it into consideration. I say if both pleaded to attempted murder of a policeman, subject to life imprisonment, there isn't a sentencing judge in the world, with the possible exception of Judge Lurie, who would dare have given the young fellow less than fifteen or twenty years in jail. And one makes this possible by tailoring the plea to this man's whole background.

SIMONDS. You are saying that that result would not have been obtained by going through a trial and making your plea to the sentencing judge?

KUH. If this fellow had gone through a trial and the evidence against him was overwhelming, there was nothing to try in a particular case; you had thirteen policemen who were part of the shoot-out, people in the bar that was held up, and a confession made by the young man. If it had gone through the trial and he ended up convicted not of one count, but thirteen counts of attempted murder of a policeman, I would like to see the judge who would give him less than fifteen years in jail, no matter what recommendations were made.

SIMONDS. Mr. Kuh, what would happen in New York City if plea bargaining were abolished today?

KUH. I can't entertain the thought. It's impossible. There were twenty-seven thousand indictments in the last court year in New York City, of which a thousand went to trial through verdict. If everybody worked six times as hard and you beefed up the judges and everything else, how many could you try—two thousand, three thousand, eight thousand. You'd never get twenty-seven thousand disposed of.

SEMERJIAN. One more question.

SIMONDS. Mr. Kuh, does plea bargaining deal particularly harshly with minority groups or indigents, in your view?

KUH. As a general matter, certainly individual cases one does have miscarriages. As a general matter, I believe not. Indeed, the treatise, if you will, in the field, written by Donald Newman, a sociologist, points out that there are many instances in which plea bargaining deals particularly lightly with minorities on the bigoted basis, "Well, those people are always cutting each other up. Those people are always disrespectful of property rights," so that there is at least a body of thought that minorities frequently get a better break in plea bargaining.

SEMERJIAN. All right, thanks, Mr. Simonds. Mr. Dershowitz, your witness.

DERSHOWITZ. Thank you. Let's go back to the example of the young black who plainly didn't deserve the harsh sentence he might have gotten. But let's assume that that young black insisted on his right to trial by jury. Why shouldn't the system equally be flexible and able to deal with him in a humanitarian way? Why should he had to waive his right in order to get the benefit of your humanitarian system?

KUH. Mr. Dershowitz, the right he waived in this case, and I deeply respect the Constitution as a defense lawyer, was wholly theoretical; he had, as I've indicated, there was nothing but evidence against him. But the practicality is—and we can't deal with theory here—that if he, after a trial that went three days or three weeks, were convicted on thirteen counts of attempted murder of New York City policemen, there isn't a judge, probably including Alan Dershowitz were he a judge, who would say, "Well, I'm going to put this man on probation," or "I'm just going to give him three or four years in jail."

DERSHOWITZ. Well, that's under the reality of the present system. We're talking about under the reality of a system where you could have flexibility and exercise it in either respect, whether he pleaded guilty or not guilty.

KUH. I say no matter what system you use, you are going to have judges who are men and have some response to the community. I think some great justice pointed out that even the Justices of the Supreme Court read the headlines.

DERSHOWITZ. Now, you don't deny, I take it, as Judge Lurie seemed to deny, that in fact throughout the country defendants, as a group, do much better if they plead guilty than if they don't plead guilty.

KUH. Well, I don't deny that, but I think one can reach a conclusion for the wrong reasons. Take a case for just a moment of two people involved in an armed robbery, one of them, extremely vicious background, etc., the other a neophyte dragged into it. The fellow with the vicious background, whether he pleads or doesn't plead, is obviously going to get a substantial term in jail, so he has nothing to lose by going to trial, and whether he pleads guilty or whether he goes to trial, he is going to get the heavy sentence, so that, Mr. Dershowitz, to conclude and to have the idea that he is being penalized for trial rather than recognizing that many of the people who go to trial face a hopeless situation and this is why they go to jail, I think is concluding on the wrong reasoning.

DERSHOWITZ. Right. You led me right to my next point which is this: let's take your black defendant but change one fact. Let's assume that he has a defense, that he's guilty but maybe there's a chance he can win. Isn't it clear that the closer he is to innocence on a spectrum of guilt or innocence, the more likely he's going to be not to want to make a deal, and if he loses, the harsher his sentence is going to be. In other words, under plea bargaining, the more clearly guilty you are, the better the deal, and the less clearly guilty you are, if you lose, the harder your penalty.

KUH. No, I think not. Obviously, there are some judges that would penalize him. Judges are men, and they run the whole gamut, but I think most judges consider remorse as a question in sentencing, and as man remorseful . . .

DERSHOWITZ. Do you think that people who plead guilty are remorseful?

KUH. Just a moment. That frequently, Mr. Dershowitz, is a factor. On the other hand, most judges—most knowledgeable judges—if they see a real triable issue, will not say, "Well, this man should have been remorseful. They will recognize he had a triable issue; he went to trial for it, and they will sentence basically on the probation report, coupled with what was this man was in fact convicted of, and if it was a heinous crime, the judge, to some extent, will find it difficult to give too light a sentence.

DERSHOWITZ. Speaking of remorse, I take it you wouldn't argue that Vice-President Agnew, for example, has demonstrated remorse for the crime of which he pleaded the nolo contendere.

KUH. I don't believe so for a minute, and I . . .

DERSHOWITZ. And indeed, isn't it clear that most defendants who plead guilty and cop a plea aren't showing remorse; they're just showing a cynical understanding without the way in which horse-trading operates in our society.

KUH. I wouldn't make that generalization. Certainly the defendants I represent who have pleaded guilty, I hope and I believe, are more than cynical people.

DERSHOWITZ. And if they were indeed remorseful, I take it, they would plead guilty whether they were rewarded or not. So if we indeed have remorseful defendants . . .

KUH. No, but you ignore something, Mr. Dershowitz: the fact that a lesser plea—the concept is that a man pleads to a lesser crime, and a lesser crime carries a lesser punishment, and so his potential punishment when he pleads guilty to a lesser crime has a much lesser ceiling than if he were convicted of—if the man's charged with murder, he might get life imprisonment. If he's permitted to plead, let us be absurd, to a misdemeanor, assault, the maximum punishment is a year no matter what the judge wants to do . . .

DERSHOWITZ. Well, I take it then you've been in a position, or could be in a position, where you might recommend to a client who you thought might even be innocent that he cop a plea if the deal is good enough and if the potential of a harsh sentence if he were convicted was harsh enough. Make this yes or no.

KUH. I would not. The answer's no.

DERSHOWITZ. You would never under any circumstances plead . . .

SEMERJIAN. Mr. Dershowitz, let's go to Mr. Simonds. One question.

SIMONDS. Mr. Specter . . .

KUH. No, Kuh is the name.

SIMONDS. Mr. Specter indicated . . .

KUH. Sorry.

SIMONDS. Mr. Specter indicated he was opposed to plea bargaining in all circumstances, as has Mr. Hartman. Mr. Kuh, I ask you with reference to the Agnew disposition much in the news, is that, in your view, an example of effective plea bargaining

KUH. I think from the defendant's angle it's fantastically effective plea bargaining. From the public angle, I deplore it. One of the things that bothers me at least as I read the account of it, Mr. Agnew pleaded to the maximum count, to the only count for which he was charged, and what that typifies to me is this under the counter kind of plea bargaining, plea bargaining that takes place before any charge is returned, plea bargaining that doesn't take place in the public spotlight, the plea bargaining that takes place then a bargain is made, "Well, we will never charge you with what you did if you will do thus and such," and that plea bargaining I deplore, and I am amazed because the only public document I see calling for the abolition of plea bargaining which is by a committee in which Mr. Specter served suggests that that kind of plea bargaining is desirable plea bargaining, and I think it's shocking.

SEMERJIAN. All right, thank you. Let's go back to Mr. Dershowitz.

DERSHOWITZ. Aren't you often in a position where you feel that the best interest of your client requires you to tell them that if they plead not guilty it's going to cost them something? And don't you have to, for purposes of advising them, tell them how much it's going to cost them in years to plead not guilty in a closed case . . .?

KUH. I don't like your cause and effect, Mr. Dershowitz, not that it will cost them. I tell the defendant if he's charged with robbery in the first degree that he could receive up to twenty-five years in jail. I don't tell him what he will receive. I don't know. I suggest to him that if he can get a plea to robbery in the third degree, the maximum will be seven years in jail, and hence the likelihood of his getting a much lesser sentence is considerable.

DERSHOWITZ. So you will play an active part in the process by which defendants are induced to forego their constitutional right to stand trial.

KUH. It is not a question of induced to forego. If a defendant sees that he is dead, in the vernacular, but if a case . . .

DERSHOWITZ. What if he sees . . .

SEMERJIAN. Wait a minute, Mr. Dershowitz. Thank you very much, Mr. Kuh, for being with us on THE ADVOCATES. All right, that completes the cases. Now, Mr. Simonds, could we have your closing argument, please.

SIMONDS. Why should we retain plea bargaining? Because without it the present system—imperfect as it may be—will become totally unworkable. The case load would overwhelm the courts, and crimes will go unpunished. And because abolishing plea bargaining will not reform the system, but will only make it less responsive to the needs of defendants and society alike. If we abolish it, do we eliminate the overzealous police officer, the politically ambitious District Attorney? Do we eliminate the inexperienced or incompetent defense counsel, or the judge who lacks the temperament and wisdom to judge? We do not. These problems with people will remain with us. Plea bargaining is a procedure; it gives the defendant that choice, the option of selecting a lesser plea and a lesser punishment, or of asserting his rights and going to trial with the attendant risks. Wouldn't you want to have that choice if you were a defendant?

SEMERJIAN. Thank you, Mr. Simonds. Mr. Dershowitz, your closing argument.

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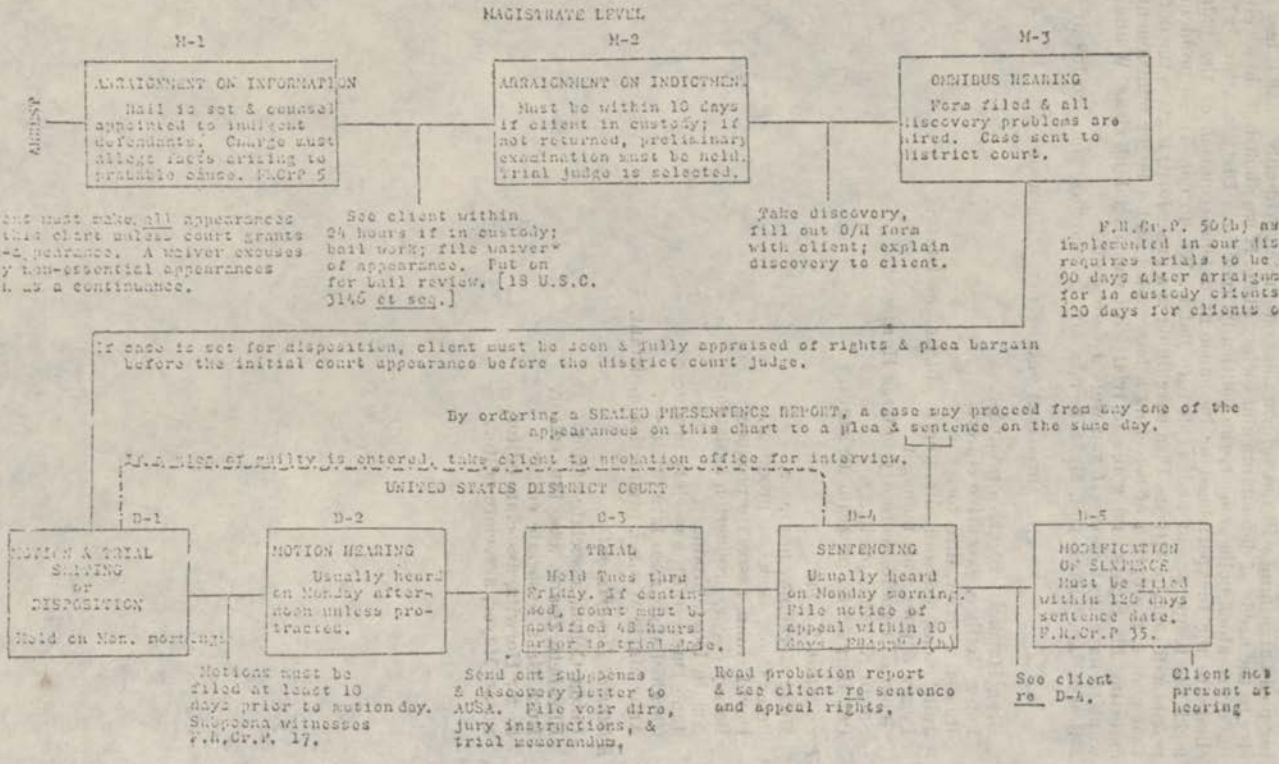
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APPENDIX A

FLOW CHART: A FELONY CASE FROM INITIAL APPEARANCE TO FINAL DISPOSITION IN DISTRICT COURT



Appendix B

The Immorality of Plea Bargaining

A PAPER PRESENTED BEFORE THE AMERICAN SOCIETY OF CRIMINOLOGY, SHERATON-CHICAGO HOTEL, 1974

(By Marshall J. Hartman, National Director of Defender Services, National Legal Aid and Defender Association)

Plea bargaining is a process whereby Americans accused of crime barter away their constitutional rights to trial by jury, privilege against self incrimination, confrontation of witness, and proof of guilt beyond a reasonable doubt in exchange for a lighter sentence. The corollary of this proposition is that those who exercise these constitutional rights will receive a more severe sentence.

The justifications for this process which has become part and parcel of our criminal justice system are three, (1) that it is more economical and that without it we could never afford all the courtrooms, judges, and court personnel needed to operate; (2) that defendants like plea bargaining; and (3) that the public somehow benefits from it. We will discuss each of these justifications in turn.

Operationally, the system works as follows: defendant through his counsel finds out from the prosecutor what charges will be dropped and/or what lesser sentence he will receive, should he plead guilty. Then defendant's counsel, after learning the prosecutor's "deal" relays the information back to the defendant for his counter-offer. At some point in the proceedings, they may check with the court, depending upon the jurisdiction, to make sure the Court will agree to the "bargain", and finally after a series of offers and counter-offers, a "deal" is struck, and the defendant pleads guilty. Until very recently these negotiations were not made part of the official court record, but that hypocrisy has now ended in most jurisdictions.

The success of plea bargaining is apparent from the statistics. The President's Commission Report of 1967, "The Challenge of Crime in a Free Society" pointed out that 85 to 90% of defendants who were indicted, entered a plea of guilty prior to trial. It is our view that this figure is directly attributable to the gun of plea bargaining, held directly to the defendant's head, stating in no uncertain terms, that if he does not plead guilty, he will suffer the consequences.

The American Bar Association Standards Relating to Pleas of Guilty point up the weapons of the prosecutor in this game, listing his arsenal of prosecutorial options:

> First, the charge may be reduced to a lesser or related offense. Second, the prosecutor may promise to nolle prosequi other charges. Third, the prosecutor may agree to recommend or not to oppose the imposition of a particular sentence. (Approved Draft, 1968, Sec. 3.1.)

In practice it is our view that the key to plea bargaining is reduction of sentence, and that reduction of charge or the dropping of charges are only means to that end.

The way it works in the jungle of the courtroom is as follows. A defendant may be charged with five burglaries. A plea of guilty to one, may bring dismissal of the other four. Such a dismissal will usually also bring with it a lower sentence than defendant would have received had he been convicted of five burglaries.

An example of reduction of charge would be the dropping of a murder charge down to one of manslaughter upon a plea of guilty. In most jurisdictions murder carries with it a mandatory minimum sentence. In Illinois it is fourteen years. Similarly, in most jurisdictions, manslaughter, a lesser included offense within the murder family, carries no minimum sentence. Therefore, faced with the fear of the mandatory minimum or in any event with a much heavier sentence even in those states that do not have such minimums, the defendant will plead guilty to get the benefit of the bargain, again, a reduced sentence.

Finally, sometimes the defendant will plead guilty as charged, if the prosecutor will agree to "go easy" and give him a lighter sentence than if he would have gone to trial. Therefore, it is the position of this paper that the process of plea negotiation, whether charges are dropped, the plea is to a reduced charge, or whether it be a plea to the same charge for a reduced sentence results in either case in a less severe sentence for the defendant if he pleads guilty.

The anomaly of this process is that we sentence defendants who we know are guilty to less time in the penitentiary for the same offenses than we do to defendants whose guilt we are not sure of. This is because even though a defendant may be convicted by a jury who may believe that a person's guilt has been established beyond a reasonable doubt, there yet may be some doubt. Presumably, however, with respect to a person who has pled guilty, we know he is guilty. It therefore seems anomolous in some eyes to give a person less time when he pleads guilty than we give to a person who asserts his innocence and his right to trial.

In *Duncan v. Louisiana* in 1968 the U.S. Supreme Court held that a person had a constitutional right to a jury trial in a state court under the Sixth Amendment which was part of the Bill of Rights to our Constitution. It is an axiom in American Jurisprudence that no person can ever be penalized for exercising a Constitutional right. Therefore it is our view that whenever a person is sentenced more severely because of the exercise of his Constitutional right to trial, that more severe sentence is per se unconstitutional. The syllogism goes something like this: a) plea bargaining rests on the assumption that a person who foregoes his right to trial will receive a lesser sentence; b) it is unconstitutional to demand a more severe sentence from an accused because he has exercised his constitutional right to jury trial; c) therefore, plea bargaining is unconstitutional. This may alarm some of the proponents of our system who claim that without plea bargaining the criminal justice system would break down. I have no sympathy for that view. I believe that American resources are such that they may be allocated wherever the needs arise and that it is merely a question of priorities. I believe that our American Criminal Justice System demands such priorities, and if road building may suffer or some other pork barrel project must be sacrificed so that adequate numbers of judges, prosecutors and defenders may be requisitioned that is a decision which the American public and the Congress must make. But it must be pointed out that in our view the American Justice System is the hallmark of the American Democratic System and we pride ourselves on it as we export our system to other parts of the world. We tell others that in America an accused is presumed innocent and that he enjoys the Constitutional right to fair trial. If in fact, he is penalized for exercising those rights then our system is a sham and we have no right to export it especially since we do not enjoy its fruits at home.

Secondly, it is claimed that defendants seek plea negotiations because it benefits them and therefore it ought to be sanctioned as part of the Criminal Justice process. It is our position that in fact defendants do not prosper at all from plea negoiations. It might be conceded that the first defendant who practiced plea bargaining in a jurisdiction might get a break, however thereafter it is our thesis that the system adjusts and defendants who plea bargain and plead guilty get what they ought to get, but defendants who demand trial and are convicted are penalized and get longer sentences. I make this assertion based on experience as well as study. The experience was in one of the major urban Juvenile Courts of our land where prior to the *Gault* decision requiring counsel in the juvenile court, all cases were tried prior to disposition. The procedure of the juvenile court was that first there would be a hearing to determine whether or not in fact the child was guilty of the alleged offense and therefore should be declared delinquent and if he were the case was continued for three weeks or so, during which time a social investigation was made of the child's background. Following which, there was a dispositional hearing to determine what individualized plan was best suited for the child. The *Gault* decision in 1967 changed all that. It held that children in Juvenile Court were to be accorded the same fundamental due process rights that adults received in the criminal courts of our land including right to counsel, right to confront witnesses, privilege against self-incrimination, and right to notice of all charges. Unfortunately when criminal court practitioners then began to come into the juvenile courts of our land they brought with them not only notions of due process fundamental to our fair system of justice but also the baggage of plea bargaining which had been prevalent in the criminal courts of our land. As a result of which in the juvenile court of this urban metropolis, after *Gault*, very few trials were held. Instead of determining after a dispositional hearing what the best plan would be for a child, plea bargaining took place prior to trial. And the result was that children perhaps who should have gone to reformatories in their own best interests were now released because they pled guilty. Whereas children who, under the old system might have been released on probation after a trial, after plea bargaining, there was a new ethic and a new view towards those

who sought trial. State's attorneys are unhappy about having trials in the juvenile court as they are in the criminal court and what occurred was that those youths who demanded trial were less likely to be considered for probation than they might have been had they admitted their guilt initially.

Another argument given for giving less time to those who engaged in plea bargaining is that defendants ought to receive less severe sentences because of true remorse as defendants who actually admit their guilt to the Court are on the road to rehabilitation. Again we point out two facts, one that the privilege against self-incrimination contained in the Fifth Amendment militates against forcing defendants to admit their guilt. This is a long and hallowed tradition steming from the Magna Carta in 1215 and it is a basic precept of Anglo American jurisprudence that the privilege against self-incrimination contained in our Fifth Amendment is vital to our criminal process. Therefore if you penalize a person because he exercises his constitutional privilege against self-incrimination you are again penalizing him for exercising a basic constitutional right, and that is per se unconstitutional. Secondly, as a practical matter one might argue that a person ought to get perhaps a little less time for pleading guilty because of a contrite heart. However let us point out that the difference in some jurisdictions between pleading guilty and taking a trial is not a matter of a few months or even six months but is substantial. For example in one jurisdiction if you plead guilty to the offense of robbery you might receive a sentence of from one to five years in the penitentiary before a particular judge. If on the other hand you took a bench trial you might receive from five to 10 years. Finally, if you took a jury trial in this particular judge's courtroom, you would receive from 10 to 20 years for the same offense. I know that it is difficult to believe these kinds of things if one is not enured to the processes of the criminal justice system.

Let me give you an example of a real case which occurred in my career as a defense lawyer. A defendant was charged with robbery and on a plea-negotiation was offered one to 10 years in a penitentiary if he would plead guilty. He refused and asserted his innocence. After two days of trial, the defendant turned to me and said Mr. Public Defender I have been convinced by the state's case that the jury is going to find me guilty, therefore I would like to plead guilty at this time and take my one to ten. I notified the judge and the prosecutor of the client's intention and the prosecutor said, "Oh, no, now that he has taken up the state's time and the court's time the recommendation will be that he receive 3 to 10 years in the penitentiary. And the judge nodded in acquiescence to the statement of the prosecuting attorney. I went back and informed the client of this development and he stated to me, "does this mean that since I have taken two days of the state's time, I now must spend an additional two years in prison? I refuse. I am going to go to trial and complete this and take my chances with the jury." He did that and at the close of the case the jury found him guilty. The court promptly sentenced him to a term of 7 to 15 years in prison.

In another case a defendant charged with attempted robbery and attempted rape was offered a sentence of three to seven years in the penitentiary if he would plead guilty. He took a trial and at the close of the jury's verdict of guilty he was sentenced to 15 to 35 years in prison. Those are substantial differences and those differences cannot be attributed merely to a contrite heart, but are part and parcel of a premeditated plan to induce defendants to forego their constitutional rights in the interest of saving court time. Under this scheme defendants are eligible for light sentences only if they cooperate with the system.

The final argument proposed in favor of plea bargaining is that at least the public is served. That is, if the defendant is not served and if the Constitution is not served, that at least the public is served because of the principle of *sure justice*, i.e., instead of letting some guilty defendants escape, via a jury tial, they all plead guilty and the state has sure swift convictions. I suggest that the public least of all receives any benefits from the plea bargaining process. First of all, the public is not represented in the courtroom. The judge has a busy calendar and the prosecuting attorney has numerous cases before him and the public defender or defense lawyers are usually overworked and underpaid. All of these factors assist in the temptation of plea bargaining, however the public is not served because defendants who ought to go to jail longer don't. And defendants who ought to be let out of jail sooner, thereby saving public expense at that end of the spectrum are not. Moreover probation officers reports and presentence investigations are given short shift in the plea bargaining process. The real factors that

count in determining how much time an individual will get after a plea bargain include the strength of the state's case and the weaknesses of the defendant's case. It is my assertion that we ought to, as Justice Black puts it, put the state to its test and let those cases that are winnowed out by the jury process go free and those defendants that are convicted should then receive their just deserts. Otherwise plea bargaining makes a sham and mockery of the whole system of corrections and of criminal justice as well.

There is one other group that we have forgotten and that is the impression that it makes upon the nearly 8 million defendants who are arrested annually and go through our courts. They have been told by an assistant public defender or private defense lawyer that they ought to plead guilty because if they don't the judge will give them more time. How many of them are coerced institutionally into pleading guilty to save themselves a more severe sentence, and how many of them receive an impression of the government represented through its criminal justice system which says to them the presumption of innocence is a mockery and a sham and a farce. Here you are presumed guilty if arrested and will surely be convicted if indicted. If we expect justice in the courts instead of violence in the streets, our courts must reflect our constitutional heritage and not engage in bargain basement techniques and cut rate sentences only for those who play the game.

CONCLUSION

In conclusion it must be pointed out that from all aspects plea bargaining is a blot on the criminal justice system. It is bad from the defendant's point of view, from the constitutional point of view and from the public's point of view. It is even bad from a system point of view because what we do to defendants in the courtroom and the police station has impact on what they do on probation and parole and in the prisons.

The National Advisory Commission on Criminal Justice Standards and Goals has recommended that plea bargaining be abolished in five years. The authors of this paper heartily concur in that recommendation. It is hoped that this paper will assist in that process.

The final question remains however, how to accomplish that goal. Can we prevent defendants from pleading guilty if they so choose? Can we prevent prosecutors from telling defendants what light sentences they will receive if they will only plead guilty? Can we discourage defendants from seeking reductions of charges to avoid mandatory minimums?

The answer is obviously no. How do we then abolish plea bargaining in our lifetime? There is no one pat answer. However, we would be remiss if we did not at least present one possible solution toward the abolition of plea bargaining and the cleansing of our criminal justice system.

Our solution to the problem permits pleas of guilty. Many people would prefer to plead guilty to avoid the rigors of trial, others to avoid embarrassment of friend. Still a third group, relying on their cleverness in not being caught, would plead guilty upon apprehension.

These guilty pleas would be unaffected by our proposed solution. It is directed at eliminating a specific form of abuse, the guilty plea induced and spawned by fear, fear of a heavier sentence, fear even of death.

The U.S. Supreme Court has allowed a guilty plea even though the defendant told the Judge in open Court that he was innocent of the charge, but was pleading guilty to avoid the death penalty. *North Carolina* v. *Alford*. It is this same court which has stated that "the disposition of charges after plea discussion is not only an essential part of the process but a highly desirable part for many reasons." *Santobello* v. *New York*.

The solution is simple and was discussed by Justice Schaefer of the Illinois Supreme Court in a case called *People* v. *Darrah*. He stated that we should consider adopting a rule prohibiting any differentiation between a sentence imposed after a plea of guilty and one imposed after a trial. This would allow defendants to explore what they might receive from the Court upon conviction, and prosecutors to inform defendants they might expect probation, but it would operate so that whatever a defendant was informed he would receive prior to trial, he would receive that same sentence after trial, barring some new fact which emerged at the trial. It is not known whether enforcement of this rule by itself would abolish plea bargaining, but it is submitted that it would go a long way in correcting what I see today to be the major abuse in our criminal justice system.

APPENDIX C

ADVISEMENT OF RIGHTS PRIOR TO GUILTY PLEA

(NOTE. This is a supplement to assist the attorney in insuring that a defendant knows exactly what he is doing upon entering a plea of guilty. Before checking off each item, make sure the defendant communicates to you his understanding thereof.)

1. ——— Name of Defendant _____.
2. ——— I have read and explained the indictment (or information) to the defendant and believe that he understands them.
3. ——— The defendant has told me all the facts and circumstances known to him about the charges made against him. I believe that I am fully informed on all such matters.
4. ——— I have explained to the defendant that there must be a factual basis for a plea of guilty and I believe that such a factual basis for the plea exists in this case. I went over the factual basis for the plea in this case with the defendant and he is prepared to reiterate it in court.
5. ——— I have counseled and advised the defendant on the nature of each charge, on all lesser included charges, and on all possible defenses that he might have in this case.
6. ——— I have explained to the defendant that he may plead not guilty to all of the charges now lodged against him. I have explained that if the defendant pleads not guilty, the constitution guarantees him:
   (*a*) The right to a speedy and public trial by jury.
   (*b*) The right to see and hear all the witnesses called to testify against him.
   (*c*) The right to use the power and processes of the court to compel the production of any evidence or witnesses in his favor.
   (*d*) The right to have the assistance of a lawyer at all stages of the proceedings.
   (*e*) The right to take the witness stand at his sole option. I have explained that if the defendant choses not to take the witness stand, no inference of guilt may be drawn from such failure.
   (*f*) The privilege not to incriminate himself.
7. ——— I have explained to the defendant that if he pleads guilty, there will be no trial either before a court or jury, and the court has the power to impose the same punishment as if he had pleaded not guilty, stood trial and been convicted by a jury.
8. ——— I have informed the defendant that the maximum punishment which the law provides is _____ years imprisonment and a fine of _____ for the offense charged in the indictment.
9. ——— (*a*) If the defendant is between the ages of 18 and 26, I have explained that he may be sentenced under the Youth Corrections Act or as a young adult offender for an indeterminate sentence (18 U.S.C. § 5010(b)) which may require him to spend as long as six years in a penal institution.
   ——— (*b*) If the offense is a drug offense under Title 21, I have explained that there may be a special term of parole of two or three years minimum which would be imposed after release from the penal institution.
10. ——— (*a*) I have explained to the defendant that if he is currently on probation or parole in this or any other court that by pleading guilty here his probation or parole might be revoked and that the defendant might be required to serve time in that case (which could be consecutive to any sentence imposed in this case).
    ——— (*b*) Similarly, if the defendant is actually serving state or federal time on another charge, I have explained that he may receive a consecutive sentence on this case.

11. ——— I have made no representations to the defendant with respect to the length of sentence or probation or fine except as follows:

---

12. ——— I have explained to the defendant all other possible collateral consequences of a plea of guilty such as: immigration consequences (deportation, exclusion, loss of immigration documents), possible civil ramifications, etc.

13. ——— I have explained to the defendant that the matter of sentence is strictly within the control of the judge. I have explained that I and the defendant will have an opportunity to speak to the court with respect to leniency at the time of sentencing.

14. ——— I have explained to the defendant that the court will not permit anyone to plead guilty who maintains that he is innocent and have reaffirmed that the defendant is pleading guilty because he in fact is guilty of the offense charged.

15. ——— I am satisfied that at the time I advised the defendant of his rights he was not under the influence of alcohol or drugs and not under a doctor's care for any mental problem.

16. ——— Based upon my conferences with the defendant, I believe that his plea of guilty is free and voluntary and of his own accord and with the full understanding of all the matters set forth in the indictment and in this advisement of rights form.

17. ——— Additional comments:

Dated: _____ _____

Attorney for Defendant.

APPENDIX D

U.S. District Court, Southern District of California

UNITED STATES OF AMERICA
PLAINTIFF,
v.

Deft. #1, ; Deft. #2, ; and Deft. #3, ;
Defendants.

No. CRIM. OFFENSE(S) CHARGED: _____

OMNIBUS PROCEEDING AND ORDERS THEREON

[NOTE.—Circle appropriate portion(s) in each and every item.]

A. DISCLOSURE BY GOVERNMENT

1. The government will or has disclose(d) all evidence in its possession, favorable to defendant on the issue of guilt.

2. The government will not rely on the Jencks Act (18 U.S.C. § 3500) except with respect to: informants, if any; cooperating codefendants, if any; and [1]

---

[1] [N.A.]

3. The government (has) (has not) made (full) (partial) (any) disclosure of investigative reports prepared by the following agencies: [1]

(*a*) Customs Agency Service
(*b*) Bureau of Narcotics & Dangerous Drugs
(*c*) Federal Bureau of Investigation
(*d*) Secret Service
(*e*) Immigration & Naturalization Service
(*f*) _____

4. The government (will) (has) disclose(d) all oral, written or recorded statements in its possession made by defendant to investigating officers or to third parties.[1]

5. The government (has) (has not) disclosed the names of plaintiff's witnesses and their statements, subject to those exceptions noted in A(2), *supra*.[1]

6. The government will seek to rely on prior similar acts, if any, or convictions of a similar nature, if any, for proof of knowledge or intent, and (will) (will not) disclose the investigative report(s) incident thereto.[1]

7. The government (will) (will not) supply the defense with names of expert witnesses it intends to call, their qualifications, subject of testimony, and reports.[1]

8. Inspection or copying of any books, papers, documents, photographs or tangible objects obtained from or belonging to the defendant (have been) (will be) supplied to the defendant.[1]

9. Inspection or copying of any books, papers, documents, photographs or tangible objects which will be used at the hearing or trial (have been) (will be) (will not be) supplied to defendant.[1]

10. Information concerning prior convictions of persons whom the prosecution intends to call as witnesses at the hearing or trial (has been) (will be) supplied to defendant.[1]

11. Government will seek to use prior felony conviction(s) for impeachment of defendant if he testifies.[1]

(*a*) Date and type of offense: _____
_____

12. Any information government has indicating entrapment of the defendant (has been) (will be) supplied.[1]

13. There (was) (was not) an informant or lookout involved.[1]

14. Identity of informant or source of lookout (will) (will not) (cannot) be supplied.[1]

15. Statement of informant or information from lookout (will) (will not) be supplied.[1]

16. There (has) (has not) been any electronic surveillance of the defendant or his premises.[1]

17. Proceedings before the grand jury (were) (were not) recorded.[1]

B. Disclosure by Defendant

1. There (is) (is not) any claim of present mental incompetency of defendant under 18 U.S.C. § 4244.[1]

2. Defense counsel states that the general nature of the defense is: [1]

(*a*) insanity at the time of the offense;
(*b*) lack of knowledge of contraband;
(*c*) lack of specific intent;
(*d*) alibi;
(*e*) entrapment; and
(*f*) general denial. Put government to proof.

3. Defendant stipulates to prior conviction(s) listed in A.11, *supra*, without production of witnesses or certified copies.[1] (yes) (no)

4. The defense (will) (will not) supply names of expert witnesses it intends to call, their qualifications, subject of testimony, and reports.[1]

5. Defendant (will) (will not) supply the names of his lay witnesses, on the issue of sanity at the time of offense.[1]

6. Defendant (will) (will not) furnish a list of alibi witnesses.[1]

7. Character witnesses (will) (will not) be called.[1]

8. Defendant (will) (will not) furnish a list of character witnesses.[1]

[1] [N.A.]

C. Discovery Motions—Magistrates Court

(*Note.*—Circle moving portion only if discovery not voluntarily disclosed or to be voluntarily disclosed by appropriate party. Ruling portion to be circled by magistrate only.)

1. The defendant moves for:
   (*a*) Discovery of all oral, written or recorded statements made by defendant to investigating officers or to third parties and in the possession of the government.[1] (Granted) (Denied)
   (*b*) Discovery of the names of government's witnesses and their statements, subject to limitations of the Jencks Act (18 U.S.C. § 3500) if relied upon under A.2, *supra*.[1] (Granted) (Denied)
   (*c*) Discovery of names of expert witnesses the government intends to call, their qualification, subject of testimony, and reports.[1] (Granted) (Denied)
   (*d*) Inspection of all physical or documentary evidence in government's possession. (Granted) (Denied)
   (*e*) Discovery of times, places and nature of any prior similar acts or convictions government will seek to rely on for proof of knowledge or intent.[1] (Granted) (Denied)
   (*f*) Production of the following witnesses for hearing or trial who are under the direction and control of the government:[1]
   _____
   _____
   _____
   _____

2. The government moves for:[1]
   (*a*) Discovery of names of expert witnesses defense intends to call, their qualifications, subject of testimony, and reports. (Granted) (Denied)
   (*b*) Discovery of names of defense lay witnesses, on the issue of sanity at the time of offense. (Granted) (Denied)
   (*c*) Discovery of names of defense alibi witnesses and their addresses. (Granted) (Denied)
   (*d*) Discovery of names of character witnesses and their addresses. (Granted) (Denied)

D. Stipulations

It is stipulated between the parties:

1. That the official report of the chemist may be received in evidence as proof of the weight and nature of the substance referred to in the indictment (or information).[2]

2. That if the official government chemist were called, qualified as an expert and sworn as a witness, he would testify that the substance referred to in the indictment (or information) has been chemically tested and is _____ a substance listed in Schedule _____ of the Comprehensive Drug Abuse Prevention and Control Act of 1970.[2]

3. That there has been a continuous chain of custody in government agents from the time of seizure of the contraband to the time of its introduction into evidence at trial.[2]

4. Other:[1]
_____
_____

NOTE—GENERAL ORDER REQUIRING CONTINUING DUTY TO DISCLOSE

If, subsequent to the omnibus proceeding and orders thereon, a party discovers additional evidence or the identity of an additional witness or witnesses, or decides to use additional evidence, witness, or witnesses, and such evidence is, or may be subject to discovery or inspection under the omnibus proceeding and orders thereon, he shall promptly notify the other party or his attorney or the court of the existence of the additional evidence or the name of such additional

[1] [N.A.]
[2] [N.A., no stip.]

witness or witnesses to allow the court to modify its previous order or to allow the other party to make an appropriate motion for additional discovery or inspection. If such additional discovery is not provided 10 days before the date of trial, the trial court may apply appropriate sanctions. In any event, such additional evidence or witnesses must be revealed to the court or adverse party 3 working days before trial, or they may not be used at trial, unless such denial would result in manifest injustice. The burden shall be on the party seeking discovery to contact opposing counsel on the appropriate dates to ascertain if additional evidence or witnesses have been discovered. General order number 150.

Approved: Dated _____

_____
Attorney for the United States.

_____ _____
Attorney for Defendant No. 1. *Defendant No. 1.*

_____ _____
Attorney for Defendant No. 2. *Defendant No. 2.*

_____ _____
Attorney for Defendant No. 3. *Defendant No. 3.*

The foregoing form is approved and the provisions therein so ordered and exchange of information, documents, etc., shall be accomplished as soon as reasonably possible.

Dated: _____ _____
U.S. Magistrate.

APPENDIX E

OMNIBUS HEARING PROJECT

I. HISTORICAL PERSPECTIVE

The Southern District of California was formed in September of 1966, with the Honorable James Carter and the Honorable Fred Kunzel as the two full-time District Court Judges with Judge Jacob Weinberger in senior status.

The case load per Judge at that time was accelerating at an alarming rate. The rate of terminating cases was such that the increasing numbers of new cases were simply jammed into the old cases and very few cases were being disposed of other than by trial. One of the basic reasons for the condition was attributed to the fact that the defense counsel were not truly aware of the nature of the government's case and the amount of evidence that was in the government's possession. Consequently, few attorneys were willing to recommend that the client plead guilty. If a disposition was offered it was usually to a count of the indictment carrying a mandatory sentence.

Chief Judge Carter, acutely aware of the growing problem, acted with vigor to prevent the judicial system from breaking down completely. He and Judge Kunzel, with the cooperation of the ABA, local Defense Bar, and the then U.S. Attorney, Edwin L. Miller, initiated a project to liberalize discovery, to minimize written motion practice and to summarily hear and dispose of those matters that hindered the progress of the case to trial or disposition. (See Exhibit 1) This project was initiated on April 1, 1967, and it was called the Omnibus Hearing Procedure. The name was derived from the fact that *all* motions were to be saved for a date to be set for the hearing of all appropriate motions. The date was called the Omnibus Hearing date. A separate form was designed to incorporate insofar as possible all of the *legal* and *factual* motions that could possibly be raised in the typical federal cases encountered in the Southern District of California (See Exhibit 2).

The government agreed to cooperate and not invoke the extremely rigid and restrictive rules and statutes (Federal Rules of Criminal Procedure and 18 USC 3500 et. seq.) which were then being used to "protect the interests of the government" in each and every case; but at the same time defeating the greater interest

of the government by "logjamming" the courts and leading to the ultimate breakdown of the administration of justice.

The implementation of the Omnibus Hearing Project was a stormy affair and every Thursday morning was charged with emotion, charges and counter-charges. The defense attorneys were wary of stipulations and distrustful of the U.S. Attorney's disclosures. The U.S. Attorney was wary of stipulations by defense attorneys which he feared would later be repudiated. The *belief* in the ultimate success of the project, because of its basic fairness and practicality, led the District Court Judges to persevere. Slowly but surely, through the efforts of the Judges and the enlightened attorneys who were involved and committed to the concept, the Omnibus Hearing Project, began to bear fruit. Trials were shortened considerably because of stipulations as to chain of custody and chemistry and other facts that could have been conclusively proven and about which there was no dispute. Cases were disposed of by way of guilty plea when defense counsel became aware of the complete absence of a defense on the merits. Some cases were dismissed by the government after both sides objectively examined the case and considered the merits of the case.

The project evolved slowly, faith and trust was gradually established between the adversaries, and this faith and trust was constantly nurtured by the court. Judge Kunzel became Chief Judge and Judge Schwartz arrived on the Federal Bench; both of these Judges encouraged, demanded, nurtured, and received continued cooperation from most counsels with respect to the Omnibus Hearing Project. At about this same time, April 1968, the U.S. Attorney's Office began to realize the benefits it was deriving from the project and initiated a more liberal disposition policy to maximize the benefits from the now proven discovery policies. This had a dramatic effect, the disposition rate increased, and the number of cases that were ultimately tried declined.

Further, the motions that had to be set for evidentiary hearings were reduced in number, and the issues were narrowed and clarified so much so that the majority of such motions were heard by the court on the basis of oral presentation rather than formal motions and points and authorities. On complex matters, the court still required moving papers.

The U.S. Attorney, per the original understanding, could and did occasionally fall back on the Federal Rules of Criminal Procedure and the statutes (18 USC 3500, etc.) when he felt that the interests of the government in the particular case were paramount. When the U.S. Attorney was obliged to take this course of action, the court was so notified and informed in open court on the day of Omnibus Hearing that "the government will fall back on Rule 16 for discovery and the 3500 sections of Title 18 and not voluntarily grant discovery." When this occurred, the defendant usually withheld stipulating to anything, and the court then proceeded through the Form OH–3 item by item or simply upheld the government. It is clear then that the phrase "Rule 16 discovery" was an accepted shorthand way of stating the government would not voluntarily grant discovery, but rather would wait for the court to order it per the OH motion format or by ruling on formalized Rule 16 discovery motions.

II. ROLE OF THE U.S. MAGISTRATE

After Chief Judge Kunzel's death in November 1969, Judge Schwartz singlehandedly carried on all matters including the Omnibus Hearings for the Southern District of California.

In July, 1969, the U.S. Magistrate's Program was initiated in the Southern District of California, and the U.S. Attorney's Office reorganized to implement to the fullest, the intent of the framers of the U.S. Magistrate's Act, i.e., to unburden the District Court Judges. Shortly after the death of Judge Kunzel, it appeared to those persons associated with the Magistrate's program that the U.S. Magistrate could perform a valuable service to the single District Court Judge by presiding at the Omnibus Hearings and ruling on the items in the OH–3 Form. Mr. Edwin Miller, then U.S. Attorney, approved the idea of transferring the Omnibus Hearing to the U.S. Magistrate; the U.S. Attorney's Office researched the law and recommended that this be done. Mr. Miller was replaced by Mr. Steward in October, 1969, and Mr. Steward accepted the idea enthusiastically. Judge Schwartz, by General Order Number 109, delegated responsibility for handling the entire Omnibus Hearing calendar to the U.S. Magistrate. The U.S. Attorney

delegated the responsibility for handling the government's duties under the Omnibus Hearing project to the Criminal Complaint Unit.

Mr. Steward supported and encouraged the U.S. Attorney's staff to continue with the advances made in liberalizing discovery, dispositions and minimizing obstacles to the progress of the cases to termination. Shortly after Judge Kunzel became ill, an aggressive disposition campaign was inaugurated, and the backlog of cases on the trial calendar dropped from 252 on September 1, 1969, to 141 on May 8, 1970. This reduction was made in spite of the fact that the Grand Jury returned over an average of 40 indictments weekly during that period. It must be noted that there was only one magistrate available to handle all preliminary matters, as well as Omnibus Hearings. Therefore, it was felt by the magistrate that the hearing of motions of all kinds *including* Rule 16 motions should be heard in the District Court. This was a limitation imposed by the shortage of magistrate time and *not* the General Order. (See General Order Number 109). This Order is drafted in broad general terms, to include all that was then being handled by the District Court, i.e., the Omnibus Hearings when full discovery was granted voluntarily, and the Rule 16 Discovery Motions" when the U.S. Attorney refused discovery and fell back on the provisions of Rule 16. Subsequently, a second magistrate was appointed, and now all such motions are susceptible to disposition before the U.S. Magistrate on Omnibus Hearing Date.

III. THE OH–3 FORM AND ITS MEANING

The OH–3 Form was designed to serve as:

(*a*) A checklist for counsel.
(*b*) A moving paper and motion document.
(*c*) A record of formal stipulations entered into by the parties.
(*d*) A Court Order.

The Court originated the form and is responsible for its issuance to the parties. After the form has been executed by all parties, signed by the Court and filed, it is an Order of the Court and must be complied with.

A careful examination of the OH–3 Form reveals that it is divided into six major sections appropriately captioned.

Section A.—Section A concerns discovery by the defendant. Item 3 and 4 of this section are extremely important. It should be noted that these items provide for much broader discovery than that available under the existing rules, statutes and law. These items are truly the heart of the matter insofar as the defendant is concerned. If the Court orders that these items be granted, then the defendant will have complete discovery, prior to the trial or to serve as the basis for an informed plea of guilty. Caveat, however, the government may invoke the Jencks Act and/or Rule 16, FRCP, as an exception to the general Omnibus Hearing agreement. In these infrequent instances the Court will uphold the government, since experience has shown that the government only invokes these protections when it is considered absolutely necessary and has always acted in good faith. The authority for the Court to order broader discovery than that provided by law springs from the original, basic Omnibus Hearing agreement entered into by the U.S. Attorney and the Court that made the Omnibus Hearing possible then and now.

Section E.—Section E concerns stipulations to be made by the defendant. This is the heart of the matter insofar as the government is concerned. The government receives these stipulations in consideration for the complete discovery it has provided. Of course, these stipulations may not be required if the government refuses complete or significant discovery beyond that required by law. It is clear that the Court cannot order that stipulations be entered into, but once entered into for consideration of full discovery from the government, the Court does enforce them, absent injustice to the defendant.

Section B.—Section B concerns motions which require separate evidentiary hearings before the District Court Judge assigned to try the case. These motions must be carefully thought out, and the Court will require defense counsel to state for the record that there is a basis for filing such motions and what that basis is. Attorneys are well-advised to inform themselves fully on the present state of the law *and* the facts upon which the motion is based.

Section C.—Section C is concerned with miscellaneous motions. A careful examination of the items in this section, particularly 7(a), 7(b), 7(c), 7(d), and 7(e) reveals that each item is directed towards the indictment itself, that is the

joinder of defendants and the joinder of offenses, the legal sufficiency or duplicity and finally with the clarity and certainty of the indictment (Bill of Particulars).

The balance of the items, 7(f), 7(g) and 7(h) is directed at the problem of witnesses and bail.

All of these items are directed at the work output of the section of the U.S. Attorney's office that is responsible for authorizing prosecutions, drafting the proposed indictments, conducting the Grand Jury proceedings and handling the pretrial court appearances for all felony cases before the U.S. Magistrate. The motion for a Bill of Particulars, 7(e), is perhaps the most frequently misunderstood item in Section C. With respect to this motion then—the case law and logic supports the position that the Bill of Particulars is in effect an extension of the indictment or, more accurately, an amendment to an indictment which is necessary to cure a vague and uncertain charge. This so that the defendant *will* be apprised of the specific charge that he must defend against without surprise at trial and to enable the defendant to plead double jeopardy. A Bill of Particulars is required then only when the indictment is vague and uncertain and the defendant must have *additional facts alleged* that are *not* recited in the indictment so that he can be certain of the charge to defend against and to avoid surprise at trial. A motion a Bill of Particulars then is a motion for additional information from the U.S. Attorney's file. When complete discovery is granted, motions for a Bill of Particulars are rarely, if ever, made. On the other hand, where discovery is denied and a conspiracy is charged (these two circumstances are almost always co-existing) motions for a Bill of Particulars as well as motions for Rule 16 Discovery are *always* made. Since both types of motions are requests for information and additional facts, it can be readily seen that a ruling on the discovery motion will also affect the ruling on the motion for the Bill of Particulars. Both are in fact interdependent and overlap to some extent. A failure to recognize this will lead to the fallacious conclusion that each can be considered separately without regard to its effect on the other. This misconception is brought about by a casual rather than a careful reading of the case law. It is frequently stated "that the function of a Bill of Particulars is not to provide discovery". This is only true when the indictment is clear and concise and the defendant knows exactly what he is charged with and what he must defend against—otherwise the statement is inaccurate for discovery of certain, additional information concerning the charge is the exact purpose and function of the Bill of Particulars. That the Bill of Particulars was never intended to discover the government's *entire case* was recognized in 1927 by the Ninth Circuit in *Rubio v. United States.*, 22 F2d. 766 and again in the 1967 Ninth Circuit case of *Morgan v. United States*, 380 F2d 686 wherein the same idea of *complete* discovery by a Bill of Particulars is repudiated, ". . . does not entitle defendant to explore at will *all* evidence the government may hold against him." It cannot be denied that a Bill of Particulars is a device by which additional information is made available to the defendant. It rarely, if ever, need be resorted to if the discovery afforded by the Omnibus Procedure is granted.

Section D.—Section D is concerned with the discovery requests by the government. Experience has shown that this section is ignored in most instances by the government and rarely has the Court had the opportunity to rule on government requests. Defense attorneys, however, proceed on a voluntary basis and circle the appropriate items.

Section F.—Section F concerns major conclusions. The purpose for this section is to lend a degree of finality to the procedure. It should be understood that this does not foreclose additional motions if facts are subsequently revealed which justify such motions. The defense attorney should be prepared to show that due diligence would not have revealed these after-acquired facts sooner.

IV. CONCLUSION

The Omnibus Hearing Procedure which began as an experiment has been tested and proven by experience in the Southern District of California. It has become a model for improving the Criminal Justice system in both Federal and

State Courts. The California State Bar Journal for September and October, 1971, in an article recommending procedures to achieve speedy trials in criminal cases has as its first recommendation an Omnibus Hearing for all pretrial motions in felony cases.

The proposed revisions of the Federal Rules of Criminal Procedure have been strongly influenced by the results of the Omnibus Hearing Project.

The Omnibus Hearing Procedure is the best solution yet offered to solve the problem of providing a *speedy and fair* trial to defendants accused of criminal offenses.

NATIONAL LEGAL AID AND DEFENDER ASSOCIATION,
Washington, D.C., March 25, 1975.

MR. WILLIAM L. HUNGATE,
Chairman, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: In response to your recent request for comments on the Proposed Federal Rules of Criminal Procedure, and in addition to the testimony recently presented to you on the subject on our behalf, I am enclosing further comments prepared by Nicholas R. Allis, Deputy Federal Public Defender, Central District of California. Mr. Allis's comments relate to Rule 12.1 and 16 of the Proposed Amendments. We hope they can be included in the permanent record of the Subcommittee proceedings and will be considered by the Subcommittee in the course of its deliberations.

I thank you for considering the views of the Defender Community and congratulate you and the Subcommittee on the important work you will be doing in this field. Let us know if we can be of further assistance on this or any other matter before the Subcommittee.

Sincerely,

JAMES F. FLUG,
Executive Director.

Enclosure.

COMMENTS ON RULE 12.1 NOTICE OF ALIBI

We oppose this rule. The potential interference with the preparation of the defense case and with defendant's constitutional rights militate against adoption of such a rule.

1. Intimidation of Defense Witnesses: Citizens are easily intimidated by law enforcement officers, particularly those of powerful federal agencies, such as the F.B.I., even when these officers do not intend such conduct. A visit from an officer is likely to increase the natural reluctance of citizens to become involved on the side of those opposed to the officer in a case.

The majority of our clients and their witnesses are from minority groups which traditionally have been somewhat suspicious of the tactics and integrity of law enforcement officers. An innocent remark by an officer may well be interpreted as a threat by one of these witnesses.

A number of defendants have lived on the fringe of the law at some time, and their witnesses while truthful, may also have been involved in or close to others who have been involved in questionable activities. Those witnesses, however truthful, can easily be made to feel that they face investigation and prosecution for these activities if they incur the displeasure of law enforcement officers.

A witness may also become afraid that he or she risks prosecution for perjury, however truthful his testimony, particularly if the interviewing officer mentions perjury.

Of course, more blatant kind of intimidation can occur such as when a potential defense witness suddenly finds himself called before a grand jury investigating an offense prior to defendants' trial.

2. Bolstering the Government's Case: Often, a defendant does not know what evidence he will present until he has the opportunity to judge the strength of the government's case at trial. This rule may force a defendant to provide

the government with incriminating evidence and such evidence may well be provided by potential witnesses the defendant finally decides not to call at the trial.

The evidence might be completely consistent with defendant's innocence and yet bolster the government's theory. Suppose defendant is charged with a bank robbery occurring about 3:00 in the afternoon. The defendant's alibi is that he was helping to repair a neighbor's automobile during the afternoon in question. The neighbor confirms the alibi, but says defendant left to buy an automobile part, and returned forty five minutes later with the part. The defendant knows the evidence may be used by the government to support its theory. Consequently, he wants to wait until the government rests its case and he can accurately determine its strength, before deciding whether to put the neighbor on the stand. The defendant can reveal this potentially incriminating evidence to the government and reserve his option of presenting the neighbor as an alibi witness or abandon his alibi defense out of fear of adding to a weak government case. An innocent defendant may more readily abandon his alibi defense in this situation out of a naive expectation that the government's case will not be convincing. *See Nakell, Criminal Discovery for the Defense and the Prosecution—The Developing Constitutional Considerations*, 50 N. Car. L. Rev. 437, 500-501 (1972).

3. Violation of Sixth Amendment Rights and Attorney-Client Privilege: Aside from the Fifth Amendment considerations rejected in *Williams* v. *Florida*, 399 U.S. 78 (1970), we believe that the attorney-client privilege and the defendant's right to effective assistance of counsel may also be infringed upon by enforcement of this rule.

Statistics indicate that the majority of federal defendants are represented by appointed counsel. Many of these defendants are from minority groups, and are also inarticulate and uneducated. The potential gap between such a defendant and his appointed counsel is serious. Traditionally, there has been suspicion on the part of defendants towards appointed counsel, particularly public defenders who are viewed as being another arm of the government. This suspicion often makes defendants hesitant to cooperate with their counsel.

The Sixth Amendment guarantees effective assistance of counsel to a defendant "at every step in the proceedings against him." *Powell* v. *Alabama*, 399 U.S. 1, 17 (1970). Included in the concept of effective assistance of counsel is the presumption that counsel and defendant will communicate freely together without interference. If defendants know that the names and addresses of their alibi witnesses will be handed over by their counsel to the government and that government agents will visit the witnesses, they will be all the more reluctant to cooperate with counsel. Thus the notice of ailbi statute may interfere with the communication and the sense of trust and cooperation that must develop between a client and his appointed attorney. When this occurs, the rule chills full exercise of the right to effective assistance of counsel.

Another example of the way in which the rule may impinge upon the attorney-client privilege and the Sixth Amendment is illustrated by the defendant who has told his counsel of alibi witnesses, but does not want them contacted by law enforcement officials. In *Cantillion* v. *Superior Court of the State of California, Los Angeles County*, 305 F. Supp. 304 (C.D. 1969), the court stated that to require a defense attorney to answer questions about his alibi witnesses in this situation constituted an invasion of the client's right to effective assistance of counsel. Id. at 309.

However, if he does not provide the names, the defendant gives up his right to present witnesses in his own defense.

We believe that "[t]he prosecution will not be severely hampered in its effort to obtain convictions by rejection of the rule since it possesses investigative powers, financial resources and technical assistance which greatly outweighs the ability of the defendant to obtain discovery." Note, "Prosecutorial Discovery: How Far May the Prosecution Go?" 7 U.S.F.L. Rev 261, 281 (1973).

If Rule 12.1 is adopted, we offer the following suggestions:

Subsection (b) Disclosure of Informants and Witnesses

The provision for reciprocal discovery against the state, set forth in subsection (b), is not sufficient. A phrase should be added so that the last sentence will

read, "The attorney for the government shall then inform the defendant in writing of the names and addresses of the witnesses upon whom the government intends to rely to establish defendant's presence at the scene of the alleged offense, *including the names and addresses of all witnesses the government proposes to offer in rebuttal to discredit the defendant's alibi.*"

In addition, the requirement that a defendant provide notice of his alibi defense "within the time provided for the filing of pretrial motions or at such later time as the court may direct. . . ." is too strict. The phrase should be changed to, "Within seven days of the commencement of trial or at such later time as the court may direct . . . ."

Subsection (e): Failure to Comply

We object to Rule 12.1(e) which permits the court to exclude the testimony of an "undisclosed" alibi witness. The inarticulate, uneducated, unemployed defendant who does not provide his counsel with the names of alibi witnesses until the eve of trial or during the trial, whether because of suspicion, desire not to have his friends intimidated, or because he cannot remember where he was at the crucial time, is too severely punished by this provision.

The Supreme Court has left undecided the question whether the sanction of preclusion is constitutional. *Williams* v. *Florida*, 399 U.S. 78, 83, n.14 (1970); *Wardius* v. *Oregon*, 412 U.S. 470, 472, n.4 (1973).

The preclusion sanction denies defendant the opportunity to present witnesses in his own behalf thereby violating his constitutional rights to due process guaranteed by the Fifth Amendment, and to compulsory process to obtain witnesses in his own behalf guaranteed by the Sixth Amendment. The Supreme Court has stated:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law. *Washington* v. *Texas*, 388 U.S. 14, 21, (1967).

The court recognized that the "Sixth Amendment was designed to abolish some of the harsh rules of the common law, particularly including the refusal to allow the defendant in a serious criminal case to present witnesses in his defense. . . ." *Id.*, citing *United States* v. *Reid*, 12 How. 361, 363–4 (1852) and *Rosen* v. *United States*, 245 U.S. 467, 471 (1918). *See In Re Oliver*, 333 U.S. 257 (1948).

At the very least, there must be overriding justifications for excluding defense witnesses from testifying. Where there are alternative methods of achieving the desired end without impinging upon a defendant's constitutional rights, those methods should be utilized. Here, the desired ends are avoidance of surpise, perjury, and congested courts. Note, "Prosecutorial Discovery: How Far May the Prosecution Go?", 7 U.S.F.L. Rev. 261, 277–80 (1973). Satisfactory alternative sanctions which will achieve these ends exist:

> (*a*) The trial can be continued so that the government has adequate opportunity to investigate the alibi witnesses;
>
> (*b*) The prosecutor can be permitted to bring out the fact that the defense violated rule 12.1 (a) and a court order, assuming there has been such, and to argue that the credibility of the alibi defense is suspect in light of the defense violation;
>
> (*c*) Contempt sanctions for willful disobedience of a court order can be imposed;
>
> (*d*) The court can condition further discovery by defendant upon providing the government with the information concerning his alibi witnesses. Note, *The Preclusion Sanction—A Violation of the Constitutional Right to Present a Defense*, 81 Yale Law Journal 1342, 1356–60 (1972).

The authors of the note in the Yale Law Journal conclude that:

> While several of the alternatives suggested above involve the possibility of various constitutional objections, none entails the danger raised by the preclusion sanction that the outcome of a trial might be changed. The preclusion sanction alone threatens to permit the conviction of an individual who is innocent of the crime for which he is charged because of his commission of a separate wrong—the failure to comply with pretrial discovery. To risk conviction on such erroneous grounds seems directly to conflict with "a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."
>
> Finally, when balancing a loss of effectiveness in the administration of the criminal process against the cost of convicting an innocent defendant, consideration should be given to the suggestion that the Constitution itself, by commanding that the defendant be permitted to present his defense, may reflect a deliberate resolution of this balance. With this in mind, and in view of the questionable urgency of the state's interest in pretrial discovery, the advantage to the state afforded by preclusion must be more than marginal to justify such constitutional infringement under the compelling state interest test. [Footnotes omitted.]

COMMENTS RE PROPOSED RULE 16

Subsection (a)(1)(A): Statement of Defendant

We recommend that the phrase "any relevant written or recorded statements made by the defendant, or copies thereof" be changed to "all written or recorded statements made by the defendant or copies thereof, which relate to matters involving the instant case and any other relevant written or recorded statements or copies thereof made by the defendant . . ."

This change will serve to protect the defendant from a narrow and unilateral decision by the prosecutor that a written statement made in connection with the case is not relevant and therefore need not be given the defendant. We believe that narrowing the prosecutor's area of discretion will have a salutory effect. The modification will diminish the possibility of undisclosed statements later coming to the attention of defense counsel and will substantially reduce the frequency of hearings revolving around the relevancy of documents, and continuances to permit the defendants to utilize those documents found relevant.

We recommend that the phrase "substance of any oral statement" should be changed to "language of any oral statement." This change will ensure that the defendant receives the exact statement rather than a mere summary of it.

We recommend that the phrase "oral statement which the government intends to offer in evidence at the trial. . ." be changed to "oral statement which the government intends to offer in evidence at the trial *or which relates to the matters involved in the case.*" This addition will help ensure that decisions as to the relevancy of defendant's statements are made by the defendant as well as the government and yet will avoid placing a burden on the government to transfer to the defendant his obviously irrelevant oral statements.

We believe that the limitation on discoverable oral statements to those which are made to government agents is unnecessary and serves no justifiable interest. Therefore, we recommend that the defendant be entitled to all oral statements, as defined above, which are "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."

A defendant should know what statements he has made which incriminate him to the extent that the government plans to introduce them at trial. He should also be shown any other statements he has made, so that any favorable statements can be utilized in his behalf.

In addition, we recommend that Rule 16 be amended to contain a provision under which the defendant would be entitled to any statements of a co-defendant. Such a provision is in the interests of judicial efficiency since it will permit defendant to anticipate problems arising under *Bruton* v. *United States*, 391 U.S. 123 (1968) and to file timely *Bruton* motions.

Subsection (a) (1) (B): Defendant's Prior Record

The government has access to the criminal record of a defendant on file with the Federal Bureau of Investigation. This information should be provided the defendant. Thus, subsection (a) (1) (B) should be changed to:

> Upon request of the defendant, the government shall furnish to the defendent the criminal record of the defendant on file with the Federal Bureau of Investigation, and any other criminal record of the defendant as is then available to the attorney for the government.

Subsection (a) (1) (C): Documents and Tangible Objects

We recommend that the phrase, "intended for use by the government as evidence *in chief* . . ." be changed to read, "intended for use by the government as evidence at the trial . . ." The change promotes the ends of discovery, and helps prevent a situation arising in which the government saves crucial evidence for rebuttal in order to avoid discovery.

Subsection (a) (1) (D)

We also recommend that the phrase "made in connection with the particular case . . ." be changed to "made in connection with the particular case or which relates to the merits of the particular case. . . ."

Subsection (a) (1) (E): Government Witnesses

We strongly support this amendment. Criminal defendants in the State of California have long had access to police reports prior to trial. These reports ordinarily include the names and addresses of government witnesses. Fears expressed for the safety of government witnesses have not proved justified. On the contrary, the discovery rules in the State of California seem to have promoted fairness and the interests of justice. There is no reciprocal right on behalf of the government in the State of California, and we oppose certain of the reciprocal rights provided for in the amendments. See our view on Rule 12.1 Notice of Alibi, and Rule 16 (b) (1) (C).

We recommend that the phrase "presentation of the case in chief" be changed so that the words "in chief" are eliminated. The change will promote fairness by preventing a situation in which the government saves a witness until rebuttal in order to avoid discovery.

We recommend that the phrase concerning discovery of the record of prior felony convictions of a witness be modified to provide that the government furnish the defendant with a record of any felony convictions on file with the Federal Bureau of Investigation and any other record of felony convictions which is within the knowledge of the attorney for the government, as well as the name, number, nature and place of any pending criminal case involving the witness and known to the attorney for the government.

Subsection (a) (1) (E) will quite likely result in more guilty pleas, and in this sense will be an unexpected boon to the government. Ordinarily, if the government is willing to take a case to trial in the Central District of California its evidence is more than sufficient to sustain a guilty verdict. There is no better way of convincing a defendant of the quality of the case against him than confronting him with an accurate scenario of what will occur at trial, including the names of the witnesses.

In addition, we support suggestion number 7 set forth in the letter of June 7, 1974, of the Public Defender Service for the District of Columbia printed at page 57 of the Commentary: Proposed Amendments Federal Rules of Criminal Procedure. The proposal "is that the government be required to disclose the names and addresses of all persons, known to the government, who have personal knowledge of the facts of the offense with which the defendant is charged."

Subsection b (1) (B)

We oppose this subsection insofar as it applies to reports of examinations which are based on statements of defendants. The attorney-client privilege and Sixth Amendment considerations militate against the forced disclosure of reports containing information based on defendant's statements, until after evidence relating to the report has been offered by the defendant at trial. Other-

wise, the government can exploit information provided by the defendant and contained in the report, by developing investigative leads based on that information. The defendant should not be forced to aid the government in preparing its case. The defendant may waive his attorney-client privilege and Sixth Amendment rights with regard to the report when he presents evidence relating to it at the trial, but he should not have to reveal the report until the waiver actually occurs.

Subsection (b) (1) (C): Defense Witnesses

We oppose this subsection insofar as it applies to defense witness other than experts.

We think the same principles which militate against forcing defense counsel to reveal alibi witnesses apply to other defense witnesses. *See* our comments on proposed Rule 12.1 Notice of Alibi, *supra*.

As a practical matter, defense discovery of government witnesses, without reciprocal discovery, will place the government and the defendant on a more even basis with regard to the amount of information possessed by each side, than is the case under the present rules. The government's investigative resources are far superior to those of the defendant. As a result, the government ordinarily can locate and investigate most defense witnesses without any help from the defendant. Moreover, the authority represented by the badge of law enforcement investigating officers usually overcomes any hesitancy to cooperate on the part of the witnesses.

The same is not true for defense investigators. Government witnesses, if located, often tell our investigators that they do not have to discuss the case and have decided not to talk about it until the trial. Our investigators have no badge which will encourage such witnesses to discuss relevant information in their possession. This experience leads us to believe that in certain instances, government agents communicate to their witnesses the advisability of not talking to representatives of the defense.

Subsection (d) (1)

We recommend the addition of the phrase "in accordance with the Federal Rules of Criminal Procedure" at the end of the first sentence. Such an addition will help protect the defendant against being forced to disclose that which is not otherwise provided for in the rules.

Subsection (d) (2): Failure to Comply with a Request

If subsection (b) (1) (C) [Defendant must furnish government with names and addresses of defendant's witnesses] is retained we recommend the deletion of the following phrase in subsection d(2) insofar as it applies to defense witnesses other than experts: "or prohibit the party from introducing evidence not disclosed." Our opposition to a preclusion sanction insofar as defense witnesses other than experts are concerned, is based on the reasoning set forth in our comments on the preclusion sanction of proposed Rule 12.1 Notice of Alibi.

Finally, we support the suggestion of the Public Defender Service for the District of Columbia that a paragraph be added such as that set forth in number 12 at page 58 of the Commentary, providing that, ". . . neither the attorneys for the parties nor other prosecution or defense personnel shall advise persons having relevant material or information [except the defendant] to refrain from discussing the case with opposing counsel or showing opposing counsel any relevant material, nor shall they otherwise impede opposing counsel's investigation of the case."

AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE

MONDAY, MARCH 24, 1975

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIMINAL JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:10 a.m., in room 2141, Rayburn House Office Building, Hon. William L. Hungate [chairman of the subcommittee] presiding.

Present: Representatives Hungate, Mann, Russo, Wiggins, and Hyde.

Also present: Thomas W. Hutchison, counsel; Robert L. Brown, assistant counsel; and Michael W. Blommer, associate counsel.

Mr. HUNGATE. The subcommittee will be in order.

Today, we resume our hearings on the pending amendments and additions to the Federal Rules of Criminal Procedure that were promulgated by the Supreme Court on April 22, 1974. Unless the Congress enacts, and the President signs, legislation making changes in these amendments, they will become effective, as promulgated, on August 1, 1975.

In order for the Congress to have adequate time in which to consider legislation, the subcommittee plans to conclude its hearings this week. We will then consider whether any legislation is necessary. If legislation is necessary, our goal is to complete House action on it before the end of May. This will give the Senate an opportunity to consider the legislation.

Our first witnesses are representatives of the Justice Department.

Mr. Keeney, will you please come to the table and introduce your colleagues; you may proceed as you see fit. We have your prepared statement, and without objection it will be made a part of the record.

TESTIMONY OF JOHN C. KEENEY, ACTING ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE, ACCOMPANIED BY HARRY GREENE, EXECUTIVE ASSISTANT TO THE U.S. ATTORNEY FOR THE DISTRICT OF COLUMBIA; PAUL R. WALSH, ATTORNEY, LEGISLATION AND SPECIAL PROJECTS SECTION; RICHARD THORNBURGH, U.S. ATTORNEY, WESTERN DISTRICT OF PENNSYLVANIA; AND H. M. RAY, U.S. ATTORNEY, NORTHERN DISTRICT OF MISSISSIPPI

Mr. KEENEY. Mr. Chairman, members of the subcommittee, I would like to introduce on the far left here Mr. Harry Greene, the executive

assistant to the U.S. attorney for the District of Columbia. On my immediate left is Mr. H. M. Ray, U.S. attorney in Mississippi, and on my right Mr. Richard Thornburgh, U.S. attorney for the western district of Pennsylvania. And on the far right is Mr. Paul Walsh, the attorney in our legislation and special projects section, criminal division.

[The prepared statement of Mr. Keeney follows:]

STATEMENT OF JOHN C. KEENEY, ACTING ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION

Mr. Chairman and Members of the Committee: I appreciate this opportunity to present for your consideration the views of the Department of Justice on the proposed amendments to the Federal Rules of Criminal Procedure.

On September 17, 1974, Mr. W. Vincent Rakestraw, then the Assistant Attorney General for the Office of Legislative Affairs, testified before this subcommittee on these same proposed amendments. The Department is pleased to have this additional opportunity before the newly constituted subcommittee to testify about the amendments, since we feel strongly that certain of the proposals, if adopted, would constitute a serious setback for criminal law enforcement.

It bears saying at the outset, since the remainder of our submission will concern itself with criticism and suggestions for improvement of the proposed Rules, that a debt of gratitude is owed to the Advisory Committee of the Judicial Conference on the Criminal Rules for the generally excellent job that was done in developing the proposed amendments. The Committee's work offers significant advances in the Rules. In our view, however, there has not been sufficient appreciation of the harmful repercussions that would be caused by some of the amendments, especially the amendments of Rules 4, 9, and 16.

The Department of Justice has fundamental objections to two aspects of the amendments: (1) the substitution under Rules 4 and 9 of summonses where arrest warrants have been used in the past; and (2) the broadening of pretrial discovery under Rule 16 and otherwise to the point of endangering our more vital cases and to the point where there are hardly any discernible limits.

I

Rule 4. Arrest Warrant or Summons Upon Complaint

The Proposal.—Rule 4 operates, when a complaint is filed showing probable cause to believe that a certain person has committed a Federal offense, to have the person brought before a magistrate, and to have the magistrate then make an independent determination whether there is probable cause to hold the person to answer in the district court, and, if so, to admit the person to bail according to law. As Rule 4 is now written, the ordinary procedure after the filing of the complaint is for the magistrate to issue an arrest warrant and thus to have the person arrested. If the government attorney requests, a summons will issue instead of an arrest warrant. A summons may be served by personal delivery, by leaving a copy at the accused's residence, or by mailing a copy. As provided in the Rule, if the person served with a summons fails to appear, an arrest warrant will issue. The general practice has been to utilize summonses to conserve the resources of the marshal's office when the prospects seem substantial that the summons will be heeded and the person will appear. The proposed amendment would reverse the present law and practice by calling, in the normal case, for the issuance of a summons upon the filing of a complaint showing probable cause. An arrest warrant would issue in lieu of summons (1) after the defendant failed to heed the summons, or (2) for some "valid reason."

In addition, as a distinct matter, the Rule would be amended (subdivision (c)) to allow the magistrate personally to examine the agent or other person swearing out the complaint, or the witnesses, rather than to act on the basis of the complaint or affidavit, in determining whether probable cause existed to believe the defendant committed a Federal offense.

Effect of the Proposal.—If the summons were made the usual process under Rule 4, the consequences for criminal law enforcement would be devastating. These consequences would include: (1) an increase in the number of fugitives

and an exacerbation of the problem of capturing them; (2) a loss of evidence, of illegal contraband, of illegal firearms, and a diminution in the recovery of stolen property, as well as other reactions by defendants to thwart law enforcement; (3) an increased number of arrests without warrants; and (4) substantial delays in the administration of criminal justice.

1. *Fugitives.*—Fugitives represent a most serious problem for law enforcement now; for example, statistics for the past few years for the District of Columbia show that 20 to 25 percent of the defendants in pending criminal cases become fugitives from justice. Imagine sending a summons to an accused felon. The force of a summons is, in effect, that the person should come in and submit to arrest or else he will be arrested; it invites him to appear, in effect, to give a bond sufficient to insure his future appearances. It sounds an alarm to excite the person to run and to be on guard when law enforcement agents come looking for him. The process is much less than a subpoena and is often used for parking violators and then with less than constant success.

We are talking about persons who have not been arrested during the commission of a Federal offense. They may be bank robbers who have been filmed and who have just been identified. They may be drug traffickers who have been selling to undercover agents. They may be thieves who have stolen government or valuable private property. Or they may be what we think of as "white collar" criminals.

It is not a saving grace that the proposed rule would allow for issuance of an arrest warrant for a "valid reason," unless we are willing to agree that the valid reason is that the issuance of a summons is generally a very unwise thing to do. To issue a summons, e.g., inviting a bank robber to appear to see if he can make bond is to ignore the high probabilities that he will not surrender easily, will spend or conceal the stolen funds, and will commit other robberies. As the rule is proposed to be changed, a magistrate runs a serious risk of reversal if he authorizes a warrant as opposed to a summons, because of the presumption in favor of the latter. In our view there should be no such presumption and the rule should remain written as it is now to have due regard for general experience and grave risks to the community. If the rule is written to make summonses the standard means of gaining physical control over defendants, it may be difficult to offer a valid reason why a particular bank robber should be treated any differently from bank robbers generally. The need for actual arrest of the defendants arises not out of facts peculiar to individual cases but out of common caution.

2. *Recovering Contraband and the Fruits of Crime.*—As one United States Attorney has pointed out, "It is a fact of life that criminals quite often carry the fruits or instrumentalities of crime upon the person or within reaching range, such as a felon with a gun, or a pusher with narcotics." The criminal may be surprised in the possession of contraband, firearms, loot, or other fruits or instrumentalities or crime because he thinks his crime has been hidden effectively, or that he has not been identified as the perpetrator or as a partner in the crime, or simply because he does not expect arrest when it occurs. *The best chance of seizing contraband or recovering stolen property is by means of a search following a lawful arrest or otherwise under search warrant.* You cannot expect nearly such accomplishment by law enforcement officials after handing defendants a summons. You can anticipate that defendants will try to sell, hide, or destroy the contraband, and, in addition, that they will sometimes attempt to injure known witnesses or to fabricate or destroy evidence.

3. *Increased Numbers of Arrests Without Warrants.*—In general, Federal law enforcement agents have a right to arrest, without a warrant, upon probable cause to believe the person has committed a felony. Since the proposal would make the job of law enforcement agents more difficult, more dangerous, and altogether less productive, it is only to be expected that the right to arrest without a warrant would be exercised much more frequently if this amendment were adopted. This would be undesirable since, without the intervention of a magistrate or prosecutor to review the question of probable cause, there will *inevitably be more illegal arrests*, resulting in the suppression of evidence and the ruination of cases that might have ended in successful prosecution with the exercise of greater care.

4. *Delay and Waste of Resources.*—An obvious source of delay involves the time required to locate defendants' addresses, personally to serve or to mail the summonses, to await court appearances, and ultimately to obtain the necessary arrest warrant and to capture the defendants. Another source of delay is the

predictably large volume of litigation over what constitutes a "valid reason" to use an arrest warrant when use of a summons is the established norm. All sorts of other delays would also ensue. More governmental effort would be spent finding hidden property and other evidence; litigating probable cause for arrests without a warrant; and overcoming all manner of harm done by warning the defendants before taking serious measures. Such additional delays would be difficult to accept, especially so soon after enactment of speedy trial legislation, even if anyone could suggest compensating reasons for occasioning the delays.

It should be pointed out that this proposal to make the use of summons the normal process under Rule 4 was never included in the 1970 or 1971 drafts of the proposed amendments and, thus, neither the Advisory Committee nor the Supreme Court had the benefit of comments of the bench and bar on this proposal. Discussion of the proposal in the Advisory Committee note refers to the comment under another rule (Rule 9), and is based entirely upon an article written by Judge Marvin Frankel of the United States District Court for the Southern District of New York. Judge Frankel writes, quite candidly in the article, that his views find little support and, indeed, are quite widely opposed, even by fellow judges in the Southern District. Judge Frankel also acknowledges that much new litigation would result under the proposal since it leaves the "valid reason" standard up in the air.

While subdivision (c) is doubtlessly designed to help the government in perfecting its affidavits, the Department is opposed to a provision that would authorize a magistrate to examine complainants and other witnesses. If the magistrate is not satisfied with the showing of probable cause made in the complaint and any accompanying affidavit, he may indicate his difficulties to see if the complainant can expand his affidavit or the magistrate may deny the application, leaving the accused at liberty until such time as the grand jury may indict or, if a misdemeanor is involved, the United States Attorney files an information. The magistrate should not become a miniature or one-man grand jury, with witnesses being called and examined, and presumably records being made to constitute another costly and time-consuming layer or pretrial proceedings.

Recommendation.—The Department of Justice urges that Rule 4 not be amended at all. The harmfulness of the pending proposal to law enforcement seems patent. No offsetting considerations have been suggested that, to our way of thinking, could conceivably balance the injuries involved. The Department of Justice will be alert to the possibility of using summonses, whenever such use can safely be made, primarily to conserve the resources of the marshal's office.

However, I would like to suggest, in the hope of averting any possible adoption of this proposal, another way of drafting the rule. Should there be an inclination to put greater emphasis upon the use of summonses in the future, Rule 4 could be amended to require a positive request by the government before issuance of an arrest warrant. The rule might then read as follows:

(b) *Issuance of an Arrest Warrant.*—A warrant shall issue whenever:

(1) a defendant fails to appear in response to a summons, or

(2) upon the request of the attorney for the government.

(c) *Multiple Warrants or Summons.*—More than one warrant or summons may issue on the same complaint or for the same defendant.

(d) *Probable Cause.*—The finding of probable cause may be based upon hearsay evidence in whole or in part.

The very least that should be done if the proposed amendment is not to be abandoned is to protect against the second-guessing of the magistrate and against generating more pretrial litigation. Frankly, I would expect most magistrates to recognize the predominant need for using arrest warrants. In any event, the proposed amendment would be made less bad by adding the following:

A determination by a court after an arrest that no valid reason existed for an arrest in lieu of a summons shall not be grounds for the suppression of evidence seized incident to the arrest, or to a search incident thereto.

II

Rule 9. Warrant or Summons Upon Indictment or Information

The Proposal.—Rules 4 and 9 are analogous. Rule 9 operates after indictment (or the filing of an information) with regard to defendants who have not already been brought into court. At present, Rule 9 makes the arrest warrant the normal means of bringing persons charged in indictments into court to be incarcerated

or admitted to bail pending trial. Summonses are used at times, often to conserve the resources of the marshals' offices, when no difficulty is anticipated about the accused's surrendering himself. In reverse of the present practice, the amendment would make issuance of summons the standard or routine procedure after indictment and would relegate issuance of arrest warrants to times when a "valid reason" exists to warrant arrest.

Effect of the Proposal.—Adoption of the proposal would have essentially the same consequences already mentioned. To the extent many persons indicted are already in custody or have been given bail, this proposal would inflict less damage, quantitatively, than does Rule 4. In addition, the damage might be somewhat less also because some persons are able, as, e.g., through grand jury witnesses who have no obligation of secrecy, to obtain forewarning of their indictment. These differences are not significant, however. I emphasize that law enforcement agents cannot always get sufficient cooperation from witnesses to be able to file a complaint, and it takes the compulsory process of the grand jury to make many criminal cases, particularly the most important ones. In many such cases the return of the indictment is a surprise to the accused. That being so, Rule 6(e) allows district judges a discretion about sealing indictments to keep them "secret until the defendant is in custody or has given bail." Rule 6(e) contains nothing about a valid reason for sealing an indictment; yet a valid reason would be required for not issuing a defendant an invitation to surrender. Indictments are not sealed arbitrarily but for the very valid general reasons that accused felons may flee and then be difficult or dangerous to apprehend, and that law enforcement agents should not have to be burdened with such unnecessary problems.

Recommendation.—For the reasons given, Rule 9 should not be amended at all. Again, in the event there is an inclination to give more emphasis to the use of summonses, that could be achieved while preserving the government's interests by mandating warrants only upon the affirmative request of the attorney for the government. Subdivision (a) of the proposed Rule 9 might then be amended to read as follows:

(a) *Issuance*

(1) *Summons.*—Upon the filing of an information or indictment the clerk shall issue a summons for each named defendant, except as provided in subdivision (a)(2).

(2) *Warrant.*—Upon request of the attorney for the government, the court shall issue a warrant instead of a summons for each defendant named in the indictment or information, if the information is supported by oath.

(3) *Multiple Warrants or Summonses; Failure to Appear.*—The clerk shall deliver the warrant or summons to the marshal or other person authorized by law to execute or serve it. More than one warrant or summons may be issued on the same information and indictment or for the same defendant. If a defendant fails to appear in response to the summons, a warrant shall issue.

III

Rule 16. Discovery and Inspection

The Proposal.—The proposed amendments to Rule 16 would change existing pretrial discovery procedure in four major respects: (1) The names and addresses of all government witnesses would be made discoverable for the first time; (2) judges would be deprived of discretionary control and an ability to require a showing by defendants sufficient to reduce broadside requests into specific issues; (3) under one view of the Advisory Committee's Note, beyond the discovery precisely mandated, there would be virtually no limit on discovery, its regulation being left completely to individual judges; and (4) special hardships would be visited upon witnesses testifying against corporations and other legal entities, contrary to existing case law.

Effects of the Proposal

1. *Disclosure of Government Witnesses.*—The Department of Justice has long been opposed to any rule that would have the effect of automatically requiring the government to disclose to the defendant during the pretrial discover stage the names and addresses of its witnesses.

The reasons for opposing a rule requiring the disclosure of the government's witnesses are essentially, first, that the witnesses and their families will be thereby exposed to very genuine risks of injury and of the application of other pressures designed to obstruct justice; and, secondly, that the disclosure will enable defendants to tailor their defenses and otherwise to avoid pitfalls that should lie in store for dishonest defenses.

The courts have sustained the government's refusals to make pretrial disclosure of its witnesses. See, e.g., *United States* v. *Condor*, 423 F.2d 904, 910 (6th Cir.), *cert. denied*, 400 U.S. 958 (1970); *Hemphill* v. *United States*, 392 F.2d 45, 48 (8th Cir.), *cert. denied*, 393 U.S. 877 (1968); *United States* v. *Westmoreland*, 41 F.R.D. 419, 427 (S.D. Ind. 1967); *United States* v. *Cobb*, 271 F.Supp. 159, 162 (S.D.N.Y. 1967). The Federal Rules and Federal statutes have similarly not required such pretrial discovery. There is one provision, 18 U.S.C. 3432, which applies only in treason and capital cases, that requires a disclosure of the names and addresses of the witnesses, but the requirement is *met by disclosure three days before commencement of trial.* This narrow provision does not mandate in treason and capital cases what we usually think of as pretrial discovery.

Our principal concern with the proposal to require a pretrial revelation of the names and addresses of all known government witnesses is that such practice would likely jeopardize the safety and even the lives of many such persons. I do not make this representation lightly nor am I referring only to a relatively small number of cases involving major racketeering figures who have made national news. Unfortunately, there are too many cases to talk about. Last year in New York, for instance, narcotics traffickers offered police officers $100,000 for videotape evidence and the name of the government's chief witness. In Wisconsin, during the course of an investigation of a prostitution ring, two witnesses were murdered after being given grants of immunity and some other witnesses chose to commit obvious perjuries rather than to give helpful testimony. I could go on with such concrete examples. One United States Attorney sent us a lengthy memorandum, giving specific instances of violence directed at witnesses to illustrate his opposition to pretrial discovery of government witnesses, and he ended with this quotation of Benjamin Franklin:

"One of the tragedies in life is the murder of a beautiful theory [meaning the proposed expansion of pretrial discovery] by a gang of brutal facts."

The law now requires the giving of a very ample degree of pretrial notice to defendants. The indictment itself must contain a statement of all the essential facts. Defendants may then be given bills of particulars, elaborating the facts charged. Defendants can use Rule 16 to obtain their own statements and grand jury testimony, if any, as well as copies of reports of examinations and tests, and of other books, papers, documents, and tangible objects material to the case. Additional discovery is given informally in many cases, voluntarily by counsel, sometimes under prodding by judges, and sometimes as a result of pretrial conferences conducted under Rule 17.1. Beyond that, of course, the defendant has his own fund of knowledge to bring to bear upon the matter. Only a relatively small percentage of Federal prosecutions result in acquittals, and it must be rare even then for someone to be charged who is a stranger to the facts.

There are exponents of broader discovery who would shrug off the specific examples that demonstrate the very substantial risks of attempts to intimidate and corrupt witnesses prior to trial; yet, they rarely suggest that any actual injustice has resulted for lack of pretrial discovery. On close examination, some of the exponents seem more concerned that the *strength* of the government's case be revealed than that defendants be helped in preparing their defenses. Some argue that broader discovery will result in more guilty pleas. Even if the incidence of guilty pleas in Federal cases were low, the Department of Justice would not try to increase the number by endangering witnesses and inviting perjury and subornation of perjury. In any event, the incidence of guilty pleas in Federal cases is very high, well over 90 percent in many districts.

A trial should be a search for truth, and not a game. Fairness requires giving defendants advance notice of the facts the government intends to prove, and fairness and the practicalities of the situation justify giving defendants advance opportunity to examine documentary and physical evidence, etc., as currently provided for in Rule 16. But fairness is due the government, too. Fairness is *not* safeguarding defendants from tripping themselves up. Fairness is *not* affording defendants time at their leisure to shape their tactics and defenses to fit every configuration of the government's case; or, to forego defenses, and ponder the opportunities of cultivating reasonable doubt.

Considering the high rate of conviction in our Federal criminal justice system, it is certainly not conjectural to speak in terms of the tailoring of defenses. Charge a man with selling another man a quantity of heroin on a certain day and let him believe that the buyer is the critical witness and a man of unsavory character, and it might be predicted that the man will tell his defense counsel he did not make the sale and that acquaintances will prove he was elsewhere at the time. Give experienced counsel a list of witnesses reflecting a high probability that a narcotics agent was also watching the sale, perhaps even hearing it broadcast, and it might be predicted that the man will decide that he had really been entrapped. Such a switching of positions is not as readily accomplished during the heat of trial. I use the example of a street sale of narcotics. Much less frequently is a case made against the highly-placed trafficker; he stays as insulated as possible.

That touches on a point to be emphasized. In a substantial number of cases, identifying the witnesses prior to trial would either be telling defendants what they already know or have guessed or it would otherwise be a matter of indifference. The Department of Justice is not so much concerned that the easy cases will be made harder, but rather that the harder cases will be made harder—and that difficult investigations will be a measure less likely to bear fruit. Here is where there may most likely be witnesses whose cooperation needs to be kept secret for their sake and the government's. The proposed amendment threatens our more significant cases—i.e., prosecutions in such areas as organized crime and vice, political corruption, narcotics trafficking, and large interstate criminal enterprises, problems that the Federal government has assumed a singular responsibility for solving.

Rule 16 now and as it would be amended may seem to offer solutions to our problems, but the solutions are illusory. There is the provision, first, for protective orders in subdivision (e), under which a court may deny or order only part of the normal discovery "upon a sufficient showing." There are theoretical difficulties in making a showing why the normal rule should not be followed on the basis of the nature of the charges, or an arrest record or even a reputation. Demonstrating that there has been a high incidence of violence and threats of violence in a range of Federal criminal cases may seem a little beside the point in determining whether one defendant should be denied what others are accorded. An appreciation of the general problem is a sound argument for keeping the rule as it is, but, change the rule and allow an exception for a valid reason, and a judge may want a reason peculiar to the case in front of him. The government cannot always be that specific. Our problem is with risks and probabilities, not near certainties. If we had particular reason to expect violence, we could guard the witness or take other measures. And pretrial discovery can occur well before trial; there is no utility in a protective order after giving away the witness's identity.

Furthermore, the protective order provision barely touches the problem that too much discovery enables defendants more convincingly to fabricate defenses. The proposed amendments attempt to meet the problem of tailoring defenses by requiring a listing only of witnesses to be used in the case-in-chief. It could jeopardize the case, however, not to list rebuttal witnesses since they may be needed in the case-in-chief if other witnesses should become indisposed or, through human failings, turn out to be bad or confused witnesses.

To guard against witness intimidation, the amendment would also allow for the taking of depositions, to preserve testimony as security against a witness' being killed or intimidated. However, the solution is impractical. Defendants would be present, under Rule 15, at the taking of the deposition and would be entitled to cross-examine the witnesses. The process would be giving the defendant the most any defendant could desire in the way of pretrial discovery and place a premium upon inducing the witness, perhaps with more sophisticated measures than by violence, to give testimony at the deposition hearing that will destroy his effectiveness later.

There is another deficiency in the deposition concept. To a reluctant and frightened witness, it is another ordeal or source of worry. Then, too, what about the other government witnesses? Are they all to be deposed? Is a defendant to have a complete run-through of the case in advance of trial? Is he to have a crack at unnerving the witness at the deposition proceeding and then another crack at unnerving him at trial? As a tactical matter, the government would not be very much inclined to use the deposition provisions in the proposed amendment

I am reminded of one organized crime investigation in which two men were thought to have been threatened during business negotiations, because they fled from the scene to their homes in another state and immediately asked for police protection. The two men would never say they had been threatened. Eventually, only relatively minor charges could be filed, naming one organized crime figure whereas several were thought to have been involved. Conviction was won but reversed on appeal due to error in the jury instructions, and finally guilty pleas were entered and a retrial avoided. The penalties finally imposed were relatively insubstantial. One witness in that case, who had not been present at the exact time when the extortion may have occurred, had to be talked to at length and calmed down every time he was called before the grand jury and before he testified at the trial. His fear so permeated the courtroom that the defense hurried their cross-examination and had him excused. This witness' fears were particularly acute during the time between indictment and trial, and to have subjected him to a deposition proceeding in front of the one defendant would have been cruel and unusual punishment for the witness.

There are practical problems about guarding frightened witnesses: it is very costly and understandably upsetting for all the witnesses; and a witness can seldom be guarded without substantial disruption of his work and living patterns. Sometimes, just before trial, witnesses will move into motels or other temporary quarters until they have testified. From the witness' standpoint, there is nothing so desirable as anonymity.

Getting the public to cooperate with law enforcement is a tremendously serious problem. It is indeed a sacrifice for witnesses to testify in our criminal justice system, although it is a sacrifice that society must insist upon and that a great many witnesses are willing to make. Perhaps witness fees should be increased, and steps should be taken to reduce the delays and inconveniences witnesses encounter in our busy courtrooms. One thing that can be done for witnesses is to reject efforts at increasing the pretrial discovery available to defendants. A concern over possible intimidation or reprisal by the criminal defendant is foremost in the minds of many witnesses. A study of the problem of cultivating witness cooperation was begun last year by the Institute for Law and Social Research, under grant from LEAA. A number of persons who had cooperated in some way with law enforcement and a number of persons who had been uncooperative were asked the non-leading question, "What changes do you think would make witnesses more willing to testify?" Roughly 30 percent in each group answered in one of the following ways: "Keep witness identification from defendants;" "Better protection of witnesses by police;" "Assure witness protection after testimony."

2. *Loose Discovery Practice.*—The way Rule 16 is presently written a judge is accorded discretion so that discovery can be tailored to the facts of the individual cases, and defense requests for discovery of books, papers, documents, tangible objects, etc., must be accompanied by a showing of materiality and that the request is reasonable. A significant body of case law has developed under Rule 16. While discretion may be exercised, discovery cannot be denied arbitrarily. The materiality and reasonableness requirements of the Rule are not strictly construed; in fact, certain types of requests are deemed reasonable and material on their face. See 8 Moore's Federal Practices—Cipes, Criminal Rules, § 16.05. The reasonableness and materiality requirements are designed primarily to prevent defendants from engaging in "fishing" expeditions into government files and were put into the Rule for the good reasons appearing in the Advisory Committee's Note. The proposed amendment would do away with the discretionary element and, worse, drop the materiality and reasonableness requirements that impose upon defendants a limited duty of narrowing the issues for the trial court.

The proposed amendment is purportedly designed to induce attorneys to complete pretrial discovery voluntarily without troubling the court. Government attorneys today often turn over discoverable matter on a voluntary basis; proper defense motions are in no event really litigated. Where questionable items are concerned, however, the Rule now properly requires judges to tailor discovery orders to the facts of the particular case upon some showing by the requesting party of specificity, materiality, and reasonableness. The request is thus refined into particular issues. The amendment would eliminate this desirable feature and in our view bodes more trouble for the courts rather than less.

Under the amendment, for example, a defendant could make a broad and amorphous request for all governmental files pertaining to him or to his witnesses, and he would have no burden of refining the request by suggesting particular reason for needing the files or any real expectation of benefitting from them. The amendment would seem to repose in the judge the entire burden of sorting out the material items requested from the immaterial. Then, too, the broader the discovery order, the more chance a defendant has later to claim a denial of discovery and of due process. Litigation will be maximized if the stake is the overturning of convictions.

3. *Inviting Judges to Order Any Discovery They Like.*—The proposed amendment would not only make bad law; it might do even worse by removing any real restrictions upon the courts in ordering pretrial discovery. The following appears in the Advisory Committee's Note explaining the amendment of Rule 16:

The rule is intended to prescribe the minimum amount of discovery to which the parties are entitled. It is not intended to limit the judge's discretion to order broader discovery in appropriate cases. For example, subdivision (a)(3) is not intended to deny a judge's discretion to order disclosure of grand jury minutes where circumstances make it appropriate to do so.

The courts have brought about broader pretrial discovery than prescribed by Rule 16 by pressing counsel to resolve problems themselves informally and by using the pretrial conference to expedite complex cases. See *Moore's Federal Practice, op. cit.*, § 16.02[3]. If the quoted paragraph refers to ordered discovery that the government acquiesces in, it is not objectionable, but the paragraph has much wider import. It invites judges to order any discovery they like.

If an individual judge can order pretrial discovery as he deems "appropriate" to the case, Rule 16 as a statement of limiting principles would be an illusion. Whereas a judge may now deny a defendant pretrial discovery on the basis of Rule 16, a defendant might argue, under the amendment, that denial of extra discovery was an abuse of discretion. The Department of Justice could not possibly yield to all the discovery orders that might be anticipated without exhausting every avenue of appeal. The amendment thus augurs a legal vacuum and seems destined to generate considerable confusion and litigation rather than producing the simplicity and expedition for which it is designed.

4. *Discovery by Corporations and Other Legal Entities.*—When the defendant is a corporation, partnership, association or labor union, it would be entitled under the proposed amendment (subdivision (a)(1)(A) of the Rule) to discover the grand jury testimony of its officers or employees merely on the basis that they were at some time so situated as to have been legally able to bind the entity in respect to the charged activities.

The Department of Justice strongly opposes this provision as drawn. It would sweep away the pretrial protection of numerous confidential government informants, making their testimony available to a defendant merely because of a work relationship, even one long past. The provision ignores the crucial distinction made in the mass of cases directly in point; that is, the distinction between witnesses who were employed by the indicted legal entity at the time their testimony was given and witnesses who were not. The cases grant discovery of grand jury testimony of the former but withhold such discovery if the witness was not an employee when testifying.

The proposed subdivision (a)(1)(A) would substantially impair difficult and lengthy investigations and prosecutions of complex white collar cases, especially fraud cases and antitrust conspiracies which extend over a period of years. In developing such prosecutions, the Antitrust Division, in particular, is often dependent upon former officers and former employees of corporations who no longer share a community of interest with their former corporate employer to volunteer information and appear before grand juries, even as the United States Attorney is frequently obliged to depend on former participants to make organized crime cases. The wholesale pretrial discovery of the testimony of such persons will increase their reluctance to come forward and testify for fear of retribution, especially if they are still employed elsewhere in the same industry, as they often are. Immunity from prosecution alone is not enough. Under the proposed rule, we would no longer be able to assure such witnesses that the Jencks Act prevents their former employers from receiving their testimony until trial and then only if they are actually called as trial witnesses. The recent up-

grading of antitrust violations to felony status, carrying three-year jail terms and possible $1 million fines, makes the stakes far higher and the problem far more serious than ever.

The Department of Justice takes the position that statements and grand jury testimony of employees, officers and agents or corporations and other defendant legal entities should be discoverable under Rule 16 only to the extent that such statements and testimony may be equated with those of individual defendants discoverable under the same rule. This formula comports with the result reached by the more thoughtfully considered cases.

Recommendation and Support.—If the Federal Criminal Rules are to contain a provision specifically covering discovery by legal entities, it should read:

Where the defendant is a corporation, partnership, association or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who was, at the time of his testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to the activities involved in the charges.

A clear distinction should be drawn, for pretrial discovery purposes, between officers and employees able to bind the entity at the time they gave a statement or grand jury testimony, and former officers and employees not legally connected to the entity at the time they gave a statement or grand jury testimony. Discovery should be allowed in respect to the former; the Jencks Act should control in respect to the latter. As stated in *United States* v. *Zirpolo*, 288 F. Supp. 993 at 1021 (D. N.J. 1968), "the absence of any such employment relationship [at the time of giving testimony] endows . . . [the ex-employee witness] with characteristics usually attributed to the status occupied by a Government witness" whose testimony is subject to the disclosure provisions of the Jencks Act.

Of course, pretrial disclosure of grand jury testimony would still be permissible under Rule 6(e) of the Federal Rules of Criminal Procedure, upon meeting the requirement of showing particularized need. Furthermore, the government often makes very full disclosures prior to trial when that will not jeopardize the witness or admit of other abuse.

The only case on discovery by corporate defendants referred to in the Advisory Committee Note to the proposed amendment, it should be emphasized, was vacated by the Supreme Court and, thus, is not precedent. *United States* v. *Hughes*, 413 F.2d 1244 (5th Cir. 1969), vacated *sub nom*, *United States* v. *Gifford Hill American, Inc.*, 397 U.S. 93 (1970). *Hughes* was contrary to the weight of authority and, as a mandamus case, a particularly inapposite one on which to base a rule on discovery of the statements of corporate employees and officers. See 1(b) *Moore's Federal Practice*, § 0.416[6], pages 2328, 2329, and *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 41 (1950). (Vacation of a case is designed by appellate courts to *prevent* further legal consequences from the decision.)

On the other hand, a line of cases decided both before and after *Hughes*, holds basically that a defendant corporation is only permitted under Rule 16(a) to view the grand jury testimony of officers and employees connected to the defendant corporation *at the time of their testimony*. See *United States* v. *Venn*, 41 F.R.D. 540 (S.D. Fla. 1966); *United States* v. *Acroquip Corp.*, 41 F.R.D. 441 (E.D. Mich. 1966); *United States* v. *American Oil*, 286 F. Supp. 742 (D. N.J. 1968); *United States* v. *Zirpolo*, 288 F. Supp. 993 (D. N.J. 1968); *United States* v. *Deardorff*, 343 F. Supp. 1033, 1044 (S.D. N.Y. 1971); *United States* v. *Bally Manufacturing Corp.*, 345 F. Supp. 410 (E.D. La. 1972); *United States* v. *Marx*, 364 F. Supp. 1022, 1030 (E.D. Ky. 1973). This is the better view.

Former officers and employees who lack an identity of interest with former corporate employers at the time of their statement or grand jury testimony should be afforded the same Jencks Act protection as any other prospective government witness situated analogously, for example, a co-conspirator or informant whose testimony would only be subject to disclosure at trial. As for the continued significance of the Jencks Act (18 U.S.C. § 3500) see *United States* v. *Percevault*, 490 F.2d 126, 130, 131 (2nd Cir. 1974), and *United States* v. *Sebastian*, 497 F.2d 1267 (2nd Cir. 1974).

Under judicial thinking, even as to individual defendants, the possibility of *imputed* liability resulting from statements of co-conspirators or ex-employees does not override the Congressional intent reflected in the Jencks Act, i.e., to prevent intimidation or bribery of government witnesses, subornation of perjury, and fabrication of defenses. *United States* v. *Percevault*, *supra*. These problems are no less present in white collar cases than in those involving organized crime

and other cases. In short, this Department takes the position that, in order for the testimony of an individual to be considered that of a defendant corporation, the person must be able to speak for the corporation and to bind the corporation *at the time he utters the testimony.* Any person who is not connected with the corporation at the time of the testimony is merely another prospective government witness protected by the Jencks Act.

While corporations and other artificial persons can never act or speak except through employees and therefore must be held vicariously liable for the conduct or statements of persons acting within the scope of their employment, it does not follow that a corporation or other legal entity is, or should be, entitled to greater pretrial discovery than a similarly situated human defendant. For example, under Rule 16(a), even an individual defendant may not have pretrial discovery of a co-conspirator's grand jury testimony relating to acts or statements of the co-conspirator for which the individual may be held vicariously liable at trial. *United States* v. *Percevault, supra.* In *Percevault,* the Second Circuit reviewed and followed the overwhelming weight of authority against using imputed liability for the acts of others as a ground for pretrial disclosure, in light of the Congressional concern for pretrial protection of government witnesses, evident both in the Jencks Act and in present Rule 16(b). It is concluded that this strong public policy concern applies with equal force to the ex-employee who turns in his former "partner in crime," the corporation.

Recommendations: For the very urgent reasons stated above, and because broadening pretrial discovery could not work any substantial betterment of our criminal justice system, the Department of Justice urges that Rule 16 not be amended at all.

IV

Rule 12.1—Notice of Alibi

The Proposal.—An additional proposed amendment that causes us major concern is Rule 12.1. This new provision would require a defendant intending to rely upon a defense of alibi to give pretrial notice of that intention and, after the government specified the time, date and place of the offense, to inform the government of the specific place where he claims to have been and to give the names and addresses of his alibi witnesses; upon his doing so, the government would be required to give him the names and addresses of its witnesses, who will be relied upon to establish his presence at the scene of the trial.

Effect of the Proposal.—The proposal would operate to require an exchange of information on the subject of alibi so as to avert trial surprise, but there is a very significant risk that defendants would abuse the provision, using it as a discovery device, with unjust results. This risk is easily avoidable by redrafting the Rule.

The critical defect in the provision is that the defendant starts the procedure, instead of the government. The provision also reflects some expectations not likely to be realized in the way of forcing a defendant to take a position under threat of forfeiting his ability to put on his witnesses. The provision is easily abused. Anyone can be listed as a witness, for he cannot be subpoenaed by the government in preparation for trial or otherwise be required to give sworn testimony.

As a pretrial discovery device, the amendment would afford defendants significant advantages not afforded in Rule 16. Let me take an example. Suppose a defendant is a seller of counterfeit money, or heroin, or stolen property. One of his buyers introduces him to a third party, to whom he makes a sale. Subsequently, he is indicted for that sale. Often such a defendant has no compunction about fabricating defenses, suborning perjury, or intimidating witnesses. What he must know more than anything else is the true identity of the two men involved in the sale. If they are what they seem, participants in crime who have apparently turned government witnesses, he can balance their credibility perhaps with his own and friends' testimony. If they are undercover agents, his problems are multiplied: he may have been dealing with undercover agents earlier, or informants, before making the sale. He must remember back, get all the discovery he can, and ponder his course. Should it be alibi? Entrapment? Ignorance of the nature of the article sold or that it was stolen? A man making an honest defense has no such problems.

As indicated in the Advisory Committee Note, this alibi notice provision gives its users new information not contained in witness lists. To simply find Federal

agents listed as witnesses does not mean that a defendant has been dealing with undercover agents; the agents may be used to testify about technical matters such as chain-of-custody, nature of contraband, or that property was stolen. Maybe if the defendant tracked down and saw all the witnesses listed, he would not need the help of this provision, but it serves at least as a shortcut to identify the key witnesses. Naming the witnesses at the scene of the crime affords a good excuse for defendants to contact the witnesses, ostensibly to avoid trial surprise, but really to try to intimidate or corrupt witnesses.

In the rare event a defendant professes to have no acquaintanceship with and be utterly surprised by the appearance of a key government witness, a judge should grant a continuance on that basis but, in my judgment, that will pose no serious problem. Occasional minor delay is certainly preferable in the criminal justice system to suffering the damages of excessive pretrial discovery.

A defendant is warned by the indictment or information that he must be prepared to meet evidence offered by the government that he committed the offense. Thus, the defendant should not be surprised when the government offers evidence he was at the scene of the crime. However, if the defendant offers alibi evidence to contradict the government's case, the government may be surprised. Notice of alibi provisions are thus designed for the government's benefit to prevent it from being surprised at trial.

In our view, therefore, the proper way to draft a rule like this is to make it work at the option of the government. The government has not often sought delay in trial to investigate alibis. If our proposal is adopted, giving the government the choice whether to use or not to use the provision, and the government should then fail to ask for a notice of alibis, the court could quite rightly take that into account if the government complained of trial surprise and sought a continuance.

Under the proposed amendment the court would be entitled to make exceptions to the provisions for good cause shown. This corresponds with the protective order provision in Rule 16 that would allow the court to deny or give only part of the ordinary discovery. Under Rule 16 the government could ask for the special relief *in camera*, without the defense's knowing, but this Rule has no such provision. The very fact of seeking to avoid the rule could be revealing.

I would reemphasize that the safeguards, which are meant to protect law enforcement interests, in Rule 16 and in this Rule, will prove illusory. A number of judges and legal writers are deeply committed in giving defendants very broad pretrial discovery, and some think it unfair that a defendant should run any risk of surprise at trial, which could reveal his deceitfulness. Judges who support unlimited disclosures by the government to prevent trial surprise, either as being unfair or as necessitating undue delays in trial, are not really going to give protective orders or make exceptions to this alibi rule.

Again, whose interests are paramount with regard to notice or alibi? The government attorney's. Can there be much quarrel with turning this provision around so that it will operate only at the instance of the government?

Recommendations.—The Department of Justice recommends that Rule 12.1 be amended to read, similar to the wording of Rule 2-5(b) of the United States District Court for the District of Columbia, as follows:

(b) Alibi demand by the government.

(1) Upon written demand of the prosecutor stating the time, date, and place at which the alleged offense was committed, the defendant shall serve within ten days, or at such different time as the court may direct, upon the prosecutor a written notice of his intention to offer a defense of alibi. Such notice by the defendant shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom he intends to rely to establish such alibi.

(2) Within ten days thereafter, but in no event less than ten days before trial, unless the court otherwise directs, the prosecutor shall serve upon the defendant or his attorney a written notice stating the names and addresses of the witnesses upon whom the government intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied on to rebut testimony of any of the defendant's alibi witnesses.

(3) Upon the failure of either party to comply with the respective requirements of this rule, the court shall, except for good cause shown, exclude the testimony of any witness offered by such party as to the defendant's absence from, or presence at, the scene of the alleged offense. This rule shall not limit the right of the defendant to testify in his own behalf.

V

Other Proposed Amendments

Because the objections of the Department of Justice to the proposed amendments of Rules 4, 9 and 16 (and to the new 12.1) are so basic and reflect such a consensus of concern among Department attorneys who bear responsibility for Federal criminal investigations and prosecutions, I have attempted to explain our apprehension about these amendments to the fullest extent, and also, whenever possible, to suggest alternative wording, the adoption of which would be less harmful from our point of view.

Rather than extend this already lengthy statement further, I would, if the chairman and members please, leave the other recommendations that were made by the Department's spokesmen at the hearings last September to your consideration on the basis of that earlier statement. Those earlier recommendations were selected (and a number of other possible objections abandoned) because it was thought that their acceptance would significantly improve the proposed amendments, and we remain convinced that these recommendations are sound and deserving of your most careful consideration.

If the Subcommittee has any questions, I will be pleased to try to answer them at this time.

Mr. HUNGATE. Thank you, sir.

Mr. KEENEY. Mr. Chairman and members of the committee, I appreciate this opportunity to present for your consideration the views of the Department of Justice on the proposed amendments to the Federal Rules of Criminal Procedure.

On September 17, 1974, Mr. W. Vincent Rakestraw, then the Assistant Attorney General for the Office of Legislative Affairs, testified before this subcommittee on these same proposed amendments. The Department is pleased to have this additional opportunity before the newly constituted subcommittee to testify about the amendments, since we feel strongly that certain of the proposals, if adopted, would constitute a serious setback for criminal law enforcement.

It bears saying at the outset, since the remainder of our submission will concern itself with criticism and suggestions for improvement of the proposed rules, that a debt of gratitude is owed to the Advisory Committee of the Judicial Conference on the Criminal Rules for the generally excellent job that was done in developing the proposed amendments. The committee's work offers significant advances in the rules. In our view, however, there has not been sufficient appreciation of the harmful repercussions that would be caused by some of the amendments, especially the amendments of rules 4, 9, and 16.

The Department of Justice has fundamental objections to two aspects of the amendments: (1) the substitution under rules 4 and 9 of summonses where arrest warrants have been used in the past, and (2) the broadening of pretrial discovery under rule 16 and otherwise to the point of endangering our more vital cases and to the point where there are hardly any discernible limits.

With respect to rule 4, arrest warrant or summons upon complaint. The proposal: Rule 4 operates, when a complaint is filed showing probable cause to believe that a certain person has committed a Federal offense, to have the person brought before a magistrate and to have the magistrate then make an independent determination whether there is probable cause to hold the person to answer in the district court, and, if so, to admit the person to bail according to law. As rule 4 is now written, the ordinary procedure after the filing of the complaint

is for the magistrate to issue an arrest warrant and, thus, to have the person arrested. If the Government attorney requests a summons will issue instead of an arrest warrant. A summons may be served by personal delivery, by leaving a copy at the accused's residence, or by mailing a copy.

As provided in the rule, if the person served with a summons fails to appear, an arrest warrant will issue. The general practice has been to utilize summonses to conserve the resources of the marshal's office when the prospects seem substantial that the summons will be heeded and the person will appear. The proposed amendment would reverse the present law and practice by calling, in the normal case, for the issuance of a summons upon the filing of a complaint showing probable causes. An arrest warrant would issue in lieu of summons (1) after the defendant failed to heed the summons, or (2) for some valid reason.

In addition, as a distinct matter, the rule would be amended—subdivision (c)—to allow the magistrate personally to examine the agent or other person swearing out the complaint, or the witnesses, rather than to act on the basis of the complaint or affidavit, in determining whether probable cause existed to believe the defendant committed a Federal offense.

What is the effect of the proposal? If the summons were made the usual process under rule 4, the consequences for criminal law enforcement would be devastating. These consequences would include: (1) an increase in the number of fugitives and an exacerbation of the problem of capturing them; (2) a loss of evidence, of illegal contraband, of illegal firearms, and a diminution in the recovery of stolen property, as well as other reactions by defendants to thwart law enforcement; (3) an increased number of arrests without warrants; and (4) substantial delays in the administration of criminal justice.

1. With respect to fugitives. Fugitives represent a most serious problem for law enforcement now; for example, statistics for the past few years for the District of Columbia, this would include the superior plus district court cases, show that 20 to 25 percent of the defendants in pending criminal cases become fugitives from justice. Imagine sending a summons to an accused felon. The force of a summons is, in effect, that the person should come in and submit to arrest or else he will be arrested; it invites him to appear, in effect, to give a bond sufficient to insure his future appearances. It sounds an alarm to excite the person to run and to be on guard when law enforcement agents come looking for him. The process is much less than a subpena and is often used for parking violators and then with less than constant success.

We are talking about persons who have not been arrested during the commission of a Federal offense. They may be bank robbers who have been filmed and who have just been identified. They may be drug traffickers who have been selling to undercover agents. They may be thieves who have stolen Government or valuable private property. Or they may be what we think of as white-collar criminals.

It is not a saving grace that the proposed rule would allow for issuance of an arrest warrant for a valid reason, unless we are willing to agree that the valid reason is that the issuance of a summons is generally a very unwise thing to do. To issue a summons, for example,

inviting a bank robber to appear to see if he can make bond is to ignore the high probabilities that he will not surrender easily, will spend or conceal the stolen funds, and will commit other robberies.

As the rule is proposed to be changed, a magistrate runs a serious risk of reversal if he authorizes a warrant as opposed to a summons, because of the presumption in favor of the latter. In our view there should be no such presumption and the rule should remain written as it is now to have due regard for general experience and grave risks to the community.

If the rule is written to make summonses the standard means of gaining physical control over defendants, it may be difficult to offer a valid reason why a particular bank robber should be treated any differently from bank robbers generally. The need for actual arrest of the defendants arises not out of facts peculiar to individual cases but out of common caution.

With respect to recovering contraband and the fruits of crime. As one U.S. attorney has pointed out: "It is a fact of life that criminals quite often carry the fruits or instrumentalities of crime upon the person or within reaching range, such as a felon with a gun, or a pusher with narcotics." The criminal may be surprised in the possession of contraband, firearms, loot, or other fruits, or instrumentalities of crime because he thinks his crime has been hidden effectively, or that he has not been identified as the perpetrator, or as a partner in the crime, or simply because he does not expect arrest when it occurs. The best chance of seizing contraband or recovering stolen property is by means of a search following a lawful arrest or otherwise under search warrant. You cannot expect nearly such accomplishment by law enforcement officials after handing defendants a summons. You can anticipate that defendants will try to sell, hide, or destroy the contraband, and, in addition, that they will sometimes attempt to injure known witnesses or to fabricate or destroy evidence.

With respect to increased numbers of arrests without warrants. In general, Federal law enforcement agents have a right to arrest, without a warrant, upon probable cause to believe the person has committed a felony. Since the proposal would make the job of law enforcement agents more difficult, more dangerous, and altogether less productive, it is only to be expected that the right to arrest without a warrant would be exercised much more frequently if this amendment were adopted. This would be undesirable since, without the intervention of a magistrate or prosecutor to review the question of probable cause, there will inevitably be more illegal arrests, resulting in the suppression of evidence and the ruination of cases that might have ended in successful prosecution with the exercise of greater care.

With respect to delay and waste of resources. An obvious source of delay involves the time required to locate defendants' addresses, personally to serve or to mail the summonses, to await court appearances, and ultimately to obtain the necessary arrest warrant and to capture the defendants. Another source of delay is the predictably large volume of litigation over what constitutes a valid reason to use an arrest warrant when use of a summons is the established norm. All sorts of other delays would also ensue. More governmental effort would be spent finding hidden property and other evidence; litigating proba-

ble cause for arrests without a warrant; and overcoming all manner of harm done by warning the defendants before taking serious measures. Such additional delays would be difficult to accept, especially so soon after enactment of speedy trial legislation, even if anyone could suggest compensating reasons for occasioning the delays.

It should be pointed out that this proposal to make the use of summons the normal process under rule 4 was never included in the 1970 or 1971 drafts of the proposed amendments and, thus, neither the Advisory Committee nor the Supreme Court had the benefit of comments of the bench and bar on this proposal. Discussion of the proposal in the Advisory Committee note refers to the comment under another rule, rule 9, and is based entirely upon an article written by Judge Marvin Frankel of the U.S. District Court for the Southern District of New York. Judge Frankel writes, quite candidly in the article, that his views find little support and, indeed, are quite widely opposed, even by fellow judges in the southern district. Judge Frankel also acknowledges that much new litigation would result under the proposal since it leaves the valid reason standard up in the air.

While subdivision (c) is doubtlessly designed to help the Government in perfecting its affidavits, the Department is opposed to a provision that would authorize a magistrate to examine complainants and other witnesses. If the magistrate is not satisfied with the showing of probable cause made in the complaint and any accompanying affidavit, he may indicate his difficulties to see if the complainant can expand his affidavit or the magistrate may deny the application, leaving the accused at liberty until such time as the grand jury may indict or, if a misdemeanor is involved, the U.S. attorney files an information. The magistrate should not become a miniature or one-man grand jury, with witnesses being called and examined, and presumably records being made to constitute another costly and time-consuming layer of pretrial proceedings.

Accordingly, the Department of Justice urges that rule 4 not be amended at all. The harmfulness of the pending proposal to law enforcement seems patent. No offsetting considerations have been suggested that, to our way of thinking, could conceivably balance the injuries involved. The Department of Justice will be alert to the possibility of using summonses, whenever such use can safely be made, primarily to conserve the resources of the marshal's office.

However, I would like to suggest, in the hope of averting any possible adoption of this proposal, another way of drafting the rule. The full text of my statement contains language which would affect this alternate proposal.

Now, with respect to rule 9, rules 4 and 9 are analogous. Rule 9 operates after indictment, or the filing of an information, with regard to defendants who have not already been brought into court. At present, rule 9 makes the arrest warrant the normal means of bringing persons charged in indictments into court to be incarcerated or admitted to bail pending trial. Summonses are used at times, often to conserve the resources of the marshals' offices, when no difficulty is anticipated about the accused's surrendering himself. In reverse of the present practice, the amendment would make issuance of summons the standard or routine procedure after indictment and would relegate issuance of arrest warrants to times when a valid reason exists to warrant arrest.

What is the effect of the proposal? Adoption of the proposal would have essentially the same consequences already mentioned. To the extent many persons indicted are already in custody or have been given bail, this proposal would inflict less damage, quantitatively, than does rule 4. In addition, the damage might be somewhat less also because some persons are able, as, for example, through grand jury witnesses who have no obligation of secrecy, to obtain forewarning of their indictment. These differences are not significant, however. I emphasize that law enforcement agents cannot always get sufficient cooperation from witnesses to be able to file a complaint, and it takes the compulsory process of the grand jury to make many criminal cases, particularly the most important ones. In many such cases the return of the indictment is a surprise to the accused. That being so, rule 6(e) allows district judges a discretion about sealing indictments to keep them "secret until the defendant is in custody or has given bail." Rule 6(e) contains nothing about a valid reason for sealing an indictment; yet a valid reason would be required for not issuing a defendant an invitation to surrender. Indictments are not sealed arbitrarily but for the very valid general reasons that accused felons may flee and then be difficult or dangerous to apprehend, and that law enforcement agents should not have to be burdened with such unnecessary problems.

For the reasons given, rule 9 should not be amended at all. Again, in the event there is an inclination to give more emphasis to the use of summonses, that could be achieved while preserving the Government's interests by mandating warrants only upon the affirmative request of the attorney for the Government. Language to achieve such an alternative is set forth in my prepared statement.

Turning now to rule 16. The proposed amendments to rule 16 would change existing pretrial discovery procedure in four major respects: (1) The names and addresses of all Government witnesses would be made discoverable for the first time; (2) judges would be deprived of discretionary control and an ability to require a showing by defendants sufficient to reduce broadside requests into specific issues; (3) under one view of the advisory committee's note, beyond the discovery precisely mandated, there would be virtually no limit on discovery, its regulation being left completely to individual judges; and (4) special hardships would be visited upon witnesses testifying against corporations and other legal entities, contrary to existing case law.

What are the effects of the proposal?

The Department of Justice has long been opposed to any rule that would have the effect of automatically requiring the Government to disclose to the defendant during the pretrial discovery stage the names and addresses of its witnesses.

The reasons for opposing a rule requiring the disclosure of the Government's witnesses are essentially, first, that the witnesses and their families will be thereby exposed to very genuine risks of injury and of the application of other pressures designed to obstruct justice; and, second, that the disclosure will enable defendants to tailor their defenses and otherwise to avoid pitfalls that should lie in store for dishonest defenses.

The courts have sustained the Government's refusals to make pretrial disclosure of its witnesses. The Federal rules and Federal statutes have similarly not required such pretrial discovery. There is one pro-

vision, 18 U.S.C. 3432, which applies only in treason and capital cases, that requires a disclosure of the names and addresses of the witnesses, but the requirement is met by disclosure 3 days before commencement of trial. This narrow provision does not mandate in treason and capital cases what we usually think of as pretrial discovery.

Our principal concern with the proposal to require a pretrial revelation of the names and addresses of all known Government witnesses is that such practice would likely jeopardize the safety and even the lives of many such persons. I do not make this representation lightly nor am I referring only to a relatively small number of cases involving major racketeering figures who have made national news. Unfortunately, there are too many cases to talk about.

Last year in New York, for instance, narcotics traffickers offered police officers $100,000 for videotape evidence and the name of the Government's chief witness. In Wisconsin, during the course of an investigation of a prostitution ring, two witnesses were murdered after being given grants of immunity and some other witnesses chose to commit obvious perjuries rather than to give helpful testimony. I could go on with such concrete examples. One U.S. attorney sent us a lengthy memorandum, giving specific instances of violence directed at witnesses to illustrate his opposition to pretrial discovery of Government witnesses, and he ended with this quotation of Benjamin Franklin: "One of the tragedies in life is the murder of a beautiful theory, meaning here the proposed expansion of pretrial discovery, by a gang of brutal facts."

At this point while I rest on the words "brutal facts" I would like to turn to my colleague, the U.S. attorney from the Western District of Pennsylvania, who could give you some of these brutal facts, these brutal examples from his own experience, and the experience of other U.S. attorneys throughout the country. If I may, Mr. Hungate, I will turn to Mr. Thornburgh.

Mr. HUNGATE. Yes. We will be pleased to hear from him, yes.

Mr. THORNBURGH. Thank you, Mr. Chairman.

Mr. Chairman, I appreciate the opportunity to appear before this subcommittee again and I am here representing the point of view of the 94 U.S. attorneys who serve in the trenches throughout this country. And I hope to present a practical, nuts and bolts point of view with respect to the very real problems that may be encountered if rule 16(A)(1)(e) in its present form is adopted. I will try to deal in facts and not rhetoric.

One of the important virtues of our criminal justice system is the willingness of witnesses to come forward when they have knowledge of criminal acts. We find this to be increasingly difficult in these days. We find that crime rates are according to reliable surveys considerably less in terms of reported crimes than of actual occurrences, and it is the feeling of those of us who must try the Government's criminal cases that this willingness of witnesses to come forward will be severely and adversely affected by the proposed rule 16(a)(1)(E). This is not a happy subject to discuss. In fact, the mere recitation of some of the facts of cases involved has a counterproductive effect because it tends to highlight and publicize the facts that these occurrences are with us.

Nonetheless, within the last week I solicited reports from 32 representative U.S. attorneys' offices, large and small, from the North,

South, East, and West sectors of this country, offices that deal with differing constituencies in communities of varying size.

First of all, I think it is important to note that each of the U.S. attorneys contacted and responding indicated their vehement opposition to a requirement to furnish willy nilly in every case the names and addresses of all Government witnesses. The reasons behind this had been previously furnished to this committee in the first round of testimony given before you in September of 1974.

This time, instead of concepts, we asked for facts, and I will furnish to the committee the results of the report which we put together in 3 days. But I would like to summarize some of the salient features of that survey taken last week in these 32 representative districts.

There was a chronicle of over 700, 713 to be exact, specific instances of assassination, assaults, beatings, threats, attempts to bribe witnesses and to suborn perjury, the disappearance of witnesses, refusals to testify, as well as economic pressure and other forms of harassment against Government witnesses in pending cases, all of this occurring without the required disclosure of the names and addresses of those witnesses.

These cases range from the classic organized crime hit or contract in major racketeering cases to much more sophisticated pressures brought to bear against businessmen, and in criminal antitrust and official corruption cases. These range from terror tactics by the Ku Klux Klan to the same type of threats by Black Muslim organizations. They range from cases involving millions of dollars to one case in the Western District of Louisiana which involved the threat of a Government check of the value of less than $100. And again, each of these instances, over 700 in all, are without the proposal that is before this subcommittee.

You might ask why do we not hear more about these things, is this not all kind of the terminology that is out of the 1920's, the rubouts, the hits, and the like? I must say that there is a frank desire to keep these incidents quiet, not to portray them in public, not to spell out the gory details of incidents that affect all of us in the prosecution of cases for the simple reason that the more publicity that attaches to these types of intimidations and harassments, the more likely it is that witnesses will be inhibited in futuro from coming forward with knowledge of criminal activities.

There have been positive steps taken to protect witnesses and to deter this type of activity within my experience as a U.S. attorney. There is a progressive prosecution effort of those responsible in those few cases when they can be identified, and there has been an expanded witnesses protection program undertaken by the Department of Justice involving the relocation, new identities and other ways to enable witnesses to be protected.

But, it would be a severe setback to these productive efforts for us to have to tell every single witness after August 1 of this year that one of the first things we must undertake in preparing our case for trial is to give their name and address to defense counsel and the defendant.

What is the rationale that underlies this proposed change? First, it is said that this is to promote further discovery, the analogy to the civil case. Well, these are not civil cases and it is important to recognize

that a criminal trial in many senses is not a search for truth in the classic sense. There are specific constitutional provisions which are designed to conceal the truth. The fifth amendment right of self incrimination, the exclusionary rules which keep evidence out of criminal trials, the fact that the Government has the continuing burden of proof, the fact that the defendant enjoys the presumption of innocence, he need do nothing, he must put the Government to his case. These are all extremely important to our American way of jurisprudence, and no one would propose that they be changed. But, they do highlight the very important differences between a civil trial and a criminal trial and the fact that the search for truth in a criminal trial is a one-sided matter.

In addition, by definition we are dealing in a criminal case with persons who are in a position where they have been charged with not being able to observe any of the rules. They have nothing to lose by the attempts of the type that I have outlined this morning.

The second rationale is the rather cruel juxtaposition of the requirement to furnish the names and addresses of witnesses immediately followed by the fact that you have a right to preserve their testimony by deposition. It seems obvious that the framers had in mind in this provision that if you have to give up the names and addresses of the witnesses, and expose them to this kind of a risk, that you can preserve their testimony in the likely event that they will be threatened, intimidated or perhaps even assassinated. I think that the witness takes small consolation from the knowledge of the fact that his testimony may outlive his own existence.

There is a real question as to whether or not the witness will even make it to the deposition, because if he is slated to be rubbed out, or assassinated, we are required to give notice under rule 15 of his name and address even to get him to the deposition. Anyone who has tried a case knows how dry and dull a deposition can be when it is read at trial, when it is contrasted with the testimony of a live witness.

Furthermore, there is a very insidious possibility that next in the proposed rule 16 that the defendant is given an obligation it would seem in the first instance, but really a right that he does not have at this time. A defendant under the correlative provision is forced to disclose his own witnesses by name and address and give the right to depose those witnesses. There is nothing to prevent a resourceful defense counsel from listing all of the Government's witnesses as his witnesses and taking their depositions, in effect, affording him a kind of pretrial tool that he has never had and does not have at this time.

Mr. HUNGATE. Well, would he then have to vouch for their credibility if they were called for trial?

Mr. THORNBURGH. No, not necessarily, if he did not call them for trial, Mr. Chairman, if he was using it merely as a discovery tool. He has no obligation to call them at trial or to introduce their depositions. I am talking about cases where there would not necessarily be the threat or the——

Mr. HUNGATE. If the Government then calls them, would the defendant's cross examination be restricted?

Mr. THORNBURGH. Excuse me?

Mr. HUNGATE. Would the Government argue that the defendant listed these as its witnesses?

Mr. THORNBURGH. I do not think so. I think that at best he might be entitled to cautionary instructions and create in the witness some kind of a quasi court witness.

Mr. RAY. I believe that in the new rules of evidence that is going to be out the window as to whose witnesses they are. In other words, I believe that rule which has been in effect is out under the new rules.

Mr. HUNGATE. Thank you, Mr. Ray. I am sorry to interrupt. Go ahead.

Mr. THORNBURGH. Furthermore, on the point of reciprocity, which is supposed to be the leavening influence for those of us who foresee problems in the prosecution of cases, there is a very real question as to whether the reciprocity provisions are constitutional. They were raised and discussed by witnesses before this subcommittee in September, and I do not profess to any great constitutional law insights. The very fact that there is a problem there gives me some cause in terms of the correlative responsibility on the prosecution. What we are really looking at here is the exchange of a pound of lead for a pound of gold because there is very little use in the defense case in terms of deposing witnesses of or knowledge of who is going to be a witness compared to what might be used by unscrupulous criminal defendants to harass or otherwise intimidate or dispose of Government witnesses.

Finally, we are told that the vehicle of the protective order, which reverses the present situation which makes disclosure of witnesses the exception rather than the rule, but says that a judge on a "sufficient showing" can enter a protective order, there is no indication as to what test is to be used. There is no indication that a judge will merely require a statement from the prosecution that there is reason to think that witnesses may be in harm. The whole matter is left up in the air, and again, getting back to the problem of dealing with the witness when he first walks in the door, it is not very satisfactory for myself as a prosecutor to say to him, well, there is a possibility that a judge might find if we make a sufficient showing that we do not have to disclose your name, because that is going to mean nothing to him. It is going to mean that he has a possibility of having his life and his family and his economic existence threatened.

In a very interesting exchange I think between the subcommittee and Judge Webster during the last hearing at pages 128 and 129, a member of the subcommittee, perhaps yourself, Mr. Chairman, asked Judge Webster what his experience was with threats and intimidation of witnesses, and he said while he was a U.S. attorney he used to run across them all of the time, but since he had been on the bench he had not seen much of them. And I submit that that is not unpredictable. I think the problem is that the court is going to be less involved in the process and less aware, with all due deference, less sophisticated about the types of schemes that might be used to work this harm on prospective witnesses.

Finally, it is said that there are some States, 22 in all which require the disclosure of witnesses, and that this ought to be the kind of rule that is satisfactory in Federal cases. But I do not think we can necessarily mutatis mutandis make this leap into the Federal court system because of a number of things. First of all, many of the cases we are involved in, as Mr. Keeney indicated, are most significant cases, serious crimes involving major criminal figures and persons of great resources

and influence to reach witnesses. Second, in most States the equivalent of the Bail Reform Act is not in effect. Under the Bail Reform Act there is no way for the Federal prosecutor to make a case to keep a dangerous criminal defendant in jail simply because he is dangerous. We must show that, and the only criteria is that prior to his conviction if he is likely to flee, then restrictive bond provisions, or a high surety bond or the like insuring his jailing can take place, but if his only propensity is to go around beating up witnesses, he must be let free under the terms of the Bail Reform Act prior to conviction.

Furthermore, there has been no study of the experiences of these 22 States in this area. I think an equivalent study of the experience of prosecutors who have been working under these rules would be useful. The mere existence of the rules on the statute book is not, I do not think, persuasive.

Finally, I have got to deal with a very simple problem. The question could well be asked: "Well, what about these witnesses, you can't keep them secret forever, they have got to come in some time and testify?" That is for sure! If we are going to make use of these witnesses they have to appear in open court and testify. But I think it is important to note again the provisions of the Bail Reform Act. After conviction it is no longer simply a question of whether or not the individual is likely to flee. It is also a question of whether or not he poses a danger to the community and the constituents of that community, and I think that gives a cause after conviction when we have exposed the witness to provide a very stringent incarceration requirement or bail requirement on a convicted defendant.

And, finally, if worse comes to worse, in the last analysis the relocation and a change of identity, and other protection features can be utilized after trial with much greater flexibility, and at much less cost than having to protect the witnesses from early on in the prosecution.

Finally, I think I have to repeat the very real concern that we as prosecutors and law enforcement officers have, and that is basically that unless we are able to provide protection to witnesses, members of the general public who are now willing to come forward with knowledge of criminal activities, unless we are able to give them some assurance that they will not be subject to some of these 713 types of harassment and intimidation and the like, we face a very real risk of a further falling off of the reporting and the willingness of the public to participate in the criminal justice process.

I thank you for the opportunity to present this point of view, and I would return, with the chairman's permission, to Mr. Keeney.

Mr. HUNGATE. Thank you, sir.

Mr. KEENEY. Thank you, Mr. Thornburgh.

Mr. Chairman, may I continue?

Mr. HUNGATE. Please. We will wrap it up as soon as we can because I want to afford the members an opportunity to inquire and we have another witness. If we divide our time between now and when we begin getting called to the floor, we need to conclude pretty soon.

Mr. KEENEY. The law now requires the giving of a very ample degree of pretrial notice to defendants. The indictment itself must contain a statement of all the essential facts. Defendants may then be given bills of particulars, elaborating the facts charged. Defendants

can use rule 16 to obtain their own statements and grand jury testimony, if any, as well as copies of reports of examinations and tests, and of other books, papers, documents, and tangible objects material to the case. Additional discovery is given informally in many cases, voluntarily by counsel, sometimes under prodding by judges, and sometimes as a result of pretrial conferences conducted under rule 17.1.

Mr. HUNGATE. Pardon me, Mr. Keeney. This statement is a part of the record. Would you please summarize the parts that you would most like to hit for about 5 minutes. That will give us all a chance to inquire, and we can see what areas are of most concern to the Members. That will also afford us an opportunity to get to the other witnesses who are waiting.

Mr. KEENEY. Very good, Mr. Chairman. I think we can rest largely on what I have said already, and what Mr. Thornburgh has elaborated on with respect to rule 16 and the interrelationship of rule 15. And I think that the point that we make in the statement with respect to witnesses against corporate and other business entities is sufficiently set forth so that there is no point in my going into them.

I would like to talk just for a couple of minutes, if I may, with respect to the alibi provisions. The provisions as presently drafted would reverse the procedure, and it would operate to require an exchange of information on the subject of alibi so as to avert trial surprise. But here there is a very significant risk that the defendants would abuse the provision, using it as a discovery device with unjust results. And we think that there is a serious risk here where defendants, by utilization of the alibi provisions which they can trigger on their own request, would find out not only what they can get under rule 16, which is the listing of the witnesses, but they can find out which of the witnesses are key to the transaction. For example, there might be an agent Jones listed as a witness, and Agent Jones might be a witness to give some technical information or background. On the other hand, Agent Jones may well have been the one who made the buy in the narcotics case. It is that type of thing we are concerned about. The triggering of disclosure of witnesses and the identity, witness identity and their role in the case is triggered merely on the request of the defendant.

Our proposal, and I understand we are supported by the American Bar Association in this regard, is to adopt something similar to the alibi provisions in the District of Columbia. Under their rules the triggering of the alibi defense and the disclosures that follow therefrom would be on a demand from the Government, so the Government would be in a position to control the situation and determine whether in any particular case it wanted to risk total disclosure of who the key witnesses are, and what their role is by making known to the defendants the particular witnesses.

Now, while we oppose the rule as drafted, we would find acceptable——

Mr. HUNGATE. Pardon me just a moment there. Do I understand that if the Government makes no move under your proposed amendment, then the defendant could still come in with a surprise alibi defense?

Mr. KEENEY. Yes, sir, he could.

Mr. HUNGATE. If the Government wanted to find out if he had an alibi defense, they would have to file the motion?

Mr. KEENEY. Yes, sir.

Mr. HUNGATE. Having done that, what would be the discovery consequences?

Mr. KEENEY. The discovery consequences would be that the Government would have to identify which of the rule 16 witnesses will controvert the alibi witnesses. The Government would have to give the time and place, the general conditions with respect to the key situation, and then list its witnesses, and the defendant would then have to list the alibi witnesses who would controvert that.

Mr. HUNGATE. Thank you.

Mr. KEENEY. Now, I might add here that the fact that the defendant in any situation triggers an alibi, triggers a mechanism providing for alibi defense does not require that he present the alibi at the trial.

We would prefer, if we are to have a rule in this regard, that it be along the lines of the rule in the District of Columbia which is set forth in my statement.

Mr. Chairman, I think that pretty well winds up the major rules that I wanted to address myself to. With respect to the other rules, we have comments on six or seven of the other rules, but we will rely on the previous submissions made by other people with respect to those rules, and we would be available for questions.

Mr. HUNGATE. Thank you, Mr. Keeney.

Mr. Wiggins.

Mr. WIGGINS. I would like to direct my question only to your testimony, at least on this first go-around, with respect to rules 4 and 9. I understand the present procedure is that the warrant is the normal process, but that U.S. attorneys have the option of requesting the issuance of a summons in lieu of a warrant. Is that correct?

Mr. KEENEY. That is correct, sir.

Mr. WIGGINS. Does not the U.S. attorney exercise some judgment based upon its perception of valid reasons for issuing a summons rather than a warrant?

Mr. KEENEY. He does, sir.

Mr. WIGGINS. Does not the new rule simply transfer that judgment to the magistrate or the issuing judge, if that be the case, so that he determines the validity of the reasons rather than the U.S. attorney?

Mr. KEENEY. Yes, sir. But it puts the burden on the Government to establish a valid reason for requiring the issuance of a warrant in this particular case as distinguished from other similar cases that might be before the court from time to time.

Mr. WIGGINS. I understand that. Yet the warrant goes out over the signature of a magistrate, and I presume that it is his responsibility to see that it is properly issued. And I can see some merit in permitting that magistrate to test the validity of your reasons. At the present time your reasons are unreviewable, and you simply get a warrant unless you exercise your unreviewable discretion to request a summons, am I correct?

Mr. KEENEY. That is right, sir. I might add, Mr. Wiggins, at this point in a number of our jurisdictions it is automatic to use a summons, or even what we call a post card notification in certain types

of crimes such as tax evasion where the circumstances indicate no need for the utilization of an arrest warrant. There is no indication that they are going to flee or other circumstances.

Mr. WIGGINS. Well now, the basic reasons for the issuance of a warrant, it seems to me from your testimony, are that you are fearful that the person to be arrested will flee the jurisdiction, become a fugitive, or that he may destroy evidence or otherwise make successful prosecution more difficult. Looking only to the second aspect of this argument; namely, the destruction of evidence, if you issue a warrant for an arrest, your ability to accumulate evidence is very stringently restricted now, is it not, to search those areas immediately adjacent to the defendant himself? That is, you cannot use the arrest warrant as a license to conduct a full blown search of this man's premises, can you?

Mr. KEENEY. That is correct, sir. But in that connection, I might point out in certain types of cases the search of the defendant in his immediate vicinity can be extremely productive if we are dealing with a gun case, if we are dealing in a narcotics case or a counterfeiting case, and sometimes the weapons or the contraband, the illegally obtained materials are kept on the person or in the immediate vicinity adjacent to him.

Mr. WIGGINS. Your ability to get contraband, and I am talking particularly about drugs, which may be immediately adjacent to the person is sort of a beneficial fallout from your search to determine whether or not he has a weapon to threaten the officer executing the warrant, as I understand the law?

Mr. KEENEY. Well, we have the right to search, not only search at the time of arrest, not only for contraband, and not only for weapons, but for evidence of the crime, sir.

Mr. WIGGINS. Well, I understand the rationale justifying the search as a protection of the officer executing the warrant, and you are not obliged to just overlook matters that you find incidental to that search. But, the basic rationale is the protection of the officer who is issuing the warrant, and I thought that was the basis for *Chimel* and other cases following.

Mr. KEENEY. The basic reason, you are right, sir, is the protection of the agent.

Mr. WIGGINS. Obviously it would require some change in the law, but I can see that rationale would apply in the case of an officer executing a summons as well as a warrant for the arrest, and the summons need not be sent in the mail. It can be executed personally by an officer now, is that not true?

Mr. KEENEY. It is true, sir. But the summons does not give any authority to take the person into custody, does not give any authority to make a search.

Mr. WIGGINS. Well, I recognize some change in the law is required. I think this gentleman is eager to say something?

Mr. GREENE. If I could, Congressman Wiggins, the language pertaining to destruction of evidence also covers the situation where, for example, under a summons, even if the police officer serves it personally on the defendant, the defendant is still in circulation after he receives the summons, so he has the opportunity to destroy evidence.

For example, this provision conventionally vitiates the effect of search warrants in many cases, because on the one hand where you can arrest the defendant for whom you have reason to believe might destroy evidence, you take him out of circulation, you can then get a search warrant for his premises, and then you do have a right to search; whereas under the proposed revision as it now stands it would virtually emasculate the purpose of the search warrant.

Mr. WIGGINS. Well, I have not mentioned search warrants yet, and I want to talk about that, but my time has expired. I would like someone just to respond to the question of whether or not it would not be wholly appropriate at the time of the execution of the summons to obtain a search warrant, if you can establish grounds for a search warrant, and you have almost all of the grounds necessary before you can even get a summons.

Mr. KEENEY. No, sir, that is not true. The fact that we have grounds to make an arrest does not necessarily give us grounds to make a search.

Mr. WIGGINS. I said almost all of the grounds. The only search that you can conduct incidental to an arrest is in the immediate vicinity of the person to be arrested. I realize that, and that continues if we do not amend the rule. If you want a more extensive search you are going to have to get a search warrant.

Mr. KEENEY. Yes, sir.

Mr. WIGGINS. Well, I am just thinking in terms of alternatives here, and I would think that maybe we could make some law permitting the same kind of a search that is incidental to a lawful arrest applicable in those cases incidental to the lawful issuance of a summons, because the same rationale applies; that is, to protect an official in the performance of his duties.

Mr. GREENE. Congressman Wiggins, if I could make one additional comment, you suggested that rule 4 would switch some discretion from the prosecutor to the magistrate or other judicial officer in the determination of whether the accused should be arrested or he should be summonsed. I think we should not lose sight of the fact that discretion on the fundamental question of whether there is probable cause to believe that the defendant committed an offense still lies with the judicial officer and, indeed, that question has traditionally been stated as a question as to whether there is a probable cause to arrest. That is, the question of arrest has historically, both constitutionally and under case law in this country been presumed to be the equivalent of the question of whether there is probable cause to believe that the accused has committed a crime, and what this provision does is to separate those two things.

Mr. WIGGINS. I have more questions, of course, but I will yield.

Mr. HUNGATE. The gentleman's time has expired for now.

The gentleman from Illinois, Mr. Russo.

Mr. RUSSO. Thank you, Mr. Chairman.

Having been a prosecutor with the State's attorney's office back home, I would like to comment on some things that I noticed that are different between the State's courts and the Federal courts. It seems in Illinois the State gives the defendant everything and the Federal courts do not give the defendant anything. When it comes to the rules of procedure, as far as discovery is concerned, it seems as if the Su-

preme Court sets the guidelines, and then the State courts go overboard and the Federal courts do not. In view of the States which have afforded defendants broad discovery and a summons procedure, do you believe these procedures will work in the Federal system?

Mr. THORNBURGH. Well, Congressman, you, as the expert on the Illinois State courts, and I, the speaker, as an expert only on the Pennsylvania State courts, I do not know. I think that it would depend on the jurisdiction. I think some of our fellows as prosecutors would complain that their State procedural rules are somewhat less forthcoming than the Federal criminal rules. In fact, that has been a frequent observation in my own State, that the Federal rules are looked upon as a more forthcoming type of criminal procedural rule. But I do not know the answer to the question, if such is the case, why there should be.

Mr. RUSSO. Most penal codes in your model rules of procedure provide for more discovery, and they provide for the issuance of summons rather than arrest warrants initially. It seems that the State courts adopt that approach but the Federal courts seem to fight that, and I am trying to figure out why it is used so readily in the State courts and opposed so quickly in the Federal courts. As a prosecutor, I can appreciate the problems you face. In many cases that I tried I have had the problem with witness intimidation, but you would still have the problem afterwards. After they testify you cannot guarantee their safety.

Mr. KEENEY. That is another problem though, Mr. Russo, after they testify. We have a very extensive program, and as Mr. Thornburgh pointed out, it is much easier to protect them after they testify. We can relocate them and give them a new identity and so forth. We have literally hundreds of people that we have had to put into that situation. Our concern here is to protect them at the most acute stage, the pretrial and the trial stage.

Mr. RUSSO. But, out of fairness to the defendant, do you think that he should be entitled to some notice as to who is going to testify against him so that he can adequately prepare his defense?

Mr. KEENEY. We give the notice to the defendant under rule 16, we give some notice to the defendants as to witnesses. I am afraid I am not getting the full purport of your question here.

Mr. RUSSO. Well, I just feel that more discovery is needed in the Federal courts. I do not know if it varies from district to district, but in my district it seems that the complaints I receive from the attorneys are that discovery is almost lacking, and they feel that you can simplify litigation, you can shorten trials, you can avoid unnecessary delays in trials, and that is where I think we have to cut down on the amount of time between arrest and trial if the defendant is there given sufficient discovery. Maybe not as broad as the discovery which has been proposed.

Mr. KEENEY. What we are opposing is mandatory disclosure of all witnesses. There is a great deal of disclosure under the present system. There is voluntary disclosure by U.S. attorneys in individual cases. There is other discovery which is brought about by the prodding of the U.S. district court. What we oppose is the disclosure of all witnesses, a mandatory requirement that the names of all witnesses be disclosed.

Mr. THORNBURGH. I would just underscore that, from my point of view as a prosecutor, that our practice, and I think the practice of most U.S. attorneys in the vast majority of cases is to open their files to the criminal defendants on a voluntary basis, and largely as a matter to induce pleas, and in over 80 percent, nearly 90 percent of the cases that are disposed of in the Federal courts.

Mr. RUSSO. Does that procedure vary from district to district?

Mr. THORNBURGH. It may, but I do not think that the principle is observed or not observed in some areas. It may vary in terms of degree. What I am speaking about here is the right in those cases where there is a very real threat involved to witnesses, and to the sanctity of the process to not impose a mandatory, willy-nilly disclosure of witnesses in every case. If I were a defense counsel I would like to have all of the witnesses named, statements, et cetera. By the same token, as a prosecutor I would like to be able to get a statement from the defendant. I cannot, and quite properly so, under our great Bill of Rights. But I think when you put it in terms of just saying well, let us just open everybody's file, and we will sit down around the table and see what the facts are here, you ignore the real street-level realities that you as a prosecutor are familiar with.

Mr. RUSSO. I do not agree. Do not misunderstand me. I do not agree in opening up the entire files, because I am still a prosecutor at heart.

Returning to rule 4, do you think it would be wise to issue a summons for nonviolent crimes rather than arrest warrants?

Mr. KEENEY. We do issue summonses very frequently in connection with nonviolent crimes. As a matter of fact, the example I gave of the income tax, in a lot of jurisdictions we almost automatically issue a summons, just a post card to the defendant to come in in connection with nonviolent crimes. But that would be, I am sorry, I am talking about an indictment situation rather than a complaint situation.

Mr. RUSSO. I do not have any further questions. Thank you very much.

Mr. HUNGATE. Mr. Hyde.

Mr. HYDE. No questions.

Mr. HUNGATE. Mr. Mann?

Mr. MANN. Mr. Greene, pursuing to a small degree the line that Mr. Wiggins was on, in the case of a summons—well, I am talking about a search warrant. What further basis for a search is there when you arrest someone and when you serve them with a summons? What is the difference?

Mr. GREENE. Well, for example, there is a doctrine of law known as the plain-view doctrine which indicates that when police officers, when the police arrest the individual, anything which they see in plain view at that point may be seized. Now, it may well be that the plain view, the plain view of a premises or an area where a defendant is located may also put them onto probable cause to believe that there is other evidence in that premises that could be seized, although they do not observe it in plain sight at that point. But, it is a sufficient observation to give them probable cause to obtain a search warrant for those premises.

Mr. MANN. Well, we are still relying on that incidental fallout by taking a person into custody that we would not get from serving a summons to give us a little further basis to request a search warrant.

Mr. GREENE. Well, clearly if the officer served the summons personally and observed the same thing in plain view he could still get a search warrant. But of course, the search warrant would be meaningless at that point, I would submit, in a large majority of the cases because the defendant is not taken out of circulation, and whatever evidence might have been secreted on the premises probably will not be there when the police get there to execute the warrant.

Mr. MANN. I clearly understand what you are saying, and I clearly understand also the incidental benefits that we get from arresting people. It looks like there ought to be a better way. Of course, when you serve the summons, as you indicate, he has got time to go to the office, or back down to the joint, or most anywhere to cover up his evidence a little bit, or maybe even contact a witness or two on various things in order to hamper the prosecution when you have just served him with a summons. I recognize that. And I recognize that the incidents that come from the benefits of making an arrest and holding him in custody give the means of the law a little bit of extra clout, because they can take advantage of what they have discovered by taking him into custody for something that he might have said and try to get a little more evidence while he is being held.

Mr. GREENE. Congressman Mann, with all due respect, I submit that the proposed rules 4 and 9 turn the constitutional provision with reference to need for probable cause to arrest on its head. I think that we cannot forget that before there can be an arrest or a summons there has to be probable cause to believe the accused has committed a criminal offense. When a police officer arrests a man on the street without a warrant, he can still arrest him if he has probable cause to believe that the defendant has committed a criminal offense and, indeed, in the case of *United States* v. *Robinson*, the Supreme Court extended that principle even to where the police arrest an individual for a traffic offense which is an offense for which they would otherwise have reason to take him into custody. So I think we should not lose sight of the initial requirements that there be probable cause to believe that the defendant has committed a criminal offense, and that we should view the arrest or the summons question in that context rather than in the context of the police just being able to use the arrest procedure to obtain additional evidence.

It is a traditional part of our jurisprudence that when people commit crimes they can be arrested and detained for those crimes.

Mr. MANN. That is all very interesting. But I am just articulating what you are not, and that is the prosecutor's frustration that we have to rely upon some little fallouts from arrests of a completely nonviolent person, that there is no particular reason to take into custody because we want to gain the advantage of the arrest and all of the illegal little bits and pieces that might come from it. Now, that is the bad part, and you have also told me that because of all of those little bits and pieces we are in a better position to get a search warrant. Well, it should not be that way.

Mr. GREENE. I do not at all think, Mr. Congressman, that the prosecution should rely on any illegal evidence that is obtained, and I do not think the present law entitles the prosecution to do that nor, of course, would the proposed revision.

Mr. MANN. So we are just stretching it a little bit if we exercise that arrest and that right to check on a weapon in order to make plain view of the still, or plain view of something else, and that then gives us the basis on which to go and get a search warrant. You have done exactly what I said, you have tried to circumvent what is a too strict rule perhaps with reference to search and seizure.

Yes, Mr. Thornburgh.

Mr. THORNBURGH. Congressman, could I throw just one additional factor in here. There is a potential problem here that is vexatious in terms of the economy of time and litigation in the courts. Imagine the situation, for example, where an arrest is authorized on a finding of probable cause that a crime has been committed, and the warrant is issued on a finding of a valid reason for use of it, and evidence is seized. It does not appear clear as to whether or not that evidence might be suppressed, not because there was no probable cause, but because there was no valid reason for the issuance of the search warrant, and what we are doing here is introducing another whole field of potential litigation over the exclusionary rules by saying sure, there was probable cause to think he committed a crime, but there was not enough valid reason to use the arrest warrant. And you have introduced another whole stage of litigation over the introduction of evidence in a needless way without any real showing there is a necessity.

Mr. MANN. I agree.

Thank you, Mr. Chairman.

Mr. KEENEY. You focused on just one of the aspects of the arguments that we have made with respect to requiring that the summons be utilized as a matter of course. There are others, and the one that I would emphasize most strongly is giving the prosecutor the discretion to utilize a warrant particularly in those situations where we are dealing with a dangerous individual. And it lessens the degree of risk if the law enforcement officer is going to arrest somebody who is not aware he is being arrested.

Now, I realize that the counterargument to that is well, if he is a dangerous person you will be able to make your sufficient showing, but we would not necessarily. We would not be able to distinguish between bank robber A and bank robber B. And as I understand the rule, it would not allow us to automatically get an arrest warrant for every bank robbery that is committed. I think it is a problem when you are shifting the burden to the Government, and the Government cannot meet it in every case, and it is going to result in a high number of fugitives, it is going to result in Federal agents being severely injured and killed in situations where they need not be.

Excuse me.

Mr. HUNGATE. Thank you. Do I understand that you are rather strongly opposed to rules 4, 9, 12.1, and 16 in their present form?

Mr. KEENEY. Yes, sir.

Mr. HUNGATE. Does that mean you might be able to live with the others?

Mr. KEENEY. We find them less objectionable, Mr. Chairman, and we would rely on the comments that we put in previously with respect to them. Our primary focus here today are on the rules that we have addressed ourselves to.

Mr. HUNGATE. I take it—and I am not overlooking that you stand by your previous statements on other rules—that those I named are the ones of great concern to you?

Mr. KEENEY. These are the ones of great concern to us; yes, sir.

Mr. HUNGATE. Mr. Russo made a suggestion that rules 4 and 9 distinguish between violent and nonviolent crimes. Would you have a different position if they did?

Mr. KEENEY. Well, I still have a problem. You say nonviolent crimes, and nonviolent crime can be committed by a violent person.

Mr. HUNGATE. Or a violent crime by a nonviolent person, I guess.

Mr. KEENEY. It is true. We very strongly would prefer that the status quo be maintained, and that the discretion as to whether or not a warrant shall issue resides in the United States attorney.

Mr. HUNGATE. If the Congress has a strong sentiment to agree with the policy of proposed rules 4, 9, 12.1, and 16 you have suggested alternatives that would be preferable to the drafts now before us?

Mr. KEENEY. Yes, sir.

Mr. HUNGATE. In the case of rule 12.1, notice of alibi, you find the District of Columbia rule preferable?

Mr. KEENEY. Yes, sir.

Mr. HUNGATE. What about the mental examination part of it; do you object to that or is that all right?

Mr. RAY. I recall from my previous testimony last fall, Mr. Chairman, that we believe that the rule should be modified so that the judge would not be precluded from having an additional examination. The rule as written may be construed as limiting that.

Mr. HUNGATE. That is right. I recall that now. Thank you.

Would you explain your comment on page 6 of your prepared statement that under 12.1, a magistrate runs a serious risk of reversal if he authorizes a warrant instead of a summons.

Mr. KEENEY. Yes, sir. We think the rule creates additional legal problems as to whether or not his action in issuing a warrant was justified under the circumstances.

Mr. HUNGATE. How would that justify a reversal?

Mr. KEENEY. It might result in reversal if he issued the warrant, and the warrant resulted in——

Mr. HUNGATE. Discovery of evidence?

Mr. KEENEY. Discovery of evidence and the evidence is suppressed.

Mr. RAY. Mr. Chairman, might I say just one word here. My problem in the district that I come from, and for Mr. Russo's benefit I have been a State prosecutor, and been in the Federal justice system since 1961, and a good many State's attorneys have been prosecutors who have been submitting these, but the problem here is that we are introducing into the system here something which instead of having speedy trials we are going to raise issues which really contribute nothing really to the guilt or innocence of people, and bog down the system. And this is the problem I have, is when we get into creating rights which are not required under the Constitution that we are going to flood the courts, and the critical stages of speedy trial, and our appellate courts are already at the breaking point. And I personally think that if we are not dealing with constitutional rights that

we ought to look hard and fast as to really what these things really do to get at the truth of a case.

Mr. HUNGATE. Well, we have been talking about the bank robber this morning. I suppose one of our problems is that we are dealing with an alleged bank robber. Of course, this fellow is going to go to jail under the warrant system, and some alleged bank robbers are acquitted. We have to consider that we have not really determined that someone is a bank robber until he is tried.

Mr. GREENE. Mr. Chairman?

Mr. HUNGATE. Yes.

Mr. GREENE. With reference to that statement, as I think Mr. Thornburgh indicated, the conviction rate for these kinds of offenses not only suggests that there is a substantial likelihood of guilt in any given case but, of course, there has been a determination again, I would note, of probable cause to believe that the accused has committed a crime. So although he has not been convicted, there has been evidence submitted to the magistrate or another judicial officer.

Mr. HUNGATE. Yes, and under the rules as proposed would it not be possible for the magistrate to make a determination that the same man should be arrested because of the existence of the same facts?

Mr. GREENE. Excuse me?

Mr. HUNGATE. Could he not have enough facts, so that he might under the rules as proposed say that there is a valid reason for an arrest warrant?

Mr. GREENE. Well, he certainly could. But one of the——

Mr. HUNGATE. Why is he not the right one to do that?

Mr. GREENE. Well, one of the very problems is what is a valid reason. There is no definition, for example, of valid reason in the proposed rules. The American Bar Association Criminal Justice Section will propose one to you later, which we frankly find very disturbing because it requires not only that the man be charged with a crime of violence to find a valid reason to arrest him, but it also requires that there be reason to believe that he is going to destroy evidence, or flee, and if he is not charged with a crime of violence, even if you think he is going to flee or destroy evidence, you cannot arrest him under the proposal. And, of course, the litigation problem that Mr. Keeney spoke of in terms of applying the exclusionary rule to exclude evidence seized, where there is no valid reason found, is also a conceivable problem and accounts for the reason that——

Mr. HUNGATE. On page 14 of the prepared statement, you discuss the witness list provision. My dim recollection of my prosecuting days in Missouri is that if I did not endorse those felony witnesses on the information the required length of time before trial I could not call them. I have some trouble with your complaint like Mr. Russo has. It seems to me that our State procedure already provides more discovery. Let me ask you about the 3-day window—and this is true in capital cases?

Mr. THORNBURGH. Capital cases.

Mr. HUNGATE. In those cases, you have to reveal all of the witnesses, but only within 3 days of trial. Would a change like that in rules 4 and 9 be helpful or not helpful enough?

Mr. KEENEY. It would be better.

Mr. HUNGATE. Mr. Thornburgh?

Mr. THORNBURGH. We are hanging by our fingernails, Mr. Chairman, and I think when you look at the situation that this rule envisions, such a provision would look pretty good. But again, I think from the point of view of the particular case that we are wondering about——

Mr. HUNGATE. Are we not getting a high conviction rate?

Mr. THORNBURGH. Yes, I think we are getting a high conviction rate due to a lot of pleas, whereas I indicated we do open our files. Those are not the cases that I am really worried about. I think that the 3-day proposition has one thing to recommend it, and that is that it reduces the exposure of the witness, but——

Mr. HUNGATE. And you have to protect him afterward anyway.

Mr. THORNBURGH. Yes indeed. I am just trying to, and maybe I am overstating my case, but I want to avoid any perception of this subcommittee that we are a bunch of paranoids coming in here raising parades of horribles. These are very real questions, and we feel them very deeply, and I take it unto myself as a very rather heavy burden to speak for all 94 U.S. attorneys, but I assure you these are not raised lightly.

Mr. HUNGATE. The committee appreciates the concerns.

Now you state that: "additional discovery is given informally in many cases, voluntarily by counsel, sometimes under prodding by judges, and sometimes as a result of pretrial conferences under rule 17.1." Now, if this is done in a vast majority of cases, then why can we not formalize it. Would we not really be just damaging a very small area, if any? Is that not right?

Mr. THORNBURGH. Not by the numbers, Mr. Chairman. I think when you get into the cases we are concerned about, they are really the most significant and substantial criminal prosecutions that the Federal Government, Department of Justice undertakes. There are cases where the resources and influences——

Mr. HUNGATE. Now, what happens where the case is one of those in which the defendant is not going to get any informal discovery—it is not going to come voluntarily from counsel, and the judge is not prodding. Your statement says that the defendant has his own fund of knowledge to bring to bear on the matter. Well now, if he has got me for a counsel he has a small fund and he is overdrawn.

Mr. KEENEY. Well, he knows the facts. He has got an indictment which charges him with committing a crime, and the time, place, and circumstances are either set forth in detail in the indictment, or he gets a bill of particulars with respect to it. So, he knows a great deal about starting out, even assuming he is an innocent defendant, Mr. Chairman.

Mr. HUNGATE. Mr. Hutchison has a question that Ms. Holtzman wanted us to raise. You may respond in writing, if you wish.

Mr. HUTCHISON. The question refers to material on page 8 of your prepared statement, and also to part of a letter dated June 17 from the Attorney General, Mr. Saxbe, which is reprinted in our commentary. The letter states, "The Department of Justice had the opportunity to comment on the preliminary drafts disseminated by the Judicial Conference, but the final draft submitted to Congress did not receive a review and consideration by this Department."

Ms. Holtzman would like to know in view of the statements in the letter and on page 8 of your prepared statement what was the Department's role in drafting these rules. The Department has a representative on the Standing Committee of Rules and Practice and Procedure?

Mr. GREENE. If I could, Mr. Hutchison, what essentially happened was early on in the drafting of these rules, during the first and second preliminary drafts, as I understand it, the Department was actively involved, as you have indicated and as Congresswoman Holtzman has indicated in the drafting of the rules. But when they went back to the court for the third drafting, and that third draft was eventually promulgated, as I understand it in the final proposal to the Congress, there were some very significant changes which were made without consultation either with the Department of any of the other bar groups.

For example, I know the American Bar Association was very disturbed that they were not consulted in this process and, for example, the changes in rules 4 and 9 that they are concerned about and some of the broader discovery provisions were not included until that final draft. [See Department of Justice response by letter dated March 31, 1975, p. 121.]

Mr. HUTCHISON. Who prepared that final draft? Are you referring to the Standing Committee or the Supreme Court?

Mr. GREENE. I am referring to the Supreme Court.

Mr. HUNGATE. Mr. Wiggins.

Mr. WIGGINS. I just want to touch upon a problem that I see that you have not commented upon in your prepared text. At the present time, if a warrant is issued, and if a person taken into custody and released pursuant to the Bail Reform Act or other appropriate statutes and flees the jurisdiction and remains a fugitive for such a period of time that the original prosecution has grown stale and you cannot proceed on that prosecution, you do proceed under the bail jumping statutes or something to that effect, is that true? And if that is true, are you satisfied that that statute is broad enough to cover the case of a person who flees the jurisdiction following the issuance of a summons without being taken into custody?

Mr. RAY. No, it does not cover summonses.

Mr. WIGGINS. It would seem that that is something that this subcommittee ought to look into if it would leave you without any weapon at all to prosecute a person who has been issued a summons and then thereafter became a fugitive for such a length of time that the basic prosecution cannot proceed. Would you not agree?

Mr. RAY. Yes, I would agree. And one other thing that comes to light along in this area and it jumps on over after trial, under the Bail Bond Reform Act, you know, the burden is on the Government to show why a person should not be out on bail, and once we get a conviction, of course, under the Federal Rules of Appellate Procedure the burden does shift, so we are a little better off under the appellate rules once we do get the conviction. But I do agree with what you said.

Mr. WIGGINS. Thank you.

Mr. HUNGATE. Thank you, gentlemen. I notice on page 17 of your prepared statement a more philosophical issue that also gives me trouble. A trial should be a search for the truth and not a game. Mr. Thornburgh touched on the fact that we have other policies that affect the search for the truth. Every time I face that problem I read Oedipus Rex again and wonder what the truth is, or when we are ever blessed to know it. Something I think which may be appropriate is in the American Bar Association standards on the administration of criminal justice.

> The lawyer knows that his system of procedure is man-made and not exclusively oriented to the discovery of absolute truth. It is subject to limiting rules directed to higher values and larger purposes than a system which might guarantee the conviction of every transgressor. Just as we reject, for example, torture and other techniques which are inhumane, we also reject certain modes of investigation, which although not inhumane are incompatible with values of a free people. The Constitution forbids various investigatory mechanisms which would be highly efficient, the general warrant being only one of these. Moreover, a man-made system inevitably finite and fallible must provide safeguards to accord this fallibility proper recognition. Since some error is inevitable, the common law adversary system deliberately chooses to err on the side of risking acquittal of some who are guilty in order to make near certain that no one innocent person will suffer conviction.

Of course, as prosecutor your duty is, as is that of defendant's counsel also, to see that the innocent are not convicted.

Mr. THORNBURGH. May I suggest, Mr. Chairman, it might be appropriate to factor into that analysis a consideration of the well-being of members of the general public who must come forward and testify in open court about wrongdoing, for without them there would be no prosecutions. And if we are going to dry up that source by exposing them early on in the process to the types of depredation that I have hinted at today, I think we may be exalting the truth searching process on the other side of the fence.

Mr. HUNGATE. The 94 U.S. attorneys chose wisely, Mr. Thornburgh.

Mr. THORNBURGH. They did not have any choice, Mr. Hungate.

Mr. HUNGATE. Thank you gentlemen very much.

[The following letter is in response to a question raised by Hon. Elizabeth Holtzman (see p. 119–120):]

DEPARTMENT OF JUSTICE,
Washington, March 31, 1975.

HON. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN: This is in response to your request that the Department of Justice explain its role in the development by the Judicial Conference of the United States of amendments to the Federal Rules of Criminal Procedure.

The Assistant Attorney General in charge of the Criminal Division is an ex officio member of the Advisory Committee on Criminal Rules of the Judicial Conference. By virtue of that fact, the Department has consistently played an active part, along with other segments of the bench and bar, in the development of recommendations for amendments to the criminal rules. The Department of Justice is not represented on the Standing Committee on Rules of Practice and Procedure, which reviews the work of the Advisory Committee, with the power to make amendments thereto, and then transmits its recommendations to the Judicial Conference and then to the Supreme Court for consideration and ultimate promulgation pursuant to the enabling acts, 18 U.S.C. 3771, 3772. Notwithstanding our lack of formal representation on the Standing Committee, the Department has

generally enjoyed a fruitful relationship with that Committee and is regularly consulted, along with others, as to any substantial changes to be made to proposed rules by that body.

In the present instance involving the amendments pending before your subcommittee, the problem—as outlined in our recent testimony—is that the Standing Committee for some reason departed from its customary practice and failed to solicit the views of the Department and the legal community with respect to very substantive changes it made to proposed Rules 4 and 9. Accordingly, the Supreme Court, which promulgated the Rules as submitted by the Standing Committee, did not have the benefit of our commentary or that of the bench and bar on these revisions of the Standing Committee. The Department believes that the failure of the Standing Committee to seek its views and those of the responsible legal community on the proposed changes was unfortunate and led the Committee to go too far. We reiterate the position, expressed previously in our testimony, that adoption of Rules 4 and 9 as proposed would have a distinctly harmful impact on criminal law enforcement.

Nonetheless, we wish to make clear that we are not recommending a change in the law that would reduce the role of the Judicial Conference and the Supreme Court in the promulgation of rules of criminal procedure. In our estimation, the present system has worked, on an overall basis, exceedingly well and has resulted in numerous advances in the procedural field. The single instance of which we are complaining as regards Rules 4 and 9 is an aberration that we have every reason to expect will not be repeated. That incident does not justify tampering with the system itself nor with the judiciary's role, under the enabling acts, in promulgating procedural rules. That role should be maintained. As noted by Roscoe Pound nearly half a century ago:[1]

It was a distinct mistake when, in the middle of the last century, legislatures, in a wave of exasperation at the disinclination of the legal profession to take up reform of procedure, began to prescribe the minute details of the conduct of proceedings in the courts. No such mistake has been made in the present generation with respect to the procedure of administrative tribunals. But the habit of legislative dictation of the minutiae of judicial procedure dies hard. The process of legislative rule making is too dilatory, too cumbersome, too ill-informed, too subject to pressure from organizations representing but a fragment of the interests involved, to be suited to the needs of today. Judicial rule making, especially with the aid of judicial councils, is the line of advance for procedure. * * *

Sincerely,

JOHN C. KEENEY,
Acting Assistant Attorney General.

Mr. HUNGATE. Is Mr. Cole present? We welcome you. And Mr. Hoffman, who we have had on both sides of the table now. You have a prepared statement, and without objection it will be made a part of the record. [See p. 147.] You may proceed as you see fit. The Chair would indicate a desire to get to questioning, let us say, within 15 minutes if possible, so that the Members may focus on what seems of greatest interest to them.

Thank you.

TESTIMONY OF ALAN Y. COLE, VICE CHAIRMAN, SECTION OF CRIMINAL JUSTICE, AMERICAN BAR ASSOCIATION, ACCOMPANIED BY HERBERT E. HOFFMAN, DIRECTOR, ABA GOVERNMENTAL RELATIONS OFFICE

Mr. COLE. Thank you, Mr. Chairman and members of the committee. Since my statement will become part of the record, and because the hour is late, I will try to skip portions of it and touch upon only those that seem to be more important, or perhaps even responsive to some of the statements made by the representatives of the Department of Justice.

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[1] Criminal Justice in America, pp. 208–209 (1930).

First, let me say that my name is Alan Y. Cole and I am appearing here today with the approval of the house of delegates of the American Bar Association to present the views of the section of criminal justice of the American Bar Association. I personally am vice chairman of the criminal justice section of the American Bar Association, and I am chairman of that section's committee on rules of criminal procedure and evidence. I am also a member of the house of delegates of the American Bar Association representing the District of Columbia Bar. And in professional life I actually try cases, both civil and criminal, in the Federal courts.

Before I go to the substance of the statement I want to make one important thing clear—that the members of the criminal justice section of the American Bar Association represent every segment of the criminal justice system. This means prosecutors, judges, public defenders, private defense lawyers, corrections officials, persons engaged in investigation and enforcement, law school professors, and students. All together, the section numbers approximately 12,000 people. When these proposed amendments first came within the study of the criminal justice section, they were studied by a special committee which included among its members Federal prosecutors, a U.S. Justice Department representative—who was, incidentally, one of the gentlemen who was testifying here this morning with Mr. Keeney—a U.S. district judge, and a lawyer active in the defense of criminal cases in the Federal courts. That committee prepared an extensive report on an item-by-item basis; that report was then turned over to the council of the section of criminal justice, which is the governing body of this 12,000-member group.

The governing council considered the report and reviewed the proposed amendments for 2 days last fall. I cannot emphasize too strongly that the views I represent here today are a balanced series of views not intended to favor either the prosecution or the defense or, indeed, the judiciary. Rather, they represent broad-gaged viewpoint, what a diversified group of people concerned about and familiar with the criminal justice system believe is in the public interest.

Before getting to specifics, I would like to make one other observation: I think all of you are familiar with the American Bar Association Standards Relating to the Administration of Criminal Justice. A key job of the criminal justice section of the American Bar Association is to implement those standards. As the committee knows, those standards cover almost every phase of the criminal justice system, they have been approved by and constitute the official policy of the American Bar Association.

Thus, to the extent that the proposed amendments to the Federal rules are consistent with these standards, the amendments have been readily embraced; to the extent that the proposed amendments conflict with the standards, they have been revised in an effort to bring them into conformity with the standards. And in instances where there are no ABA standards to provide any kind of a measurement, the section has formed its own judgment. In general, the criminal justice section supports the proposed amendments, with one major exception—we recommend that a proposed amendment to an entire rule 15 be rejected;

in other instances, we have proposed changes which are set forth in the statement.

I would now like to address something which obviously concerns the committee—the problems with rules 4 and 9, the issuance of the summons in place of the warrant. First, let me say that the emphasis on the warrant is consistent with the ABA standards. Consequently, we strongly urge the adoption of the proposed amendments to rules 4 and 9.

Mr. HUNGATE. Do you support rules 4 and 9 as promulgated?

Mr. COLE. No. We suggest, however, the adoption of a definition for the words "valid reason" and I have set that definition out in my statement. I would like to read it to you because I think it will cover many issues raised by the representatives of the Justice Department:

> A valid reason exists for the issuance of an arrest warrant rather than a summons where the defendant is charged with a crime of violence, if the Magistrate finds that issuance of a summons rather than a warrant may afford the defendant an opportunity to secrete or destroy evidence of the offense, or flee upon being summoned. A determination by a court after arrest that no valid reason existed for an arrest in lieu of a summons shall not be grounds for the suppression of evidence seized incident to the arrest, or to a search incident thereto.

In other words, the last sentence would eliminate the concern raised by the Justice Department representatives that another level of litigation would be created. If the first part of the proposed language is adopted, and it would meet the problems raised by the Justice Department—regarding fugitives and the destruction of evidence. It would cover the problem on which members of this committee have expressed a concern—that an arrest warrant should be used as a means of arresting only in cases involving crimes of violence; that it should not be used to round up such persons as income tax violators.

That concludes my remarks on rules 4 and 9. Perhaps it would be best, Mr. Chairman, to break at this point for any questions on these rules before we proceed to others.

Mr. HUNGATE. Mr. Hyde?

Mr. HYDE. I take it then, sir, that referring to your definition of a valid reason on page 4 of your prepared statement, the only reason that you could possibly get a warrant would be for a crime of violence?

Mr. COLE. That is correct.

Mr. HYDE. I would point out to you the case of Warren Mensic, the president of the savings and loan in my community and say to you that $19 million more or less disappeared along with Mr. Mensic. He is still up in the hills of Arizona or somewhere. An awful lot of people were driven over the edge of brankruptcy by this fraud. It seems to me utter nonsense to confine this to a crime of violence where very serious crimes exist where violence might follow the uncovering of the crime. I also do not agree with the myopia or the tunnel vision in confining your "valid reason" to crimes of violence where the violence done to the victims is often economic violence.

Mr. COLE. Mr. Hyde, can I ask this question? Was an arrest warrant issued for Mr. Mensic at the outset of that prosecution?

Mr. HYDE. I really do not know, but I know he fled, and I know he later was apprehended. He then walked off a Federal prison. And

he has not been found yet. But, to this day I hear from people wondering where their money is.

Mr. COLE. I understand that. But the point I am trying to make is, in his circumstances, I do not think it would have made any difference whether this definition existed or not. He ran away, and when people run away—whether you are after them with an arrest warrant or a summons—you have a problem in finding them. But the distinction the section is trying to make is in the day-in-and-day-out cases in which most people come in. As a matter of fact, a summons does not even have to be served on them. In many instances if you call the persons' attorneys and tell the attorneys to bring them in, they will bring them in. So the whole notion of going around and arresting people in cases in which arrests under these standards are not required is something which we find unnecessary. That is why we make this proposal.

The definition we have suggested is a workable one. If for any reason members of the committee think it should be changed, this is something you might do. But certainly, if you stay with this frame of reference, you will eliminate all the objections voiced by the Justice Department.

Mr. HUNGATE. Mr. Russo?

Mr. RUSSO. How about in such nonviolent crimes such as drug trafficking, if the ABA standard for valid reason becomes a part of the amended rule No. 4?

Mr. COLE. If it is an offense which is a straight narcotics offense, it is probably not a crime of violence. If there are any violent relationships attached to it, if the indictment calls out anything in addition to a straight violation of the narcotics laws, you might have a crime of violence.

Mr. RUSSO. You also have what the Justice Department was describing as the loss of evidence problem.

Mr. COLE. That is right. But I also subscribe very strongly to the theory suggested by Mr. Mann, and I think Mr. Wiggins as well, that one does not use arrest warrants to obtain evidence. If one wants to find some evidence, go out and get a search warrant, and go and get the evidence. But the notion of perverting the arrest or summons process into a technique by which one accumulates evidence is offensive; I share the views of Mr. Mann and Mr. Wiggins.

Mr. RUSSO. I think the theory of using the arrest warrant is just for that reason, I think it is wrong, but I think what the Justice Department was pointing out was if the evidence was there, why give the defendant a chance to throw it away? Why tie the hands of the Justice Department?

Mr. COLE. I recognize that point of view. On the other hand, if the committee has to choose, you have to make a choice between whether this is what an arrest warrant is to be used for, or whether a search warrant should be used for that purpose. Somewhere the line must be drawn. The cases, particularly the U.S. Supreme Court cases on this subject, have held that these things can be done when they seem to have been fall-out and accidental. What you have been hearing today by distinction is a deliberate, purposeful use of a procedure which was never designed for that purpose. That is the distinction that I would make.

Mr. HUNGATE. I suppose you could strike the language "where the defendant is charged with a crime of violence" so that the definition could apply to either sort of crime.

Mr. COLE. You could do that; or you could change the comma after "violence," to the word "or," and that would solve the problem. It would not be limited to crimes of violence, it would be crimes of violence——

Mr. HUNGATE. Or other crimes if where he makes this finding.

Mr. COLE. Yes. You understand, Mr. Chairman, that I am presenting the views of the ABA Criminal Justice Section, but I am answering questions as an individual.

Mr. HUNGATE. I understand that.

Mr. Mann.

Mr. MANN. I believe that your last suggestion is an answer to my question, because I consider there are so many crimes where people are more likely to flee than they are in crimes of violence. I think that is probably one of the lesser probabilities, and certainly with reference to the secretion of evidence, crimes of violence offer very little evidence to be hidden.

Mr. COLE. I would agree.

Mr. MANN. In fact, it is the other ones, the embezzlements, or the drugs, or whatnot. So I would hesitate to agree that we should restrict it to crimes of violence on the use of the warrant. But you have made a couple of good suggestions in that section. Thank you.

Mr. HUNGATE. You may proceed.

Mr. COLE. I would like to go to rule 11. Rule 11, as the committee probably recognizes, is one of the most provocative of this package because it embodies for the first time formally in any Federal document the whole plea negotiation procedure. The American Bar Association Standards for Criminal Justice are consistent with proposed rule 11, and it is consistent with the American Bar Association Standards.

While we recommend the adoption of the proposed amendments to rule 11, we do, however, suggest that one change be made in two sections of proposed rule 11—in (e)(2) and in (e)(4). In each of these areas it is provided that the plea bargaining is to be proposed in open court, and presented to the judge in open court; also, in (e)(4), in which the judge decides to reject the plea bargaining, he is to reject it in open court. We recommend that in each instance the words "on the record" be substituted for the words "in open court." We do this for two reasons. First, we are concerned regarding potential Government problems involving cooperative witnesses and informers who may be bargaining for a plea in one instance, in return for cooperating to testify in other cases.

Mr. HUNGATE. Subsections (e)(2) and (e)(4)?

Mr. COLE. That is correct. This would provide a protection to certain Government witnesses if the Government is not anxious to have spread in the media and throughout the community the fact that a person has made a plea bargain and will be cooperating in a subsequent case.

There is another reason—from the point of view of the defense lawyer—in cases of high notoriety of high-profile cases. If a plea bargain is presented in open court, and if it is rejected by the judge,

that defendant would hardly be able to get a fair trial at a subsequent time. So the American Bar Association recommendation here is that the words "in open court" be changed to "on the record," so it is still part of the formal proceedings, but it need not be spread publicly. But for those proposals, we recommend adoption of rule 11.

Mr. HUNGATE. Any questions at this point?

Mr. RUSSO. Yes, sir.

Mr. HUNGATE. Mr. Russo.

Mr. RUSSO. I have a question. How about in that particular section changing the phrase "on the record" to "either in open court or on the record," at the discretion of the judge?

Mr. COLE. If you like, that says essentially the same thing.

Mr. RUSSO. So that in that type of a case the judge in his own discretion can put it on the record in open court or not.

Mr. COLE. I think, Mr. Russo, the suggestion that it be "on the record" would not preclude a judge from doing it in open court. It would also make it possible for the judge, at least at the request of either defense counsel or prosecutor to do it on the record, but not in open court. If you think your language is better, that is no problem. We simply set forth the idea.

Mr. RUSSO. OK.

Mr. COLE. Now, rule 12 is not one of the more provocative parts of this package. Here we have proposed a first sentence to be placed in subdivision (e), cited on page 8 of my statement:

> A motion made before trial shall be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict, but no such determination shall be deferred if a party's right to appeal is adversely affected.

The purpose of our recommendation is to discourage the tendency of some judges to reserve ruling on pretrial motions until after trial, in the hope that a jury's verdict will make those determinations unnecessary. This is commonly referred to in the trade as "hoping the jury will take the judge off the hook." You are thus putting a case to trial when in the end the judge may rule that there was no case to begin with. Our proposal here is an attempt to get pretrial motions which can be determined prior to trial and not reserved.

Mr. HUNGATE. Without naming any judges or specific cases, can you give us an example to illustrate that problem?

Mr. COLE. Yes. I can give you a specific example involving a case, in which I was involved. This was a case in which we had urged from the outset that the indictment be dismissed. We said that the indictment as written did not state a crime under Federal statutes.

The matter was deferred and deferred, and then as a matter of fact, was removed from one judge to another; ultimately we went to trial without having the motion resolved in any specific way, although I think at some point the clerk actually wrote down that the motion had been denied because we were at trial.

Mr. HUNGATE. Was that an appealable ruling?

Mr. COLE. Let me proceed. I think you will see what the problem was. Subsequent to the trial I made a motion for an arrested judgment on the grounds that this was still not a crime that had been stated, even though after trial and a jury finding of guilty we were still arguing this. And the judge at that time, with nothing left but

to face that legal issue, indeed, did face it and held that it did not state a crime under the Federal code. I am sorry to say that the court of appeals subsequently reversed him. But that still has not been resolved, because the case will probably go up to the Supreme Court. But that is an example of what we are talking about. If that determination had been made prior to trial, there would not have been a trial, the Government would have had a right of appeal, as it did in this instance. So the purpose of this proposal is to see that these pretrial motions are decided pretrial if they can be, unless there is some special reason.

We also make a recommendation about some minor word changes on which I do not want to waste the time of the committee. It is contained in my written statement.

As the Justice Department representative indicated, we favor the adoption of the District of Columbia rule with respect to the notice-of-alibi defense, and we have set out as an appendix to my statement the precise language of the District of Columbia rule, melded into parts of the proposed amendment, to make it a totality. If it is the committee's view that the approach in the District of Columbia be followed, rather than the approach in the proposed amendment, then I suggest that the language of that proposed rule in our appendix will serve your purpose.

We think, as did Mr. Keeney and his colleagues, that this whole procedure should be triggerable by the prosecution and not by the defense. Beyond that there is no difference between the rule as proposed by the Supreme Court and the District of Columbia rule. It is only a question of who starts the process; we were persuaded by the Government representatives on the section council and committee that they should start the process rather than have the defense lawyer do so.

Mr. HUNGATE. If they do not start the process, then they are subject to whatever surprise might be occasioned by an alibi?

Mr. COLE. That is correct, except that discovery rules in rule 16 might touch upon it, if it does not, if the Government does not want it to start, it is not started.

Mr. RUSSO. Mr. Chairman, I have a question on rule 12.

Mr. HUNGATE. Mr. Russo.

Mr. RUSSO. In rule 12(d)(2) there is no provision or no sanctions provided in the rules in the event the Government fails to comply with the defendant's request for discovery. I was wondering if we should include in rule 12(d)(2) a clause if the Government fails to produce the evidence as requested either through inadvertence or strategy, that the evidence will be suppressed unless the Court, for cause shown, believes that there is some reason to grant the waiver. Again, if it puts the Government on notice of the consequences of malfeasance, and yet gives them the chance to get reasons for their failure to produce evidence, I think there should be something in there.

Mr. COLE. I would be inclined to agree with you, Mr. Russo, although this was not something that was considered by the criminal justice section.

Mr. RUSSO. OK. Thank you.

Mr. HUNGATE. I am troubled by your statement about alibi surprise. You seem to think that the prosecutor might discover that the defendant was going to rely on alibi through rule 16 discovery.

Mr. COLE. My guess is, Mr. Chairman, that where an alibi defense is likely to occur, the prosecutor, if he is an experienced prosecutor, is going to make the request. As a matter of fact, I should think it would be almost routine for prosecutors in cases that lend themselves to alibi defenses to make the request immediately.

Mr. HUNGATE. Then he is in effect, the prosecution is given an option. If the prosecutor does not wish to reveal some of the details of his case and is willing to rely on rule 16 for discovery, then he won't start the alibi notice process. Under the rule as promulgated, the defendant has the option to start the process.

Mr. COLE. We are in favor of rule 16 with some modifications. That is, we are in favor of the discovery provisions, and if there is discovery, it seems to me that the only thing that might be lacking anywhere is the knowledge by the Government as to who the specific alibi witnesses are. In other words, we are proposing that under the amendments to the discovery rule, rule 16, the defendant will also provide a list of his witnesses, so the Government will be apprised of who the defendant is going to call. And the only thing that the Government is not going to know is who of those witnesses are alibi witnesses and what the nature of the alibi is.

Mr. HUNGATE. But they could not depose him, I suppose?

Mr. COLE. I would think any prosecutor who is concerned about a possible alibi defense would immediately make the request and get that information.

Are there other questions on 12.1, re alibi defense?

I will go to 12.2, the insanity defense, and say that the section of criminal justice of the American Bar Association is in favor of this rule also. The purpose of the rule is to expedite trials. It will avoid the situation in which the Government suddenly discovers during a case that an insanity defense is going to be used and has to ask for an adjournment.

On the other hand, we do want to point out there are some constitutional questions lurking in this thicket, on which we take no position. I am not sure whether the committee wants to take any position on those, but I think you should be aware that they exist. One of those questions is whether constitutionally there is authority to compel a defendant to undergo a psychiatric examination, which this rule provides for. The other question is whether anything which the defendant may say to a psychiatrist or anyone else he speaks to during the course of that examination can be used against him. These are difficult questions, and I suppose that if this rule is adopted, if it is accepted, litigation will have to settle these issues.

The section of criminal justice has not taken a position on those two questions.

Mr. HUNGATE. But you do support the rule as promulgated?

Mr. COLE. We do.

Mr. RUSSO. I wonder if the Federal rules of evidence may not answer that second question, and although the specific psychiatrist-

patient privilege was not included in the law, the courts will recognize the privileges on a case-by-case basis, and this is a likely privilege to be recognized before the Supreme Court because the draft includes the privilege.

Mr. COLE. That may be. If that is the situation, namely, that the statements made during the course of that psychiatric examination are privileged and cannot be used, then that particular constitutional question disappears. But the problem is, Mr. Russo, that it gets more complicated—for example, what happens if the defendant should take the stand and say something during the course of a case which may be inconsistent with something he said during the course of that psychiatric testimony, and then you get to problems touched on, for instance, under the *Miranda* case?

Mr. RUSSO. If he does not waive that privilege, then I do not think that the psychiatrist can come in and say anything about it.

Mr. COLE. OK.

Mr. HUNGATE. I would not think that you would support a rule you believe permits a court to require a psychiatric examination when it would be unconstitutional to require this?

Mr. COLE. To answer that, Mr. Chairman, I must remind you what I said at the outset—that the section of criminal justice is composed of all of the elements in the spectrum of the criminal justice system, including prosecutors, defense lawyers, and judges. They all have very strong views on such problems. Sometimes a sharp cleavage occurs. Rather than try to push it to a vote, and develop a majority and a minority position, it becomes more political to go ahead and do it this way.

Mr. HUNGATE. Thank you.

Mr. COLE. If there are no questions with respect to 12.2, I would like to go to rule 15, which we consider to be a very important and serious matter. Rule 15, which is incidentally, you may recall, one which was not even mentioned by the Department of Justice representatives when they were before you this morning, deals with the subject of depositions. In its present form—that is, without the amendments that have been proposed—the rule permits the defendant, with leave of the court, and only under carefully designated circumstances to take the deposition of a witness. The proposed amendment would substantially loosen the circumstances under which these depositions could be taken, and they would permit depositions to be taken not only by the defendant, but by the prosecution as well.

The criminal justice section feels that the proposed amendment to rule 15 contains serious and glaring deficiencies, and urge that they be rejected in toto—that is, that all of these proposed amendments to rule 15 be rejected.

First, the conditions precedent to the taking of a deposition, the language that has been used there, the section of criminal justice finds inadequate. It is looser and less explicit and precise than the language in the present rule; it would permit the taking of a deposition in many more situations than is presently permitted.

The section also does not believe that rule 15's definition of "unavailable," a definition which I am sure this committee is familiar with since it comes from the rules of evidence, is a satisfactory one. The

importance of the word "unavailable" in rule 15 is that you have one set of circumstances when you take a deposition.

The conditions precedent to the taking of a deposition established the circumstances in which you simply take it, but the word "unavailable" defines, when you can use the deposition at the trial. We find that the definition of "unavailability" as contained in those proposed amendments, and as contained in the Federal rules of evidence, is not a satisfactory formulation of the circumstances in which depositions should be used at the trial.

There are other problems with the amendments to this rule, but the two things which I have just discussed are the more significant ones. We think that in the event any rule of this nature is used or adopted, provision should be made that any deposition be taken before a judicial officer, whether a master, magistrate, or a judge.

Mr. HUNGATE. Pardon me just a minute while we go off the record.

[Off-the-record discussion.]

Mr. HUNGATE. We will stand in recess at this time. The committee will be adjourned until 2 p.m.

AFTERNOON SESSION

Mr. HUNGATE. The committee will be in order, and we will resume our consideration of the pending amendments to the Federal Rules of Criminal Procedure. We anticipate a good bit of action on the floor this afternoon, so we better get our time in as we can. You may proceed, Mr. Cole.

Mr. COLE. Thank you, Mr. Chairman.

At the time of the luncheon recess I was talking about rule 15, and I want to simply reiterate that the section of criminal justice is opposed to all the amendments relating to rule 15, and thinks that rule 15 should be let alone. I previously gave you some reasons. I would like to also state, in addition to the specific objections that I stated earlier, that the section of criminal justice believes that it is probably undesirable as a matter of policy to use, or encourage the use of depositions in criminal cases; that it is just bad business. In addition to that, there is a series of questions relating to possible infringement of the sixth amendment right of the defendant to be confronted by witnesses against him, which may be involved here as well.

In any event, the section strongly recommends that the amendments to rule 15 be rejected in their entirety.

Mr. HUNGATE. Just a moment, counsel has a question.

Mr. HUTCHISON. Thank you. With regard to rule 15, and the definition of "unavailable," do you have any suggestions, if the rule were to be retained, as to how "unavailable" could better be defined?

Mr. COLE. I would suggest that if the concept of unavailability were to be used, it be limited to (4) and (5) of the subpositions of (g); that is, that a witness is unable to be present or testify at the hearing because of death, or then-existing physical or mental illness or infirmity, or is absent from the hearing and the proponent of the deposition has been unable to procure the attendance by the process of other reasonable means.

I think that even with respect to the second of those two, there should be some tightening up; I think some showing should be required that the attendance of the witness has not been procurable. What we are trying to avoid is a trial by deposition—that is the important thing. The Constitution says a man is entitled to be confronted by the witnesses against him.

I appreciate that he can be present at the time the deposition is taken, but that is not the same as bringing the witness into a courtroom so that the jury can see him and the judge can see him. And unless this "unavailability" definition is extremely tight, you will have a loose situation which can be very significant in the trial of criminal cases. I think it might be of interest to the committee what the policy considerations are against the wide use of depositions in criminal cases. The section of criminal justice felt, among other things, that it may give rise to excessive use of depositions on the one hand; and a large number of 2255 petitions on the other, charging ineffective assistance of counsel if defense counsel does not proceed to take depositions.

In other words, you may have insidious pressure to take depositions when they are not necessary, and to make a relatively simple criminal case very complex, all of this for no particular reason.

It is a better business to bring the witnesses into the courtroom than to bring the deposition concept into the trial of criminal cases loosely. The section of criminal justice thinks this is a bad thing.

Mr. BLOMMER. Mr. Chairman?

Mr. HUNGATE. Yes, sir.

Mr. BLOMMER. Mr. Cole, referring to your sixth amendment problem, didn't *Green* v. *California* speak directly to the point, saying the sixth amendment is not violated by the use of such statements as depositions?

Mr. COLE. The *Green* case does focus on this issue, but I would suggest you may have entirely different results when someday a defendant is convicted on a series of depositions without a single witness being in front of him. I don't think *Green* v. *California* deals with that kind of question. This rule opens up that possibility.

Mr. BLOMMER. I see; thank you.

Mr. HUNGATE. You have no doubt that under this rule, as proposed, it is possible to have a case tried solely on depositions.

Mr. COLE. I have no doubt.

Mr. HUNGATE. All right.

Mr. COLE. Now we turn to rule 16. This is the rule on which you heard a good deal from the representatives of the Department of Justice this morning.

Unlike the Department, the section of criminal justice is, in general, in favor of the amendments to rule 16. As the committee recognizes, the major objective of these proposed amendments is to broaden discovery on both sides, for both defense and prosecution; this approach is consistent with the ABA Standards Relating to Discovery and Procedure Before Trial. As noted this morning by a number of members of the committee this is not unlike the procedure followed in many States throughout the country.

The section has, however, some very specific recommendations with respect to these amendments. For example, in subparagraph (a)(1)

(A) we believe that no distinction should be made between the substance of any oral statement made by a defendant, and a written or recorded statement made by him.

As the rule is presently drafted, in the one instance there is an obligation on the part of the prosecution to turn over statements of defendant, which are written or recorded; in the case of the oral statement, as this amendment is written, it is to be turned over only to the extent that it is to be used at the trial. We don't see any distinction. If the defendant is entitled to have copies of statements made by him, or be informed of statements made by him, he should have both kinds. There should be no difference in treatment.

We think that at the end of section (a)(1)(A) there should be an insert which provides that the Government shall permit the defendant to inspect and copy any relevant or recorded statements, or the substance of any oral statements made by a codefendant which the prosecution intends to use at the trial.

For reasons on which I am unclear, that language was in an earlier draft of these rules, but was dropped out when the rules were finally promulgated. There has been no explanation as to why they were dropped.

But certainly, in the concept we are talking about, a slightly broadened discovery procedure, the defendant should be entitled as well to copies of the statements of codefendants, if the Government intends to use them at the trial. That is not a big step. There are many complicated reasons why the defendant ought to have that; the *Rubin* case is the one that's involved here. This was in the earlier draft, and it is not clear why it was dropped out.

The section also recommends that the proposed amendment in subdivision (b)(1)(A) be rejected. Section (b) is the portion of this rule which deals with the discovery which the defense must make; the (a) part of the rule deals with the discovery that the prosecution must make. The reason for our recommendation is that the ABA criminal justice standards have indicated that discovery against the defendant should go to medical and scientific reports and statements of experts which he has, and which he intends to use; that certainly should be discovered.

So far as the identity of witnesses is concerned, that should also be discovered. But the section did not feel that the discovery provided in (b)(1)(A) was justified, and therefore recommends against that.

Now, the section supports the provisions which require the parties to exchange witness lists in advance of the trial. However, the section proposes that the policy of the Jencks Act, that is 18 U.S.C., section 3500, which now applies only to the prosecution, should also be made applicable to the defense.

The section thus proposes that the defense be obliged to turn over to the prosecution statements of witnesses in the possession of the defendant or his counsel which relate to the offense charged. That is the same obligation which now runs against the prosecution.

And finally, the section believes that the Jencks Act material should be provided in advance of the trial, rather than after the witnesses testify.

The text of the provisions relating to these items has been marked up and changed in the appendix to my statement, so that all of our recommendations have been written into the proposed rules.

There was one thing suggested this morning by the representative of the Department of Justice which I would like to deal with now, something which the section of criminal justice has specifically recommended—the question of the addresses of Government witnesses. While we do not think there is any reason for our suggestion to be put into the rule, we think that the committee report should indicate that the Government should not be required to provide the home addresses of Federal and State law enforcement officers—that their office addresses should be sufficient for the purpose of this rule. We are not anxious to jeopardize the families of law enforcement officers if there is that kind of danger; there is no reason to provide home addresses. If an FBI agent is called as a witness, it is sufficient if he is identified as a member of the Federal Bureau of Investigation and gives the address of his particular office.

The second recommendation which the section of criminal justice makes here, and again it does not require inclusion in the rule itself, but should be mentioned in any report which this committee issues, is that grand jury proceedings should always be transcribed. There is a tendency in some districts not to transcribe grand jury proceedings; the consequence is that the right of a defendant to obtain the grand jury transcript is often thwarted because there simply is none—it has never been transcribed. When the committee writes its report it would be a simple matter to indicate that it would be desirable and useful to have grand jury proceedings transcribed, so that when a defendant is entitled to obtain them, there will be something to obtain.

This is our position on rule 16. I have not tried to trace through every phrase, because there is an appendix to my statement, appendix B, a rewritten version of rule 16 to the extent that we differ from the proposals.

Mr. HUNGATE. Mr. Russo had a question that he requested counsel to pose.

Mr. HUTCHISON. Thank you, Mr. Chairman.

There are actually two questions. The first one goes to the rationale behind the recommendation on (b)(1)(A). Why should prosecutorial discovery be restricted—what is the rationale behind the ABA standards, one. And two, isn't the ABA position on (b)(1)(A) inconsistent with its position on applying the Jencks Act to defendants?

Mr. COLE. I would like to answer the second part of the question first. I don't think there is any inconsistency about the position of ABA with respect to the witness list in (b)(1)(A). The standards clearly show a preference for broad discovery, and one of the ways to effect broad discovery is to provide for an exchange of information concerning witnesses.

Therefore, the fact that the ABA favors the exchange of witness information, and the ABA favors the exchange of statements in advance of the trial, is not inconsistent, but rather consistent with, the ABA standards on relating to discovery and procedure before trial.

The question relating to (b)(1)(A) is a little different. I am the first one to confess that the position of the ABA on this subject is

somewhat cloudy, but I would not say that the position we are taking is inconsistent with anything in the standards.

The standards make it clear that there are problems of self-incrimination in this area. In that sense, for example, if you were to compel a defendant to provide a document in his possession to the prosecution which the prosecution might then use in its case-in-chief, you would have a situation in which the defendant is being compelled to provide evidence against himself.

That is not the case when he is exchanging witness lists, or the statements made by a witness. That is not the case when he is required to divulge and reveal expert opinions, or the statements of expert witnesses that may have been made. But when you are talking about something that belongs to him, indeed something which he may have written, or somebody has written to him, which he is not prepared to disclose, which he may or may not want to use in his case, you have a different problem.

I am enlarging on this beyond the scope to which the standards go, but I think you are entitled to a complete answer to the question, and I am giving you the best one I know.

Mr. HUNGATE. We have been summoned to the floor to vote. I suggest that we resume at 3 o'clock. We will adjourn to that time.

[Whereupon, at 2:35 p.m. a recess was taken until 3 p.m.]

Mr. HUNGATE. The committee will be in order. We will proceed with the witness.

Mr. COLE. Mr. Chairman, before I leave my testimony with respect to rule 16, I want to make this observation. You have heard a great deal this morning from the representatives of the Department of Justice about what a bad business it is to have discovery in criminal cases, and I think that the committee, in evaluating the position of the Department of Justice, should take into account the fact that the Department has representations at deliberations of the Judicial Conference, from whence these rules and proposed amendments come.

The Department of Justice has representation in the Section of Criminal Justice, and its representative participated in the discussions when the Section of Criminal Justice formulated its position. I mentioned earlier that, indeed, one of the men sitting at this table this morning on behalf of the Department of Justice, Mr. Green, was a member of my criminal justice section committee which reviewed these rules. Thus, the Department has had input at all the various stages.

I can only say that in the case of my committee and the Section of Criminal Justice, we were not prepared to buy the Department's position, which we considered to be an extreme position. We think there ought to be discovery in criminal cases. We think as our amendments modify these proposed amendments, rule 16 should be adopted, and that it is a step forward.

Mr. HUNGATE. What is the size of your section?

Mr. COLE. 12,000 members.

Mr. HUNGATE. Is that for the whole ABA?

Mr. COLE. No, the Section of Criminal Justice.

Mr. HUNGATE. 12,000 members.

Mr. COLE. 12,000 members, representing every segment of the criminal justice system—prosecutors, defense lawyers, judges, corrections officials, enforcement, investigation representatives.

Mr. HUNGATE. What is the size of your committee?

Mr. COLE. The original committee was approximately 10 or 12 people, representing each of the segments of the Federal system—judge, prosecutor, defense lawyer, Department of Justice, and so forth; that was the original step in our consideration. Then the report went to the Council of the Section of Criminal Justice, composed of some 25 or 30 people, also representing every segment of the criminal justice system. In both instances, the Justice Department people participated and were present in these considerations.

I want to thus make it clear that rule 16 as we come forward with it from the American Bar Association's Section of Criminal Justice is not something loaded one way or the other; we have heard the presentation of the Department of Justice.

Mr. HUNGATE. Can you tell me what the vote was, either in that council or on your committee?

Mr. COLE. I am sorry, I cannot give you the votes on that. I cannot recall them; but it was not close on this one.

Mr. HUNGATE. Oh, I see. With some of the evidence rules, the Judicial Conference Advisory Committee favored a draft 8—7, and then split 7—7. It was not that close on your committee or in the council on rule 16.

Mr. COLE. I do not recall that rule 16 was that close an issue in any of its aspects. There may have been an occasional one that was that close, but not on this rule.

Mr. HUNGATE. Is it possible to ascertain what the vote was?

Mr. COLE. There was a recorded vote in the council, but I do not think that I have the records left of the committee any longer.

Mr. HUNGATE. Go ahead. Are there any questions at this point?

Mr. COLE. There is one other thing, Mr. Chairman, that I might add to this, and that is that the report of the section of criminal justice—which is essentially what I am giving you here today—was circulated throughout the entire American Bar Association, so that all other sections of the ABA who might have some interest could have some kind of input into this. Not only is this the work of a section comprising 12,000 people, but it also has peripheral reverberation throughout the whole ABA.

Mr. HUNGATE. Go ahead.

Mr. WIGGINS. Just to be fair, the ABA's criminal justice section is composed of attorneys that wish to identify themselves with that section, they are both prosecutors and defense counsel.

Mr. COLE. That's correct.

Mr. WIGGINS. And you would agree that defense counsel outweigh prosecutors by a factor of 1 to 100 or so; wouldn't that be fair?

Mr. COLE. No; I would disagree with that, Mr. Wiggins. I would say that the defense lawyers are probably outnumbered by the other people in the section because, it is not only composed of prosecutors and defense lawyers, it also includes judges, correction officials, law enforcement people, professors, and students. I would think that if you took a numerical count, the defense lawyers would probably be a smaller group.

Mr. WIGGINS. Well, I will take your word, and I won't question it, except mentally.

Mr. COLE. Well, I am only guessing, and I can only give you my best judgment.

Mr. WIGGINS. Did I understand you to say that a vote of some sort was taken by the entire section of 16,000?

Mr. COLE. No; I did not say that.

Mr. WIGGINS. At what level was the vote taken?

Mr. COLE. The vote in this report is the work of the governing council of the section of criminal justice. That governing council is an elected body representing the 12,000 members, and is, again, composed of all segments of the spectrum of the criminal justice system. It has some 23 voting members on it, but it has as many as 30 or 40 liaison members; liaison representatives from the Department of Justice, the National Association of Attorneys General of the States, the International Association of Chiefs of Police, and other organizations. All of these people participated in this discussion.

Mr. WIGGINS. That's fine. I represent half a million people, but I wouldn't ever state that I speak for over half a million people, it would be barely accurate to say I speak for half of them, and then only occasionally. But I realize that only goes to the weight of your testimony, not the substance.

Mr. HUNGATE. Go ahead, Mr. Cole.

Mr. COLE. All right. Once we leave rule 16, we come to rule 20, which is a relatively noncontroversial rule. We have a suggestion to make. It was a suggestion, incidentally, made by the Department of Justice during our deliberations. It is that the words "for each district" be added in subparagraph (d) after the reference to "United States Attorney."

This proposed change would make it necessary to obtain, in addition to the approval of the U.S. attorney in the district in which the juvenile is arrested, the approval of the U.S. attorney in the district in which the charge is pending.

I would suggest that this was perhaps an inadvertent omission by the draftsmen. I do not think it is a provocative question. Unless there are some questions, I am going to pass over that.

Mr. HUNGATE. Go ahead.

Mr. COLE. Rule 29.1 deals with the procedure to be followed in making closing argument in criminal cases. Frankly, at the time this came up it was a mystery to some of us why it was being proposed. We found out that in the New York area, and possibly in the New Jersey area, the practice is followed by which the Government waives its opening argument in the final argument. This means that the defense lawyer gets up and makes his closing argument, and then the Government closes after him.

I have tried cases in many districts around the United States, and I have not run into this practice in other places. The normal procedure is, the Government will open, the defense will then follow, and the Government will close.

The purpose of rule 29.1 is to insure that the normal procedure, or the procedure which generally prevails throughout the United States, will be followed everywhere. The section of criminal justice is in favor of this proposed amendment. The other system sometimes works, and in fairness, it makes it impossible for the defense lawyer to know what

the nature is of the Government's argument if he doesn't argue. The Government is protected because it has both the opening and closing.

Mr. WIGGINS. May I interrupt?

Mr. HUNGATE. Yes.

Mr. WIGGINS. It would be appropriate for the prosecution to waive the right to opening argument if this rationale is to prevail, and yet, the language of the rule simply says the prosecution shall open and defense shall be permitted to reply; and then the prosecution shall be permitted to rebut the defense argument; normally that would be in the nature of a right, according to the prosecution, which would be waivable, all other things being equal.

Do you think we ought to make it more precise, so it is not subject to waiver?

Mr. COLE. In order to accomplish the purpose of this rule, if an additional sentence were added, it would make it absolutely clear. I think it would be useful because there is a possibility that in some district some prosecutor will get up and say, "I will waive my opening," and we will be right back where we are in prompting this rule in the first place. So, I think it would be useful.

Mr. WIGGINS. I guess nowadays in particular it becomes very possible, all manner of people come into criminal Federal court, in order to provide "competent counsel" when a person is accused of a crime.

Mr. COLE. I agree completely with you.

Mr. HUNGATE. Maybe it should be waivable in both closing and rebuttal rights.

Mr. COLE. Or you could simply say: "The prosecution shall not be permitted to waive opening argument"—something of that sort.

Mr. HUNGATE. We will refer that to counsel.

Mr. COLE. Right.

Mr. HUNGATE. Thank you.

Mr. COLE. Rule 32 deals primarily with procedures applicable to sentencing and presentence investigation. The section of criminal justice has two different suggestions to make with regard to these proposed amendments.

The first of them is with respect to subdivision (a)(1); there, we propose addition of the words "Government counsel shall have an equivalent opportunity to speak to the court."

As section (a)(1) is presently proposed, the language is as follows: "Before imposing sentence the court shall afford counsel an opportunity to speak on behalf of the defendant, and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf, and present any information in mitigation of punishment."

We would add, immediately following that: "Government counsel shall have an equivalent opportunity to speak to the court," based on a notion of fairness and on a belief that the court should be fully advised.

I notice that the chairman is turning to the ABA Standards; the ABA Standards caution against the prosecutor's making specific recommendations as to sentencing. On the other hand, the ABA Standards also encourage the prosecution to assist the court in the sentencing process.

The prosecutor should not get up and say, "I think you ought to give this man 90 years," but I think he should get up and say, "That is all well and good what the defense counsel and defendant have said, but I think there are other aspects to this that should be considered."

Mr. WIGGINS. Do you have in mind the practice of Judge Sirica when you suggest that language? I'm thinking of when he started to pronounce sentence before counsel had an opportunity to say anything.

Mr. COLE. I would like to say that we had nobody in particular in mind when we made that recommendation, but that that might be an example.

The other recommendation that the section of criminal justice has with regard to rule 32 concerns the language which appears in subdivision (c)(3)(A) and (c)(3)(B).

Those provisions deal with the question of whether the presentence report should be made available to the defendant and his counsel by the trial judge; the rules provide that this information will be made available except under certain circumstances.

Our section has suggested language which we think is better than that in the proposed rule. The suggested language is set out in the appendix to my statement, and it comes almost verbatim from the ABA Standards. It is just a question of what is better language, and I don't think there is a major policy issue involved in any way.

We are in favor of making this information available to the defendant and to defense counsel whenever possible, and we think the exception to it should be as circumscribed as possible. Our proposed language, as I say, is directly from the ABA Standards.

Mr. HUNGATE. Pardon me. Isn't there a conflict between permitting the Government attorney to have an equivalent opportunity to speak to the court, and the ABA Standard on the Prosecution Function, § 6.1(b)? Section 6.1(b) provides that the prosecutor ordinarily should not make any specific recommendation as to the appropriate sentence unless a recommendation is requested by the court or is part of a plea agreement.

Mr. COLE. I do not think there is a conflict. The Standards make it clear that unless requested by the court, the prosecutor should not be making specific recommendations on the sentence—that is, saying, "You ought to give this man 3 years, or 1 month, or 30 years."

But, certainly, it does not preclude the prosecutor's getting up during the sentencing process, and when the court hears defense counsel and the defendant, letting the prosecutor bring to the attention of the court considerations which are relevant to the sentencing process, without necessarily being specific about the length or precise terms of the sentence.

In other words, there may be something the Government wants to say that the sentencing judge ought to hear; and it can be something other than a specific recommendation as to the length of sentence.

Mr. HUNGATE. I agree, I think we should say that the court can hear from the prosecutor. However, I still think there is conflict with the Standards. There might be cases where the prosecutor should say something the court should hear, but the court hasn't asked him. It seems to me that the standard which applies when there is no jury fixing the penalty, requires the prosecutor not to comment, even though

he may have information he considers vitally important, unless he has agreed to as part of a plea agreement or unless the court asks him to.

Section 6.1(c), which applies when the sentence is fixed by the jury, requires the prosecutor to avoid introducing evidence bearing on the sentence because that prejudices the jury on the issue of guilt.

It seems to me that that is a rather difficult assignment.

Mr. COLE. I think it is, and I think these Standards were not necessarily written for trying cases in Federal court. In some State courts, you do have a jury which is involved in the sentencing process, but you do not have it in Federal practice.

Mr. HUNGATE. But you deal with these specific things.

Mr. COLE. You are right, there may be a conflict. I can only say, and maybe this is a classic example for Mr. Wiggins, this is a recommendation we are passing on which is essentially prosecutorial—it is not a defense recommendation. This is something the prosecution side felt strongly about.

Mr. HUNGATE. Thank you.

Mr. COLE. The last of the rules that we have to deal with is rule 43. And in rule 43 the principal issue is the problem of the unruly or difficult defendant, the problem of the defendant that cannot be controlled in the courtroom.

This whole subject was explored by the Supreme Court in *Illinois* v. *Allen*. Our problem with this proposed amendment relates to subdivision (b)(2). Section (b)(2) concerns an instance in which the continued presence of the defendant is not required in the courtroom. The language contained in the proposed amendment concerns a defendant initially present who engages in conduct which is such to justify his being excluded from the courtroom.

We think that the proposed language is too loose. This relates to a basic and fundamental constitutional right, and we would like to insert language right out of the U.S. Supreme Court decision of *Illinois* v. *Allen*, thus substituting for that language the following: "engages in conduct such that subsequent to the warnings of the court that he will be removed if he continues his disruptive behavior the defendant conducts himself in such a manner that the trial cannot be carried on with him in the courtroom."

That language, as I say, comes right out of the Supreme Court decision in *Illinois* v. *Allen*, and we believe it to be more precise.

Mr. HUNGATE. I think your view corresponds with the view of others who have addressed themselves to that section. The rule as proposed seems to neglect the warning.

Mr. COLE. That is correct.

Mr. HUNGATE. The Public Defender Service for the District of Columbia has suggested this: "Permits, after having been warned that disruptive conduct will cause him to be removed from the courtroom, in behavior which obstructs the progress of the trial." That formulation is similar to yours.

Mr. COLE. That is exactly the same point, that is correct, Mr. Chairman.

Mr. HUNGATE. Mr. Hutchinson has a question for you from Ms. Holtzman.

Mr. HUTCHISON. The question is based upon the comments on the rules enabling acts found on pages 17 and 18 of your statement. It is

similar to a question that I asked the Department of Justice representatives earlier today on her behalf. Is the ABA criminal justice section satisfied that the preliminary drafts of these amendments were adequately circulated for comment to those who were interested, including your organization?

Mr. COLE. The best answer to that question is to say that I am not informed that the section of criminal justice was involved in any stage of the earlier draft of these proposed amendments. Once we became involved in that, our examination of them was extremely intense. Had there been a similar opportunity on earlier drafts, or stages, there would have been more input from the ABA to the rulemaking process.

I cannot say that there was no opportunity, but I can say there was no participation. I can give you one example, however, of the kind of situation we find ourselves faced with, and that is with respect to rule 16. There was language in 16(a)(1) providing that upon the request of the defendant, the Government shall permit the defendant to inspect and copy any relevant or recorded statements and the substance of any oral statement made by a codefendant, which the Government intends to use at the trial.

Inexplicably, that language was omitted in 16(a)(1) when these amendments were promulgated, so that no one from our section had an opportunity to say, "Don't take it out, leave it in," we did not know it was coming out.

I am not sure what one can do to rectify this situation, but this is an example of one instance in which there was no warning.

Mr. HUTCHISON. Would this be a matter the criminal justice section would like to be informed of on a continuing basis, with a chance to comment, perhaps, on preliminary drafts?

Mr. COLE. We certainly would. We definitely would like to be built into that process as much as, for example, the Department of Justice.

Mr. HUNGATE. Any further questions? Mr. Wiggins.

Mr. WIGGINS. Your recommendation for amendments to rule 16 provides it is not necessary to give the home address of a Government witness. I am certain that recommendation reflects your belief that there is a possibility of harassment to perhaps members of the witnesses' families. Is that a correct assumption of the consideration which caused you to make that recommendation?

Mr. COLE. Our recommendation was limited to home addresses of Federal and State law enforcement officers; it did not apply to all witnesses. The reason for the recommendation was that the home addresses of these law enforcement officers are an irrelevancy. If he were an FBI agent, or from the State attorney general's office, or a member of the State police, you would be more interested in his office address than in his home address.

Many of these officers keep their addresses confidential for obvious reasons. And it is not our purpose in providing for the discovery of names and addresses of witnesses, to create a situation which would result in harassment of law enforcement officers' families; or, if there is danger, endanger those families. But our recommendation did not go beyond law enforcement officers.

Mr. WIGGINS. Well, I can understand that; and it seems to reflect a greater sensitivity to law enforcement officers than to nonlaw enforcement officer witnesses.

If the actual showing of potential of harassment can be made, maybe after some months of operation under the rules, some data can be collected and if nonlaw enforcement officers are also subject to harassment, would that be persuasive to your section?

Mr. COLE. I think it would be, yes, indeed.

Mr. Wiggins, I am sure you recognize this problem, the purpose of disclosing witness lists and addresses, names and addresses of witnesses, is to give the other side—whether it is the prosecution of the defense—an opportunity to in some instances to interview, check up on these people, and get ready to deal with them in one way or another when they appear at the trial.

When you are given the description of a law enforcement officer, his home address is really not very important. When you are given the name of a John Smith, the absence of his address may be the difference between knowing who you are talking about, and who you are not talking about. I recognize there may be situations in which this could create a danger, or abuse, but by the same token, if we don't give an address in most of the nonofficial witness types, we are not giving information which is meaningful.

Mr. WIGGINS. Did you discuss before I arrived the question of when that information should be made available to the defense counsel, and more specifically, your attitude with respect to some 3-day rule, or some other rule, the extent of the Jencks Act, or a period of time, but so early?

Mr. COLE. I did not discuss it, but I would like to because I think it is important.

I think that information should be made available after the indictment, on the issuance of the information. I do not see any reason why any of this discovery information should be made available before there is, in fact, a charge against an accused, so that you know what you are dealing with. You should not be permitted to go out and discover before you know what the discovery is about.

I think it would be, in many instances, completely inadequate to limit discovery, or production of documents, or names of witnesses, to 3 days before trial, particularly in a case involving a long trial, or many witnesses, or many documents; that kind of discovery is almost no discovery at all.

The defense lawyer has limited resources in most instances. If he is preparing for trial, and gets the information 3 days before trial, there is not much he can do with it; and he does not have a large number of people to——

Mr. HUNGATE. May I interrupt. Of course compared to what defense attorneys get now, 3 days would be an awfully long time, wouldn't it?

Mr. COLE. In many instances it is a long time. I would like to say, however, that in those courts in which there is some of this discovery, to my knowledge it is not limited to the 3-day period.

So, if this committee should adopt the 3-day period, in many instances it would do more harm than good, because there are times when the court requires discovery and does not limit it to a 3-day period before trial.

Many courts do not provide for any discovery. In such cases, the 3 days would be better than none, I agree.

Mr. WIGGINS. One final question with respect to your observation on rule 43 because there are obviously practical problems to be dealt with, and unless there is an important constitutional issue.

The rule does not require that the trial judge use alternatives to removal before the removal occurs. I wouldn't expect the rule to spell out what alternatives there might be, but what are your suggestions if the rule might contain urging that the court attempt to employ alternatives to physical removal before he falls back on the ultimate weapon?

Mr. COLE. I would think that kind of suggestion should certainly be made in the committee report. I agree with you; that does not really need to be included in the rule itself. I know there are some judges before whom I appeared who would be shocked to hear what I am going to say; but, in general, I think Federal judges try very hard to do a good job, and are not going to exclude defendants from a courtroom needlessly; it is the rare judge who will abuse that authority. I think that the kind of escarpment you are talking about is the kind of thing that most Federal judges would probably use before they fell back on what is now going to be provided in this rule.

I do not think that in the main Federal judges are quick on the trigger to throw somebody out of court.

Mr. WIGGINS. I know they are not. As a matter of fact, I think they are extraordinarily patient human beings.

Let's assume a judge wanted to employ the technique of tying a defendant down, strapping him in the chair before he is removed. Do you regard that as an almost worse penalty than removing him?

Mr. COLE. Yes, I do, because it makes a spectacle of the defendant in front of the jury, and so taints the trial that I am not sure what can result. If there is some way to advise the jury that the defendant cannot be present during the remainder of the trial, but that the trial will go on, I think that would be far better than having the defendant shackled, or tied to his chair in the courtroom in front of the jury.

Mr. WIGGINS. One final question. What if defense counsel should leave at this point, what happens?

Mr. COLE. With defense counsel, you have a different situation entirely than what you have with the defendant. I think that the defense counsel can be directed by the court to come back to that courtroom and stay there; if he fails to do so, I think as an officer of the court he can be censured, or handled in a variety of other ways, and, indeed, can be held in contempt of that court.

I do not see the problem of dealing with an unruly defense counsel as nearly as complicated as dealing with an unruly defendant. The defense counsel does not have the rights which a defendant has, which we must be concerned about. I do not think a defense counsel would ever walk out of a courtroom if the judge told him to stay.

Mr. WIGGINS. Do you think the rule ought to address itself to the unruly defense counsel?

Mr. COLE. I do not think these rules should address that issue. I think that can be handled by individual judges, individual contempt proceedings, and grievance committees.

Mr. HUNGATE. Mr. Mann?

Mr. MANN. I have no questions, Mr. Chairman.

Mr. HUNGATE. Ms. Holtzman, you are just in time for questioning. These gentlemen are testifying on behalf of the ABA criminal justice section and we heard representatives of the Justice Department earlier. I will go to you in a moment.

Mr. WIGGINS. I would like the witness to comment about a matter that concerned me this morning, you may well have been present. But I am concerned—I am concerned about the fugitive after the issuance of a summons. I think you heard my observations this morning.

Mr. COLE. Yes, I did.

Mr. WIGGINS. Do you have any thoughts with respect to that problem?

Mr. COLE. Mr. Wiggins, we have proposed that the words "valid reason" be defined in both rules 4 and 9.

Mr. WIGGINS. I understand that.

Mr. COLE. To some extent, that would take care of the problem of fugitivity—that is one of the reasons behind our definition of "valid reason" and the issuance of the warrant. There would be the fact that there might be a chance of the accused fleeing.

Mr. WIGGINS. Well, I am more concerned with the person who does in fact flee, whether there are good reasons is beside the point. He leaves after the summons is issued and exited upon him, and he stays away for a long period of time, 4 or 5 years, so that prosecution becomes a practical impossibility.

He now returns, or is apprehended. The prosecution can't very well proceed on the original—so, what do we do about him? He is not a fugitive from justice, or at least he is not apparently violating a criminal section which deals with persons who have been released and leave the jurisdiction. Have I made my point clear?

Mr. COLE. I am not sure I understand, but let me answer it in part. Why cannot the prosecution proceed on the original charge?

Mr. WIGGINS. Well, let's assume they can't because all the witnesses are dead.

Mr. COLE. Then they would have to issue a new charge against him, in which he is charged with fleeing. There must be some appropriate provision in 18 U.S.C. which would cover that act. He would be charged and tried on that new basis. Under those circumstances there would not be any problem about prosecuting.

Mr. WIGGINS. There wouldn't be if there were such a statute.

Mr. HUNGATE. How about unlawful flight to avoid prosecution?

Mr. COLE. I would think that would cover it; and I think there are others which would also cover it.

Mr. HUNGATE. The penalty might be lighter.

Mr. WIGGINS. Well, I don't have those sections before me, but I think they are premised on an initial fact, that the person has been released and thereafter he flees. And if he is not released, the section is not applicable.

But I presume this committee could request changes in that statute as well. But unless this amendment takes care of the problem, we have a hole here that needs to be filled in.

Mr. COLE. That, I think, should be changed in the substantive statute, and not in the rules of procedure. These rules are directed toward making this machinery work, given the definition of the substantive crime.

Mr. HUNGATE. Ms. Holtzman?

Ms. HOLTZMAN. Thank you, Mr. Chairman.

I had an opportunity to read your testimony, and I want to compliment you on raising the problem with rule 15 respecting depositions.

I understand that you will provide this committee with information regarding the extent to which you participated in, and were advised of the process by which these rules were ultimately adopted and promulgated. I think it is very important in terms of our evaluation of these rules to understand the extent to which concerned segments of the bar had the opportunity to participate, and have their voices heard in the formulation of these rules; this would affect my judgment, and I suspect, the judgment of others. So, I would hope that you could get that to us as soon as possible.

I also want to ask you about your position on rule 12.1. Have you been questioned about that here?

Mr. COLE. Yes. 12.1 is the alibi defense, and we have suggested that the committee adopt the District of Columbia procedure. That provides essentially that the Government may trigger the operation of this rule, instead of letting the defendant trigger it.

We were persuaded by representatives of the Justice Department and Government that this was the better way to proceed. We see no prejudice, or detriment to the defendant, and there are reasons, we think, that suggest this is the better way to do it. It has been done that way in the District of Columbia, and it seems to be working.

Ms. HOLTZMAN. When you state here, then, that your position is an intermediate position, in what respect is it an intermediate position? It seems to me you are strengthening the rule on behalf of the Government; is that correct?

Mr. COLE. It is intermediate in the sense that there are different ways for the procedure to operate. I have talked now about the difference in triggering the procedure, but there is a difference, also, in the way the procedure itself can operate.

Ms. HOLTZMAN. It's the triggering mechanism?

Mr. COLE. It's the triggering mechanism.

Ms. HOLTZMAN. And your proposal would strengthen the Government's hand, is that right?

Mr. COLE. I do not think we are strengthening anybody's hand, it just allows the Government——

Ms. HOLTZMAN. Well, if the defendant has no intention, it allows the Government to begin the process.

Mr. COLE. That is right. It allows the Government to find out whether there will be, or will not be, an alibi defense. Frankly, we think that is consistent with the larger issue of discovery and broader disclosure, pretrial, cutting in both directions.

Mr. Wiggins had me over the anvil earlier suggesting that we were representing only the defense bar in some of our recommendations, which we are not. We are trying to do the best we know how in the public interest. Sometimes that falls on one side, and sometimes it falls on the other.

In this instance, while it gives the Government the opportunity to trigger the activity, in the end, it creates a broader pretrial disclosure, and makes both sides better equipped to proceed with the trial. We

see no problems concerning violation of rights of self-incrimination in that procedure at all.

Ms. HOLTZMAN. Well, I think, if I may pursue this that the rule with respect to the alibi defense doesn't deal with discovery on the part of the Government at all, does it?

Mr. COLE. It doesn't where the defendant——

Ms. HOLTZMAN. Rule 12.1 doesn't really have too much to do with discovery, right?

Mr. COLE. When the Government makes the request, there is an obligation on the Government to state the time and place where the offense was committed.

Ms. HOLTZMAN. Do you consider that as a terribly onerous burden on the Government?

Mr. COLE. No, I don't think so. And I do not think it is a terribly onerous burden on the defendant to then say that he is going to take the position that he was not there.

Ms. HOLTZMAN. Well, to what extent do you run into constitutional problems there?

It is required of the Government to state where the defendant supposedly was, and when and where he committed the alleged criminal offense. But don't you run into constitutional problems when you require the defendant to state where he was and furnish the Government with a list of alibi witnesses?

Mr. COLE. I do not think so. I think that the defendant is going to state that he was not where the Government says he was going to state.

Ms. HOLTZMAN. Well, does the defendant have to state anything?

Mr. COLE. No, the defendant does not have to state anything. Ms. Holtzman. Under the way this would work, the defendant would be giving to the Government the witnesses which he intends to call to establish his alibi defense, and which under our view of rule 16 he would be giving to the Government in any event. The only difference is that he would now be designating these particular witnesses as relevant to the alibi defense. I am not sure that I see any incrimination problem in this arrangement.

Ms. HOLTZMAN. What about constitutional problems arising under subsection (e), failure to comply with disclosure of alibi. Does denying the defendant the right to call witnesses on his own behalf, violate any constitutional right of the defendant, in your view?

Mr. COLE. I guess an argument can be made that you are foreclosing the defendant from calling witnesses; but, by the same token, if the rules require the defendant to disclose this information prior to trial, they are fair rules and do not create an incrimination type of problem. I would think if the defendant fails to follow the rules, the defendant can be penalized.

Mr. HUNGATE. If you would yield briefly. I believe Wisconsin has had a notice of an alibi defense statute since 1956.

Mr. COLE. There is nothing very novel, as I understand it, about the alibi defense disclosure. The only disputes that have occurred relate to how it is going to work. And the only difference is between what we are suggesting and what has been suggested in the proposed amendment—the question of who triggers it.

Ms. HOLTZMAN. Except that, perhaps—and I don't know if anyone commented on this—there is some concern about the question of intimidation of the witnesses. It has been raised before this committee that if the defendant gives the names of his witnesses, they may be intimidated by an interview by the FBI. The Government itself is a pretty scary thing to people in this country. Thus, having the Government interview a witness is totally different from having a defense lawyer interviewing a witness.

Have you taken that into account in your analysis of the rule?

Mr. COLE. We have taken this into account, and that is also relevant in the context of rule 16, which talks about discovery directly; it talks there about disclosure of names and addresses of witnesses by both sides.

I share your concern. I have seen situations in which defense witnesses have been intimidated by Government agencies. I know of cases in which Government witnesses have been threatened or intimidated by pretty nasty defendants. That is the nature of the game. You have to weigh all of this, and when you are through, you have to decide whether you want disclosure or not. We come out on the side of disclosure by both sides.

Mr. HUNGATE. The second bell announcing a vote has just rung. Does the subcommittee want to resume after voting?

Thank you very much, Mr. Cole, for your very helpful testimony. I understand that Mr. Hoffman has a statement he wants to make?

Mr. HOFFMAN. Mr. Cole made clear that he was speaking for the section of criminal justice when he started, but throughout the testimony from both sides there have been references to the ABA. We have never had the opportunity to pass on this as an association as such.

Mr. HUNGATE. Mr. Cole speaks for the criminal justice section, as he was careful to state when he was providing his personal views.

[The prepared statement of Mr. Cole follows:]

STATEMENT OF ALAN Y. COLE, SECTION VICE CHAIRMAN ON BEHALF OF THE SECTION OF CRIMINAL JUSTICE OF THE AMERICAN BAR ASSOCIATION

My name is Alan Y. Cole and I appear today to present, with the approval of the House of Delegates of the American Bar Association, the views of the Section of Criminal Justice of the American Bar Association with respect to the proposed Amendments to the Federal Rules of Criminal Procedure.

I am Vice Chairman of the American Bar Association's Criminal Justice Section and Chairman of that Section's Committee on Rules of Criminal Procedure and Evidence. I am also a member of the House of Delegates of the American Bar Association, representing the District of Columbia Bar. In professional life, I am a partner in the law firm Cole and Groner in the District of Columbia and I specialize in the trial of criminal and civil cases in Federal courts throughout the United States.

The members of the Criminal Justice Section of the American Bar Association represent every segment of the criminal justice system: prosecutors, trial and appellate judges, public and private defense lawyers, corrections officials, persons engaged in investigation and enforcement, law school professors and students, among others. We number over 12,000.

The proposed Amendments were first carefully studied by a special committee, which included among its members Federal prosecutors and representatives of the Department of Justice, a United States district judge, and lawyers active in the defense of criminal cases in the Federal courts. This Committee prepared an extensive report which was presented to the governing Council

of the Criminal Justice Section. That Council, which is representative of the many different viewpoints encompassed by the Criminal Justice Section, spent the better part of two days at a meeting last fall reviewing the recommendations of the Committee. It adopted some and rejected others and made a few of its own; and the report which I present to you today is the work of that Council. I cannot emphasize too strongly that the Section's recommendations reflect a balancing of attitudes and are not weighted in favor either of the prosecution or the defense.

Before getting to the specifics, I would like to mention that the Criminal Justice Section has been actively involved in the implementation of the *ABA Standards Relating To The Administration Of Criminal Justice* for many years. As the Committee knows, these *Standards* cover most of the important areas in the field of criminal justice. They have all been approved and constitute the official policy of the American Bar Association. To the extent that the proposed Amendments to the Federal Rules are consistent with these *Standards*, the Amendments have been readily embraced; to the extent that proposed Amendments conflict with the *Standards*, they have been revised to bring them into conformity; and in instances where there were no *Standards* by which to measure a proposed Amendment, the Section has formed its own judgment.

In general, the Criminal Justice Section supports the proposed Amendments except as hereinafter noted and subject to the following suggested changes:

Rule 4

The Section proposes only one change with respect to Rule 4. The proposals which has been submitted to amend this Rule are aimed at achieving several objectives:

(a) establishing clearly that the preferrred and normal procedure for requiring the appearance of the accused is by the issuance of a summons rather than by an arrest warrant;

(b) setting out the circumstances under which an arrest warrant will issue; and

(c) providing that the finding of probable cause upon which a summons or an arrest warrant may be issued can be based—in whole or in part—upon hearsay evidence. This last Amendment does not attempt to define "probable cause" and it is intended that such determinations be made on a case-by-case basis.

The emphasis on the summons rather than the warrant is consistent with the *ABA Standards Relating To Pretrial Release*, §§ 3.2 and 3.3, and the adoption of these Amendments is therefore urged. However, the proposed Amendment uses the term "a valid reason" in delineating the circumstances when a warrant rather than a summons should be used, but it does not define that term. The ABA Section of Criminal Justice proposes that the following definition of "a valid reason" be added to paragraph b(2):

"A valid reason exists for the issuance of an arrest warrant rather than a summons where the defendant is charged with a crime of violence, if the Magistrate finds that issuance of a summons rather than a warrant may afford the defendant an opportunity to secrete or destroy evidence of the offense, or flee upon being summoned. A determination by a court after an arrest that no valid reason existed for an arrest in lieu of a summons shall not be grounds for the suppression of evidence seized incident to the arrest, or to a search incident thereto."

Rule 9

The proposed Amendments to Rule 9 are similar to those proposed for Rule 4 in that they are likewise designed to provide for the issuance of a summons rather than a warrant. Accordingly, the proposed Amendments to this Rule are also in accord with the *Standards Relating To Pretrial Release*, §§ 3.1–3.4, and the Section supports their adoption. However, the Section urges that definition for the term "a valid reason" proposed to be included in Rule 4 also be included within paragraph (a)(2) of Rule 9.

Rule 11

The proposed Amendments to Rule 11 are among the most provocative and they were the subject of extensive debate within the Criminal Justice Section. However, the Section generally supported all of the proposed Amendments.

The proposed subsection (b), dealing with the plea of *nolo contendere*, is almost a verbatim recitation of the *ABA Standards Relating To Pleas Of Guilty*, § 1.1(b). Proposed subsection (c), which sets forth the procedure which the Court must follow before accepting a plea, appears to represent a codification of existing case law (see, *Boykin* v. *Alabama*, 395 U.S. 238 (1969); *McCarthy* v. *United States*, 394 U.S. 459 (1969)) and is in accord with *ABA Standards Relating To Pleas Of Guilty*, § 1.4. Proposed subsection (e), governs the procedure for plea negotiations. It establishes rules designed to prevent abuses in the "plea bargaining" process, which is now recognized as an integral part of the administration of criminal justice (*Santobello* v. *New York*, 404 U.S. 257, 260 (1971)). It expressly provides that the Court shall not participate in the discussion process. The provisions of subsection (e) are in accord with *ABA Standards Relating To Pleas Of Guilty*, §§ 3.1–3.4. See also *ABA Standards Relating To The Function Of The Trial Judge*, § 4.1.

Under proposed subdivision (e)(2), the terms of any plea agreement which has been reached between the prosecutor and the defendant must be revealed in open court at the time of plea of guilty or *nolo contendere* is tendered. Similarly, under proposed subdivision (e)(4), if the Court rejects the plea agreement, the Court is required to advise the defendant in open court that the Court will not be bound by the plea agreement.

We recommend that the phrase "in open court" in (e)(2) and (e)(4) be changed in each instance to "on the record". This change is designed to prevent public disclosure of instances where a defendant has promised to cooperate with authorities in connection with an ongoing investigation. It is also designed, in cases in which there is substantial media coverage, to make it possible for a defendant whose pleas are rejected to be able subsequently to obtain a fair trial. With these changes, the Section supports the proposed Amendments to Rule 11.

Rule 12

The general thrust of the proposed Amendments to Rule 12, which the Section supports except for the change hereinafter noted, is to facilitate the dispositions of pretrial motions. This approach is consistent with the policy contained in the *ABA Standards Relating To Discovery And Procedure Before Trial*, §§ 5.2–5.3. While the proposed Amendments do not explicitly provide for an omnibus hearing—which the *ABA Standards Relating To Discovery And Procedure Before Trial*, § 5.3, recommend—the Advisory Committee note encourages such a hearing.

Subsection (d) establishes a mechanism by which the Government may make known its intention to use certain evidence at trial, thereby giving the defendant the opportunity to raise a motion to suppress pursuant to subdivision (b)(3). In addition, (d)(2) allows the defendant to request notice of Government's intention to utilize any evidence at trial which the defendant would be entitled to obtain under Rule 16, which governs discovery. To further implement this effort to litigate as many issues as possible prior to trial, proposed Rule 12(f) provides that the failure to raise in timely fashion those defenses or objections which must be made prior to trial shall generally constitute a waiver.

The Section proposes that the first sentence of subdivision (e) be changed to read as follows:

"(e) *Ruling on Motion.* A motion made before trial shall be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict but no such determination shall be deferred if a party's right to appeal is adversely affected."

The purpose of this recommendation is to discourage the tendency of some judges who reserve rulings on pretrial motions until after trial in the hope that the jury's verdict will make determinations unnecessary. In short, it is the purpose of this recommendation to insure that pretrial motions are determined prior to trial except where there is good cause. Specific provision is contained in this recommendation that there can be no deferral of a pretrial motion if a party's right to appeal would be adversely affected.

The Section also recommends that the words "for cause shown" in subdivision (f) be stricken as unnecessary.

Rule 12.1

Rule 12.1 is a newly proposed rule and establishes the procedure in cases in which there is an alibi defense. It provides that the defendant commences the

procedure by noting his intention to rely upon an alibi defense. The Government must thereafter respond by advising the defendant of the specific time, date and place at which the crime is alleged to have been committed. The defense must then disclose the names and addresses of witnesses who will support its position; and the Government is thereafter required to reveal the names and addresses of its witnesses who will testify as to the defendant's presence at the scene of the crime.

As the Advisory Committee has noted, the proposed Rule embodies an intermediate position. The Section prefers the procedure which permits the Government to put the process into operation. This is the procedure which has been in effect in the District of Columbia. We suggest, therefore, the substitution of the Rule set out in Appendix A to replace proposed Rule 12.1 in its entirety.

Rule 12.2

Proposed Rule 12.2 deals with the problems which arise when a defendant relies upon an insanity defense. It requires that the defendant give notice in advance of trial that he intends to rely upon such a defense and also of his intention to introduce expert testimony relating to mental disease, defect or other condition bearing upon the issue of whether he had the mental state required for the offense charged. By requiring advance notice of these issues, it is anticipated that trials will proceed more expeditiously. The proposed Rule also provides that the Court, upon motion of the prosecution, may order the defendant to submit to a psychiatric examination.

The Section, while generally supporting this proposed Rule, notes that there are two constitutional questions lurking in the background: first, whether the defendant can be compelled to take a psychiatric examination; and second, whether any statements which the defendant makes during the course of such an examination can be used against him. The Section's support of the proposed Rule should not be taken as indicating any position on these questions.

Rule 15

Rule 15 of the Federal Rules of Criminal Procedure deals with depositions. In its present form, the Rule permits the defendant, with leave of court and only under carefully defined circumstances, to take depositions of a witness. The proposed Amendment would substantially loosen the circumstances under which depositions can be taken, and would permit depositions to be taken not only by the defendant but by the prosecution as well.

The Criminal Justice Section feels that the proposed Amendments to Rule 15 contain serious and glaring deficiencies and urge that they be rejected. In particular, the Section does not believe that the conditions precedent to the taking of depositions as set out in the proposed Amendment to Rule 15(a) are as stringent as they should be. The Section also does not believe that the definition of "unavailable"—the condition which makes a deposition usable as substantive evidence at a trial—set out in proposed subdivision (g) is satisfactory, either from a policy or a drafting point of view.

The Section believes that if depositions are to be taken in criminal cases, provision should be made that they be taken in the presence of a judge, a magistrate or a master. The Section also believes that if the Government is to be permitted to take depositions in criminal cases, a defendant's waiver of his right to be present during such depositions as provided in the proposed Amendment to 15(g) should not only be in writing but also with the consent of his counsel.

The Section is generally concerned that the use of depositions in criminal cases as provided in the proposed Amendments to Rule 15 is probably undesirable as a matter of policy and, in addition, will likely create substantial constitutional questions with respect to a defendant's Sixth Amendment right of confrontation. The Section recommends that the proposed Amendments to this Rule be rejected altogether.

Rule 16

The major objective of the proposed Amendments to Rule 16 is the broadening of discovery for both the defense and the prosecution. This is consistent with the *ABA Standards Relating To Discovery And Procedure Before Trial* and the Criminal Justice Section generally endorses this effort. However, the Section has a number of specific recommendations which it desires to make with respect to the proposed Amendments to this Rule.

In subparagraphs (a)(1)(A), the Section believes that no distinction should be made between the substance of any oral statement made by a defendant and written or recorded statements made by him. These should all be producible whether or not the Government intends to offer them in evidence at the trial. The Section also believes that subparagraph (a)(1)(A) should be amended to provide that the Government shall produce any statements, upon the request of a defendant, made by a co-defendant which the Government intends to use at the trial.

If the Committee accepts our recommendation to reject the proposed Amendments to Rule 15 relating to depositions, then the last sentence of proposed subdivision (a)(1)(E) should be stricken. This sentence would be meaningless if the proposed Amendments to Rule 15 were not adopted.

Our Section also recommends that the proposed Amendment to subdivision (b)(1)(A) be rejected. The *ABA Standards Relating To Discovery And Procedure Before Trial*, § 3.2, have gone so far only as to provide that the prosecution should be entitled to discover medical and scientific reports and the statements of experts; and the production of these items is provided for in proposed subdivision (b)(1)(B). We oppose, therefore, the proposed Amendment to subdivision (b)(1)(A).

The Section supports the provisions which require the parties to exchange witness lists in advance of trial. However, we propose that the policy of the Jencks Act, 18 U.S.C. § 3500—which now applies only to the prosecution—be made applicable to the defense as well. Thus, the Section proposes that the defense be obliged to turn over to the prosecution any statements of witnesses in the possession of the defendant or his counsel which relate to the offense charged. Finally, the Section believes that Jencks Act material should be provided in advance of trial rather than after the witnesses testify. The text of subdivisions (a) and (g) of Rule 16, revised in accordance with these recommendations, is attached as Appendix B.

The Criminal Justice Section has two recommendations to make which it hopes the Committee will deal with in its report. The first is that in providing witness lists in accordance with proposed subdivision (a)(1)(E), the Government not be required to provide the *home* addresses of Federal and state law enforcement officers, since disclosure of such home addresses would serve no useful purpose and could lead to unpleasant harassment and sometimes even danger to the officers' families. The second is that the Committee should note its strong recommendation that grand jury proceedings should always be transcribed in their entirety. Such a procedure will insure that where, under the Rule, a defendant is entitled to a grand jury transcript, his right to obtain it will not be thwarted because it may not have been transcribed.

Rule 20

Rule 20 provides for pleading to a charge in the district in which a defendant is present, notwithstanding the fact that the charge is pending in a different district. The purpose of the Rule is salutary and the Criminal Justice Section finds the proposed Amendments to be satisfactory. However, the Section recommends that the words "for each district" be inserted after the phrase "United States attorney" in subparagraph (d), relating to juveniles. This proposed change would make it necessary to obtain, in addition to the approval of the United States attorney in the district in which the juvenile is arrested, the approval of the United States attorney in the district in which the charge is pending.

Rule 29.1

Proposed Rule 29.1 establishes a uniform procedure throughout the Federal system with respect to closing arguments. It requires the prosecution to open, thereby affording the defendant an opportunity to hear the Government's statement before presenting its argument. This is the present rule in most jurisdictions and the Section supports the proposed Rule.

Rule 32

The proposed Amendments to Rule 32 deal primarily with the procedures applicable to sentencing and presentence investigation; and although our Section is in general agreement, we recommend a number of revisions.

First, we recommend that the following sentence be added to subdivision (a)(1): "Government counsel shall have an equivalent opportunity to speak to the court." Although the *ABA Standards Relating To Sentencing Alternatives And Procedures*, § 5.3(c), caution against the prosecutor making specific recommendations as to sentencing, it is also considered the duty of Government counsel to assist the court in the sentencing process. The language which we propose is designed to grant the prosecution as well as the defendant and his counsel a right to be heard before sentence is imposed.

The proposed Amendment to subdivision (a)(2) is designed to make clear that the court does not have any duty to advise a defendant who has pleaded guilty or *nolo contendere* of his right to appeal after sentence is imposed. This is consistent with the *ABA Standards Relating To Criminal Appeals*, § 2.1(b).

The proposed Amendments to subdivision (c) relate to the disclosure of presentence reports. Our Section has proposed language in lieu of the proposed Amendments to subdivisions (c)(3)(A) and (c)(3)(B), which is set out in Appendix C. Our proposed language is taken directly from the *ABA Standards Relating To Sentencing Alternatives And Procedures*, § 4.4(b), and we believe it to be preferable to the language contained in the proposed Amendments.

Rule 43

Rule 43 deals with the presence of the defendant during criminal proceedings. A proposed subparagraph (b) defines the situations in which the continued presence of a defendant is not required. It provides that a defendant will waive his right to be present if he voluntarily absents himself. It also provides that a court has authority to exclude an unruly defendant from the courtroom and proceed in his absence. These proposed changes are consistent with the *ABA Standards Relating To The Function Of The Trial Judge*, § 6.8, and the Section supports this proposed Amendment. However, it finds the language in proposed subdivision (b)(2) to be inadequate. The proposed Amendments to this Rule were designed to incorporate the holding of *Illinois* v. *Allen*, 397 U.S. 337 (1970). The Section therefore urges that the following language, which more directly conforms to the language contained in *Illinois* v. *Allen*, be used in subdivision (b)(2):

"engages in conduct such that subsequent to the warnings of the court that he will be removed if he continues his disruptive behavior the defendant conducts himself in such a manner that the trial cannot be carried on with him in the courtroom."

* * * * * * *

This has been a long statement and I do not want to impose upon the Committee's patience and time any longer than necessary. However, before closing, I would like to advise the Committee that while the Criminal Justice Section voted to reaffirm the policy of the Enabling Act, i.e., that rules and amendments to rules should be promulgated by the Supreme Court and become effective after transmittal to the Congress, the Section specifically pointed out that the Enabling Act procedure can be effective only if drafts of proposed rules and amendments are circulated widely in advance of their promulgation in sufficient time to allow diversified segments of the bench and the bar an opportunity to comment thereon. In this spirit, and on behalf of the Section of Criminal Justice of the American Bar Association, I want to thank the Committee for providing us with an opportunity to comment on these proposed Amendments and I want to express my personal appreciation for the courtesies which you have extended to me today.

I shall now be pleased to respond to any questions which you may have.

APPENDIX A

Rule 12.1 *Notice of Alibi*

(a) *Notice by Defendant.*—Upon written demand of the prosecutor stating the time, date, and place at which the alleged offense was committed, the defendant shall serve within ten days, or at such different time as the court may direct, upon the prosecutor a written notice of his intention to offer a defense of alibi. Such notice by the defendant shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom he intends to rely to establish such alibi.

(b) *Disclosure of Information and Witness.*—Within ten days thereafter, but in no event less than ten days before trial, unless the court otherwise directs, the prosecutor shall serve upon the defendant or his attorney a written notice stating the names and addresses of the witnesses upon whom the government intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied on to rebut testimony of any of the defendant's alibi witnesses.

(c) *Continuing Duty to Disclose.*—If prior to or during trial, a party learns of an additional witness whose identity, if known, should have been included in the information furnished under subdivision (a) or (b) of this rule, the party shall promptly notify the other party or his attorney of the existence and identity of such additional witness.

(d) *Failure to Comply.*—Upon the failure of either party to comply with the respective requirements of this rule, the court shall exclude the testimony of any witness offered by such party as to the defendant's absence from or presence at, the scene of the alleged offense. This rule shall not limit the right of the defendant to testify in his own behalf.

(e) *Exceptions.*—For good cause shown, the court may grant an exception to any of the requirements of this rule.

APPENDIX B

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: any relevant written or recorded statements and the substance of any oral 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; and recorded testimony of the defendant before a grand jury which relates to the offense charged. Where the defendant is a corporation, partnership, association, or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who was, at the time either of the charged acts or of the grand jury proceedings, so situated as an officer or employee as to have been able legally to bind the defendant in respect to the activities involved in the charges. Upon request of a defendant, the government shall permit the defendant to inspect and copy any relevant or recorded statements and the substance of any oral statements made by a codefendant which the government intends to use at trial.

(B) *Defendant's Prior Record.*—Upon request of the defendant, the government shall furnish to the defendant such copy of his prior criminal record, if any, as is then available to the attorney for the government.

(C) *Documents and Tangible Objects.*—Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or positions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of his defense, or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

(D) *Reports of Examinations and Tests.*—Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, made in connection with the particular case, 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.

(E) *Government Witnesses.*—Upon request of the defendant the government shall furnish to the defendant a written list of the names and addresses of all government witnesses which the attorney for the government intends to call in the presentation of the case in chief together with their grand jury testimony and any statements which the government is obligated to produce pursuant to 18 U.S.C. § 3500 together with any record of prior felony convictions of any such witness which is within the knowledge of the attorney for the government.

(2) *Information Not Subject to Disclosure.*—Except as provided in paragraphs (A), (B), and (D) 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 other government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.

(3) *Grand Jury Transcripts.*—Except as provided in rule 6 and subdivision (a)(1)(A) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury.

(4) *Failure to Call Witness.*—The fact that a witness' name is on a list furnished under this rule shall not be grounds for comment upon failure to call the witness.

(b) *Disclosure of Evidence by the Defendant.*

(1) *Information Subject to Disclosure.*

(A) *Reports of Examinations and Tests.*—Upon request of the government, the defendant shall permit the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to his testimony.

(B) *Defense Witnesses.*—Upon request of the government, the defendant shall furnish the government a list of the names and addresses of the witnesses he intends to call in the presentation of the case in chief together with any statements of the witnesses in the possession of the defendant or his counsel which relate to the offense charged. When a request for discovery of the names and addresses of witnesses has been made by the government, the defendant shall be allowed to perpetuate the testimony of such witnesses in accordance with the provisions of rule 15.

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APPENDIX C

Rule 32. *Sentence and Judgment*

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(c) *Presentence Investigation.*

* * * * * * *

(3) *Disclosure.*

(A) Before imposing a sentence, the Court shall, upon request, permit the defendant or his counsel if he is so represented, to read the report of the presentence investigation exclusive of any recommendation as to sentence. In extraordinary cases, the Court may except from disclosure parts of the report which are not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, or source of information which has been obtained on a promise of confidentiality.

(B) If the Court is of the view that there is information in the presentence report which should not be disclosed under subdivision (C)(3)(A) of this rule, the Court shall state for the record the reasons for its action and to inform the defendant and his attorney that information has not been disclosed.

* * * * * * *

Mr. HUNGATE. All right, we will stand adjourned until 10 a.m. on Wednesday, March 26.

[Whereupon, at 3:50 p.m. the subcommittee adjourned, to reconvene at 10 a.m., Wednesday, March 26, 1975.]

AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE

WEDNESDAY, MARCH 26, 1975

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIMINAL JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:45 a.m., in room 2226, Rayburn House Office Building, Hon. William L. Hungate [chairman of the subcommittee] presiding.

Present: Representatives Hungate, Mann, Thornton, Russo, Wiggins, and Hyde.

Also present: Thomas W. Hutchison, counsel; Robert L. Brown, assistant counsel; and Michael W. Blommer, associate counsel.

Mr. HUNGATE. Today we hold our final hearings on the pending amendments to the Federal Rules of Criminal Procedure. Our witnesses represent the National Association of Criminal Defense Lawyers, the Center for Law and Social Policy, and the Judicial Conference of the United States.

In order to insure that all witnesses are given an equal opportunity to be heard, we will operate under these ground rules. Each set of witnesses will be allotted 1 hour of time. The witnesses will be given up to 30 minutes to make whatever presentation they want, and the remaining time will be reserved for questions from the members.

Our first set of witnesses represents the National Association of Criminal Defense Lawyers and the Center for Law and Social Policy. The witnesses are Herbert Semmel and Prof. Melvin Lewis of the John Marshall Law School.

Do you gentlemen have prepared statements?

Mr. SEMMEL. Yes, I have a prepared statement.

Mr. HUNGATE. Without objection, it will be made part of the record at this point, and you may proceed however you see fit.

[The prepared statement of Herbert Semmel follows:]

STATEMENT ON BEHALF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE WASHINGTON COUNCIL OF LAWYERS

We appreciate the invitation of the Subcommittee to submit comments and suggestions concerning the proposed amendments to the Federal Rules of Criminal Procedure submitted to the Congress by the Chief Justice on April 22, 1974. The National Association of Criminal Defense Lawyers is a nationwide organization of 1,250 lawyers actively engaged in the practice of criminal law. The Washington Council of Lawyers is a voluntary association of lawyers in the District of Columbia in private practice, in government, and in the law schools. The Council has more than 400 active members.

50-473—75——11

After a careful review of the proposed amendments, we conclude that with some changes suggested below, the amendments should be approved, leaving to judicial interpretation and the rulemaking process the task of clarification and further improvement of minor deficiencies. The remarks below are addressed to the major issues raised by the proposed amendments. Although not included in the detailed remarks, for the reasons set forth by the Advisory Committee, we also fully support the provisions of Rule 4 which provide for the use of summons instead of arrest unless a valid reason for an arrest has been demonstrated. We find the fears of the Justice Department with respect to this change to be illusory and believe that good sense of the United States Judges and Magistrates will protect the just interest of the government in situations where an arrest in the first instance is necessary.

The issues addressed below are as follows:

Rule 11: The regulation of the plea bargaining process is equitable and will facilitate disposition of cases without trial. p. 4.

Rule 11: The provisions on advice to the defendant should be made more specific so as to meet good practice standards and constitutional requirements. p. 6.

Rule 32: Disclosure of pre-sentence reports to the defense is necessary to ensure accuracy and to avoid injustice and may be constitutionally required. p. 9.

Rule 32: The defense should be given an evidentiary hearing if contested factual issues arise which are relevant to sentencing. p. 14.

Rule 16: The relationship of pretrial discovery to investigate resources. p. 20.

Rule 16: The discovery rules as amended fall short of the minimum standards of the American Bar Association with respect to disclosure by the government:

A. Limitations imposed by the Jencks Act. p. 25.

B. The affirmative duty of the United States Attorney to obtain information subject to discovery. p. 27.

C. Failure to require disclosure of exculpatory material. p. 30.

Rule 16: The provisions for compulsory unconditional disclosure by defendants impinge upon rights protected under the Fifth and Sixth Amendments. p. 31.

Discovery by defendants and the privilege against self-incrimination, p. 32.

The Sixth Amendment right of defendants to present witnesses in their own behalf would be infringed by the denial of right to call witnesses and present physical and documentary evidence if a defendant declined to comply with compulsory discovery requirements, p. 37.

RULE 11—PLEAS

The Regulation of the Plea Bargaining Process is Equitable and Will Facilitate Disposition of Cases Without Trial

The major change effected by Rule 11 is a salutory one—it recognizes the reality of plea bargaining and regulates the process. The major change in current practice is the provision allowing the defendant to withdraw the plea if the court rejects the bargain and notifies the defendant it intends to impose a sentence less favorable to the defendant than contemplated by the agreement. Rule 11(e)(4).

We are surprised that some federal judges are opposed to this change, some apparently on the ground that the proposed rule would involve the court in the plea bargaining process. Proposed Rule 11(e)(1) expressly excludes the court from any participation in the plea bargaining discussions. The only "participation" by the judge in the process is the judge's decision to accept or reject the bargain. The judges in most federal districts, where the prosecution may recommend a sentence, have been doing precisely the same thing for many years. The only change here is to make the process fair to the defendant by allowing him to withdraw his plea if the bargain is rejected by the judge. Such a provision seems overwhelmingly fair on its face. The reality of plea bargaining is such that a defendant may sometime find it to his advantage to plead guilty even if he asserts his innocence. In *North Carolina* v. *Alford*, 400 U.S. 25 (1970), the Supreme Court held there was no denial of due process in accepting a guilty plea from a defendant who nevertheless asserted his innocence.

The Court recognized that the evidence against a defendant may appear to be so overwhelming that a guilty plea is in his best interests despite his asserted innocence. The same considerations apply on the side of the government. Diffi-

culties of proof may mean that a plea to a lesser included offense or in exchange for a relatively light sentence may be the best obtainable and in the public interest.

The ability of the criminal justice system to function requires that plea bargaining be encouraged and the number of trials needed be kept to a minimum. Problems of delay are severe in many federal districts. Plea bargaining encourages the disposition of cases without trial, is indeed essential to that process. The practice of binding the defendant to a plea but permitting a judge to reject the consideration and impose a stiffer sentence discourages a defendant from pleading. It is no secret that certain federal judges are regarded by defense counsel and prosecution alike as maximum sentencers, resulting in a reluctance of defense counsel to recommend guilty pleas even if a reasonable sentencing recommendation is made by the government. The proposed Rule 11 will do away with such impediments to the disposition of cases by allowing the withdrawal of the plea if the bargain is rejected by the judge. It will ensure simple fairness to defendants who now play Russian roulette in many districts when they plead guilty, never knowing if the bargain will be accepted.

Other judges have expressed opposition to Rule 11(e) on somewhat opposing grounds, that it will remove too much of the sentencing power from judges because the pressure of court calendars will coerce judges into accepting the bargain. This is indeed a feeble objection by a federal judge who wields such awesome power in the sentencing process. The judge should have no difficulty in rejecting a bargain he regards as unwise or unwarranted. It is hardly appropriate to abandon a procedure that will facilitate plea agreements and that is so fundamentally fair because a judge will feel a little pressure from his calendar. Indeed, some second thoughts on the part of the judges might be desirable before rejecting a plea agreement which the prosecution and defense attorneys, the persons best acquainted with the case, find equitable and in the best interests of the public and the defendant.

The Provisions on Advice to the Defendant Should be Made More Specific so as to Meet Good Practice Standards and Constitutional Requirements

Rule 11(c) which governs advice to a defendant before acceptance of a plea should be amended to specify that the defendant be notified of his recognized constitutional rights and that his guilty plea waives such rights. Such specificity will ensure protection to defendants and at the same time reduce requests for appellate and collateral review of guilty pleas.

In *Boykin* v. *Alabama*, 395 U.S. 238 (1969), the Supreme Court held that a defendant must be advised of his Fifth Amendment privilege against self-incrimination, his right to a jury trial, and his right to confront witnesses against him. 395 U.S. at 243. The court explained the importance of a full statement of rights before accepting a guilty plea:

"What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequences. When the judge discharges that function, he leaves a record adequate for any review that may later be sought (citation omitted) and forestalls the spin-off of collateral proceedings that seek to probe murky memories." 395 U.S. at 243–44.

The proposed Rule 11(c) does not give the defendant the solicitude the Court required in *Boykin* and does not create a record which bars serious collateral attack. In place of a specific instruction as to a right to a jury trial, or to confront witnesses, the proposed Rule only requires the defendant be advised "there will not be a further trial of any kind" (Rule 11(c)(4)). In place of an explanation of his right to plead not guilty and yet not be compelled to testify at trial, the defendant is merely told that he has a right to plead not guilty and persist in that plea (Rule 11(c)(3)). Perhaps trained lawyers know such rights exist but no such assumption is warranted in the case of defendants in criminal cases. If one is unaware of a right to jury trial, how does one knowingly waive that right if he is told only that he will not have a trial of any kind. If the defendant has never heard of his right to remain silent, how can he learn of its existence by telling him that he has a right to plead not guilty.

The Rule also omits one other fundamental right about which defendants should be advised at the time of a plea, even if so advised earlier, the right to counsel, *U.S.* v. *LaValle*, 330 F. 2d 303 (2d Cir.) *cert. den.* 377 U.S. 998 (1964).

Why these fundamental rights are not specified is somewhat of a mystery. Most federal judges specify all these rights and more before accepting a plea. The entire process usually takes about five minutes, particularly if the defense counsel has discussed these matters with his client in advance of the hearings, as defense counsel should. The Federal Rules of Criminal Procedure should not invite judges to do less than current practice, nor should they sanction records which will leave in doubt whether the defendant understood his rights and made an informed, voluntary decision to plead guilty.

Therefore, Rule 11(c) should be amended to require that the defendant also understand his right to counsel if not represented, including right to appointment of counsel for indigent defendants, right to jury trial, right to confront and cross-examine the witnesses against him, and his Fifth Amendment privilege against self-incrimination.

RULE 32—SENTENCE AND JUDGMENT

The proposed Amendment to Rule 32 grants to defendants the right to inspect and comment upon the pre-sentence report, except where the court finds that disclosure would result in harm to any person, violate confidentiality, or disrupt a program of rehabilitation of the defendant. The amendment would bring Rule 32 into substantial conformity with the ABA Standards Relating to Sentencing Alternatives and Procedures § 4.4 (1967). It reflects the practice currently followed by some District Judges, probably only a minority of the District Court bench. We support the proposed amendment as necessary to protect against the injustice of sentencing based upon possibly inaccurate, incomplete, or wholly false information. However, we submit that if the defendant raises a substantial factual issue on any allegations in the report likely to affect the sentence, he should be entitled to a hearing on the issue, not merely the right to comment now contained in Rule 32(c)(3).

Disclosure of Pre-Sentence Reports to the Defense is Necessary to Ensure Accuracy and to Avoid Injustice and May Be Constitutionally Required

Our Constitution wisely requires the most stringent procedural safeguards before an accused can be convicted of a crime. But in the vast majority of cases these procedures have little impact because the case is disposed of by a plea of guilty. It is estimated that over ninety percent of all convictions are the result of guilty pleas. Advisory Committee Notes to Rule 11, Committee Print, p. 31. In almost every case the real issue is the sentence, not guilt or innocence. Yet, this most crucial determination is made in the majority of cases based on information contained in a pre-sentence report which is never shown to the defense, information which may be accurate but may also be the gossip of malicious neighbors, the imagination of a suspect eager to cooperate with law enforcement officials, or the unverified statement of faceless informers.

Although many probation officers make some attempts to verify information, the amount of time which can be devoted to a particular case is necessarily small. Probation officers lack the power to cross-examine their informants and often fear that close questioning will frighten off sources of "information". Much of the information they report to the court is second hand, from the records of local police departments or the FBI, and the probation officer has never even spoken to the informant. In case of confidential informants, the probation officer does not even know the informant's name. Yet the District Judges tend to regard the pre-sentence reports as highly reliable. For example, in *United States* v. *Weston*, 449 F.2d 626 (9th Cir. 1971), the District Judge increased the sentence from five to twenty years on the basis of reports by the FBI and the Narcotics Bureau that defendant was a major narcotics dealer. The sentencing judge commented:

"Well, as I commented, Mr. Kempton, in the companion case, the Jackson case, this Court has great respect for the probation service in this and other districts, and I believe as a whole they are a group of officers who are extremely objective, very concerned with the welfare of the defendants, who they report upon, and also are attentive to their duties as officers of the Court.

"And when statements are made categorically as they are made here, the Court has no alternative, in the face of contrary factual information, rather than simply a vehement denial, but to accept as true the information furnished the Court which in turn was obtained by the probation officer from the officers of the Federal Bureau of Narcotics and Dangerous Drugs."

When the Court of Appeals for the Ninth Circuit reviewed the confidential information submitted to support the allegation that defendant was a major narcotics dealer, it concluded:

"To say that it corroborates the very broad charges contained in the pre-sentence report is an over-statement. Moreover, it contains nothing to show, rather than to assert, that the informant was reliable, or otherwise to verify the very serious charge made against Weston. It appears in the record in this case that Weston's house was searched after her arrest and nothing was found, nor was any narcotic found on her person or in her purse." (448 F.2d at 630).

The Weston case is a rare example where sentencing upon vague allegations surfaces in a reported opinion. But experienced attorneys recognize the attitude of the District Judge toward the probation report as typical. It seems almost incredible that our system permits people to be imprisoned for years without being given the information upon which the sentencing judge relies. In *State* v. *Pohlabel*, 61 N.J. Super. 242, 160 A.2d 647 (*App. Div.* 1960), the defendant was sentenced to seven *consecutive* terms of three to five years for forgery, based on misinformation in the pre-sentence report. Because there was no requirement for disclosure of the report, it was only after eight years of imprisonment that the defendant learned of the misinformation in the report, and an additional year of litigation was required before he was freed.

The arguments against disclosure of pre-sentence reports are based on unsubstantiated fears, generally that source of information will dry up if the report is made available to the defendant. This argument has been exposed by the ABA Advisory Committee in its Comments on the Standards Relating to Sentencing Alternatives and Procedures (1967), § 4.4(b), p. 219–20, and in the Standard itself. The Advisory Committee found that the "dry up" argument "falters on two grounds".

"The first is based on the experience of those members of the Committee who have lived under a system in which disclosure is routine, and is supplemented by the Committee's examination of sample reports produced under such a system. The conclusion is that there is little factual basis for the fear that information will become unavailable if the report is disclosed. The quality and value of a presentence report will turn to an infinitely greater extent on the skill of the probation service and the availability of adequate supporting facilities than it will on whether its contents remain a secret. This view is further supported by the experience of the Legal Aid Agency in the District of Columbia. . . .

"The second reason is more fundamental. One of the basic values underlying the manner in which the guilt phase of a criminal case proceeds is that the defendant is entitled to know the details of the charges against him and is entitled to an opportunity to respond. It is believed that this value is subverted by a system which does not require disclosure of the information contained in the presentence report.

"Perhaps an example can best make the point. Assume two statutes, one defining the offense of robbery and providing a ten-year maximum term and the other defining the offense of armed robbery and providing a twenty-year maximum. It would be unthinkable in this country to permit the defendant to be convicted of robbery under the first statute and yet sentenced to twenty years under the second because of a report submitted to the court by a probation officer which disclosed for the first time the fact that the defendant was armed. Defense of this result on the ground that the sources of such information would dry up if the defendant were told about it would be dismissed out of hand.

"But contrast a jurisdiction which takes a different approach. Assume here that the legislature has defined only one offense of robbery and has remitted to the sentencing court the job of grading the offender within the range of a twenty year maximum term. In this context we seem quite prepared to admit the propriety of the same twenty year term on the same ground: namely that the defendant was armed. Yet this time we make no requirement that the defendant be informed that the judge may act on this basis."

The ABA Advisory Committee also rejected the argument that disclosure will unduly delay the proceedings. It noted that it is the obligation of the defense attorney "to assure that the sentence is based on adequate and accurate information", *Id.* at p. 222, and that disclosure of the pre-sentencing report facilitates this process rather than delays it. Further, the Advisory Committee said:

"Nor can the majority of the Advisory Committee accept the argument that non-disclosure should follow because the proceedings will be delayed by disclo-

sure. In the first place, such an argument is a difficult one to make in the face of a conclusion that basic fairness requires disclosure; it completely avoids the fundamental relevance of justice to the defendant as a factor in determining procedural requirements. In the second place, the majority believes that this too is a straw man which both is not likely to find support in the facts of many cases and which in most can be avoided by the presentence conference proposed by section 4.5, *infra*." *Ibid.*

We fully support the principle of disclosure of presentence reports. As the ABA Advisory Committee concluded, "disclosure of the report ought to be required because such a practice will increase the fairness of the system, because it will increase the appearance of fairness, and because it will assure a greater degree of accuracy in the sentencing determination."

The Defense Should Be Given an Evidentiary Hearing if Contested Factual Issues Arise Which are Relevant to Sentencing.

The proposed amendment, 32(c)(3)(A) affords the defense the opportunity to "comment" upon the pre-sentence report. The amendment would more fully achieve its purpose of assuring accuracy of the information in the report by specifying that the defense shall have the right to rebut derogatory information, including the power to subpoena witnesses and cross-examine them.

The cases of *U.S.* v. *Weston* and *State* v. *Pohlabel*, *supra* pp. 10–12 are examples of the necessity for such safeguards. Another example is *Collins* v. *Buchkoe*, 493 F.2d 343 (1974), where the defendant, convicted of rape, was sentenced to life imprisonment based upon the pre-sentence report and a separate confidential accusation of rape by another alleged victim which the defendant denied. The defendant was never given the opportunity to rebut the allegations of other rapes. The judge said he was: "entirely satisfied that this defendant is possessed of an abnormal sex urge * * * that it was uncontrollable * * * that he did far more than that [the convicted offense], * * * not only with the girl who is the complainant in this case, but I am satisfied with other girls."

On appeal the Sixth Circuit reversed, holding that the reliability and truthfulness of the information considered in sentencing is a matter of fundamental concern. While recognizing the broad discretion of the sentencing judges as to the nature and source of information utilized by him in sentencing, the court found there are nevertheless limitations imposed by the requirements of due process, including the opportunity to rebut derogatory information demonstrably relied upon by the sentencing judge when such information can in fact be shown to have been materially false. Other cases in the Courts of Appeal for the First, Third, Fourth, Fifth, and Ninth Circuits are cited in the decision supporting the right of defendant to a hearing on factual matters in dispute which are material to the sentence.

The cases have not required and we do not propose a full scale post conviction trial following strict rules of evidence. See *Williams* v. *New York*, 337 U.S. 241 (1949). What is necessary is that the defendant have the opportunity to present evidence in the manner called for under the circumstances of the case. As revealed in the quote from the District Judge in *U.S.* v. *Weston*, supra, p. 10, the mere denial by defendant of a charge in a pre-sentence report will not carry much weight with the judge. In some cases the defendant can offer direct evidence disproving derogatory information. In other situations, where defendant denies a charge, the only method of demonstrating its falsity is to cross-examine the person making the charge.

Issues in the sentencing process collateral to the crime for which defendant was committed are very much the same as those present when parole or probation is to be revoked. In each case, the defendant is to be imprisoned at least in part for conduct for which he has never been convicted. In such circumstances the Supreme Court has enunciated specific procedural rights required by due process. In *Morrissey* v. *Brewer* 408 U.S. 471 (1972), involving parole revocation, the Court held:

> Our task is limited to deciding the minimum requirements of due process. They include:
>
> (a) Written notice of the claimed violations of parole.
>
> (b) Disclosure to parolee of evidence against him.
>
> (c) Opportunity to be heard in person and present witnesses and documentary evidence.
>
> (d) The right to confront and cross examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation).

The Supreme Court has held that where an additional sentence may be imposed because of factual matters beyond the scope of the conviction—such as multiple offenses or sexual psychopathology—the defendant is entitled to an evidentiary hearing. *Specht* v. *Patterson*, 386 U.S. 605 (1967). There is little reason to distinguish this situation from one in which a defendant is sentenced to a maximum term instead of receiving probation or a minimum term because of information relied upon by the sentencing judge without opportunity for effective rebuttal by the defendant. Yet the Rules of Criminal Procedure, even after the proposed amendments, would seem to permit imposition of years of imprisonment under the same circumstances as the multiple offender laws without any requirement for a hearing.

There is legislative precedent for an evidentiary hearing in the special sentencing provisions of both the Organized Crime Control Act of 1970, 18 U.S.C. § 3575(b), and the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 849(b) which provide: "In connection with the hearing [on sentence], the defendant and the United States shall be entitled to assistance of counsel, compulsory process and cross-examination of such witnesses as appear at the hearing."

These provisions may fall short of the due process requirements of *Morrisey* v. *Brewer*, *supra*, if they were interpreted to permit a court to consider information from a person who avoided service or failed to respond to a subpoena. Nevertheless, they indicate the kind of provision which Rule 32(c) should contain.

The same arguments are likely to appear against an evidentiary hearing as were advanced against disclosure of the presentence report, in particular, an added reluctance of informants to provide information if they are subject to later questioning under oath. But perhaps this reluctance has its advantages as well as its drawbacks. We are dealing with information which may send a person to prison for many years. Should we not encourage caution on the part of informants by reminding them that they may have to justify their remarks? The Supreme Court has already held that the informer's privilege must give way if revelation of his identity is "essential to a fair determination of a cause." *Roviaro* v. *U.S.*, 353 U.S. 53 (1957). And *Morrisey* v. *Brewer*, 408 U.S. 471 (1972) indicates that due process requires an evidentiary hearing on disputed fact issues. At the same time, the Court there recognized an exception if confrontation would subject an informant to risk of harm.

What we are ultimately faced with is the problem so familiar in criminal procedure of protection of individual liberty without unduly hampering enforcement of the law. We are dealing with the most fundamental issue in most criminal cases, liberty, probation, or imprisonment, and the length of imprisonment. Individuals may not be deprived of their liberty on the unsworn testimony of informats who know they will never be called to a day of reckoning before the courts if the information they offer is untrue or inaccurate.

PROPOSED CHANGES IN THE DISCOVERY RULES (RULE 12.1 AND RULE 16)

The Relationship of Pre-Trial Discovery to Investigative Resources

Unprecedented changes in the proposed amendments would require defendants to supply information to the prosecution in a scope beyond that found in either federal or state practice and would require such discovery regardless of whether the defendant has sought discovery from the prosecution. Such changes are founded on a misconception of the investigative resources available to the prosecution and defense.

The proposed amendments for the first time require the defendants to provide the government with the names and addresses of defense witnesses, a requirement of general applicability not found in state practice. In addition, the right of the government to obtain physical evidence and documents to be produced at trial has been made absolute. Formerly, virtually all discovery on the part of defendants has been conditioned on their first requesting discovery of the prosecution. To a large extent, broad and unconditional discovery has been imposed upon defendants supposedly to achieve "parity" of discovery between prosecution and defense. Since the prosecution will now be required to supply defendants with the names and addresses of witnesses, so the argument goes, a like requirement should be imposed on defendants.

Such an argument is an abstraction divorced from reality. It compares elephants and peanuts and finds them equal. The government has available to it the most extensive investigative resources imaginable—the FBI, specialized fed-

eral law enforcement agencies such as the Narcotics Bureau and the Internal Revenue Service, and all state and local police organizations. Every conceivable kind of expert is available from government agencies, plus the services of specialized crime experts and laboratory facilities of the FBI. In addition, the government has available to it the best pre-trial discovery device that any lawyer could ever wish for—the grand jury. The United States attorney may call any potential defense witness before the grand jury and question him at length. Neither the witness nor the defendant is permitted to have counsel in the jury room. A transcript of the testimony of the defense witness is prepared and available for cross-examination. On the other hand, prosecution witnesses need not be called before the grand jury; government investigators often appear instead and testify to the results of their investigation. Even if a potential prosecution witness is called, there is no requirement that a record of his testimony be made and often no record is made. This practice prevents defendants from using the transcript of the grand jury proceedings for cross-examination at trial.

In contrast, most defendants have almost no investigative resources available to them. For indigent defendants, the Criminal Justice Act provides only $150 for both investigative and expert assistance without prior approval and a maximum of $300 with prior court approval. 18 U.S.C. § 3006A(2) and (3). Expenditures in excess of $300 can be authorized only for services of "unusual character or duration" and these require the additional approval of the chief judge of the Circuit. Approvals of amounts in excess of $300 are rare in practice.

Similarly, defendants of modest, limited means generally have no funds available for investigation, their resources having been exhausted in retaining counsel. It is only the wealthy defendant or the rare case of a defendant who attracts widespread public sympathy and support who may actually have funds to conduct an adequate investigation, and even these well-heeled defendants cannot begin to match the resources of the government. Even when investigators are employed by defendants, or the attorney himself investigates, their effectiveness is markedly less than that of government counterparts. Records of businesses, banks and myriad government agencies are opened to the prosecution but are regularly denied defense investigators. Many witnesses feel a much greater compulsion to talk when a law enforcement officer flashes his badge than when an investigator for a private party seeks out information.

The issue then is how this imbalance of resources can be corrected. In the criminal rules we are not dealing with private parties but with the public interest in ensuring that justice is achieved. The oft-repeated admonition "the responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict" (ABA Code of Professional Responsibility, EC 7-13) is honored in the breach by the proposed amendments if the price the defendant must pay is that he must supply the prosecution with information which may incriminate him, see *infra*.

There is also an intensely practical reason for not supplying names of defense witnesses which is illustrated by reports from attorneys as to police investigatory techniques in the states requiring disclosure of alibi witnesses. A police officer approaches an alibi witness and the following dialogue occurs:

Policeman: "We have John Jones on a charge of robbery on June 25. He says you were with him that night."

Alibi witness: "Oh no, I never saw him that night."

Even the lawyer trained in semantics might respond as the witness did, since the witness views an acknowledgment of association with defendant as implicating the witness in the crime. Is this not the natural reaction of the average person? Later, at trial, after the alibi witness testifies that he was with defendant far from the scene of the crime, the prosecution calls the police officer who is asked of his conversation with the alibi witness and answers (truthfully) that the witness told him he had not seen the defendant on the night of the crime. What this illustrates, of course, is that police investigation is by its nature coercive and threatening to the average citizen. Requiring the defense to expose each of its witnesses increases the possibility that justice will be distorted.

The Advisory Committee Notes to the proposed amendments acknowledges that "the government normally has resources adequate to secure much of the evidence for trial", but finds that unspecified situations might require disclosure by defendants "in the interest of effective and fair criminal justice administration". In essence, the Advisory Committee found disclosure to be necessary in only exceptional cases but promulgated a rule of general applicability. A much

more careful approach, tailored to the actual needs of the government is necessary particularly where serious questions are raised of invasion of the constitutional rights of defendants under the proposed amendments.

The Discovery Rules as Amended Fall Short of the Minimum Standards of the American Bar Association with Respect to Disclosure by the Government (Rule 16(a))

A. *Limitations Imposed by the Jencks Act*

To a substantial extent, the departures in the amendments from the ABA minimum standards are required by the limitations on pre-trial disclosure of statements of government witnesses found in the Jencks Act, 18 U.S.C.A. § 3500 (Supp. 1973). The interrelationship between the Jencks Act and other pre-trial discovery requires that Congress amend the Jencks Act to coordinate with the proposed amendments to the Criminal Rules.

The Jencks Act prohibits compulsory disclosure of statements of prospective government witnesses or their grand jury testimony until after the witness has testified on direct examination at trial. When the statement is delivered after the direct examination, the defense must be given time to study it and to prepare cross examination based on the statement. If the statement is in any way lengthy, this may often entail a delay of several hours, in which the jury, the judge, and the prosecution are immobilized. The resulting delays have caused many U.S. Attorneys to voluntarily turn over Jencks statements prior to the beginning of trial. However, some U.S. Attorneys still withhold them until after direct examination.

The American Bar Association standards provide for pre-trial discovery of the "relevant written or reported statements" of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial. Likewise, grand jury minutes containing testimony of such persons is also subject to pre-trial discovery. ABA Standards, §§ 2.1(a)(i) and (iii).

The primary purpose of the Jencks Act, as revealed by the legislative history, S. Rep. No. 981 on S. 2377, 85th Cong. 1st Sess. (1957), was to prevent wholesale fishing expeditions into the prosecution's files, a result Congress thought might follow from the decision of the Supreme Court in *Jencks* v. *U.S.*, 353 U.S. 657 (1957). Requiring pre-trial disclosure of "Jencks Act statements" (only substantially verbatim statements or written statements of the witness) does not in any way infringe upon this objective of Congress. In addition, Rule 16(a)(2) under the proposed amendments would specifically provide against discovery of "reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case."

Suppression of statements of government witnesses has sometimes been supported by a desire to protect the witnesses from coercion or intimidation. Since the amendments call for the government to reveal the names and addresses of its witnesses (Rules 16(a)(1)(D)), suppression of statements of witnesses no longer will serve to protect their identity. If there is a reasonable possibility of such coercion, the government may obtain relief from discovery under amended Rule 16(d)(1). Similarly, it has been asserted that in some cases where the government must call a hostile witness, pretrial disclosure of his statement may make it easier for the witness to tailor his testimony so that it will assist the defendant without directly contradicting an earlier statement. Such cases are rare, and upon a reasonable showing the court may deny discovery under amended Rule 16(d)(1).

In sum, an amendment of the Jencks Act to permit pretrial discovery of substantially verbatim statements of prospective prosecution witnesses would bring the proposed amended rules into conformity with the ABA minimum standards and would not impinge upon the protection which the Jencks Act sought to give to prosecutorial internal files.

B. *The Affirmative Duty of the United States Attorney to Obtain Information Subject to Discovery*

Rule 16 also fails to meet the ABA standards with respect to disclosure by the government of prior criminal records of the defendant and prospective government witnesses. The principal shortcoming is the failure to require the prosecutor to take reasonable steps to obtain such information.

The ABA Standards, Section 2.1(d), require the prosecutor to disclose "material and information in the possession or control of members of his staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report or with reference to the particular case have reported to his office."

Amended Rules 16(a)(1)(A) and (D) contain substantially equivalent language requiring disclosure of statements of the defendant and reports of physical or mental examinations or scientific experiments. These rules use the language requiring disclosure of information "*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.*" However, Rules 16(a)(1)(B) and (E) use different language when dealing with the prior felony convictions of witnesses or prior criminal record of the defendant. Rule 16(a)(1)(B) requires discovery of the defendant's prior criminal record "*as is then available to the attorney for the federal government*". Rule 16(a)(1)(E) requires discovery of prior felony convictions of prosecution witnesses "*which is within the knowledge of the attorney for the government*". The Advisory Committee notes do not explain the different language between subsections (B) and (E) and subsections (A) and (D). The result of the difference is significant, however.

The language of subsections (B) and (E) apparently would not require the U.S. Attorneys to request a full report of prior criminal convictions from the FBI, although this is readily available with a minimum of effort. It is virtually impossible for defense counsel to obtain information as to prior convictions, particularly as to prosecution witnesses, except from the prosecution. The prior conviction may have occurred in any of the jurisdictions of the United States. We have been informed by the FBI that they provide governmental agencies with criminal records of 400,000 persons *daily*, but will not make such information available to defense counsel. We see no reason why the rule should not require the government to use "exercise of due diligence" to discover any prior convictions of the defendant or a witness.

Furthermore, we believe that the discovery of criminal activity by prosecution witnesses should not be limited to prior convictions for felonies, but should include all convictions, including misdemeanors. In *Davis* v. *Alaska*, 94 S.Ct. 1105 (1974), the Supreme Court held that a defendant may have a constitutional right under the Sixth Amendment's confrontation clause to impeach a witness by evidence of prior conviction, even a juvenile offense, if, under the facts of a case, the criminal conduct of a witness would indicate a propensity to cooperate with the prosecution in exchange for leniency or a desire to avoid suspicion. The defendant then has a right to introduce evidence of the existence of such conviction. This right is meaningless, however, unless the information is available to the defendant. Often, the only source of such information is the government itself. Accordingly, the word "felony" should be deleted from Rule 16(a)(1)(E).

C. *Failure to Require Disclosure of Exculpatory Material*

Section 2.1(c) of the ABA standards requires the prosecution to "disclose to defense counsel any material or information within his possession or control which tends to negate the guilt of the accused as to the offense charged or would tend to reduce his punishment therefor." The proposed amendments to the Criminal Rules do not contain any such provision. The Advisory Committee Notes to Rule 16 state that the committee "decided not to codify the *Brady* rule" (*Brady* v. *Maryland*, 373 U.S. 83 (1963)). Codification is necessary, however, because there is no clear cut guideline as to what effort, if any, the prosecutor must make to obtain exculpatory information not contained in his own files. At present, there is no clear cut requirement on the part of prosecutors to obtain exculpatory material in the hands of the FBI, police, or other investigatory agencies, even when available on request. See cases summarized in *Hall, Kamisar, LaFave & Israel*, Modern Criminal Procedure (1969) 1060-66. Prosecutors often make no attempt to comply with the *Brady* rule on exculpatory material beyond examining their personal files. Information which might establish innocence might thus be denied to the court, resulting in serious miscarriages of justice. *Cf. Giles* v. *Maryland*, 386 U.S. 66 (1967).

To clarify the obligation of the prosecutor in such cases, an additional subsection F should be added to proposed Rule 16(a)(1), as follows:

"(F) Upon request of a defendant, the government shall disclose to the defendant any material or information which tends to negate the guilt of the

accused as to the offense charged or would tend to reduce his punishment therefor which is 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."

The Provisions for Compulsory Unconditional Disclosure by Defendants (Rules 12.1(c) and 16(b)) Impinge Upon Rights Protected Under the Fifth and Sixth Amendments

The provisions for compulsory discovery by defendants raise grave questions of constitutionality under the Fifth Amendment privilege against self-incrimination and the Sixth Amendment right of a defendant to call witnesses in his own behalf. Under the rules presently in effect, the government has no unconditional right of discovery against a defendant, although the defendant can be compelled to give certain "non-testimonial assistance" to the government, such as handwriting samples, voice samples, fingerprints, and appearance in line-ups. Otherwise, discovery by the government against the defendant presently comes about only if the defendant requests discovery from the government. Even in such cases, discovery is limited to either medical or scientific reports or other papers or physical objects which the defendant intends to produce at the trial.

A. *Discovery by Defendants and the Privilege Against Self-Incrimination*

Even the limited conditional discovery presently available against defendants raises substantial constitutional questions. Justices Black and Douglas dissented in 1966 from the promulgation of the discovery rules presently in effect, in part because of their concern over the constitutional questions under the Fifth Amendment. 39 F.R.D. 272, 276. Professor Charles Alan Wright, himself a member of the Standing Committee on Rules of Practice and Procedure, has described the current limited reciprocal rule as operating "near the border of the Fifth Amendment". 1 *Wright*, Federal Practice and Procedure (Criminal) § 255. Wright concluded that it would have been extremely difficult to reconcile unconditional discovery by the government with the privilege against self-incrimination. *Wright, supra* § 256.

The amendments to the rules would require precisely such unconditional discovery by defendants. The amended Rule 16(b) would require the defendant to disclose to the government before trial:

(1) any writing or other tangible object which the defendant intends to introduce at trial,

(2) the names and addresses of witnesses the defendant intends to call at the trial (also required by Rule 12.1(b) in case of alibi defense), and

(3) any results or reports of physical or mental examinations and scientific tests which the defendant intends to introduce as evidence at the trial or which were prepared by a witness whom the defendant intends to call at the trial.

Under the proposed amendments, the government has an unconditional right to such information even if the defendant has never requested any discovery from the government.

The argument that such disclosure may be required without violating the privilege against self-incrimination rests on the notion that the defendant will be called upon to disclose only that which he will disclose in any case at the trial. See *Williams* v. *Florida*, 399 U.S. 78 (1970). Professor Wright explains the weakness of this argument as follows:

"But this appealing argument may not be a complete answer. Defendant will shortly reveal those things he intends to produce only if the government has first made a case against him sufficient to survive a motion for directed verdict. Unless the government can prove a case sufficient to go to the jury, a defendant need prove nothing. There is nothing in Rule 16, as amended, which prevents the government from using material which it has obtained by discovery as part of its own case-in-chief and thus it may be that there will be cases where the government is able to make a *prima facia* case only with the aid of evidence it has obtained by discovery." (*Wright, supra*, § 256)

A study in the *Harvard Law Review* reached the conclusion that "the policies adherent in the Fifth Amendment privilege against self-incrimination indicate that the prosecutorial discovery provisions of the proposed amendment to Rule 16 are unconstitutional and should be rejected." Note, *Prosecutorial Discovery under Proposed Rule 16*, 85 Harv. L. Rev. 994 (1972).

Williams v. *Florida*, *supra*, is often cited as authority for unconditional pretrial discovery against defendants of anything the defendant will reveal at trial.

See, *e.g.*, *Wright*, *supra*, § 256 (Supp. 1973); ABA Standards, Supp. 1970, pp. 4–6. However, the *Williams* case dealt only with a limited notice-of-alibi situations, not general discovery against defendants.[1] The pre-trial revelation of an alibi or alibi witness will be much less likely to risk incrimination of a defendant than the general discovery required by the proposed amendments to Rule 16(b).

The distinction between discovery of non-incriminating defenses and general discovery against defendants, in light of the Fifth Amendment, was highlighted by two decisions of the California Supreme Court. In the widely-cited *Jones* v. *Superior Court*, 58 Cal. 2d 56, 372, P.2d 919, 22 Cal. Rptr. 879 (1962), the California Supreme Court required disclosure by the defendants of information which related to the defense of impotency in a rape case. In a later case, the same court limited the holding of the *Jones* case, noting that details of the impotency defense could not possibly incriminate the defendant. *Prudhomme* v. *Superior Court*, 2 Cal. 3d 320, 466 P.2d 673, 85 Cal. Rptr. 129, 133 (1970). Unconditional discovery of witnesses and documents to be produced at trial by a defendant was rejected, the court cogently explaining the reasons as follows (2 Cal. 3d at 326–27, 85 Cal. Rptr. at 133):

"Thus, if we analyze *Jones* in the light of the policy considerations discussed in *Schader*, it is apparent that the principal element in determining whether a particular demand for discovery should be allowed is not simply whether the information sought pertains to an 'affirmative defense,' or whether defendant intends to introduce or rely upon the evidence at trial, but whether disclosure thereof conceivably might lighten the prosecution's burden of proving its case in chief. Although the prosecution should not be completely barred from pretrial discovery, defendant must be given the same right as an ordinary witness to show that disclosure of particular information could incriminate him. . . ."

"For example, if a defendant in a murder case intended to call witness A to testify that defendant killed in self-defense, pretrial disclosure of that information could provide the prosecution with its sole eyewitness to defendant's homicide. Similarly, consider the effect of disclosing the name or expected testimony of witness B, whom defendant intends to call only as a 'last resort' to testify that defendant only committed a lesser-included offense. . . ."

The proposed amendment to Rule 16(b) sweeps aside this fundamental distinction as to whether the defendant's pretrial disclosure will assist the prosecution in presenting its case in chief. Although the Supreme Court in approving rules of procedure presumably does not intend to offer any views as to constitutional issues which may be raised by application of the rules, Rule 16(b) is likely to be regarded by the lower courts as an indication that a literal enforcement is constitutional. There is, in fact, some support for an inference of constitutionality inherent in promulgation of a rule of procedure. See *Hanna* v. *Plumer*, 380 U.S. 460, 471 (1965). Not surprisingly, the District Courts are likely to regard the rules as carrying "a strong presumption" of constitutionality. See *Helms* v. *Richmond-Petersburg Turnpike Authority*, 52 F.R.D. 530, 531 (E.D. Va. 1971). The proposed Rule 16(b) does not even contain the caveat found in each section of the ABA Standards relating to discovery against defendants—"subject to constitutional limitations". Such a caveat should be included in any rule concerning disclosure by defendants which Congress approves.

B. *The Sixth Amendment Right of Defendants to Present Witnesses in Their Own Behalf Would Be Infringed by the Denial of Right To Call Witnesses and Present Physical and Documentary Evidence if a Defendant Declined to Comply With Compulsory Discovery Requirements (Rules 12.1(c) and 16(d)).*

The Sixth Amendment to the Constitution guarantees defendants the right "to have compulsory process for obtaining witnesses in his favor". This right to compulsory process includes the right to actually have the witness testify at trial. In *Washington* v. *Texas*, 388 U.S. 14 (1967), the Supreme Court held (388 U.S. at 19):

"The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present

[1] The majority opinion in Williams would sanction the disclosure requirements of Rule 12.1(b) in notice of alibi situations. The court expressly left open the question as to whether a court may refuse to allow defense alibi witnesses to testify if the defendant declines to comply with a discovery order. 399 U.S. at 83, fn. 14. For the reasons noted above, we believe Rule 12.1(b) requiring disclosure of the names of alibi witnesses is unwise as a matter of policy. In addition, we find the dissenting opinions in the *Williams* case, 399 U.S. at 106 to be more persuasive in their analysis of the Fifth Amendment's application to discovery of witnesses in alibi cases.

the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as the accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense, this right is a fundamental element of due process of law."

The amendment to Rule 16(d) would impinge on this right to present witnesses. If the defendant refuses to submit a list of witnesses prior to trial, he may be denied the right to call witnesses at the trial. If he refuses to assist the prosecution by furnishing it with documents and physical evidence prior to trial, he may be barred from offering such items as evidence at the trial. It is not enough to say the choice is that of the defendant since he may call the witness or introduce the evidence if he makes pre-trial disclosure to the prosecution. The Constitution contains no provision affording a right to call witnesses only if the defendant cooperates with the prosecution, even to the point of incriminating himself. The right to a defense is fundamental to due process and may not be so conditioned. In *Chambers* v. *Mississippi*, 93 S.Ct. 1038 (1973) the Court found this right so fundamental as to strike down on constitutional grounds a long established rule of evidence recognized in most states. An exception to the hearsay rule is recognized for "statements against interest", subject to two well-recognized limitations—the declarant must be unavailable for trial and the statement cannot be solely against penal interest. In *Chambers*, exclusion of a hearsay statement was held unconstitutional as an infringement on the right to present witnesses in defense, even though the statement was against penal interest and the declarant had actually testified at trial.

The Supreme Court has never decided whether a court may refuse to allow defense witnesses to testify if the defendant declines to comply with a discovery order. Even in the limited context of a notice-of-alibi rule, the Supreme Court expressly reserved judgment on the question in *Williams* v. *Florida*, 399 U.S. 78, 83, fn. 14 (1970).

The Court now seems to have offered in Rule 16(d) a *sub silentio* advisory opinion on the issue, in contravention of its own long recognized prohibition on such advisory opinions. The proper vehicle for resolution of such issues is an actual case or controversy as provided in Article III of the Constitution, with adequate opportunity for briefs, argument, and full consideration by the court. The fears of Mr. Justice Black as to misuse of the rule-making power appear to have been well taken. See dissent of Mr. Justice Black to the 1966 amendments to the Federal Rules of Criminal Procedure, 39 F.R.D. 272 (1966).

TESTIMONY OF HERBERT SEMMEL, CENTER FOR LAW AND SOCIAL POLICY, WASHINGTON, D.C.

Mr. SEMMEL. I appreciate the opportunity to appear before this committee. Before addressing myself to any particular individual rules, I would like to make some comments on the amendments in general, in particular regarding objections raised by the Justice Department which dealt with general reliance on summons, rather than arrests, in rules 4 and 9; and under rule 16 that the Government must provide the defense with the names and addresses of Government witnesses.

Actually, in these areas I don't believe there is any fundamental difference on the underlying policies. For example, I think we all agree that arrests should be avoided unless you have a situation where the defendant will either flee, or will be destroying evidence. Similarly, I think there is agreement that the defendant should be given the ability to adequately prepare for trial, unless the disclosure of such a witness will cause either intimidation of the witness or perjury.

What, then, is the difference in the approach in the proposed rules and the approach of the Justice Department? Essentially the Justice Department has said that we, the prosecutor, should make the determination of when it's necessary to make an arrest; when it's necessary to

make a disclosure to the defense. Now, that essentially is the present state of affairs. As the Justice Department demonstrated, they often use a summons; they, on occasion, open up their files.

The proposed amendments would simply transfer that decision-making, as to when a summons or an arrest warrant should be issued from the prosecutor's office to the judiciary. I submit that under an adversary system the Supreme Court's rules are definitely fairer and in keeping with that adversary system. The prosecutor should not determine the extent of the discovery which the defendant is entitled to. The law should specify it, and the judiciary should apply that law.

A second general comment has to do with whether the rules should apply to the normative situation found in the criminal justice process with exceptions for handling unusual situations; or whether the rules should be addressed, primarily, to the unusual.

I support the approach of the Supreme Court amendments which operate under the normative situations. Most defendants in fact appear for trial and do not flee; most defendants do not intimidate Government witnesses. Essentially, what the proposed rules do is apply to these normative situations, they say, in a normal situation a summons will be used; in a normal situation the defendant will get the names and addresses of Government witnesses.

The rules adequately take care of the exceptional cases where there is some danger that the defendant will not appear, that he will flee, or intimidate witnesses. By allowing the courts to issue arrest warrants for a valid reason; by allowing the courts to deny discovery, and indeed under 16(d)(1) the proposed rule uses the term "sufficient showing" as the only test for the right of the court to deny discovery.

So, certainly such terms would encompass any possible intimidation of witnesses; any possible destruction of evidence. And the question is, do we have such a low regard for the Federal judges that we are going to require rules, as the Justice Department suggests, in order to protect against Federal judges allowing defendants to intimidate witnesses? I think we can easily rely in this area on the good sense of the Federal judges and the Federal magistrates.

A third general comment I have would be a general approach which I would hope this committee would consider with respect to the rule-making process, and the function of the Congress with regard to these rules.

I think it's quite proper that under the leadership of this committee Congress has finally begun to take a close look at the rules promulgated by the Supreme Court. The Rules Enabling Act clearly contemplated that such a review should be undertaken, but it was never actually undertaken until this committee first examined the proposed evidence rules, and now the proposed criminal rules.

On the other hand, I think it's also clear that if Congress undertakes to rewrite every rule change that's contemplated by the Supreme Court, the rulemaking process is going to be completely undermined. If that is the case, what essentially would happen, is that the Supreme Court would become merely the initiating process for congressional legislation. This would effectively undermine the purpose of the Rules Enabling Act.

In general, I think that the rules of procedure should be left to the courts and to the judiciary. Unlike the evidence rules which touch

upon important substantive rights, these rules clearly are procedural rules; they are the result of a lengthy process of deliberations and drafting. I believe that this process can be substantially improved; and on that topic I would refer you to the testimony of Professor Lesnick who testified last September as to methods for improving the rulemaking process. But the proposed rules, I think, should be accorded at least a healthy respect by Congress.

There is, however, one area where I would depart from the policy of deference to the rulemaking process, and that is where important constitutional rights are involved. I think when we are dealing with constitutional rights, each branch of the Government must defend the Constitution, and it is particularly necessary here where the Supreme Court is playing a very unusual role for the courts. The Supreme Court is in fact acting as a legislative body when it writes rules.

I say that because when you are writing legislation or writing rules, you are dealing with general rules for the future and not adjudication of past conduct, which is what courts typically do. The result is that the constitutional issues become submerged in the process, where no individual attention is given as in the normal situation.

Indeed, in recent years both Justices Black and Douglas have dissented from the adoption of rule changes primarily because they felt the court has not given the rules the detailed study that is given individual cases. But lurking in the rules are very significant constitutional issues.

And to compound the problem, the Supreme Court itself has suggested in the case of *Hanna v. Plumer*, that the rules carry a presumption of constitutionality. The result is that where constitutional rights are infringed, or potentially infringed, then Congress must step into the role of examining the issue and, if necessary, amending the rules to prevent any constitutional infringement.

I now would like to turn to rules 4 and 9 which were not covered in my written statement; I'll just make a brief comment on them. They are the rules that have to do with the use of the summons as a normal practice, and the use of arrest only when a valid reason is shown.

We support rules 4 and 9 as written by the Supreme Court. I think the issue is very simply, why should the prosecution arrest someone if they can't give a U.S. magistrate a valid reason why the arrest is necessary? That's all the rule says. All that is required is that the Justice Department provides the magistrate with valid reasons why an arrest is necessary. It is important to remember that this is done in an ex parte context, there is no adversary proceeding, the U.S. attorney comes in to the magistrate and makes a presentation showing why there is a valid reason for an arrest.

I submit if they cannot meet that very simple test, then there is, in fact, no reason why an arrest should be made; the prosecution should proceed by way of a summons.

If I can just mention a case from my own experience, I was involved in the defense of a prosecution for harboring a deserter from the armed forces. The defendant was a housewife with five children. She was arrested by the FBI while two of her children of preschool age were at home. She was required to ultimately leave the children unattended for a short time. It was sort of an amusing sidelight because

she called her babysitter who, it turned out, was a coconspirator and therefore had already been arrested. The case was ultimately dropped without ever coming to trial. Nevertheless, this woman was required to leave her children, was arrested, and spent most of the day in jail.

It seems to me there was a very bad judgment made on the part of the U.S. attorney in that case in not proceeding with a summons. That would be precisely the kind of thing that would be avoided if a U.S. attorney had to explain to the magistrate what valid reason there was for an arrest in a case.

I think the Government's concern about suppression of evidence can be simply answered, as both Mr. Mann and Mr. Wiggins suggested on Monday. All the Government has to do is obtain a search warrant at the same time it obtains the summons; that will in fact bring substantial benefits to the Government in a search because the search warrant would be broader, generally, than the possible scope of the search pursuant to an arrest. You would not be limited to the immediate physical area and the defendant himself; the search warrant could specify the entire premises could be searched. The use of the search warrant is essentially a constitutional way, as the Supreme Court has repeatedly said. The Constitution looks to a judicial screening before a search is made, and is the normal procedure to protect the right of privacy of the public. The search incident to arrest is an exception to that, which is founded on the necessity to protect Government agents who are making an arrest, and to protect against the destruction of evidence which is lying about when an arrest is made.

But the search warrant is the normal procedure, and it fits in very nicely with a summons procedure. The Government can serve the summons, make the search, and at the same time the defendant is not subjected to being taken to jail, required to post bail in cases where there is no valid reason.

I would now propose to turn to rule 11, unless there are any questions.

Mr. WIGGINS. If I may ask you to comment, if you would please, on a special concern of mine. The concern I have in this problem of an accused who is served a summons, as distinguished from being arrested, and thereafter he leaves for the purpose of avoiding prosecution, and stays out of the clutches of the law for such a time that the prosecution of the basic offense can no longer proceed for any reason.

What offense, separate offense if any, has the defendant committed which would justify going forward on some basis against him?

Mr. SEMMEL. I'm sorry that I can't answer that question definitively because I don't have the U.S. Code to see whether failing to appear in such circumstances would constitute a crime, just like his fleeing while on bond.

I would think if that is a problem the appropriate method would be to amend the criminal code to make it criminal in such circumstances, rather than adopt a rule that everyone should be arrested simply so that if they don't appear, they then could be prosecuted.

Again, I think that is the unusual case for which a special rule should be created. That problem should not be the factor on what is the normative rule.

Mr. WIGGINS. Thank you.

Mr. HUNGATE. Proceed.

Mr. SEMMEL. I would like now to turn to rule 11, which I covered on page 4 of my written testimony. Essentially this rule involves a recognition of the reality of the practice of plea bargaining and attempts to regulate that process. It would allow withdrawal of the plea if the judge rejects the bargain and indicates that he wishes to sentence in excess of that which has been agreed upon.

It seems to us that such a rule is eminently fair. If the defendant is going to be subjected to a higher penalty than he bargained for, he should have the right to proceed to trial. I think the rule will clearly facilitate the plea bargaining process and avoid unnecessary trial by taking the defendant out of the position where he has to play a guessing game with the judge when making a guilty plea.

In many cases the defendant reaches an understanding with the U.S. attorney, but then has to make an assessment on whether the judge wants to accept the arrangement. The result is that some defendants may decide not to plead guilty and go to trial because they are afraid the judge will not accept the plea bargaining. Now, under the proposed rules the defendant has the opportunity to find out whether the judge will accept the bargain or not. If the judge accepts the bargain, the plea will remain in effect; if the judge rejects it and proposes to impose a severe penalty, then the defendant has the option of either accepting the more severe penalty, or going to trial.

I think that will bring about a high incidence of guilty pleas if we take out this Russian roulette the defendant has to play if he doesn't know what the result of the plea will be.

Mr. HUNGATE. Pardon me. Is it always true that the defendant doesn't know what is going to be happening with the plea?

Mr. SEMMEL. I can't answer that in totality; it is certainly the practice in some district courts that the defendant has no assurance. I think it is the general practice that most Federal judges are reluctant to commit themselves in advance to accepting a recommendation of the U.S. attorney.

Mr. LEWIS. If I may amplify that very briefly, I think there are two members of the subcommittee here present who can probably vouch for the proposition that in some courts it varies from judge to judge. Some judges will offer commitments in advance of a plea, others refuse to be party to any such discussions. So, it depends really sometimes within a given district court on the identity of the district judge to whom the case is assigned.

Mr. SEMMEL. There is one point with respect to rule 11 that I would like to urge the committee to consider an amendment to, because it involves what I consider a basic constitutional right. That is the provision of subdivision (c) which governs the advice to the defendant before the plea of guilty.

The rule does specify some of the advice that should be given the defendant, but we feel that it does not meet the required constitutional test which the Supreme Court set down in *Boykin* v. *Alabama*. The court in that case said very clearly that before a plea of guilty the defendant must be advised of his fifth amendment privilege; he must be advised as to his right to jury trial, and he must be advised as to his right to confront witnesses against him. And in fact, I think that is the practice in Federal courts generally.

However, the rule does not specifically require that advice. It does make some general reference to the fact that the defendant should be advised that if he pleads guilty, there will be no trial. But that might tell a lawyer who knows there is a right to trial by jury, knows there is a right of the defendant not to testify if he goes to trial. Lawyers know those things, and I think a defendant should be told more than "You will lose your right to trial" because he may not know that he will lose the right to jury trial, the right to remain silent, and so on.

I think that all of this would take about 2 minutes out of any given session before the court, but should be included.

Mr. HUNGATE. You are suggesting that language be added to rule 11(c).

Mr. SEMMEL. Yes, sir.

Mr. HUNGATE. Thank you.

Mr. SEMMEL. If there is no other question about rule 11. I would propose to go on to rule 32. I am skipping somewhat, we are now on page 9 of my written testimony; rule 32, however, has to do also with sentencing, the presentence report.

Basically the major change in the rule is that it provides mandatory disclosure of the presentence report except if the disclosure would be harmful to the defendant or would cause harm to other persons.

Now, of course, the change in the rule is, from the present system in which it is now discretionary with the judge as to whether the report will be delivered. In fact, now in many Federal districts there is no disclosure of the presentence report,

Now, this is a very strange procedure, I think, because if we look at the reality of the criminal justice system, there are perhaps as many as 90 percent of the cases that are disposed of on a guilty plea. So that for most criminal defendants the crux of the whole proceeding is the sentencing process.

Now, when we come around to determining guilt we have the most elaborate procedural safeguards, but when we come about determining a whole lot of factual issues, which may be the real questions of the case, as to whether the defendant is sentenced to prison and how long he will go to prison, we have no procedural safeguards now. The rules now permit the judge to proceed on a report which the defendant never sees, never has a chance to contest; and he may in fact sentence the defendant to a prison sentence based entirely on erroneous information.

Some of the information in the report of course may be very valid. On the other hand, some of it may be gossip; some of it may be malicious testimony by enemies, neighbors, and so on; and some of it may be information supplied by police informants who themselves may be subject to criminal prosecution, and who may believe that the police may be more lenient if they supply information which is derogatory to someone else.

Now, the problem is compounded by the fact that the information which the probation officer delivers is not necessarily information that the probation officer has himself obtained firsthand. Much of the information in the probation report comes from the FBI files, and from local police files. So, the judge doesn't even have the benefit of the judgment of the probation officer as to whether the information is accurate.

Now, the rule in general would allow the defendant in most situations to see the report, and we support that rule. The problem which we have with the rule is that we don't think the rule adequately protects the constitutional rights of the defendant. If the defendant makes a good faith challenge to the material which is contained in the probation report, there is no adequate proceeding under which he can rebut derogatory information.

All the rule does is to allow him to "comment" on the report. It does not provide the right for him to present any evidence, or to rebut the information in the report. It does not provide where necessary he may have the right to cross-examine persons who have given information which is derogatory and may result in a heavy sentence.

Now, this may appear not to be so serious, but in my written testimony I set out examples from appellate cases in which judges have sentenced defendants on information which turned out to be highly erroneous.

Mr. HUNGATE. Permit me to inquire, please. One criticism we often hear about our criminal justice system is the protracted time it takes to reach a decision, right or wrong. I think the British disposed of the Lord Haw-Haw case in under a year, while we spent 12 years with Tokyo Rose.

Now, perhaps we should not have presentence reports if it is going to lead us into another series of hearings that would prolong the process.

Mr. SEMMEL. Well, I think the criminal justice system has a number of purposes, and the presentence report certainly serves the purpose of making a just determination—I think Professor Lewis particularly would like to comment on that.

Mr. LEWIS. If I may, sir, I would have to say this, I believe the chairman's question really goes to the heart and inter-relationship of many of the rules that are before this committee this morning.

I suggest to the committee that the one single factor most responsible for delays in the processing of criminal matters is in 18 U.S.C. 3500. There is no more meaningful factor in the delaying of adjudication, and these delays are caused not only at the pretrial stage, and not only in consequence of causing a great many trials that would otherwise be unnecessary, but the very length of the trial itself, which is frequently as much as doubled in consequence of 3500.

Now, this relates fairly directly to rule 16, which is under consideration by this committee at this time. Rule 16 makes an attempt to accommodate both the doctrine of *Wardius* and the proposition that certain disclosures are indeed helpful in proper and expeditious disposition of adjudication. But at the same time while attempting to accommodate that, it attempts to conform to the close-fisted doctrine of 3500. Because statements cannot be required on one side unless they are produced by the other, and the Justice Department is totally unwilling to surrender the technical advantage of 3500, we are left in a position in which rule 16 falls very, very far short of most comparable State discovery patterns.

Now, I would suggest that the concern of this committee relative to expediting the adjudicative process would be only very marginally advanced by an elimination of the presentence report, and would be very meaningfully furthered by the approach to rule 16 suggested to

this body by the American Bar Association, that calling for pretrial disclosure of witness statements.

I suggest that this would have beneficial effects in a great many different dimensions, and I think this may be the answer, sir, in that area.

Mr. HUNGATE. You are supporting the ABA criminal justice section position on rule 16?

Mr. LEWIS. Yes, sir.

Mr. HUNGATE. Now, let me grossly oversimplify this. One of the problems in our criminal justice system is the long time it takes to get a final decision.

Judges now have presentence reports available to them, and are they not now subject to being scrutinized for errors?

Mr. SEMMEL. Yes.

Mr. HUNGATE. Overall, I think most of us feel that presentence reports aid the defendant more than they harm him and, as defense counsel, would be reluctant at this moment to see them done away with. Is that a fair statement?

Mr. SEMMEL. I would say it varies from case to case, it would be hard to generalize. I would think it depends on what is in the report, if there are unreliable statements derogatory to the defendant——

Mr. HUNGATE. You gentlemen speak from experience, I'm sure. When you are pleading someone guilty, would you ask for a presentence report, or would you rather not have one?

Mr. LEWIS. Sir, that would depend upon the following factors. First, my knowledge of what such a report would be likely to elicit from the defense standpoint; and, second, the question whether there had been an agreed adjudication between defense counsel and prosecutor which I believed the court would be likely to accept.

In the latter case I believe that I would not want a presentence investigation because it simply would serve no purpose. In the former case I would not want it if I believed it would fundamentally damage the cause of my client.

In any other situation, sir, I would want it, provided that I were given the opportunity to comment with respect to anything contained in this report which might be damaging and which might not be supported by the facts.

Mr. HUNGATE. Are you now afforded the opportunity?

Mr. LEWIS. In some courts, yes, sir; in others, no. And again, this varies from judge to judge within a given district as to whether, and the extent to which defense counsel will be given knowledge of the contents of the report.

Mr. HUNGATE. Even as their knowledge of the law varies.

Mr. LEWIS. That may be so, sir.

Mr. WIGGINS. I am not sure, professor, that you are supporting the same position as the principal witness. I understood his point to be that there should be some mechanism for testing the accuracy of the information contained in the presentence report, since obviously it affects the fundamental interest, if not rights of the defendants.

And you urge only the right to inspect and comment, which would be, as I understand it, which would be reflected if the rule were adopted as proposed.

Mr. LEWIS. Sir, first off, let me say that I was attempting to give a direct response to the chairman's question, which was, as a practical proposition, what would I want to have happen now, in the present status of things.

I certainly agree with the principal witness that the defendant should be given a chance to establish, if he can, factually, the lack of the foundation for statements made within the presentence report. I definitely agree with that.

Mr. WIGGINS. Would you have a different view with respect to this rule which you are urging upon us with respect to rule 16, and give a similar right to the Government to question the accuracy of any self-serving and in their view false information submitted to the judge, to impact his sentence?

Mr. LEWIS. Certainly.

Mr. WIGGINS. That should not be withheld from the Government, I take it.

Mr. LEWIS. Certainly not. If the Government has anything it wishes to contradict, a statement made at sentencing by the defendant, or on his behalf, not only do I think that they should have the right to present that, I think that they do, without restriction.

Mr. WIGGINS. Well, I guess the question for decision by Congress is whether the procedural penalties outweigh the benefits, and there are obviously benefits to the defendant because you are proposing what amounts to presentence trial of the factual issues which may bear upon the sentence; and that involves delay and complex procedural conditions.

Mr. LEWIS. I think that is correct, there will be some cases where it will cause delay.

Mr. SEMMEL. First of all, in most situations I don't think that will be the case because if there has been a plea bargaining, I don't think all these protections are necessary. If the judge accepts the plea bargain, it really is not necessary; if the judge doesn't, then the defendant has a right to a trial.

I think this hearing perhaps should be limited only to cases where there had been no plea bargain which has been accepted.

Mr. HUNGATE. We have passed through the 30 minutes allotted for your prepared remarks, but we have interrupted you several times. You may proceed for about 3 more minutes, and then I will go to the questioning.

Mr. SEMMEL. Mr. Chairman, Mr. Lewis has a number of comments he would like to make, and since I have submitted written testimony, there is just one other point I would like to make, which is not included in my written testimony. I would like to submit to the committee another point for consideration which is not directly covered by the rules.

The Los Angeles Times on October 23, 1974, reported that U.S. attorneys are complaining that the prosecution of criminal defendants is in danger because FBI investigators' reports contain information which might be used to discredit prosecution witnesses.

And essentially, if the committee examines this article, what the prosecutors are saying to the FBI is delete information which is helpful to the defendant and which indicates that witnesses have made contradictory remarks about the case, so when under the Jencks Act

they are finally required to deliver these statements to defendants they will appear to be consistent and harmful material to the Government will be deleted.

It seems to me that is a fairly outrageous violation of the constitutional requirement that defendants be furnished with materials which would be exculpatory; and that these rules should be amended to——

Mr. HUNGATE. Would you care to offer that as part of the record at this point?

Mr. SEMMEL. Yes, sir, I would like to do that.

Mr. HUNGATE. Without objection, it will be received and made a part of the record.

[The article referred to is as follows:]

[From the Los Angeles Times, Oct. 23, 1974]

PROSECUTORS SAY FBI REPORTS IMPERIL CASES

WASHINGTON.—U.S. attorneys are complaining that the prosecution of criminal defendants is endangered because FBI investigative reports contain information that might be used to discredit prosecution witnesses.

The FBI has rejected suggestions that certain information helpful to defense lawyers should be left out of the reports.

But FBI officials have promised to consider other ways of making the reports more valuable to prosecutors.

The dispute surfaced in a closed session between the federal prosecutors and FBI legal counsel John Mintz during a Department of Justice conference in New Orleans last week. Mintz and some prosecutors have discussed the issue in interviews since then. The U.S. attorneys asked not to be identified.

The complaints involve the written reports that FBI agents prepare after interviewing individuals summoned as prosecution witnesses.

The courts increasingly are requiring prosecutors to allow defense lawyers to examine those reports.

The prosecutors have complained that witnesses sometimes lie and often make mistakes in their answers to FBI agents during the first round of questioning and sometimes change their accounts later.

The FBI reports include such conflicts and mistakes by witnesses. Defense lawyers may seize upon those discrepancies in an effort to convince a jury that the witness is lying or unreliable, the prosecutors said.

Some prosecutors asked that the FBI omit reports of the initial interviews and prepare written accounts only of the witnesses' final version of the crime according to some attorneys who attended the session.

"There they go with the coverup thing again," said one prosecutor who opposed the suggestion. "We were about evenly divided on it. But Mintz, to his credit, said no and stood firm."

This prosecutor acknowledged that giving the conflicting accounts to defense lawyers might weaken the government position.

But he said, "This is a risk we have to take because if the public ever starts doubting that an FBI agent tells the whole truth, then we're in worse trouble."

Other prosecutors suggested that the solution to the problem was not in deleting conflicts but in greater pressure by the FBI agents for accurate answers during the first interviews. That would produce fewer discrepancies over such details as dates when later interrogations and investigations were completed, they said.

Mintz assured the prosecutors that the FBI was "already doing some special training in this area," a U.S. attorney said.

Mr. SEMMEL. I would then like to give our remaining time to Professor Lewis, and then we will both be happy to answer any questions. Professor Lewis is the legislative director of the National Association of Criminal Defense Lawyers.

TESTIMONY OF PROF. MELVIN B. LEWIS, JOHN MARSHALL LAW SCHOOL

Mr. LEWIS. I suppose obviously the most appropriate thing I could say in the obviously limited time available to me would be to express my disagreement with Mr. Semmel's presentation relative to the function of this committee concerning Supreme Court rules.

This is not the first time I have made this statement. I regard the work of this subcommittee in respect to the Federal Rules of Evidence as the outstanding legislative accomplishment of the last century.

Mr. HUNGATE. Your time has just been extended. [Laughter.]

Pardon me, sir.

Mr. LEWIS. I think that the distinction that has to be made, as the committee so very wisely has done, is between matters on the one hand involving internal court management, and matters on the other hand that deal with consideration of substantive rights. The blurring of the line, if that line exists ultimately in terms of distinction between substance and procedure was nowhere more evident than in connection with the Federal Rules of Evidence. That same blurring manifests itself, I think, in some very signal particulars in respect to the rules that are before this committee.

I would ask that this committee consider that the rules which are enacted without its intervention, and those enacted with its interventions are accorded equal deference. Both are considered to bear the imprimatur of Congress as well as that of the court. And it is largely for that reason that the rules are given special deference. I believe it is in that context—I think I am still within my 45 seconds——

Mr. HUNGATE. You are.

Mr. LEWIS. I would ask that this committee would consider, it is now faced with an alibi disclosure under rule 12.1, which actually takes the tack that the defendant must first announce that he has an alibi, and then be told where and when the offense is alleged to have been committed.

If this committee agrees, that is putting the cart somewhat in advance of the horse, I would suggest to the committee that another result is to lead a fictitious reciprocal disclosure to a rule which in fact does not embody that feature. If what the rule contemplates as a signal disclosure on the part of the Government is the time and place of the offense, I would then commend to the committee—and I am sure it is already considered in the *Wardius* decision which so states unequivocally—that the disclosure of the time and place of the offense, and it does not really constitute a reciprocity at all; that's at 412 U.S., the footnote at the bottom of page 478.

More, with respect to the proposed alibi rule before this body, I would commend to the committee the proposition, and I think it is fairly patent, that Federal cases by and large are not adaptable to this kind of treatment. I think that the rule has been—pardon me, but candor compels this—poorly considered as in fact many of them have. For, if you look at the average Federal indictment, and I do not here draw, sir, upon academic credentials at all, I don't think that they

would be impressive to a body of this type, I do draw upon some 200 Federal felonies, and I commend to you from that the thought that the average Federal indictment consists in a fairly broad allegation of conspiracy, or mail fraud, or something of that nature, followed by a list of overt acts, running somewhere between 3 and 20.

And the overt act one will be something like this:

On or about June 15, 1974, the Defendant Smith had a conversation with John Jones.

Now, the application of an alibi rule to a charge of that kind, backed up with all kinds of extra indictment offenses thrown in to show intent, to show pattern, to show whatever extra indictment offenses are considered to be shown in Federal prosecution, raises just manifold implications of situations in which a defendant will find out in the middle of the trial that there is indeed an occasion on which he is alleged to have done something when he was somewhere else.

As applied to State practice the charge is generally a very straightforward proposition that at a certain date and time an apartment was burglarized, or an individual struck on the head, or something of that general nature. Alibi rules of that kind have a certain relevancy in cases of that type but I don't think it's possible to transplant them in the sense that they are transplanted here into Federal practice uncritically, and without the kind of adaptation that would be necessary to make the thing rational in the light of the distinctive type of indictment that is characteristically returned in the federal system.

Now, one other point in connection with that. An alibi statute which grants considerably greater reciprocal information than that which is contemplated by 12.1 was held unconstitutional by the Illinois Supreme Court in *People* v. *Fields*, 59 Illinois 2d, page 516. The rationale of *Fields* at 59 Illinois 2d. 516—January 30, 1975—and I apologize for stating things which are obviously known to some members here.

Mr. HUNGATE. It's been decided since they left. Pardon me.

Mr. LEWIS. I can assure the chairman that in both cases a substantial contact has been retained between the Congressmen and their home State, so we don't have to be concerned about that aspect of the case.

But in any event, the failure of 12.1 to require rebuttal witnesses is in and of itself a condemnation of that rule under the accepted reading of *Wardius*. The rule does require, of course, that the government provide the names and addresses of witnesses who will say that the defendant indeed was at the place where he was alleged to be, but this is not parallel to the requirement of providing of rebuttal witnesses on that issue. A rebuttal witness on the issue, for example, might simply say that the defense witness is a liar.

Now, it's precisely this dimension which is contemplated by *Wardius;* and it's precisely this dimension which led to the invalidation of the Illinois statute in the *Fields* case, and we are about to——

Mr. HUNGATE. Pardon me, was that found unconstitutional under the Illinois Constitution, or under the Federal Constitution?

Mr. LEWIS. Federal, sir.

Mr. HUNGATE. All right.

Mr. LEWIS. It was a Federal-based decision dealing with the implications of *Wardius* as the Illinois Supreme Court interpreted that decision.

As we talk of transplants, it might be worthwhile to consider just what business rule 804 of the Federal Rules of Evidence has in rule 15, contemplating depositions.

I could not agree with any given statement more than I agree with that of the American Bar Association that rule 15 is simply ill advised, poorly constructed, and not deserving ratification by the committee and enactment into law.

The transplant from rule 804, that being criminal rule 15(g), contemplates a definition of unavailability which is just really lifted from 804. But what we wind up with, if we view it that way, is a situation in which depositions can be taken in fairly amorphous circumstances in contemplation of their being used in equally ill-defined situations—if after the taking of the deposition, for example, the witness claims the fifth amendment, or forgets, or something of that order. What you've got here is not a deposition procedure which is designed to accommodate itself to the oddball situation in which a significant witness is dying of cancer, or is about to move to Europe, or something of that type.

What you've got here is, I suggest, a rule whose application runs very far beyond anything that was ever suggested to be available under former rule 15. And I join the American Bar Association in suggesting that the imprecision both of the expression and the concept which is implicit in that rule deserves very critical scrutiny on the part of this committee.

Mr. HUNGATE. Thank you. Because of the constraints of time I have alluded to before, and because we have other witnesses here, we'll proceed to questioning and once it gets to be a little later today, we will just be running back to the floor for votes. We want to give everyone as much attention as we can.

Mr. LEWIS. Of course, sir.

Mr. HUNGATE. The Chair will go to the gentleman from Arkansas, Mr. Thornton, for 5 minutes.

Mr. THORNTON. Thank you, Mr. Chairman.

I do want to thank both Mr. Semmel and Professor Lewis for their testimony; and I am very interested in pursuing with Professor Lewis his comments with regard to other rules that may not have been discussed in direct testimony, such as the rule 15, which you just mentioned.

Do you have other—I would like to give you the opportunity to proceed for a few minutes with further discussion of the kind that you have been working on.

Mr. LEWIS. Congressman, you are most gracious, sir; I will accept that opportunity with respect to rule 16 because of the fact that rule 16 brings us full circle as to what I was saying before of the pervasive influence of the Jencks Act throughout criminal jurisprudence in the United States.

Now, the State counterpart to rule 16, for example, drawing on my home State, is Illinois Supreme Court's rules 412 and 413. These rules contemplate a reciprocal obligation of both the defense and the State which extends to summaries and transcripts of witness statements. And I might mention that throughout more than 3 years of experience with this procedure we have had little or no trouble with it.

But the conventional wisdom that in Federal cases the statements of witnesses are not to be disclosed, biases rule 16 in a position in which it lacks any kind of bilateral advantage for all practical propositions. Because you see, sir, to give the prosecution and the defense a list of witnesses, and then say all right, you are now on a basis of parity, go forth and investigate equally, is really not appreciably different from sponsoring a race between two parties, one of whom happens to be equipped with a motor vehicle. There is no equality between the Government and the defense where what is exchanged is simply a reciprocal opportunity for investigation.

The practicalities of investigations—and in most cases, by the way, under a $300 criminal justice act limit for that sort of activity—will do the following thing. First, it will tremendously intensify the disparity between the criminal defendant with financial resources and the criminal defendant who lacks those resources.

Second, it will again tremendously intensify the advantage possessed by the prosecution in criminal cases because of the built-in advantage which the prosecution enjoys in criminal investigations. Not only does the investigating commence earlier, but in addition to that—and there are so many things to be mentioned along this line, I'll content myself with simply mentioning the situation where a man comes into a plant where a punch-press operator is employed and says, "I would like to talk to the operator about a criminal case." Consider the difference on the one hand if he flashes a Federal badge, and on the other hand if he says, "I am the defense lawyer and I would like to speak with him."

Mr. THORNTON. How do you deal with the problem of conducting a fishing expedition, which is the opposite situation; I believe that is related to the Jencks Act. Do you have some comments on that?

Mr. LEWIS. I don't think it lends itself to a fishing expedition, I really don't. The Jencks Act, sir, was a reaction to the *Jencks* decision and to the published fears that in consequence of that *Jencks* decision the syndicate's criminal lawyers would be rummaging through FBI files, extracting all matter of information which could then be used to subvert this or that or the other aspect of the Government itself, not to mention the judicial process. That was the philosophy of the Jencks Act.

And in terms of fishing expeditions, I suggest to you that this is no more or no less available if lists of witnesses are furnished; and again, its availability will depend primarily upon the financial resources of a given criminal defendant——

Mr. THORNTON. Right.

Mr. LEWIS [continuing]. Entirely on that. To the extent that that's available, a matter of financial resource, sir, it's available right now.

And I commend to you this thought, that disclosure of witness statements at this stage will not only avoid an adjournment ranging between 5 minutes and 2 hours following every prosecution witness, it will also have the effect of precipitating guilty pleas which would never otherwise be received because of the fact that the defendant from these statements would indeed be aware of the proposition that the Government does indeed have a case.

Mr. HUNGATE. Thank you, Mr. Thornton.

Mr. Hyde?

Mr. HYDE. I have no questions other than to welcome my good friend, Professor Lewis.

Mr. LEWIS. Thank you, sir.

Mr. HUNGATE. Mr. Russo?

Mr. RUSSO. Thank you, Mr. Chairman.

I still think John Marshall is one of the finest schools in Illinois, second to DePaul, of course.

Mr. LEWIS. We were honored to receive your letter, sir; and we are actually contemplating putting together a faculty meeting for the purpose of preparing a report of the kind that your letter requested.

Mr. RUSSO. Thank you very much.

I just have a few questions, having worn both hats, for 3 years in the State attorney's office in Cook County as a prosecutor, and 1 year as a defense attorney—I still think I wear the prosecutor's hat more than I wear the defense attorney's hat.

It always seems to bother me a bit when people talk about the built-in advantage that the U.S. attorney's office had, or the State attorney's office had. I'm just wondering, how much right does a criminal defendant have over the State?

The objective of the State's attorney and also the prosecutor is to remove the criminal from the street, and at the same time afford him certain rights. Don't you think that the U.S. attorney's office and the State's attorney's office are entitled to a few rights?

Mr. LEWIS. Sir, I don't think that there is any question that they are entitled to, and enjoy them, very substantial rights. And I think you will find a few of the rights, both in their theoretical and their practical applications listed at footnote 9 of the *Wardius* decision; that would be at 412 U.S. at page 475.

The resource problem is not one which besets the Federal prosecutor, it simply does not. Now, at the State attorney's level there probably is a different situation, the volume of the cases, plus the fact that cases are accepted there on a simple citizen complaint, which would never happen within the federal system.

Mr. RUSSO. You indicated there were certain advantages, speedy trials, the effect that more pleas would be obtained after certain statements, and the fact that there wouldn't be the 2-hour delay.

I was wondering, do these advantages outweigh the threats against the State and Federal witnesses? As you realize and I realize, 9 out of 10 cases are won by the U.S. attorney's office, and this places the defendant in a very precarious position when he is indicted by the Federal Government; and his influence over witnesses that the Government is going to call is tremendous once he finds out who they are. If he doesn't find out until the day of the trial, that makes it a little more difficult for him to use his influence on particular witnesses. I feel that they are outweighed by the advantages of——

Mr. LEWIS. Mr. Congressman, I suggest that the fact that the Government wins 9 cases out of 10 is a statistic which is probably equally applicable to any charge of threatening a Government witness. I don't know of anybody——

Mr. RUSSO. We had testimony from the U.S. attorney's office indicating over 713 various serious cases, serious circumstances against their witnesses once their testimony was released.

Mr. LEWIS. Respectfully, Mr. Congressman, every one of these 713 cases—and I'll accept that figure unequivocally for want of anything with which to rebut it—but every one of these cases arose under a rule and statutory scheme through which the defendant was denied all access to any preknowledge concerning the identity of any Government witnesses.

Now, once you are faced with the proposed amendment to rule 16, which would call for an exchange of the identities of witnesses, this is in furtherance of the proposition that obviously a certain amount of pretrial discovery is legitimate, and is desired by both sides.

Now, Mr. Congressman, the whole point is this, I think we have to come to a decision right now whether we are going to adapt our whole system of justice to the odd-ball situations in which something like that might reasonably be feared, or whether we might simply state that on a proper showing by the prosecutor of legitimate fear for the security of a given witness, that identity could be protected in a manner consonant with the rights of the defendant, rather than to write our entire scheme in the light of the least tenable situation we could find.

Mr. RUSSO. It seems to me that rule 15 was added because the drafters wanted to give more discovery to the defendant in rule 16(a)(1)(c). When a request for discovery of names and addresses of witnesses was made by the defendant, the Government shall be allowed to perpetuate the testimony of such witness.

From reading that I get the feeling that it was inserted there because the drafters felt once the identity has been given, the chance of having problems increases.

Mr. LEWIS. I am inclined to agree that was exactly what they had in contemplation, sir. And yet, at the same time I would ask that it be borne in mind that rule 15 as cast contains no standard whatever for a situation in which a deposition properly could be taken.

Now, I ask you to consider one other thing, by the way, with respect to rule 15. Drawing upon your experience, sir, both as a prosecutor and as a defense lawyer I ask you to consider how, in the realm of a criminal justice act under which most Federal felonies are handled, how within the framework of this act it would be rationally possible to require a defense lawyer to participate in depositon procedures in various parts of the country, without a 13th amendment violation, quite literally.

Mr. RUSSO. You know, I'm not in favor of depositions, I'm just pointing out that the deposition was probably put in there to protect the Government witnesses from some type of action taken against them.

Mr. LEWIS. I ask you to consider, Mr. Congressman—and then I will yield to Mr. Semmel——

Mr. RUSSO. I have run out of time.

Mr. LEWIS [continuing]. A deposition would not occur the next day, the fact is, it would probably just be normal procedure, a period of at least a month between the time of the furnishing of the name and address of the witness.

Mr. RUSSO. I believe a witness' demeanor in front of a jury and judge is very important, so I am against depositions.

I have no further questions.

Mr. HUNGATE. Mr. Wiggins?

Mr. LEWIS. By the way, in this context, may I offer this, if the committee does see fit—and I hope it will not—to adopt the deposition procedure, that a safeguard should be employed, a provision that a deposition must be taken in the venue in which a cause is pending unless for some reason, physical disability of the witness, or something of that order, he is unable to attend there.

Mr. HUNGATE. Mr. Wiggins?

Mr. WIGGINS. Just one question, professor. I am unclear in my own mind as to what the penalty is for failure to comply with the discovery provisions of the rule.

Just hypothetically, let us suppose that defense counsel, or the prosecution gives to the other side the name and address of the witness 24 hours before trial; and on cross-examination it is discovered that he talked to that witness 3 weeks ago, and revealed the substance of his testimony to counsel 3 weeks ago. It's apparent that the counsel has not complied with the rule for his own tactical advantage, that would benefit him or his client. What penalty is imposed for failure to comply with that provision?

Mr. LEWIS. On the face of the rule, sir, none. I suppose conceivably the Federal contempt remedy seems to be expanding in new areas almost daily, and probably would accommodate itself to those situations.

But, of course, it would be peripheral to the question of the rights of the litigants before the court.

Mr. SEMMEL. Rule 16(d)(2) leaves the question of the penalty to the court by providing that the court may order additional discovery, grant a continuance, prohibit the party from introducing the evidence; the court may enter such other order as it deems just under the circumstances.

So, the court for example, even if the witness had already testified and it turns out the name of the witness wasn't disclosed, could strike the testimony. Or the court could adjourn the case for a short time to allow whichever party was prejudiced time to investigate the witness; there is total flexibility.

Mr. LEWIS. These things are possible, of course, but both the *Williams* case and the *Wardius* case leave completely open this proposition, if pretrial disclosure is not made, may the evidence nevertheless be introduced. This is something that is specifically excepted from the scope of both the *Williams* and the *Wardius* decisions. There is no authoritative answer as to that, sir, at this time.

Mr. WIGGINS. Thank you.

Mr. HUNGATE. Mr. Semmel, as I understand it, you are supporting 4 and 9 as is.

Mr. SEMMEL. That's correct.

Mr. HUNGATE. Can you tell us, if it's not an imposition, what about 11? I'm trying to make sure which ones you support.

Mr. SEMMEL. Rule 11——

Mr. HUNGATE. Skip around, however you see fit.

Mr. SEMMEL. All right. Rule 11 we support with the suggestion that it be amended as to the advice to be given to the defendant so as to include all his constitutional rights.

Mr. HUNGATE. We understand that.

Mr. SEMMEL. Essentially, rule 12, there doesn't seem to be any question about. Rule 12.1, notice of alibi, I submit is an infringement

on the constitutional right of the defendant to require the defendant to——

Mr. HUNGATE. Pardon me. Has the constitutionality of alibi notice statutes been tested, do you know?

Mr. SEMMEL. Well, the constitutionality of the alibi statute was upheld in the *Williams* case.

Mr. HUNGATE. If properly drafted.

Mr. SEMMEL. If properly drafted, although with this exception, the court left open a very important question, can the defendant be barred from introducing testimony if the defendant violates the requirement; and it specifically said "We need not decide in this case."

Mr. HUNGATE. That question is open.

Mr. SEMMEL. Right, that question is open.

Now, this rule would authorize the Federal courts to bar any alibi evidence if the defendant did not comply with the alibi rule.

Mr. HUNGATE. So, you are critical of 12.1.

Mr. SEMMEL. Yes.

Mr. HUNGATE. Thank you.

Mr. SEMMEL. In 12.2 essentially we have the same reservation the American Bar Association has, the constitutional right of the defendant, in speaking to a psychiatrist, and the revelation of what the defendant may say to the psychiatrist.

Mr. HUNGATE. Well, I think they have indicated their assent to this rule, but expressed no opinion on it, the constitutional question.

Mr. SEMMEL. I would take essentially the same position.

Mr. HUNGATE. All right, thank you.

Mr. SEMMEL. Mr. Lewis, I believe, has commented on rule 15, general opposition to the expansion of the use of depositions.

Mr. HUNGATE. Do you share that view?

Mr. SEMMEL. Generally, yes.

Mr. HUNGATE. Thank you.

Mr. SEMMEL. Rule 16—I might say I have somewhat philosophical differences about the approach that should be taken to the rule, I would not urge it as strongly as Mr. Lewis; if the committee amends it. I don't think it raises a constitutional question.

Mr. HUNGATE. You are talking about rule 15?

Mr. SEMMEL. Rule 15, the depositions.

Mr LEWIS. Only as a second-choice alternative to objection, sir.

Mr. HUNGATE. Go ahead.

Mr. SEMMEL. Rule 16, essentially we have supported rule 16(a), which is discovery by the defendant. In written testimony I have suggested one change, which goes to the inconsistency on the duty of the U.S. attorney in making discovery. In some of the sections it talks about material which is in 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 Government.

In other portions of that rule they don't have that requirement at all, they just simply say in (a)(1)(E) on Government witnesses, their prior criminal records, they say, the Government must produce such records within the knowledge of the Government.

Now, that is a very serious problem because the defendant cannot get from the FBI the criminal record of Government witnesses, the only

way the defendant can get that information is if the U.S. attorney requests it and turns it over.

If the rule stands as it now reads in 16(a)(1)(E), if the U.S. attorney fails to request a criminal record on a witness, there is no way that the defendant can obtain it.

I would urge the former provisions be retained and that 16(b) as amended be rejected, primarily on the grounds that the defendant should not be compelled in the face of the fifth amendment right of self-incrimination to furnish to the Government material which would incriminate the defendant. One of the rules requires that the defendant provide any documents, or other writings. We believe the defendant has a right to withhold that until the prosecution has made a prima facie case. Otherwise this rule forces the defendant to give to the prosecution evidence which could be used in its case in chief to incriminate the defendant.

Rule 17 we don't have any comment. Rule 32——

Mr. HUNGATE. No comment, or support?

Mr. SEMMEL. We support it, sorry.

Mr. HUNGATE. All right.

Mr. LEWIS. Speak for yourself on that one, it bothers me.

Mr. SEMMEL. Oh, I'm sorry. No, we would not, as Mr. Lewis commented. That has to do with the place of taking depositions——

Mr. HUNGATE. You do not agree with that.

Mr. SEMMEL. Yes because otherwise defense counsel would be flying all over the world, taking depositions.

Mr. LEWIS. I believe that depositions should certainly be restricted to the venue of the trial, unless there is some critical, compelling situation, if they are taken at all.

Mr. HUNGATE. And 20, Mr. Semmel?

Mr. SEMMEL. I have no comment on 20.

Mr. HUNGATE. All right, 29.1?

Mr. SEMMEL. Or on 29.1.

On rule 32, I think I already mentioned the general support for rule 32, but I would add the right of the defendant to a hearing when there is a bona fide dispute as to material which the judge takes into account in sentencing—incidentally, I would just add on the delay, if the judge wants to avoid a hearing, the judge can simply announce that those factors will not be taken into consideration that are in dispute in the report. A hearing would be required only if there is a dispute as to material in the presentence report which the judge will use in sentencing. I believe those are the only provisions.

Mr. HUNGATE. Forty-three?

Mr. SEMMEL. Forty-three I don't have any comment on.

Mr. HUNGATE. All right. Now, the Justice Department testified at our hearings on Monday—it protested, I see in the paper, that:

> A proposed change in federal criminal procedure would require prosecutors to treat bank robbers like parking violators. The change would require the prosecutor to send out a summons instead of an arrest warrant, or must convince the U.S. Magistrate to make an exception. The summons is either mailed or delivered and tells the person to come in on his own. Imagine sending a summons to an accused felon. The best chance of seizing contraband or recovering stolen property is following a search following a lawful arrest, or otherwise on a search warrant,

and so on.

Could you comment on that?

Mr. SEMMEL. Yes. Certainly, that is an exaggeration of the description of the rule. That is to say, there are all kinds of Federal cases which may technically be felonies, income tax evasion, white-collar crimes, down to bank robbery.

In a sense maybe the prosecutor has to treat them the same, he has to go down to the magistrate and tell the magistrate why they want to arrest him. But the magistrate does not have to treat a bank robber the same, that magistrate can have him arrested.

Mr. HUNGATE. Is it fair to state that the amendments simply transfer the discretion to arrest from the prosecutor to the magistrate?

Mr. SEMMEL. That's exactly correct.

Mr. LEWIS. Well, more than that, sir, if I might just add. When an indictment is returned today, under the present law against a bank robber, it is brought before the chief judge of the district who then authorizes the issuance of a warrant and then, only then can the arrest be made.

If the chief judge of a district for some unimaginable reason—and that would be equally unimaginable in the case of a magistrate—decided that a phone call should be made to the bank robber to offer him the chance to come in first, it seems to me that result could be reached under present law.

It never has been, it never would be, either, under rule 4.

Mr. RUSSO. Would the chairman yield?

Mr. HUNGATE. Mr. Russo.

Mr. RUSSO. Is there any abuse of the U.S. Attorney's office securing summonses, as opposed to warrants? Do we have that lack of confidence in the U.S. attorneys to not be able to make these decisions?

Mr. LEWIS. Sir, I don't know whether the question really is in terms of a lack of confidence toward U.S. attorneys; or whether really the proper way to approach this is, where should the discretion be vested.

Mr. RUSSO. Well, they are closer to the facts than the magistrate, and I think that knowing some of the things that the prosecutor has, as to whether there is contraband there, as to whether or not there is evidence which they may be able to secure, an arrest warrant would be necessary in that case. And why can't we leave that in the hands of the U.S. Attorney?

Mr. LEWIS. With great respect, sir, the same argument has been made in support of search warrants and with greater logic because of the fact that the objective of a search warrant is to find evidence, whereas the objective of an arrest, the theory, is only to take the defendant into custody.

The search and seizure dimension of an arrest warrant is completely peripheral in theory. They arrest him in order to arrest him, not to search him.

Mr. RUSSO. I understand that. And anything in plain view can also be seized, is that correct?

Mr. LEWIS. Yes, sir, that's correct; but that should not be the objective for an arrest, as opposed to a summons. If that is the case we might as well simply say, "Well, we'll authorize an exploratory arrest in every case because the man——

Mr. RUSSO. That is not what I am saying.

Mr. LEWIS. I'm sorry, pardon me, sir.

Mr. RUSSO. We disagree.

Mr. LEWIS. I guess so, we understand each other on certain other points, and I certainly respect that, sir.

Mr. RUSSO. I am not saying arrest warrants should be used that way. I am merely saying that in the case where the U.S. attorney knows that he needs a warrant to secure the defendant and maybe secure some evidence, why not give him the opportunity to obtain it.

Mr. LEWIS. If you ask me, sir, what I have observed. I have observed this, there is not that lack of rapport between prosecutors and magistrates that would inhibit them in a situation of that kind.

Mr. RUSSO. OK; thank you.

Mr. HUNGATE. Criminal rules recently promulgated in Missouri provide a different way of handling depositions on behalf of the State and on behalf of the defendant. Depositions taken by the State are admissible only when the witness is dead, or when the State has made a good faith effort to secure the presence of the witness and was unable to procure it. Depositions obtained by the defendant may be used in many other instances. The intent is to insure conformity with a standard of the confrontation clause.

What do you think of that sort of a possibility, Mr. Semmel, as to having perhaps two ways for depositions?

Mr. SEMMEL. Well, of course the defendant may take depositions in very limited circumstances and use them. I think the suggestion of the Missouri rule is preferable to rule 15 because it would narrow the use of depositions in general, particularly on the part of the Government.

Certainly, there is a marked difference between a confrontation of a witness in front of a jury, and a confrontation in some lawyer's office where a deposition is taken. So, as a rule I think you certainly should try to get the witnesses before a court and jury, and not have in effect the trial proceed in some lawyer's office.

Mr. LEWIS. May I add one practical consideration. It is one thing to question a witness in the context of the trial as a whole, even if that is the first witness to be heard, nonetheless, one has had the advantage of having heard the prosecutor's opening statement, and one is likely to know how the testimony is likely to fit into the evidentiary posture of the case.

It is quite a different thing to question a witness in a vacuum in which the relevance of his possible testimony is completely conjectural. And it is against that background that the deposition procedure really is not an adequate compliance with the right of confrontation in the average case.

Mr. HUNGATE. Are there any further questions?

Mr. RUSSO. I have just one more.

Mr. HUNGATE. Mr. Russo.

Mr. RUSSO. On page 37, Mr. Semmel, where you talk about the 6th amendment right of defendants to present witnesses on their own behalf. And you feel if he refuses to comply with the discovery provisions, that as a result he will be denied the opportunity to present his witnesses, and you said that raises some constitutional problems.

But the defendant can waive his right, waive his constitutional rights, and I would think after the Government requesting the list of witnesses and he willfully refuses, he, in effect, has waived his constitutional right.

Mr. SEMMEL. A waiver is a voluntary act, and this is not a voluntary act by the defendant.

Mr. RUSSO. If he refuses to submit the list of witnesses, that is voluntary. He can say yes, or no. The rules are going to provide that he has to submit the witness list, and if he refuses to do so, he has voluntarily—in my mind at least—voluntarily waived his constitutional right under the 6th amendment.

Mr. SEMMEL. I would say that he has not voluntarily waived it, because he has been coerced by the rule.

Mr. RUSSO. Assume the rule is constitutional.

Mr. SEMMEL. Well, if the rule is constitutional, then there is nothing being denied.

Mr. RUSSO. OK. I have no further questions.

Mr. HUNGATE. Thank you both very much. You have been very helpful and we appreciate your testimony today.

Mr. SEMMEL. I appreciate the opportunity.

Mr. LEWIS. I appreciate very much the opportunity to have been here. There was a time about a year ago when I was very strongly tempted to show up before the committee with a can of polish and a rag, and an offer to shine all shoes.

Mr. WIGGINS. It's not too late. [Laughter.]

Mr. HUNGATE. The Judicial Conference of the United States provides our next witnesses, Judge Lumbard, Judge Webster, and Professor Remington. We welcome you gentlemen here, and you may arrange yourselves at the table as you see fit.

The subcommittee has received a number of written comments upon the proposed amendments, and without objection they will be made part of the permanent record. An article entitled, "New Rules of Criminal Discovery", in volume 31 of the "Journal of Missouri Bar." Without objection, that will also be made a part of the permanent record. [See appendix at p. 316.]

The deadline for witnesses to submit supplemental statements for inclusion in the permanent record is the close of business on Tuesday, April 8. The subcommittee will go forward with the markup in this matter in the month of April, so that is why we are closing the hearings today, and setting a deadline of the 8th for supplemental statements.

Now, I have another matter to bring before the subcommittee, too. In the Washington Post of Friday, March 21, former Washington Metropolitan Chief of Police Jerry Wilson had an article entitled "Holding the Legal Profession to Account". This whole article, without objection, will be made part of the record. It stated among other things:

> The legal requirement for prompt presentment of an arrested person to a Magistrate is undisputable. The Federal Rules of Criminal Procedure provided for 40 years an officer making an arrest shall take the arrested person without unnecessary delay before a judicial officer. The language is clear, the requirement is mandatory, and unless either the crime or the defendant is unusually important that law is consistently disregarded.

The article makes other references to the criminal rules. Since he is a gentleman of some experience, having served as Chief of Police in Washington, D.C., for some time, the Chair, immediately after the article appeared, invited him to testify before the subcommittee.

I thought that with his background, experience, and expertise he could be of some help to us. As I said, I invited him, but he found himself unable to appear here. I regret that because we can always use help.

[The article referred to follows:]

[From the Washington Post, Mar. 21, 1975]

JERRY V. WILSON: HOLDING THE LEGAL PROFESSION TO ACCOUNT

The American Civil Liberties Union Fund recently filed a class action suit against the Washington police department to enjoin what the ACLU purports to be the *police department's policy* of not promptly presenting to a magistrate persons arrested and detained. The reader deserves to know that as one of the named defendants in that suit, I might be expected to reflect a bias on the issue.

I confess! I'm about to express bias, but the ramifications of my prejudices go beyond that particular case, to the entire spectrum of games which lawyers eternally play, using all the rest of us as pawns.

The legal requirement for prompt presentment of an arrested person to a magistrate is indisputable. The Federal Rules of Criminal Procedure have provided for 40 years that "an officer making an arrest * * * shall take the arrested person without unnecessary delay before . . . [a judicial officer]." The language is clear, the requirement is mandatory. But, unless either the crime or the defendant is unusually important, the provisions of that law are consistently disregarded.

This disregard is not due to police policies. It is because there is no judicial officer, no prosecutor, no defense attorney available for presentment without unnecessary delay *after convenient office hours.*

Usually, if you are arrested much after noon, you must either post collateral or make bond or wait until the next morning for a regular session of court to see a judge; if arrested after noon on Saturday, you will just have to wait until Monday. But your wait is not because the police department is closed down.

It is not that lawyers are unwilling to work. Rather, it is that lawyers, like the other so-called professionals—the social workers, the correctional specialists, the doctors—have developed a notion that keeping regular office hours on nights and weekends is somehow undignified, demeaning, degrading. During those times when the action is taking place, they are content to leave matters to the attention of the police, firefighters, prison guards, interns and reporters. Thus, "professionally insulated" from the realities of life as it is, they will be better able to render their opinions, their criticisms, their judgments during the next civilized office hours.

The lawyers are the worst of the lot, for they inflict their criticisms in the form of civil suits against *the rest of us.* Notice that it is the absence of a judicial officer, not of police, which precludes nighttime presentments. But do the lawyers sue the court? Certainly not, for criticism of another lawyer would be damnably bad form. (Besides how likely is one to obtain court action when challenging a system devised for the convenience and comfort of the court in the first place?)

As a case in point, when the celebrated *Mallory decision* came down from the Supreme Court two decades ago, the law journals reported the ruling as a "control of police misconduct." Never a hint that if there were police misconduct, then it had been approved and reinforced by lawyer misconduct of the prosecutor, the trial judge and the appeals court which sent the case to the Supreme Court.

And the courts tolerate, even encourage, all sorts of charades which confound any objective of justice. Overlooking the shenanigans of defense attorneys who seek continuances in hope the case will grow old and be dropped; dismissing

cases in the absence of a witness who all present know is unneeded for the case; substituting the grand jury for the apocryphal rubber hose by indicting persons they know they cannot convict only in hope a conspirator will become a witness for prosecution.

As the authors, interpreters and enforcers of the principal rules governing our society, lawyers have constructed the system so that everyone is held to account but themselves. They purport to maintain professional discipline, but the process is conducted with a secrecy that lawyers would never tolerate unchallenged in another group. And from the anecdotes at any lawyers' cocktail party you can discern that the discipline is neither rigorous nor taken very seriously.

But change may be on the way. The contingency fee racket is already killing one golden egg goose, forcing us to no fault automobile insurance in self-defense (if lawyers weren't making the rules, we would have had no-fault years ago). Some of the lawyers put out of work by no-fault have shifted to medical malpractice suits, and no doubt eventually will force us to nationalize medicine, but other lawyers already are left with too little to do for profit. And, into this bloated market are pouring thousands of law school graduates looking for work. Already there is talk of advertising fees and of open disciplinary hearings. We may wind up with a civilian review board for lawyers.

But what I really look forward to is the day when lawyers finally realize that most of the villains are among themselves and begin suing one another for malpractice on a grand scale.

Mr. HUNGATE. We appreciate the work done by the Judicial conference. As I recall, you gentlemen were the first witnesses when we held hearings on this matter last year; and in accordance with our understanding then, you will be our final witnesses.

We welcome you, Judge Lumbard, Judge Webster, and my one-time preceptor, Professor Remington.

TESTIMONY OF JUDGE J. EDWARD LUMBARD, CHAIRMAN, ADVISORY COMMITTEE ON CRIMINAL RULES, ACCOMPANIED BY JUDGE WILLIAM H. WEBSTER, ADVISORY COMMITTEE ON CRIMINAL RULES, AND PROFESSOR FRANK J. REMINGTON, STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Judge LUMBARD. Thank you very much, Mr. Chairman, we very much appreciate the opportunity to be here to comment on those suggestions and criticisms that have been made by witnesses since we were here last; and also communications which you have had from many of the judges.

As you know, I submitted a detailed statement when we were here on September 17 as to how the Criminal Rules Committee operated. And in addition to that, in the last few days you received a detailed statement with respect to each of the rules. We will not go over that, but merely attempt to discuss the highlights on the more important rules. And this will be divided between Professor Remington and Judge Webster, and if any time remains, I should like to make a few remarks of a general nature which I think the committee will find relevant.

I should say that since we were here last, that Professor Remington has been appointed by the Chief Justice to be a member of the Standing Committee on the Rules.

Professor Remington?

Mr. REMINGTON. Mr. Chairman, if it's appropriate, we would like to go through the rules chronologically with Judge Webster and my-

self sharing the responsibility for a very brief presentation emphasizing what we conceive to be the principal objections which have been raised to the rules.

First, rules 4 and 9. They were discussed earlier this morning. The objections are well known to the committee. Basically they are that a prosecutor should be able to decide when custody should be taken in the view that he is in the best position to know whether that is necessary, or whether the contemporaneous search for evidence is warranted under the circumstances.

The position of the rule and of the Judicial Conference is that the warrant and the arrest pursuant to the warrant is part of the judicial process. The warrant has significance precisely because it is issued by a judicial officer. And what that requires is a decision by the judicial officer as to whether or not there is probable cause to initiate criminal prosecution, and also whether there are grounds for taking a citizen into custody, an immensely important decision in terms of the impact on that citizen.

I think it will become apparent, as we talk about the rules, that there is a general trend in the proposals which are before this committee to vest in the judicial officer the responsibility for discharging certain important functions, and in the direction of suggesting that this should be done openly.

Although rules 4 and 9 are not detailed with regard to what is a valid reason, it seems to us that there are adequate opportunities to deal with that question should experience demonstrate that judicial officers cannot be relied upon to decide whether it is an appropriate case in which to take custody. There is opportunity for appeal to the court of appeals; and it's in the nature of the rulemaking process that it is a continuing process, and should this turn out to be an unwise rule, there is opportunity for change.

However, I would say that it is the view of the Rules Committee that a judicial officer can properly be relied upon to make this decision along with other important decisions judicial officers have to make. I might make two other comments. It has been said by the Department of Justice—apparently in earlier testimony—that there was no opportunity to comment on this rule. In checking my notes, I find that the sequence is substantially this, the amendment to rule 9 was before the advisory committee at its 1971 meeting. The Department of Justice was represented on the committee by the head of the criminal division, at that time Henry Peterson, to my recollection, and by Harold Kofsky who for about 15 years sat in with the committee, representing the Department of Justice.

There was no change made in rule 4 in 1971. The proposal went before the standing committee in the spring of 1972. And the standing committee, the chairman of which was Judge Maris, suggested a change in rule 4 as well as rule 9.

The proposal was returned to the advisory committee, which met in September of 1972, and the changes were before the advisory committee at that meeting; and presumably the Department, had an opportunity to comment on the changes. The rule proposals then went back to the standing committee and were approved by it and the Judicial Conference in the fall of 1972.

Now, I don't want to say there was all the opportunity that there might have been in the sense that these were, in my recollection, difficult times for the Department, and it may be that the opportunity to comment at that particular time was not what they thought in retrospect to be adequate. But I do want to assure this committee that every effort was made in the course of the rulemaking process to afford maximum opportunity to comment; and our records show that this opportunity was afforded to the Department of Justice.

With regard to the question of the consequences of the refusal to respond to a summons, that Congressman Wiggins raised, that is an issue under the present rule which does provide for a summons as well as for a warrant. The question is, who should make the decision: Should it be a prosecutor in the view that this is a prosecutorial decision; or should it be a judicial officer in the view that the decision to issue a warrant, is a decision to be made by a judicial officer? In our view, it is the latter. The problem of nonresponse to a summons will exist whether or not the rule is amended. It is my understanding that the statute of limitation does not run, and the defendant remains therefore, while he is a fugitive, subject to prosecution for the initial offense. But there may be situations where witnesses die, or become unavailable, where the fact that he does not respond to the summons may result in his not being subject to prosecution.

But I think it is the judgment of the committee that, properly implemented, this rule will not significantly increase the risk of nonappearance.

Mr. Chairman, I think that is responsive to most of the comments which we——

Mr. WIGGINS. I have a question.

Mr. HUNGATE. Mr. Wiggins.

Mr. WIGGINS. Rule 4 provides that a summons may be served upon the defendant, or may be left at his place, or both. It provides that the service may be by any person of suitable age and discretion likely to make a return.

It's possible, therefore, that a police officer or other law enforcement official could serve personally a summons upon a defendant.

Mr. REMINGTON. Yes.

Mr. WIGGINS. Do you know of any constitutional reasons why a police officer should not be permitted to make a search of the defendant and his immediate surroundings, equivalent to the search he would make if he were executing an arrest warrant?

Mr. REMINGTON. I know of no case in which that issue has been litigated. Certainly, the normal authority which the officer has to effect an arrest without a warrant on probable cause would not, in my judgment, be precluded by the issuance of the summons. Were a situation to develop where in the service of the summons the person attempts to flee, the officer could effect an arrest because of the reaction of the suspect. If the suspect were to try to dispose of incriminating evidence, the existence of the summons would not preclude the officer from making an arrest.

Mr. WIGGINS. That is the issue I want to speak to. As you know, the prosecution side is very concerned about losing their right to conduct a search incidental to an arrest, and I am wondering whether they

must inevitably lose that right. I realize the existing law supposes an arrest before the search is permitted.

But I understand the rationale for it to be either protection of the officer making the arrest; I would guess that the person executing the summons is entitled to some protection, too. I don't know whether that matter ought to be dealt with under the rule. But I am curious to know whether you know of any constitutional reasons why substantive legislation might not be enacted to extend the equivalent search right to a police officer if he executes a summons personally.

Mr. REMINGTON. No, I do not. And, in fact, in cases where summons are authorized, there is opportunity to photograph and fingerprint the suspect who responds to a summons in court. In State practice at least, judges order the defendant to be photographed and fingerprinted, a fourth amendment infringement authorized as an incident to his appearance in response to the summons.

So, I would say two things. One is, the rule as proposed, allows the law enforcement officer to inform the judicial officer that the defendant may have evidence in his possession and that a contemporaneous search is necessary to prevent the destruction of that evidence; and that would be grounds for the issuance of a warrant rather than a summons.

Second, it would be constitutional for the Congress to provide for a search as an incident to service of a summons. It is my judgment that as long as the summons is based on probable cause, a search to prevent the destruction of evidence could constitutionally be provided for.

Mr. WIGGINS. Do your colleagues share that point of view?

Judge LUMBARD. Yes.

Judge WEBSTER. Congressman Wiggins, I might just add one other point. You raised a point which was not expressly considered by the committee, but I think it's very clear from *Terry* against *Ohio* that the person who serves the summons has the right to search for weapons if he fears difficulties. A weapons search should give no trouble at all.

Mr. HUNGATE. Mr. Hyde, do you have any questions?

Mr. HYDE. No, sir.

Mr. HUNGATE. We had a couple of suggestions from the Public Defender Service for the District of Columbia on this issue. It suggests that the manner of service specified in (e)(3) be changed to provide that, "Where personal service is not obtained, a copy of the summons must be left with someone of suitable age at the defendant's home *and* a copy of the summons mailed to the defendant's last known address." It feels that this will help assure that arrest warrants do not issue in cases where the defendant has not actually been notified that he is being sought by the Government.

Would that be a troublesome amendment?

Mr. REMINGTON. No; it would not be troublesome. As this committee knows, the rulemaking process is a creation of Congress set up to evaluate the rules of procedure on a continuing basis. Some of the suggestions which have been made in response to the inquiries of this committee are reactions not to proposed amendments, but to the present rules. They are suggestions for further rule changes. There is no question that the present rules are not perfect, and that further changes should be made, either through the rulemaking process or by action of Congress. The change you have mentioned, Congressman

Hungate, is one of those which ought to receive consideration either by this committee, or by the Advisory Committee on Criminal Rules.

Mr. HUNGATE. Thank you. Judge Webster, please.

Judge WEBSTER. Mr. Chairman, if there are no further questions about rules 4 and 9, I will proceed to rule 11.

I might mention again that I submitted to the chairman under cover of a letter dated March 18, 1975, an exchange of correspondence between Judge Kaufman of the District of Maryland and myself, which I felt would be illustrative and useful in terms of explaining the possible apprehension of some district judges in terms of the impact of plea bargaining. [See correspondence at pp. 289–290.]

Professor Remington, I'm on 11(e), would you prefer to take care of 11(c) first; what would be the chairman's preference?

Mr. HUNGATE. You concluded with 11?

Judge WEBSTER. No; I will have more to say on 11(c).

Mr. REMINGTON. I can comment briefly on 11(c). This is an issue which was raised in earlier testimony this morning. The question is whether the provisions of rule 11(c) adequately apprise the defendant of the rights which he gives up when he pleads guilty.

In our judgment the proposed rule is adequate to meet the requirements of *Boykin*. The proposal informs a defendant in a way which is understandable to the ordinary layman. There are cases in which other consequences of conviction would be of great significance to a defendant. But most, if not all, defendants in the federal system are now represented by counsel and we think it appropriate to leave some of the responsibility for advising a client to the defense lawyer. And at the time of the *Boykin* case this was less true than it is today. The second point which we want to stress is that the encumbrance of a rule with specific requirements that the judge, must tell the defendant about a long list of 20 different things, rights which he may give up by his plea of guilty, will develop a ritual without meaning to the defendant.

It is far more important to tell the judge what he must do, as a minimum, and to leave to the judge and to defense counsel the responsibility for giving a defendant additional advice when the facts of a particular case makes it desirable to do so. The defendant has the right to challenge the adequacy of the advice given him in a particular case by motion to withdraw his plea of guilty.

Mr. HUNGATE. Basically, as I understand it, you are suggesting that it be regarded as the responsibility of the defense counsel to give the *Boykin* advice. You are suggesting that there may be a line drawing problem. The rule may wind up like some State constitutions, which contain detailed provisions about when to open the windows, and therefore become too cumbersome.

Mr. REMINGTON. We think if we go in that direction it won't be long before we have a procedure so technical and so encumbered that it is not workable.

Mr. HUNGATE. Do you think it would do more good if counsel would tell defendant of the *Boykin*-type rights?

Mr. REMINGTON. Yes, and for the judge then to tell the defendant in plain English what he wants him to know; and to ask counsel whether he had a discussion with his client and whether he advised him fully of his rights.

Mr. HUNGATE. All right, go ahead.

Judge WEBSTER. In view of the time, Mr. Chairman, we will proceed on with our discussion of some of the problems relative to rule 11(e), which deals with plea agreements or plea bargaining.

Mr. Chairman, I prepared, after personally discussing the practices in the eighth circuit with each of the chief judges of the districts of the eighth circuit, a table which I thought might be illustrative and interesting to you. The eighth circuit roams from the Canadian border to Arkansas, and I think it is a representative circuit.

It's important that in talking about plea bargaining we do understand that the rule deals with four different types of plea agreements.

Mr. HUNGATE. Without objection, Judge, this chart will be made part of the record. [See p. 221.] Go ahead.

Judge WEBSTER. Thank you, Mr. Chairman. Two are in general practice, as the committee will note—throughout the eighth circuit and I believe throughout the rest of the country—first, the practice of permitting the prosecuting attorney to reduce the charge or offer a lesser charge than the original charge; and, second, permitting him to drop multiple counts in a multiple-count indictment.

The third type of plea agreement deals with an agreement only to recommend a specific sentence.

Mr. HUNGATE. Pardon me, as I read the chart, it would not be permitted to do that in the eastern district of Missouri, or in the western district of Arkansas, is that correct?

Judge WEBSTER. That is their stated practice——

Mr. HUNGATE. All right.

Judge WEBSTER. What they normally do in those districts is allow the prosecutor to come in and dismiss the original one and offer a substitute indictment, and then permit him to dismiss the other one later.

Mr. HUNGATE. But type 2, dropping counts, is uniformly permitted throughout the circuit.

Judge WEBSTER. Throughout the circuit.

Mr. HUNGATE. All right.

Judge WEBSTER. Now, on recommending punishment you see that a significant number of the districts permit the prosecutor to recommend a stated punishment, which is not binding upon the court; and the defendant is informed at the time that it is not binding, it's only a recommendation.

In those situations—and this is true under the rule—the judge is not obligated to permit the defendant to withdraw his plea so long as he understands at the time he enters the plea that the recommendation is not binding upon the court.

The fourth one, which is the controversial one, is the practice of permitting the prosecuting attorney, or the U.S. attorney and the defendant to agree upon a stated punishment. That practice is in existence in three of our districts, and in other districts throughout the country. It's my understanding that this scaleoff is relatively constant throughout the country. Some courts are permitting the fourth type.

Those who are regularly permitting the third type, which is a recommendation only, are concerned that somehow or other the proposed rule may force them to take the fourth type, which they disagree with in principle and do not feel the need of in practice.

The rule is very clear that none of these plea bargains are obligatory upon the judge, he can refuse any form of plea bargaining if he chooses not to have it. If he does choose to have plea bargaining, then the rule undertakes to regulate the procedure under which it will take place.

I might briefly mention, because we just received this last night, that at our request the Deputy Attorney General's Office polled the U.S. attorneys across the country and received responses from 74 out of 94 U.S. attorneys. In answer to the question "Does your office engage in plea negotiations as to the dropping of counts in an indictment or information" the response was 47, "often"; 26, "occasionally"; one, "seldom"; and none, "never."

In response to the question with respect to plea negotiations as to general sentence recommendations such as probation or leniency: 7, "often"; 22, "occasionally"; 22, "seldom"; and 23, "never."

With respect to recommending a specific sentence, 6, "often"; 10, "occasionally"; 25, "seldom," and 33, "never."

Unfortunately the questionnaire did not reach the fourth type of plea agreement.

The final question, I think, illustrates that in the opinion of the U.S. attorneys who responded, 20 feel that this policy results from their own office policy; 15 from the judges' views; and about 39 think the two policies are equally controlling.

Mr. HUNGATE. Judge, would we have any idea, it would be interesting to know the type of districts where the response was "often," was New York, Los Angeles, or Detroit among them?

Judge LUMBARD. I can tell you it was not New York, we don't have any such thing in the 2d circuit.

Mr. HUNGATE. I see. I was trying to get the volume.

Judge WEBSTER. I am sure the Attorney General's office knows the answer to this, but we do not.

Mr. HUNGATE. All right.

Judge WEBSTER. But I want to stress again that there is nothing in the rule that requires a judge who has a plea to go to one of the more permissive types of plea agreement procedures which involve in a greater degree the participation of the U.S. attorney.

Mr. HUNGATE. Judge, do I understand your statement correctly, that under the plea agreement procedure of rule 11 the judge, if he sees fit, can just sit there and reject all plea agreements?

Judge WEBSTER. If the judge saw fit, he could reject them all.

Mr. HUNGATE. I just don't think that's the proper way to do it, to say, "I'm not going to have any of it, you can bring them in if you want to, but I'll never accept one." But he would be within his rights under this rule?

Judge WEBSTER. That is my interpretation of the rule.

Mr. HUNGATE. Judge Lumbard, would you comment on that?

Judge LUMBARD. That's right, and in fact many judges take that position; and equally many U.S. attorneys take that position.

Mr. HUNGATE. If rule 11 goes into effect as is, such a judge would not have to change his position. He may have to take it publicly more often, but he could reject them all.

Judge LUMBARD. That's correct, he would not have to change his position.

Mr. HUNGATE. U.S. attorneys and defense counsel would not do anything wrong in trying to get a plea agreement accepted but the rule still permits the judge to say, "I'm an old man, I have never done it and I'm not going to do it."

Judge LUMBARD. It would be a very courageous U.S. attorney who would venture to make a suggestion about a sentence if he were not asked by the judge to do so.

Mr. HUNGATE. I see, thank you.

Judge WEBSTER. You see from the table that there is a wide difference of practice, and those practices continue to be available.

I would like to sum up our position somewhat hurriedly with respect to the committee's contention that this rule protects the public and the defendant. We have had criticism coming from both directions, and I think I can answer it in this way:

1. The agreement is disclosed on the record; we think that protects the public interest, and the interest of the defendant.

2. The judge does not participate, under our rule, in any form of plea negotiation. Thus we avoid what has come to be known as the "invisible process" in which many public interest groups feel the defendant may somehow be sold down the river in the back room, in the judge's chambers.

The recommendation of the prosecutor, to the extent that it is entertained by the judge, can be tested against the presentence report at a subsequent time, or, with the defendant's consent under proposed rule 32, the judge may have prior access to the presentence report at the time the recommendation is made to him.

The statement cannot be used against the defendant if the plea is later withdrawn.

Now, there was some comment in one of the statements that the fact of a plea offer might somehow be used against a defendant in a subsequent proceeding. I think the rule is clear that the offer of a plea of guilty may not be used against the defendant in a subsequent case, if he does in fact withdraw his plea of guilty.

Mr. HUNGATE. That issue came up, if I recall correctly, in the rules of evidence. We put it on the shelf until we took up these criminal rules.

The argument was made that these statements would be made in open court, incident to offering a plea agreemnt, so there would be no question about the fact that the statement was made and was without duress of some form anyway. It was argued that such statements should be admissible. Have I stated that about halfway?

Judge WEBSTER. If I understand the committee's concern, Mr. Chairman——

Mr. HUNGATE. Rule 410 of the Federal Rules of Evidence.

Judge WEBSTER. The rules of evidence become effective, I believe, the same day as these rules are designated to become effective. It would be our view that this would be the most recent statement of legislative intent, and our rule would control.

Mr. HUNGATE. Judge, that is our view, too. This came up in the House-Senate conference on the rules of evidence legislation.

The Senate version of rule 410 said that:

"This rule shall not apply to the introduction of voluntary and reliable statements made in court on the record in connection with any of the foregoing pleas", that is a plea of guilty or nolo, "for impeachment purposes or in a subsequent prosecution of the declarant for perjury or false statement."

Judge WEBSTER. And then I believe in the next sentence it says it doesn't apply——

Mr. HUNGATE. I know that. Mr. Hutchison drafted that sentence. But, the proponents of the Senate version will argue that the Senate's language in rule 410 be put into rule 11. We are going to have to meet that argument.

I want to make sure I understand clearly the position of the Judicial Conference in regard to the use of such statements for impeachment, or for perjury prosecutions.

Judge WEBSTER. I have to express my personal view, that under ordinary circumstances this is a price that we should be willing to pay to obtain candor in the courtroom, and not have hypothetical situations presented by the attorney, preparatory to the offer of the plea. We assume that the prosecutor had sufficient evidence when he brought the charge, or he would not have made it. Therefore, I don't think this type of impeachment evidence is apt to be that crucial in the trial of the case. There may be situations where the defendant would take the stand and deny, or state as an affirmative fact that he had not taken, not offered a plea, or something of that kind.

Mr. HUNGATE. Go ahead.

Judge WEBSTER. I think I have about concluded my remarks. I think there are potential exceptions to this. But as a general rule we are better off accepting the fact that this material will not be used against the defendant.

Mr. HUNGATE. All right, you are saying then, that you back rule 11(e)(6) as written, which precludes the use of such statements for impeachment purposes and for perjury prosecutions.

Judge WEBSTER. Yes, sir.

Mr. HUNGATE. Mr. Wiggins?

Mr. WIGGINS. I understand you are one of our judges, is that correct?

Judge WEBSTER. Yes, sir.

Mr. HUNGATE. From Missouri.

Mr. WIGGINS. Could you fairly try a case, if it resulted in a conviction thereafter, and sentence the defendant with proper objectivity if you had reason to believe that he lied during the trial, inconsistent statements had been made to you in court, prior to the trial, in connection with a rejected plea bargaining?

Judge WEBSTER. I don't say it's impossible to do so. In an urban area I think the practice would probably be, if there is concern on that score, to transfer to another judge. But I don't think it's impossible to do.

For instance, we do hear suppression evidence and rule on those matters, and then go on to trial. If you are asking with respect to how the judge might feel about the sentence that would be imposed; I

would expect it would be very difficult to separate that from your mind if you felt that the defendant had lied.

Mr. WIGGINS. Is it a problem—the problem I raised—is it a problem of sufficient magnitude for this committee to consider it by perhaps requiring the assignment of a different judge for the trial?

Judge WEBSTER. No, Congressman Wiggins, I don't believe it is. And you might impose very serious hardships, for instance, in North Dakota. The two judges in North Dakota are 300 miles apart. We have the Speedy Trial Act coming upon us soon, and I think that such a requirement would be counterproductive.

Judge LUMBARD. I think you can leave this to the discretion of the particular judge. If there is any possible embarrassment, he can see that another judge comes in. And, of course, if he for some reason doesn't when he should, well, then you have the possibility of filing an affidavit of prejudice and get another judge that way.

Mr. HUNGATE. Pardon me, but he rules on the affidavit of prejudice.

Judge LUMBARD. Yes; but it's almost compulsory, unless there is no substance to it whatever, it is almost compulsory that it be granted.

Mr. BLOMMER. Mr. Chairman?

Mr. HUNGATE. Mr. Blommer?

Mr. BLOMMER. Could I pose a hypothetical, and it was relayed to me by the U.S. attorney from the District of Columbia, relating to rule 410. The situation he worries about is that in the course of a plea, when the court has determined the voluntariness of it, he questions the bank robber, "Did you go into the bank," and he says, "Yes, I did." "Did you have a gun," "Yes, I did." "Did you pull out the gun," and he says, "Yes, I did."

And a week later the plea is withdrawn. The man goes to trial, in come the alibi witnesses, "He was in Florida." The defendant takes the stand and says, "I wasn't near that bank."

Now, they say, "We should be able to use those statements made in court, that have all the indicia of truth, to test that man's credibility and impeach that testimony." Now, they feel that strongly.

Judge LUMBARD. Well, you are going to have enough evidence in a case of that sort so you don't need to worry about that, as a practical matter, for the Government to prove its case.

Mr. HUNGATE. Maybe he refreshed his recollection.

Mr. REMINGTON. We fear that under the Senate version that there will be temptation on the part of defense counsel, instead of being candid, to say: "Judge, we are prepared to admit for purposes of this proceeding that the following took place," thus avoiding the risk that a statement can later be used against his client.

Mr. BLOMMER. But Professor, doesn't the court have the constitutional burden to determine that that plea was voluntary?

Mr. REMINGTON. Yes.

Mr. BLOMMER. Can't he say to the defendant before he is going to accept it, "I want to know some facts"?

Mr. REMINGTON. Yes.

Mr. BLOMMER. I can't see counsel say, "Wait a minute, Your Honor, I gave you a hypothetical——"

Mr. REMINGTON. Well, the practice varies. Many judges turn to the U.S. attorney and say, "What is your evidence?" and that is where they

find the facts, they ask the defendant. In other situations they do it by looking at the presentence report. The rule is calculated to leave that to the discretion of the judge. It is possible to do so by means other than the direct questioning of the defendant. I believe the direct questioning of the defendant is preferable, and I would not like to see this discouraged because of the fear on the part of defense counsel that the statement can subsequently be used against his client.

It is better to be able to say to counsel, "Your client can and should be completely candid with the judge in a guilty-plea proceeding."

Mr. HUNGATE. We had better move on.

Judge WEBSTER. If I may sum up in two sentences our position on that rule—and we have dealt with it at more length in our responses—the rule is not a substitute for judicial resources, and we have not contended that it is.

It does serve the public interest to the extent judges and prosecutors are willing to find it useful in satisfying the defendant's anxiety about the terms of his punishment. And thereby it frees more time for other cases where a defendant desires a trial on the merits.

The key, Mr. Chairman, is your confidence in the ability of the Federal judges to exercise proper discretion with respect to an open proposal in which he had no prior participation.

Mr. HUNGATE. Thank you. I didn't mean to be critical of spending time on this issue. I think this provision is one that we will focus on if we get to the floor of the House. We certainly will focus on it if we get to conference with the Senate because the Senate takes a different view on this thing. But go ahead.

Mr. REMINGTON. Mr. Chairman, this group of rules, starting with 12.1, it's the alibi rule, and 12.2, notice of defense based on the mental condition; 15, which gives the right to the Government to take a deposition; and 16, dealing with discovery—all have in common the objective of trying to have resolved prior to trial a maximum number of issues.

The objective is the same objective which the American Bar Association's Standards Committee had in mind when that committee, consisting of prosecutors and defense counsel, unanimously recommended broad discovery.

Earlier, Mr. Lewis mentioned alibi defenses are uncommon in Federal courts. In San Diego, which is the busiest district in terms of criminal cases, it has long been the practice in every case for the judge to ask the defendant whether he is going to rely on an alibi. This is done as part of the omnibus pretrial hearing. Certainly this important question prior to trial does add to the more prompt disposition of criminal cases in that district. The importance of the alibi defense may vary from district to district, but there certainly are districts where that is an important issue.

With regard to rule 15, the Congress enacted a provision identical to rule 15 as part of the Organized Crime Control Act, so the decision to allow the Government to take depositions is present congressional policy. The Advisory Committee is of the view that that ought to apply not only to organized crime cases, but to other cases.

The legislative history of the Organized Crime Act discloses that Congressman Poff made it clear that the enactment of a provision al-

lowing the Government to take a deposition in an organized crime case was not meant to preclude the Advisory Committee from recommending that the Government be allowed to also take depositions in other criminal cases. To allow the Government to take a deposition has been the recommendation not only of this Advisory Committee, but every Advisory Committee on the Criminal Rules, starting in 1940.

Mr. HUNGATE. Now, as I understand your statement, rule 15, which deals with depositions, is identical to a provision of the Organized Crime Control Act adopted by Congress.

Mr. REMINGTON. Yes.

Mr. HUNGATE. Has the constitutionality of that provision been tested?

Mr. REMINGTON. I am confident that there has been no decision holding it to be unconstitutional. I don't know whether the issue has been raised unsuccessfully.

Mr. HUNGATE. You don't suggest, with regard to the confrontation problem, that there be no trial, no chance to test the credibility of your witnesses in front of a jury?

Mr. REMINGTON. The proposal says:

> Whenever due to special circumstances of the case, it is in the interest of justice that the testimony of a prospective witness of the party be taken and preserved for use in the trial.

Can the Federal judiciary be relied upon to prevent the abuse of the deposition authority? In my judgment it is unlikely that a Federal district court is going to authorize taking of deposition unless that standard is met.

Mr. HUNGATE. What you are pointing out, I think, is that it is not a right of the prosecution, or the defendant, to take a deposition, but a discretionary power of the court to authorize taking a deposition.

Mr. REMINGTON. That's right, in a case where the Government can point to a danger to the witness, or the ill health of the witness, it seems to me most appropriate to allow the Government to preserve his testimony.

Judge WEBSTER. Mr. Chairman, not only is it discretionary with the court, but in my view it is self-policing. I can't imagine a Government prosecutor abusing his rule because experience with preliminary hearings show that the prosecutor doesn't want his witnesses cross-examined under oath before trial, and thereby afford the defendant unusual opportunity to test the Government's case. I just don't think the prosecutors will ask to do it, except in exceptional circumstances, and subject to the court's approval.

Mr. HUNGATE. He might seek to depose the defendant's witnesses.

Judge WEBSTER. He can't do that, he can only depose his own.

Mr. HUNGATE. He cannot depose the defendant's witnesses.

Judge WEBSTER. That's correct.

Mr. HUNGATE. What if he lists them as his?

Mr. REMINGTON. The Advisory Committee note makes clear that the proposed rule does not authorize an adverse examination of the other side's witnesses.

Mr. HUNGATE. He would not give the order.

Mr. REMINGTON. No.

Mr. HYDE. Mr. Chairman, if I might ask a question somewhat removed from what we are talking about, one that bothers me, and that is the change of venue question.

As I read the rule, and as I know the practice to be in the northern district of Illinois, there is no provision for that. And if you don't like a judge, or more important, if a judge doesn't like you: and if there are good reasons why you reasonably fear that you will not get a fair trial, it seems to me you ought to get at least one chance to change venue from a particular judge you have been assigned to.

In the State courts it is abused, they go shopping for judges, and I'm against that. But I know of situations where it is just going to be impossible to get a fair trial, and you have had some awfully traumatic experiences in other cases: the judge could have done the former law partner in—there are just all kinds of reasons why I think the interest of justice would be served in at least getting one change of venue.

Judge LUMBARD. You can file an affidavit of prejudice, and that gives you one chance.

Mr. HYDE. As a matter of right?

Judge LUMBARD. As a matter of right, and if there is any substance to it, the judge must grant it and must disqualify himself. And if he should abuse that power, of course that is subject to correction by the court of appeals.

Mr. HUNGATE. Now, when you say that, Mr. Hyde, you are meaning a motion to change the judge or to change the venue?

Mr. HYDE. Well, we always called it a change of venue from the judge.

I was unaware that as a matter of law the defendant would have at least one opportunity to get another judge.

If I might respectfully submit—I think the requirement to put facts down is onerous. You might not really want to put facts down, and the judge might not want the facts down as well.

Believe me, you get into political situations, you get into racial situations. And I just think if a lawyer, an officer of the court says, "On behalf of my client, I don't believe we would get a fair trial," I think he should have one chance. I think only one because then you are not going shopping.

But really, you are going to be terrorized, trying a case before a judge you had all kinds of trouble with before, or get off the case.

There are so many reasons why in the interest of justice—and really, I am not trying to cast any aspersion on the bench—I think there are many times when the judge would just as soon—of course, he has the option to transfer the case.

I would just suggest that sometime this ought to be considered in the rules, an affidavit without setting forth the facts, that you get a fair trial.

Mr. HUNGATE. I thank the gentleman. This is not directly before us, but I think it is a matter of concern to many members of the bar.

Please proceed.

Judge LUMBARD. In view of the shortness of time, Mr. Chairman——

Mr. HUNGATE. We are going to stay with you a while. Time is still short, but we are going to stay as long as we can. Go ahead.

Mr. REMINGTON. Mr. Chairman, there has been extensive discussion of 16. Let me just say that the issue raised by the Department of Justice with regard to Government witnesses is an extremely difficult question. My experience with the Advisory Committee now extends over a period of 15 years. This matter has been under consideration for 15 years. There was a proposal to make a change in the early 1960's. The Department of Justice prepared an extensive memo on the danger to Government witnesses. The committee at that time decided not to require disclosure of witnesses.

The present Advisory Committee, with substantial unanimity, has proposed that there be fairly extensive discovery coupled with adequate protective provisions to guard against abuse.

The judge is authorized to give a protective order or to defer discovery until the time of trial. In a case in which the Government suggests that disclosure of their witnesses would subject those witnesses to danger, it would be perfectly appropriate for the judge to delay the disclosure of the identity of the witnesses until immediately preceding the trial.

The proposed rule also provides that the Government may take a deposition of the witnesses if to do so will help in minimizing the danger to the witness.

The advisory committee was fully aware of the seriousness of the issue which the Department of Justice raises. It is a most difficult question. But again, the conclusion is that Federal judges, given information by the United States attorney, can be relied upon to act in a way that will give adequate protection to the witnesses.

The proposed rule puts maximum responsibility on the parties to exchange information prior to trial. This is happening today particularly in districts that are using the omnibus hearing which involves full disclosure by both sides which is apparently working well. If the parties cannot agree on disclosure, there is provision for them to come before the judge; each party can raise its own particular concern about discovery, and ask the judge to make an appropriate order to take care of that concern.

It is our judgment that pretrial disclosure is in the interest of a more effective administration of justice.

The advisory committee note says that it is not the purpose of the rule to prevent a judge from suggesting discovery in situations not provided for in the rule. This is to encourage innovations such as the so-called omnibus hearing. That hearing works, the judge saying in the ordinary case to the U.S. attorney to make his file available to the defendant; and suggesting that defense counsel make available to the prosecution information about the defense. The experience in the courts in which the omnibus hearing is used, is that they are able to dispose of a maximum number of issues prior to trial. In the case in which there is a plea of guilty, there is a record of the fact that the defendant has had an opportunity to raise a variety of pretrial issues and has had sufficient information to decide whether to raise constitutional and other issues prior to his decision to plead guilty.

This kind of judicial innovation and experimentation ought to be encouraged.

Mr. HUNGATE. Mr. Wiggins?

Mr. WIGGINS. I have a question about rule 16. And the question relates to that part of rule 16 dealing with the oral statement of the defendant, and the requirement that the substance thereof be given by the prosecution to the defense.

There is new language, and it provides:

> The substance of any oral statement which the government has offered at the trial, made by the defendant, whether before or after arrest in response to interrogation by any person known to the defendant and government agents.

The question that I have involves oral statements obtained after arrest, when either a nonexistent or an inadequate Miranda warning was given, and the prosecution knows it cannot introduce that statement in evidence, and accordingly has no intention to do so; but under a recent ruling of the Supreme Court may be able to use it for impeachment purposes.

Do you think that in that case the defendant should have the benefit of the statement, even though it is not intended to be used but, of course, the Government doesn't know for certain whether the defendant is going to take the stand; and if you think they should have it, whether some amendment would be in order to the language I just quoted.

Judge LUMBARD. Yes; of course, that usually comes up on a motion to suppress the statement, which results in a hearing prior to trial. And at that point the Government must say whether or not it has such a statement.

There was a recent case in the District of Columbia on which I happened to sit, where the prosecution had failed to advise—in fact, they advised the defendant, advised the court in writing that they had no such statement, and later used it in the trial; and we reversed the conviction.

Mr. REMINGTON. There is reason for the limiting language. We are told that there may be situations in which a Government agent has talked to the defendant over the course of 10 years, or so; and to literally search the record and give the defendant everything he has ever said to the Government, would be an awfully onerous responsibility.

So the rule is limited to the requirement that he be given the statements which the Government is going to use. You ask whether that includes only statements which you are going to use in the case in chief or also statements which have been prepared to use for purposes of impeachment.

The rule does not deal adequately with that issue although the spirit of the rule would include those statements also.

Mr. WIGGINS. I think so, too. And if the subcommittee, when it considers it, agrees, it would be simple to amend that language.

Judge WEBSTER. Returning, Mr. Chairman, to rule 32, which is the presentence report. Very briefly, the amendment serves two important objectives: First, to satisfy the appearance of justice. The requirement of a presentence report and disclosure to the defendant of that presentence report under ordinary circumstances fills a hole which formerly existed in the judicial process, which had an ex parte aspect which was incomprehensible to the defendant who had been able to confront the witnesses, dispute the claims, and then suddenly the most

significant thing of the whole trial, what was going to happen to him, became a closed book to him.

Second, from the standpoint of the public and the court system, disclosure will head off postconviction challenges which occurs when the sentence is based upon the contents of a presentence investigation which was not disclosed to the defendant.

I heard this morning the suggestion that a formal hearing which offered the opportunity to introduce evidence should be accorded to the defendant. In addition, the problem suggested by the chairman in response to the question with respect to a speedy trial, I think the answer is that a presentence report is not essentially an adversary document. It is prepared by a neutral officer, a probation officer; it has certain diagnostic aspects to it, it is furnished to the court and follows the defendant to prison and through his rehabilitation process.

The probation officer is not going to be adverse to correcting an error which appears in his report. The time to make those changes is not at some formal hearing, but before sentencing. The attorney reports to the defendant, "Here is what they have," and the defendant says, "That's not so, and here is how we can show it." The attorney there has adequate opportunity to go back and get that report corrected.

If the probation officer refuses to correct it, I would rely upon the district judge to frame a procedure for that particular case in which he can determine whether or not the facts are true. If he chooses the other alternative provided by the rules he simply disregards it and says, "I'm not going to rely on it."

In terms of preparing a report, the judge must order a report or state on the record the reason for not ordering it. Occasionally a report is not necessary, if it's just another addon sentence to be served concurrently, or for reasons of that kind; the defendant doesn't want to waste his time, he wants to start serving his sentence and doesn't want to wait. Those situations will arise. But if the judge declines to order one, he puts his reasons on the record.

Then, with respect to the disclosure, if this judge concludes from the report that certain information should not be disclosed, either for the benefit of the defendant or the protection of the source, the judge can handle that situation under the rule by simply setting forth on the record those factors upon which he did rely.

But I want to cover one rule, rule 43. The purpose of that rule is not to raise any constitutional issues. When *Illinois* v. *Allen* was announced in 1973, authorizing a trial judge to deal with an unruly defendant by various measures, including taking him out of the courtroom unless he promises to conduct himself properly, this was a very needed and welcomed declaration of law in a difficult time in the courts' history.

However, rule 43, as it stood and stands, now seems to require the presence of the prisoner anyway. The only purpose of the amendment to rule 43 is to make it clear that the rule will permit exclusion under the circumstances stated.

Here again we must trust the trial court's discretion.

Mr. HUNGATE. It was suggested that in rule 43(b)(2) we might put in a warning requirement.

This language was suggested by the ABA criminal justice section.

"Engages in conduct such that subsequent to the warnings of the court that he will be removed if he continues disruptive behavior," the defendant conducts himself, and so forth.

They argue that this language is compelled by *Illinois* v. *Allen*. Do you have a comment on that?

Judge WEBSTER. We attempted to track *Illinois* v. *Allen*, and if that is what *Illinois* v. *Allen* says, it would certainly not change the intent of the rule.

Mr. HUNGATE. As I understand the problem, if we have a disruptive defendant, this rule says the trial can proceed on with him out of the courtroom. The suggested amendments to your rule propose that the court warn the defendant that the judge say, "Now, let me warn you that if you don't desist from this conduct . . .", and so forth.

Judge LUMBARD. It's hard to imagine a judge taking any such action without warning the defendant at least once; usually it happens several times before.

Mr. HUNGATE. So a warning really won't be a burden, it's the practice anyway, is that right?

Judge LUMBARD. That's right.

Mr. WIGGINS. May I inquire about the amendment you had in mind on rule 43, to clarify it?

Judge WEBSTER. Are you asking how rule 45 is handled?

Mr. WIGGINS. I think it was rule 43, that inadvertently requires the presence of the defendant during the trial.

Judge WEBSTER. The rule says that the defendant shall be present at every stage of the trial, including the impaneling of the jury, the verdict of the jury, and the imposition of sentence, unless otherwise provided by these rules.

Now, the obvious exception is the one illustrated in *Illinois* v. *Allen*. But even though it might be constitutionally permissible to exclude a defendant who would not behave in court, under the existing rule 43, it says that we still have to have him in there. We want to bring our rule in line with the latitude accorded by *Illinois* v. *Allen*.

Mr. WIGGINS. Well, are you satisfied with subparagraph (b) of the proposed rule 43, which makes it explicit that the defendant may be removed for the reasons stated in that subparagraph?

Judge WEBSTER. Yes; we are.

Mr. WIGGINS. It really says "he may be deemed to have waived," it doesn't say that he may be removed, except in the heading.

Judge WEBSTER. As modified it would provide that the further progress of the trial shall not be prevented, and the defendant shall be considered to have waived his right to be present.

Mr. WIGGINS. Yes; I understand, and I think we all agree what the intent is. But it doesn't say explicitly what they propose to do, and that is to authorize the trial to proceed in the absence of the defendant. What it says in a backhand sort of way is that he shall be considered to have waived his rights.

Mr. REMINGTON. Your question suggests that in rule 43, instead of talking waiver we should have said, "under those circumstances the trial may continue in his absence." I agree that would have been a more forthright way of dealing with the issue.

Mr. HUNGATE. I have one last inquiry, on rule 29.1, which says that after the closing of the evidence the prosecution shall open the argument, the defendant shall reply, and the prosecution shall be permitted to rebut.

We had a discussion at Monday's hearing on whether the proposed rule allowed the prosecution to say, "We waive opening argument," thereby forcing the defendant to go first.

Judge LUMBARD. Well, I guess you couldn't make him talk if he didn't want to. But the judge would be under the duty to limit the prosecutor in what he might say in rebuttal. He might even impose a sanction of saying, "You either talk now, or you don't talk at all."

Mr. HUNGATE. Thank you.

Mr. WIGGINS. Of course, limiting the prosecution to rebuttal comments effectively denies the defendant the right of a one-shot at the jury.

Mr. HUNGATE. The answer he suggests would be to deny rebuttal unless you open.

Judge LUMBARD. That is what I would say to the prosecutor, "You either talk now and make a full disclosure, or you are not going to talk at all."

Mr. HUNGATE. Well, gentlemen, thank you very much. You have been most helpful to the subcommittee. And as we indicated, you have until April 8, the close of business, to submit further statements.

Judge LUMBARD. I would like to submit a short statement, Mr. Chairman, in accordance with your suggestion.

Mr. HUNGATE. We will be pleased to receive it.

The subcommittee's plan is to begin with the markup on the 9th of April, and hopefully to conclude markup in the month of April.

Mr. REMINGTON. Mr. Chairman, we did mail a written statement to the committee.

Mr. HUNGATE. It did arrive. Without objection, that will be made part of the record at this point.

Mr. REMINGTON. With the permission of the committee we would like to make some changes in the statement and will mail a revised statement prior to the April 8 deadline.

Mr. HUNGATE. Without objection, permission is granted.

[Two prepared statements, one dated March 26, 1975, and the other dated April 7, 1975, follow:]

STATEMENT OF J. EDWARD LUMBARD, JUDGE, U.S. COURT OF APPEALS, SECOND CIRCUIT; WILLIAM H. WEBSTER, JUDGE, U.S. COURT OF APPEALS, EIGHTH CIRCUIT; AND FRANK J. REMINGTON, MEMBER, STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, MARCH 26, 1975

Mr. Chairman and members of the committee, we appreciate this opportunity to present for your consideration some further comments on the proposed amendments to the Federal Rules of Criminal Procedure.

The proposed rules are, as you know, accompanied by explanatory notes which give indication of the changes made and the reasons for the changes. We will not try to repeat those detailed comments here.

We had the privilege of appearing before this committee on September 17, at which time we made additional comment, both written and oral, on the nature of the proposed rule changes and the reasons which underlie the recommended changes.

We are greatly appreciative of this additional opportunity to make further comment, particularly in response to some of the objections which have been made to the proposed changes. Some of these objections have been in the form of written responses to the committee. Others have been made in appearances before this committee.

RULE 4—ARREST WARRANT OR SUMMONS UPON COMPLAINT

Rule 4, in its present form, provides for issuance of a summons in lieu of an arrest warrant only upon request of the attorney for the government. The proposed amendment provides for issuance of an arrest warrant in three situations: (1) when a defendant fails to appear in response to a summons; (2) when a valid reason is shown for the issuance of an arrest warrant rather than a summons; or (3) when, although a summons was previously issued, a valid reason is shown for the issuance of an arrest warrant.

The basic change is to give the judicial officer, rather than the prosecutor, the responsibility for deciding whether a suspect is to be taken into custody pursuant to a warrant rather than asked to appear in response to a summons. It is typically assumed that the warrant reflects judicial approval of an enforcement decision to take a suspect into custody. As such, it is appropriate to give the judicial officer responsibility for determining not only probable cause but also whether there is reason to take the suspect into custody.

Reasons for taking custody as well as facts constituting probable cause can be shown the judicial officer ex parte. Enforcement has not been unduly handicapped by the requirement that the judicial officer find probable cause. There is no more reason to expect that the judicial officer cannot be entrusted with the responsibility for deciding whether reason exists to take the citizen into immediate custody. At one time the Advisory Committee on Criminal Rules proposed that the meaning of "probable cause" be codified in the rule. It was concluded that this was unnecessary. It is similarly thought unnecessary to specify the meaning of "valid reason" for the issuance of an arrest warrant. If this develops into a problem in practice, the rule-making process provides an appropriate vehicle for change.

Priority is given to the summons on the theory that a taking of physical custody of a defendant should not be presumed to be a necessary incident to the commencement of criminal proceedings against him. This theory is reflected in several recent law reform undertakings which include recommendations similar to the proposed amendment to rule 4. See ABA Standards Relating to Pretrial Release § 3.3 (Approved Draft, 1968) (summons to be used in lieu of arrest warrant except when need for custody); National Conference of Commissioners on Uniform State Laws, Uniform Rules of Criminal Procedure, rule 221 (c) (Approved Draft, 1974) (arrest warrant may be used in lieu of summons only in specified circumstances); National Advisory Commission on Criminal Justice Standards and Goals, Courts standard 4.2 (1973) (preference for summons except when need for custody present).

Although the subcommittee has received testimony and correspondence favoring the proposed amendment to rule 4, some objections have been raised. It is said that the proposed amendment may bring about the following results: (1) increased number of fugitives among defendants charged with serious federal crimes, (2) increased opportunity for the secretion and destruction of evidence and the fabrication of alibis by defendants prior to apprehension, (3) an increased usage of warrantless arrests by law enforcement officers as a counter-measure to preserve evidence, and (4) substantial additional delays in the administration of criminal justice. It is believed that these fears are unjustified.

With respect to the first objection, it must be kept in mind that a warrant may issue, either initially or after issuance of a summons, upon a showing of a valid reason for issuing a warrant. The risk that the defendant would not appear in response to a summons, which is sometimes evident from the seriousness of the offense alleged in the complaint and is sometimes evident from special circumstances of the individual case, is certainly a "valid reason" for taking custody. Thus, the amendment would permit the issuance of a warrant when there is some basis for the belief that the defendant might otherwise become a fugitive, but at the same time would guard against the routine resort to an arrest warrant rather than a summons without consideration of whether that risk or some other reason justified taking custody of the defendant.

As for the second and third objections, it is well to note that under *Chimel* v. *California*, 395 U.S. 752 (1969), only limited measures may be taken incident to arrest to preserve evidence; a warrantless search incident to the taking of custody may be made only of the person of the arrestee and of "the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." It is not to be denied, of course, that in certain cases this evidence-gathering aspect of the arrest may be an important objective, perhaps more important than gaining custody of the defendant to ensure his subsequent availability for prosecution. However, this need to utilize the arrest as a basis for making a limited warrantless search arises most frequently when the defendant is located promptly after commission of the offense or when the defendant's involvement in a continuing course of criminal conduct is determined as a result of undercover activities. In such situations, it would be most unlikely that the arrest would be delayed while application was made for a warrant, and thus the provisions of rule 4 would not come into play. In the unlikely event that an arrest warrant were sought in circumstances where there was a need to search the persons of the defendant (e.g., where the warrant is sought on probable cause that the defendant will later appear at a certain place with narcotics in his possession), the need to search would be a "valid reason" under rule 4 to issue a warrant rather than a summons. Should experience demonstrate the need to search as an incident to the service of a summons, this authority can be conferred by Congress upon the law enforcement officer authorized to serve the summons. It seems far preferable to legitimize this limited and proper intrusion upon the liberty of the citizen than it is to authorize his arrest and detention solely for the reason of conferring authority upon the enforcement officer to conduct a lawful search incident to the arrest.

The amendment of rule 4 will not, as claimed, result in "the fabrication of alibis." This risk is not a basis for denying release following arrest, and thus the fact the defendant is merely summoned to appear rather than arrested does not substantially increase his opportunity to structure a false alibi. The only situation in which the making of an arrest may thwart the fabrication of an alibi is when the arrest is made at the scene of the crime promptly following its commission; in such a case, the arrest will of necessity be made without a warrant and the provisions of rule 4 will not come into play.

Finally, the amendment will not result in additional delays. Delay because of nonavailablity of the defendent is not a necessary consequence of the amendment, for an arrest warrant may issue when there is reason to doubt whether the defendant would respond to a summons. As for the delay in the warrant-issuing process resulting from the need to establish a "valid reason" for taking custody in addition to the preexisting probable cause requirement, it will be minimal. "The reason," it is observed in the advisory committee note, "may be apparent from the face of the complaint or may be provided by the federal law enforcement officer or attorney for the government." This additional dimension in the warrant-issuing process will not unduly complicate that process and will have the most desirable advantage of ensuring judicial attention to the need-for-custody issue.

RULE 9—WARRANT OR SUMMONS UPON INDICTMENT OR INFORMATION

Rule 9, in its present form, provides for issuance of a summons in lieu of an arrest warrant, upon indictment or information, upon request of the attorney for the government, or by direction of the court. The proposed amendment, corresponding to the proposed amendment to rule 4 discussed above, provides for issuance of a warrant instead of a summons if the attorney for the government presents a valid reason therefor. Again, as observed in the advisory committee note, the objective is to give the judicial officer responsibility for deciding whether it is necessary to take the indicated citizen into immediate custody and also "to give high priority to the issuance of a summons."

The objections which have been raised with respect to the proposed amendment to rule 9 are essentially identical to those discussed above concerning the amendment to rule 4. The response set out above is thus equally applicable here.

The proposed amendments to rule 11 are designed to achieve two primary objectives: (1) to prescribe the advice which the court must give to ensure that the defendant who pleads guilty has made an informed plea and (2) to provide a plea agreement procedure designed to give recognition to the propriety of plea discussions, to bring the existence of a plea agreement out into the open in court, and to provide methods for court acceptance or rejection of a plea agreement. The underlying concern is that of ensuring that pleas of guilty are knowingly and voluntarily entered and otherwise fairly obtained, and that a contemporaneous record is made of the circumstances of pleas of guilty so that the validity of subsequent collateral attacks upon such pleas may be promptly and correctly determined. These concerns are at the foundation of many recent law reform efforts in which provisions similar to those under discussion here have been proposed. See ABA Standards Relating to Pleas of Guilty (Approved Draft, 1968); National Conference of Commissioners on Uniform State Laws, Uniform Rules of Criminal Procedure, rules 441–444 (Approved Draft, 1974); ALI Model Code of Pre-Arraignment Procedure, art. 350 (Tent. Draft No. 5, 1972).

Of the many comments which have been received by the subcommittee concerning the amendments to rule 11, the great majority are contained in correspondence from members of the federal judiciary. Most of these letters raise essentially the same point concerning the provision in subdivision (e) which recognizes the possibility of a plea agreement in which the defendant's plea is tendered in exchange for the prosecution's agreement to recommend a particular sentence. These letters note that it is *not* currently the practice in many districts for the judge, either in a guilty plea case or otherwise, to receive a specific sentence recommendation from the attorney for the government. Determination of the sentence, so the argument goes, is a function of the judge alone, who must take into account the need for general deterrence and also for rehabilitation of the individual, as may be indicated by the facts set forth in a presentence report. These matters are deemed to be beyond the responsibility of the prosecutor, who in any event will not as of the time of arraignment have sufficient facts to make a sentence recommendation. Moreover, the fear is expressed that, if the prosecutor is permitted to make a specific sentence recommendation in open court, the judge is placed in the unfortunate position of having to (1) accept the recommendation and thus surrender his judicial function; (2) ultimately impose a sentence lower than recommended and thus give the appearance of being "soft"; or (3) reject the recommendation and give the appearance of being a roadblock in the way of the efficient and prompt disposition of criminal cases.

The rule contemplates that there may be four distinct types of agreements made by a prosecutor in return for a plea of guilty: (1) the prosecutor may agree to reduce the original charge to a less serious charge; (2) the prosecutor may agree to drop, or not institute, a charge or charges relating to other offenses; (3) the prosecutor may agree to recommend a sentence, such as probation, to the sentencing judge; and (4) the prosecutor and defense counsel may agree that a certain sentence is an appropriate sentence in the case and the plea of guilty is entered on the condition that the agreed-upon sentence will be imposed.

An analysis of existing practice in the various federal districts has been made, and the results have been made available to the committee. In brief, it appears that a reduction of the charge or the dropping of charges is a prevalent practice, commonly recognized as an appropriate practice for a prosecutor to follow. The making of sentencing recommendations is more controversial and is a less frequent practice, though one followed in a significant number of districts. The making of a specific agreement as to sentence is least common and is most strongly opposed by a large number of federal judges.

The point to be stressed is that the amendments to rule 11 do not require that the practice in the various districts become uniform. Rather, the amendments establish procedures for all forms of plea negotiation (with respect to the degree of the charge, the number of offenses charged, and the sentence to be imposed) currently to be found in the federal system, but do not mandate that all of these forms be accepted by the judge. It is true that the proposed rule does say that it is appropriate for counsel to engage in plea discussions. The rule also prohibits the judge from participating in such discussions. But the rule *does not* mandate the judge to follow any given practice. He can, for example, make clear that he will accept no recommendation or agreement as to sentence and, if he does, it

seems obvious that counsel will not risk the ire of the judge by engaging in what would be a fruitless practice in his court. All the judge must do is (1) ensure that any agreement that has been made be disclosed in open court and (2) if there is an agreement, clearly indicate to the defendant what his position is with respect to such agreement.

In the situation where plea negotiations result in an agreement to reduce the charge or drop some other pending charges, there is current controversy as to whether the judge can refuse to concur, thus requiring the prosecution to proceed for the more serious charge or for several charges. The proposed rule does not attempt to resolve this issue, which is now in the process of litigation in the Court of Appeals for the Fifth Circuit. See also *United States* v. *Ammidown*, 497 F.2d 615 (D.C. Cir. 1973). The matter may ultimately have to be resolved by the United States Supreme Court, involving, as it does, an important constitutional separation-of-powers question. See rule 48 which indicates that a dismissal can be "by leave of court." Apparently this phrase was added by the Supreme Court when it approved the rules submitted to it in the mid-1940s. See Orfield, Criminal Procedure Under the Federal Rules §§ 48:17–48:20 (1967).

Even if it is decided that the judge lacks authority to refuse to allow a charge to be reduced or additional charges to be dropped, there is nonetheless value in requiring that the prosecutor's agreement be made a matter of record. The agreement may raise an issue of the voluntariness of the plea under subdivision (d). The record is also helpful in the event of a later claim by the defendant that a promise was made which was not fulfilled by the prosecutor.

In those districts where it is the custom to accept a sentence recommendation from the prosecutor, the amendments establish a procedure whereby the defendant may have placed upon the record in advance of his plea what that recommendation will be and *either* an acceptance of that recommendation by the judge *or* a rejection and a caution that if he persists in his plea the sentence may be higher than recommended. But in those districts where it is established practice not to accept a sentence recommendation from the prosecutor, this practice may continue without violating the rule. If a judge makes it clear that he will continue the practice of not receiving a specific sentence recommendation from the attorney for the government, then quite obviously plea negotiations will continue to be limited to matters other than sentence recommendations. Indeed, there is authority indicating that plea negotiations as to sentence would be improper under such circumstances; cf. *Dillon* v. *United States*, 307 F.2d 445 (9th Cir. 1972) (prosecutor's promise to recommend a lenient sentence if the judge asked him for a recommendation was "wholly illusory" where prosecutor knew judge never asked).

The judge is under no obligation to commit himself, at the time of the plea, to sentence in accordance with the prosecutor's recommendation. Rather, pursuant to subdivision (e)(4) the judge may instead advise the defendant that he is *not* bound by the recommendation and that consequently if the defendant persists in his plea he may receive a less favorable disposition than was recommended. In the past, guilty plea defendants have often not received this warning and, as a consequence, have later tried to offset their plea on the ground that they did not get the sentence which they had been promised.

In those districts in which the judge allows counsel to reach a plea agreement involving an agreement as to proper sentence, the rule will require the judge to make the agreement a matter of record. In this situation the judge will then be called upon to either concur with the agreed-upon sentence or, if he does not concur, so inform the defendant and afford him an opportunity to withdraw his plea. Again it must be stressed that the practice can be engaged in *only if the judge, the prosecutor,* and *the defendant* all agree.

In testimony before the subcommittee a question has also been raised concerning subdvision (c), which specifies those matters about which the court must advise the defendant before a plea of guilty is accepted. The proposed amendment requires that the defendant be advised concerning (1) the nature of the charge, (2) the mandatory minimum penalty (if any) and the maximum possible penalty, (3) the fact that the defendant has the right to plead not guilty, or to persist in the plea if it has already been made, and (4) the fact that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by so pleading he waives the right to a trial. It has been suggested that subdivision (c) be expanded to encompass a full statement of rights waived, at least those enumerated in *Boykin* v. *Alabama*, 395 U.S. 238

(1969) (the privilege against self-incrimination, the right to trial by jury, and the right to confront one's accusers), and perhaps others as well.

Although this is a matter upon which there may be a reasonable difference of opinion, there is much to be said for the formula set out in proposed subdivision (c). At the outset, it must be noted that *Boykin* does not hold that a specific warning of these rights is constitutionally required. The court merely held that a waiver of such rights could not be presumed from a completely silent record and has subsequently upheld guilty pleas which were entered without such warnings. See footnote 3 in *North Carolina* v. *Alford*, 400 U.S. 25 (1970). This is not to say, of course, that the rule should not require any more than is compelled by due process. The more fundamental point is that the advice given to the defendant at the time of his plea, in terms of its length and character, should be stated in a way which will be most meaningful to the defendant. *Boykin* mentions but three constitutional rights, but there are a great many more which are waived by a plea of guilty. See *United States* v. *Frontero*, 452 F.2d 406 (5th Cir. 1971). It is to be doubted that a litany of all these rights would be meaningful to the typical defendant.

In view of the Advisory Committee it is not desirable to mandate a judge to go through a long ritual which tends to get automatic and routine. Rather, within the limits allowed by law, a judge should be given flexibility to accomplish the objective of the rule, namely, that of ensuring that the defendant is making an informed plea. In almost all cases, defendants are represented by counsel who should share with the judge the responsibility for informing the defendant of the consequences of his action. In the event that a judge, in an individual case, fails to inform a defendant of an important consequence of his plea, there is opportunity to raise the issue in the court of appeals. There is nothing in the rule, as proposed, which prevents the judge from adding other advice in appropriate cases. Indeed, the advisory committee note states: "What is required, in this respect, to conform to *Boykin* is left to future case-law development."

Proposed subdivision (c) is intended to ensure that the defendant is informed of his constitutional rights in a meaningful rather than abstract way. For example, to say that the plea of guilty constitutes a waiver of the privilege against self-incrimination might not even be fully understood by a person trained in the law. It is the act of pleading guilty which is incriminatory, and thus it is much more meaningful to advise the defendant that he has a right not to make such a plea. Similarly experience has shown that some defendants, if merely told they are waiving their right to jury trial, will conclude that some sort of trial without a jury will be held, and thus it is better to tell the defendant that if there is a plea of guilty there will not be a trial of any kind.

Rule 410 of the Federal Rules of Evidence is inconsistent with proposed rule 11(e)(6). Rule 410 provides that it may be superseded by an amendment to the Federal Rules of Criminal Procedure. In our view the rule 11(e)(6) proposal is preferable to rule 410 of the Federal Rules of Evidence. The latter would allow the introduction of statements made at a rule 11 proceeding if introduced for purposes of impeachment or in a prosecution for perjury. Effective arguments can be made in behalf of both approaches. Evidence rule 410 prevents a defendant from making false statements in court without having to suffer the consequences of that action. Subdivision (e)(6) of this rule will hopefully produce full disclosure by a defendant without fear that he will later have his statements used against him. The risk created by Evidence rule 410 is that counsel will avoid having his client make statements, thus defeating the primary objective of rule 11 which is to encourage complete openness on the part of the defendant who pleads guilty.

One final observation is in order. The amendments to rule 11, as noted earlier, take account of the long-standing practice whereby many federal criminal cases are disposed of upon a plea of guilty, often as a consequence of plea negotiations. The amendments do not undertake to abolish this practice; rather, they attempt to give it visibility and to subject it to meaningful control. This is the same approach which has been followed in the several law reform efforts of the American Bar Association, the American Law Institute, and the National Conference of Commissioners on Uniform State Laws, cited earlier. It is noteworthy that in testimony before and communications to the subcommittee by those involved in federal criminal justice as judges, prosecutors, and defense counsel, there has been general agreement with this basic approach. However, it is sometimes

assumed by those not intimately involved in the workings of the criminal process that it would be better if there were no plea negotiations and if criminal trials were the rule rather than the exception. For example, a recent editorial in a major metropolitan newspaper objected to the proposed rule 11 amendments because "the questionable process of plea bargaining in the federal courts will become a formalized procedure," thereby substituting "administrative determination of guilt for the normal constitutional procedures designed to protect the accused and to arrive at a judgement based on the evidence."

The assumption that the quality of criminal justice would be enhanced if trials were the "normal" procedure is in error. The most obvious point is that criminal cases must be promptly disposed of with the judicial, prosecutorial, and other resources which are available. Although the pressures of the docket may vary in different parts of the country, there is no doubt but that those cases which are to be tried can be brought to trial promptly only if the majority of defendants elect not to go to trial. This aspect of the problem has taken on even greater significance with the recent enactment of P.L. 93-619, the "Speedy Trial Act of 1974." But more is involved than administrative convenience and need. As stated in Enker, Perspectives on Plea Bargaining, appearing in the Task Force Report: The Courts 112 (The President's Commission on Law Enforcement and Administration of Justice, 1967):

But there are other reasons to maintain a high proportion of guilty pleas and a low proportion of trials. To suggest the least important of these first, a substantial increase in criminal trials would entail an equally substantial increase in the burden of jury duty on citizens. Many citizens prefer to avoid jury service because it interferes with their private and business lives. Would a disproportionate increase in this burden produce resentment against or a sense of alienation from the criminal process that might be directed against defendants and make other "pro-defendant" reforms less politically acceptable? Probably the best that we can say is that we do not know the answer to this question, but it should cause us to pause before throwing administrative considerations to the winds.

Maximization of adjudication by trial may actually result in more inaccurate verdicts. So long as trials are the exception rather than the rule and are limited, by and large, to cases in which the defense offers a substantial basis for contesting the prosecutor's allegations, the defendant's presumption of innocence and the requirement of proof beyond a reasonable doubt are likely to remain meaningful to a jury. The very fact that the defendant contests the charges impresses upon the jurors the seriousness of their deliberations and the need to keep an open mind about the evidence and to approach the testimony of accusing witnesses with critical care and perhaps even a degree of skepticism. If contest becomes routine, jurors may likely direct their skepticism at the defense. Prosecutors too readily apply the overall, and overwhelming, statistical probability of guilt to individual cases; we do not want jurors to do the same. It makes some sense, then, to screen out those cases where there is no real dispute and encourage their disposition by plea, leaving for trial to the extent possible only those cases where there exists a real basis for dispute.

RULE 12—PLEADINGS AND MOTIONS BEFORE TRIAL; DEFENSES AND OBJECTIONS

The changes proposed in rule 12 are designed to encourage the resolution of a maximum number of issues prior to trial. This is the recommendation of the American Bar Association Standards on Criminal Justice and is the trend of judicial decisions in most jurisdictions.

There have been questions raised as to whether one can raise objections or request discovery early in the proceedings which may, in some cases, take place before a United States magistrate who lacks jurisdiction to try offenses carrying a penalty of over one year. Although the rule may not be explicit, it seems clear by its context that it applies only to proceedings in the trial court. This is clearly implied in rule 12 (c) which indicates that the court may set a time for the making of pretrial motions at the arraignment or as soon thereafter as is practicable. Nothing in rule 12 is designed, therefore, to change existing practice which precludes the making of pretrial motions, such as motions to suppress, in initial proceedings before the magistrate prior to the case being bound over to the trial court.

RULE 12.1—NOTICE OF ALIBI

Proposed rule 12.1 will change existing practice in that it will, if adopted, require the defendant to give pretrial notice of his intent to rely upon an alibi defense. The advisory committee note explains the objectives of the proposed rule.

There have been objections to proposed rule 12.1. Some of the objections assert that the proposed rule is unconstitutional. In the view of the Advisory Committee, doubts as to the constitutionality were resolved by Williams v. Florida, 399 U.S. 78 (1970). Other objections are based upon the assertion that to require pretrial notice of alibi is unfair to the defendant, because the prosecution has a great deal more in the way of investigative resources and will therefore be further advantaged. This is a policy decision. It is the view of the Advisory Committee that it is desirable to have as full pretrial discovery as is feasible, and the notice of alibi requirement is consistent with this objective. Finally, some objections are based on the assertion that there may be extreme situations, such as a conspiracy case, in which the rule would seriously disadvantage the prosecution if multiple defendants were all to give notice of their intention to rely upon various alibis. In the unusual case, subdivision (f) of rule 12.1 authorizes the court to grant an exception to any of the requirements of the rule.

RULE 12.2—NOTICE OF DEFENSE BASED UPON MENTAL CONDITION

This proposed rule would bring the federal system into compliance with the practice in most states where it has long been the requirement that a defendant raise the defense of insanity by a special plea prior to trial. In cases involving an issue of mental condition, it is particularly important that the issue be raised prior to trial in order to enable the necessary pretrial mental examinations and pretrial preparations to take place. In the view of the Advisory Committee, the proposed rule represents desirable practice and is constitutional.

RULE 15—DEPOSITIONS

Present rule 15 authorizes the taking of depositions only by a defendant. Under the proposed amendment, the court may, upon motion of either the defendant or the government, order a deposition taken when "due to the special circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial." The principal objective is the preservation of evidence for use at trial, not discovery; a deposition may not be taken of an adverse witness.

Most of the persons or organizations who have communicated with or given testimony before the subcommittee have not expressed any objection to the proposed amendment of rule 15. Critics of the amendment have contended that it violates the defendant's right to confrontation; that the amendment constitutes a "broad expansion" of the rule so as to permit "unlimited depositions by the government," whereby court trials may "evolve into simply reading to the jury a cold, flat statement"; or that the "special circumstances" under which depositions may be taken should be spelled out in more detail.

The underlying concern of the critics—that it is highly desirable that the factfinder in a criminal case be able to observe the demeanor of witnesses—is a legitimate one. But this concern has never been deemed to bar the admission of all hearsay; see rule 804 of the Federal Rules of Evidence, recently enacted by Congress in P.L. 93-595. Existing rule 15 permits the use of a deposition of an unavailable defense witness, and the amendment merely makes the same provision as to a witness for the prosecution, which has the burden of proving guilt beyond a reasonable doubt. See National Conference of Commissioners on Uniform State Laws, Uniform Rules of Criminal Procedure, rule 431(a)(3) (Approved Draft, 1974), which also permits the taking of depositions to perpetuate testimony by both the prosecution and the defense.

It is not correct to say that the amendment of rule 15 is a "broad expansion" permitting "unlimited depositions." A deposition taken in accordance with rule 15 is not by virtue of that fact alone admissible. Rather, the deposition of either a prosecution or a defense witness is admissible as substantive evidence *only* if that witness is "unavailable" as a witness at trial. Unavailability is defined in amended rule 15, and the definition is essentially the same as that recently

adopted by Congress in rule 804(a) of the Federal Rules of Evidence. Given this limitation upon the use of depositions and the provision for cross-examination at the time the deposition is taken, it seems clear that amended rule 15 would not violate the right of confrontation. See *California* v. *Green*, 399 U.S. 149 (1970).

It is important to note that the proposed amendment to rule 15 is a necessary concomitant to the proposed amendment to rule 16 providing for defense discovery of a list of the names and addresses of witnesses the government intends to call at trial. As emphasized in the advisory committee note to rule 16: "A principal argument against disclosure of the identity of witnesses prior to trial has been the danger to the witness, his being subjected either to physical harm or to threats designed to make the witness unavailable or to influence him to change his testimony. . . . [The purpose of the provision for taking the deposition of a prosecution witness] is to make pretrial disclosure possible and at the same time to minimize any inducement to use improper means to force the witness either to not show up or to change his testimony before a jury."

As for the language in the amendment which provides that the court may grant a deposition motion when "due to the special circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial," it is necessarily somewhat general. The court must be free to take account of the unique circumstances of the individual case, all of which cannot be captured in a predetermined verbal formula. Clearly, as stressed in the advisory committee note, the court will consider whether the deposition will expedite rather than delay matters and whether or not there exists facts suggesting the future unavailability of the witness.

RULE 16—DISCOVERY AND INSPECTION

The proposed amendment to rule 16 gives greater discovery to both the prosecution and the defense. Subdivision (a) provides that upon request of the defendant the government shall disclose: prior statements of the defendant; the defendant's prior criminal record; documents and tangible objects which are material, are intended for use by the government as evidence in chief at trial, or where obtained from or belong to the defendant; reports of certain examinations and tests; and a list of the names and addresses of government witnesses. Subdivision (b) provides that upon request of the government the defendant shall disclose: documents and tangible objects the defendant intends to introduce as evidence in chief at trial; reports of examinations and tests the defendant intends to introduce as evidence in chief at the trial; and a list of the names and addresses of witnesses the defendant intends to call. The underlying thesis of the proposed amendment—that broader discovery by both the defense and the prosecution will contribute to the fair and efficient administration of criminal justice by aiding in informed plea negotiations, by minimizing, the undesirable effect of surprise at trial, and by otherwise contributing to an accurate determination of the issue of guilt or innocence—is endorsed in many current laws reform efforts. See ABA Standards Relating to Discovery and Procedure Before Trial (Approved Draft, 1970); National Conference of Commissioners on Uniform State Laws, Uniform Rules of Criminal Procedure, art. IV (Approved Draft, 1974); National Advisory Commission on Criminal Justice Standards and Goals, Courts standard 4.9 (1973).

With respect to disclosure by the government, the concern most frequently expressed by those who have testified before or communicated with the subcommittee relates to proposed subdivision (a)(1)(E), which provides for disclosure upon request of a written list of the names and addresses of "all government witnesses which the attorney for the government intends to call in the presentation of the case in chief." The fear is that the disclosure of the identity of witnesses prior to trial will expose those witnesses to danger from persons who would wish to make the witnesses unavailable or to influence them to change their testimony.

As the advisory committee note indicates, the committee has not been unmindful of this concern. But the committee is nonetheless of the view that the proposed amendment is justified, for disclosure of the names and addresses of government witnesses is often critical to defense counsel's efforts to investigate his client's case or otherwise to provide effective representation. There is no reason to believe that risk to government witnesses is such a common occurrence as to

justify a general rule against disclosure, as is attested to by the fact that nearly half of the states have provided by rule or statute for disclosure to the defendant of the witnesses to be called against him. Moreover, the rules provide two procedures which the government may utilize when it is believed that disclosure will create a risk of harm to the witness. One is to make the pretrial disclosure and then take the deposition of the disclosed witness, as specifically provided for in subdivision (a)(1)(E), which should substantially minimize the inducement to use improper means to cause the witness to absent himself or to change his testimony. The other is provided for in subdivision (d)(1), which permits the court to deny, restrict, or defer discovery upon a sufficient showing, which may be made in writing to the judge alone. Thus, a protective order would be appropriate where there is reason to believe that a witness would be subject to physical or economic harm if his identity is revealed.

Some concern has been expressed with respect to that part of subdivision (a)(1)(C) which provides that upon request of the defendant the government is to disclose to him those documents and tangible objects "which are material to the preparation of his defense." The suggestion has been made that only the defendant knows what is material to his defense, and that therefore the defendant should be required to particularize the materials to be discovered. But this alternative is impracticable, for a defendant cannot particularize materials which he does not know exist.

With respect to disclosure by the defendant, some have objected that there does not exist parity between the prosecution and defense and that therefore disclosure should be required of the prosecution but not of the defendant. But, while it may well be that a reasonable difference of opinion might exist on this point, it must be stressed that discovery by the government is a part of existing rule 16. The principal thrust of the proposed amendment is that it gives the right of discovery to the government independently of a prior request for discovery by the defendant. As the advisory committee note indicates, the committee "is of the view that an independent right of discovery for both the defendant and the government is likely to contribute to both effective and fair administration."

On the whole, the Advisory Committee is of the view that the safeguards built into rule 16 are adequate to prevent abuse of the rule. Making pretrial disclosure the responsibility of the parties will take the obvious and routine discovery practices out of the courtroom, thus saving important judicial time. In the contested situation, the judicial discretion to grant a protective order will control against abuse by one party or the other. As proposed, the rule is consistent with the innovative "omnibus hearing" practice now being used in a number of district courts.

RULE 17—SUBPOENA

The proposed amendment to rule 17 (f)(2) provides that the witness whose deposition is to be taken may be required by subpoena to attend at any place designated by the trial court. The purpose is to confer upon the court discretion over the place at which the deposition is to be taken, similar to that provided in civil cases by Civil rule 45(d)(2). There has been concern that this will impose an undue burden upon defense counsel who are often inadequately compensated. However, there is no reason to believe that the discretion given the judge will be exercised in a way which will be unmindful of the need to protect defense counsel against unreasonable demands upon his time.

RULE 32—SENTENCE AND JUDGMENT

The major change is in the requirement that the presentence report be disclosed to the defendant and his counsel. This proposed change reflects the practically unanimous opinion on the part of a range of organizations including the American Law Institute, the American Bar Association, the Commission on Uniform State Laws, various presidential commissions, and almost every group that has given consideration to the issue. In the increasing number of states which have required disclosure, the uniform consensus is that the requirement is both fair and workable.

Some concern is expressed that the rule does not assure a defendant of the opportunity of a hearing in the event that he claims there are errors of fact in

the presentence report. Experience in a number of jurisdictions has demonstrated that this degree of formality in procedure is not required; that differences can and are usually resolved by discussion with the probation officer who prepared the presentence report. In the unusual case when this cannot be done, the judge has discretion to take appropriate steps to resolve the dispute.

RULE 43—PRESENCE OF THE DEFENDANT

The proposed amendment to rule 43 is designed to reflect *Illinois* v. *Allen*, 397 U.S. 337 (1970), wherein the court held that one constitutionally permissible way for a trial judge to handle an obstreperous defendant is to "take him out of the courtroom until he promises to conduct himself properly." In its present form, rule 43 limits trial in absentia to situations in which there is a "voluntary absence after the trial has commenced," which might be construed as precluding a federal judge from taking the action held constitutionally permissible in *Allen*.

The great majority of persons or organizations which have given testimony before or communicated with the subcommittee have voiced no objection to this amendment. In a few instances, the objection has been made that the proposed amendment does not incorporate everything which is said in *Allen* with respect to precisely when a defendant may be excluded from the courtroom—for example, that a prior warning may be appropriate, or that a defendant may regain his right to be present by manifesting his willingness to conduct himself properly.

It is true that the amendment to rule 43 does not treat such matters, but this is so by choice rather than oversight. As the advisory committee note indicates: "The decision in *Allen* makes no attempt to spell out standards to guide a judge in selecting the appropriate method to ensure decorum in the courtroom and there is no attempt to do so in the revision of the rule." Because the difficult question of when the constitutional right to be present must give way to the interest in an orderly trial will of necessity require further attention from the courts, it is appropriate that the rule merely recognize the authority of the judge to exclude the defendant in those circumstances which the Supreme Court or lower federal courts may subsequently identify. The amendment is cautiously stated in terms of when the defendant "engages in conduct which is such as to justify his being excluded," and thus is not subject to being read as an effort to permit exclusion beyond that deemed permissible under *Allen* and its progeny.

SUPPLEMENTAL STATEMENT OF J. EDWARD LUMBARD, SENIOR U.S. CIRCUIT JUDGE, APRIL 7, 1975

This statement, in support of the proposed amendments to the Federal Rules of Criminal Procedure and which supplements testimony given before this Subcommittee on September 17, 1974 and March 26, 1975 on behalf of the Advisory Committee on the Criminal Rules, will be limited to two over-all considerations: (1) the need to adopt measures which make criminal proceedings more speedy and efficient: and (2) the need to entrust the application of the standards in the proposed rules to the discretion of the trial judge, rather than to the prosecutor.

I

An important consideration with respect to the proposed amendments to the discovery provisions of the criminal rules (Rules 12.1, 12.2, 15 and 16) is the part they may play in reducing court time spent on criminal cases by increasing the number of dispositions without trial and shortening the time required to try criminal cases.

Criminal trials now consume over twice as much time as they did in 1962. The bulk of this increase is due to the doubling of the number of federal criminal trials since 1962: there were 7,600 criminal trials in 1974, as opposed to 3,788 criminal trials in 1962. The increased number of trials is the product of an increase of approximately forty percent in the number of criminal cases brought and disposed of annually, as well as an increase in the percentage of criminal cases in which the defendants plead not guilty and a trial is required to dispose of the case. In fiscal year 1962, when 30,013 criminal cases were terminated, only

12.6 percent of the cases (3,788) went to trial; in fiscal year 1974 there were 41,526 criminal cases terminated, of which 18.3 percent, or 7,600 cases, required a trial. (See Appendix A for the annual figures from 1962 through 1974.)

Not only has the number of trials more than doubled, but the length of individual trials has increased as well. For example, the percentage of criminal trials lasting four or more days in 1965 was 14.8 percent (figures from 1962 through 1964 are not included in the Administrative Office's Annual Reports for those years), while in 1974, 17.3 percent of criminal cases lasted at least four days. (See Appendix B for annual figures from 1965 through 1974.) Moreover, in fiscal year 1974 there was a sudden increase in the number of criminal trials lasting twenty or more days. There were 53 such trials, taking 1,767 trial days, in 1974. There were only 31 such trials in 1973, and only 12 in 1970. (See Appendix C for annual figures from 1962 through 1974.)

As the time consumed by federal criminal trials has doubled since 1962, the complement of district judgeships has increased from only 302 in 1962, to 400 today—the last increase having taken effect on June 2, 1970. Thus federal district court judges have been spending an increasing proportion of their time on federal criminal matters. In addition, Rule 50(b) of the Federal Rules of Criminal Procedure (which became effective in October 1972) mandates that district courts give preferred attention to criminal business and requires them to implement plans for the prompt disposition of criminal cases; as a result civil litigation has suffered increasing delays. The Speedy Trial Act of 1974, Pub. L. 93-619, 88 Stat. 2076, which imposes even stricter requirements for prompt disposition of criminal cases, will intensify the effect of Rule 50(b).

Besides the doubling of the number of trial days spent on criminal cases, federal courts have also had to spend considerably more time on pretrial hearings. Federal court decisions, notably those of the Supreme Court in *Miranda* v. *United States*, 384 U.S. 436 (1966), and *United States* v. *Wade*, 388 U.S. 218 (1967), have added new areas for pretrial examination. Moreover, along with the increase in questions to litigate, the availability of paid counsel for indigent defendants has also increased. Since the passage in 1964 of the Criminal Justice Act, 18 U.S.C. § 3006A, counsel have been paid from government funds to represent indigent defendants in the great majority of criminal cases. In large metropolitan courts, counsel appointed under the Criminal Justice Act are believed to represent over 70% of the defendants in criminal cases. This provision for paid representation has contributed significantly to the increasing number of criminal trials, as well as pretrial motions.

The Advisory Committee believes that the availability and use of broader discovery under the proposals to amend Rules 15 and 16, and under proposed Rules 12.1 and 12.2, will provide a substantial impetus toward earlier and fairer dispositions of criminal cases.

For example, broader and earlier discovery before trial not only enables counsel better to prepare his client's case; it also advises counsel what the defendant faces in standing trial and permits a more accurate evaluation of the factors to be weighed in considering a disposition of the charges without trial. Defense counsel are seldom adequately informed by those whom they defend, with the result that many cases are tried which need not be, and many pleas of guilty are not entered until much time and effort has been expended and trials have been commenced.

Those judges who already employ such discovery practices as are contained in proposal Rules 15 and 16 in the criminal cases they handle are convinced that considerable time is served by such early and broad disclosure.

The discovery provisions of proposed Rule 12.1 will similarly tend to reduce the time spent by courts on criminal cases. As stated in the Advisory Committee's note to this rule:

There are cases in which the identity of defense witnesses may be known, but it may come as a surprise to the government that they intend to testify as to an alibi and there may be no advance notice of the details of the claimed alibi. The result often is an unnecessary interruption and delay in the trial to enable the government to conduct an appropriate investigation.

Such interruptions not only delay and prolong a trial, but as they are unexpected, and of differing duration, it is difficult for the court to schedule other proceedings during such breaks.

Likewise the objective of Rule 12.2 (notice of an insanity defense) is to enable the government to prepare in advance to meet this issue. Failure to give such notice often results in the necessity for a continuance during trial, with consequent disruption of court scheduling.

II

Much of the concern expressed by the Department of Justice with respect to the proposed amendments to Rules 4, 9, 16 and 32, is based on its fear that the district judges will not exercise their discretion under the rules in the public interest. The Advisory Committee is of the view that where the government attorneys are prepared to, and do, advise the court of the facts and factors which are relevant to the exercise of discretion, there is far less risk that such discretionary powers will be abused than there is if such decisions are left in the hands of the prosecutor.

Regarding the proposed amendments to Rule 4 and Rule 9, we can expect a fairer judgment on the need to issue a warrant if that decision is made by a judge, with appropriate advice from the government. Surely it is highly unlikely that any judge would refuse to issue a warrant where the charge relates to bank robbery, narcotics, hijacking or any crime which smacks of the professional criminal.

Likewise the administration of the discovery provisions (Rule 15 and Rule 16) are subject to the sound discretion of the trial judge who may issue protective orders and determine when and under what circumstances information must be furnished, should the government inform the judge of such a need. The district judges are keenly aware of the dangers in making premature disclosure where this may endanger witnesses or the availability of evidence. A considerable majority of federal trial judges have served as prosecutors or defense counsel, and many have experience as both.

The Rule 32 proposal for full disclosure of presentence reports similarly contains a provision authorizing the district court to limit the extent and time of disclosure of certain items in a report upon a proper showing. Proposed Rule 32(c)(3)(A)–(B).

In considering its proposed standards for the administration of criminal justice, the American Bar Association confronted the issue raised here by the Justice Department of whether the exercise of discretion, particularly relating to discovery, should rest with the prosecutor rather than the trial court. The ABA proposals, like almost every proposal for the improvement of the administration of justice in recent years, reflect the determination that the responsibility for such decisions is better vested in the trial judge. In the introduction to the ABA Standards, Discovery and Procedure Before Trial, it is stated:

It has been argued that, with these standards as a guideline, discretion to make or withhold disclosures should be left entirely to the prosecutor, not subject to court intervention except where disclosure is a constitutional requirement. As will be observed in the standards, improved pretrial processes will in large measure depend on the prosecutor's initiative in complying with the standards. But the ultimate responsibility for the validity of convictions and the fairness and efficiency of the judicial process lies with the court, as does responsibility for the exercise of judgment as to the merit of the grounds for withholding disclosure in a particular case. Thus one of the central features of this report is the articulation of this responsibility of the court for what transpires in a criminal case prior to (as well as at the time of) disposition. (*Id.* at 245)

Our proposals are based largely on the ABA proposals, as the commentary to the proposed amendments point out.

It is the conviction of the Advisory Committee that in order to expedite and improve criminal justice, the trial judge must ultimately supervise the whole process, including each important step therein, if any real improvements are to result.

APPENDIX A

Year	Disposition of criminal cases	The number of trials	Trials/ dispositions (percent)
1962	30,013	3,788	12.6
1963	31,546	3,865	12.25
1964	31,437	3,924	12.5
1965	32,078	3,872	12.1
1966	30,644	4,410	14.4
1967	30,350	4,405	14.5
1968	31,349	5,533	17.65
1969	32,406	5,563	17.2
1970	36,819	6,583	17.9
1971	39,582	7,456	18.8
1972	48,101	7,818	16.25
1973	43,456	8,571	19.7
1974	41,526	7,600	18.3

Note: The above figures are taken from the annual reports of the Director of the Administrative Office of the United States Courts, 1962 through 1974, tables C. 8 and D. 1.

APPENDIX B

Year	trials	Number of days— <1	1	2	3	4-9	10-19	20+
1962	3,788	[1]	[1]	[1]	[1]	[1]	[1]	22
1963	3,865	[1]	[1]	[1]	[1]	[1]	[1]	28
1964	3,924	[1]	[1]	[1]	[1]	[1]	[1]	27
1965	3,872	926	873	1,034	466	483	63	27
1966	4,410	1,135	951	1,165	575	503	62	19
1967	4,405	1,057	1,077	1,106	542	553	49	21
1968	5,533	1,325	1,373	1,401	708	625	82	19
1969	5,563	1,516	1,234	1,390	695	636	73	19
1970	6,583	1,860	1,614	1,615	738	680	64	12
1971	7,456	2,096	1,678	1,735	937	891	93	26
1972	7,818	1,979	1,907	1,929	868	978	133	24
1973	8,571	2,154	1,893	2,149	1,071	1,128	145	31
1974	7,600	1,909	1,501	1,892	980	1,128	137	53

[1] Figures not available in annual report.

Note: Figures taken from the annual report of the Director of the Administrative Office of the United States Courts, 1962 through 1974, table C. 8.

APPENDIX C

Year	Trials lasting 20 or more days	Total trial days consumed by such trials
1962	22	706
1963	28	1,067
1964	27	1,038
1965	27	882
1966	19	719
1967	21	[1] 591
1968	19	552
1969	19	603
1970	12	420
1971	26	[2]
1972	24	[2]
1973	31	[2]
1974	53	1,767

[1] For 20 cases only.
[2] Figures not available from annual report of the Administrative Office, as table C-9 omitted for years 1971-73.

Note: Figures taken from annual report of the Director of the Administrative Office of the United States Courts, 1962 through 1974, tables C-8 and C-9.

8TH CIRCUIT—PLEA AGREEMENT PRACTICES PERMITTED

	Reducing charge	Dropping counts	Recommending punishment	Agreement on punishment
	(1)	(2)	(3)	(4)
Eastern district, Arkansas	X	X		
Western district, Arkansas		X		
Eastern district, Missouri		X		
Western district, Missouri		X		
Northern district, Iowa	X	X	X	
Southern district, Iowa	X	X	X	
District, Minnesota	X	X		(1)
District, Nebraska	X	X	X	X
District, North Dakota	X	X	X	X
District, South Dakota	X	X	X	X

[1] Will utilize rule 11(e) when adopted.

CONGRESS OF THE UNITED STATES,
COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Washington, D.C., March 18, 1975.

Prof. FRANK J. REMINGTON,
University of Wisconsin, Madison Law School,
Madison, Wis.

DEAR FRANK: You know that the Subcommittee is rapidly approaching the final stages of work on the Judicial Conference amendments to the Federal Rules of Criminal Procedure. They have provoked considerable comment and some criticism, especially from the Department of Justice and United States Attorneys.

A number of the criticisms are difficult to evaluate because the Advisory Committee Note is silent or extremely brief on the point. I am raising issues and asking questions in this letter that fall into that category.

If you can address some of these points in your testimony March 26, all the better. If you would rather do it in writing, that would be fine, although we will need the answers before too much more time elapses.

I also look forward to answers to the questions raised earlier about proposed Rule 12(e) and the government's right to appeal pursuant to 18 U.S.C. 3731, and proposed Rule 16(a)(2) relating to the discoverability of a prosecutor's work product.

Rule 4 and Rule 9.—The rationale behind the proposed change in procedure from the issuance of arrest warrants to the issuance of summonses is still not clear and, as you know, the Notes are silent, except for Judge Frankel's article which applies to Rule 9. It would be most helpful if you could give some thought to what would constitute a "valid reason" for a magistrate or court to issue an arrest warrant instead of a summons. That point would have to be made clear either in the Rule or in the legislative history.

Rule 11(e)(2).—The Rule, as proposed, requires the "plea agreement" to be disclosed in open court. There seems to be confusion as to whether just the terms of the agreement or the entire agreement, including justification, would be required to be disclosed in public. Several United States Attorneys point out that plea agreements often are made to secure testimony. The public identification of an informant will either discourage him from becoming one or create a potential threat to him. What is your opinion of inserting the words "except for good cause shown" after the words "open court" to give the court discretion to hear part or all of the plea bargain in camera?

Rule 11(f).—What do you think of the recommendation that a defendant be placed under oath at the time he pleads guilty? The rationale is that it would impress a defendant with the importance and significance of what he says to the court. This also would go towards curing the "charade" aspects of current guilty plea procedures.

Rule 12(b).—The question of timing of pretrial motions and procedures arises in several of the proposed Rule changes. In this Rule, several United States

Attorneys believe that pretrial motions should be allowed only after the return of an indictment. What would your reaction be to including that requirement in Rule 12(b)?

Rule 12.1.—The Advisory Committee Note states that the Judicial Conference, at an earlier time, disagreed on the appropriateness of whether the prosecutor or the defendant should initiate the operation of a notice of alibi rule. As you know, the District of Columbia, as well as other jurisdictions, has a rule where the government initiates the process to prevent its being surprised by an alibi defense. Why did the Judicial Conference draft a rule in which the defendant initiates the process? The United States Attorney for the Southern District of New York, in a lengthy objection to the Rule as proposed, poses what appears to me to be very difficult hypotheticals. What if all the defendants, in a complicated conspiracy case, file an intention to use an alibi? How can the government possibly inform the defendants of the specific "time, date and place at which the offense is alleged to have been committed" without disclosing all of his proof? Wouldn't it be wiser to formulate a rule whereby the government could choose not to protect itself against an alibi defense in cases which are not appropriate to the use of an alibi defense?

Rule 16(a)(1)(A).—The Judicial Conference proposes that corporate defendants "may" be granted the discovery of the grand jury testimony of its former officers or employees. Although the Note cites the fact that a Fifth Circuit district court in an antitrust case granted such discovery by broadly interpreting existing Rule 16, it offers no rationale as to why this precedent should be written into the Rule. Several United States Attorneys have objected. Why, for example, should the grand jury testimony of a former labor union official be available to other union officials who are indicted, along with the union itself, as a result of that testimony? I don't believe that the legal fiction that, in such a case, a legal entity is entitled to the discovery of "its own testimony would give much comfort to a witness whose testimony is revealed. As the Note points out, grand jury secrecy is for the protection of witnesses and to encourage them to come forward with information.

Rule 16(a)(1)(E).—This new Rule raises another question of timing. Because there will be no court hearing on discovery motions, it is unclear when a defendant's "request" is properly made. For example, would it be proper for a defendant to request a written list of names and addresses of government witnesses on the day he is arrested? Shouldn't this request, as well as the other requests made under this Rule, be delayed at least until some time after indictment? It has been pointed out that, pursuant to 18 U.S.C. 3432, the names of government witnesses in a capital case are required "at least three days" before trial. Wouldn't this type of time limit be appropriate in this section?

Rule 20(d).—Is there a reason why juveniles should be treated differently than adults regarding the approval of two United States Attorneys to allow the transfer of proceedings pursuant to this Rule?

Rule 32(a)(1).—The proposed deletion of the second sentence was made, according to the Note, by the "proposed revision of Rule 46(c)." Apparently, that proposal was not included in this submission. Should the sentence deletion be made in view of that fact?

Rule 43.—The Rule as proposed eliminates reference to the absence of a defendant at a trial where the death penalty could be imposed upon him. The Note points out that the Supreme Court hasn't decided on the consitutionality of such an occurrence. I don't believe the Judicial Conference or the Subcommittee intends to try and decide that question here. I wonder if we should act affirmatively to eliminate that provision from the existing Rule.

Rule 43.—Are there any situations in which a defendant can plead without being personally present? I would like to know if the insertion in the first sentence changes existing case law.

I look forward to seeing you on March 26th.

Personal regards.

MICHAEL W. BLOMMER,
Minority Counsel,
Subcommittee on Criminal Justice.

UNIVERSITY OF WISCONSIN, MADISON,
LAW SCHOOL,
Madison, Wis., March 21, 1975.

MR. MICHAEL W. BLOMMER,
Minority Council, Subcommittee on Criminal Justice, House of Representatives, Washington, D.C.

DEAR MIKE: This is a reply to your letter of March 18. We are also preparing a written report for the subcommittee. Some of the written comments prepared by Wayne LaFave and myself will relate also to some of the questions which you raise.

I would like to try to respond to some of the questions which you raise.

With regard to proposed rule 12 (e), there is certainly no purpose to limit the government's right to appeal. Certainly counsel ought to feel free to call this to the judge's attention, urging him to decide the motion prior to trial if it is the kind of motion which, if granted, would lead to a government appeal. I would think that the vast majority of federal judges would respond favorably to that request. If I am wrong about this, it may follow that there will need to be a provision in the rules, though I have some doubts as to whether the double jeopardy protection can be modified, even to this extent, through the rulemaking process.

With regard to rule 16 (a)(2), I do not think the material in subdivision (a)(1)(D) is inconsistent with the work product exception which normally goes to the product of legal research or the theories or conclusions of the prosecuting attorney. See Uniform Rules of Criminal Procedure, rule 421 (b).

With regard to rules 4 and 9, Wayne LaFave has prepared a detailed explanation in the written report to the committee.

With regard to rule 11 (e)(2), there may be situations in which the court will want to know some information relating to the underlying reason for the plea agreement. In my judgment, rule 32 will allow that information to be furnished to the judge. You will note that under rule 32 (c)(3)(B) the information can be communicated in camera.

With regard to rule 11 (f), I think the oath would be appropriate, but might lead to the conclusion that the statements can be used later in evidence, a conclusion which to some extent will deter the willingness to be open about the plea agreement.

With regard to rule 12 (b), I think it apparent, particularly in subdivision (c), that it is contemplated that all rule 12 proceedings are in the trial court. The case is not bound over to the trial court (except for cases triable by the magistrate) until after the preliminary or the indictment. I think the result will be the same even if there is no specific provision in the rules.

With regard to rule 12.1, the issue of who should have the burden is a debatable one, and persuasive arguments can be made in favor of each alternative. With regard to the complicated case, it seems to me that the provisions of subdivision (f) will allow the judge the necessary authority to prevent the kind of result with which your question concerns itself.

With regard to rule 16 (a)(1)(A), it certainly seems apparent that there are many situations in which a corporation should be entitled to the statements of its employees for the same reason that an individual defendant is entitled to his statements. This, like many rules, can lead to abuse, but it is thought that the discretionary authority given the judge is sufficient to enable the judge, in a proper case, to refuse to allow the statement to be given where to do so would jeopardize the former employee or his willingness to testify.

With regard to rule 16 (a)(1)(E), it is again assumed that requests for discovery, mentioned in rule 12, will be made at the stage when the case reaches the trial court. There may be reasons for discovery prior to arraignment if necessary for the defendant to decide how to plead but, in some of the jurisdictions using the omnibus hearing, the arraignment is adjourned for this purpose. If the government is asked earlier, it seems to me that the appropriate response is to refuse the request. The remedy is a motion in the trial court, and I think rule 12 is clear that such motions cannot be made until the trial court sets a motion date.

With regard to rule 32 (a)(1), the other revision in rule 46 (c) was made by the Supreme Court in the rules which became effective in 1972. The reference is therefore no longer necessary.

With regard to rule 43, what is raised is a policy question as to whether a defendant may be tried in absentia for a capital case. It is assumed that this will have to be decided by the courts. Whether it should be referred to at all is a matter of policy.

You also ask whether a person can plead without being present. As I read rule 11, this would not be possible. Were it desirable to change this with regard to minor offenses, I would think the change could best be made by an appropriate provision in the magistrates' rules.

I look forward to seeing you on the 26th.

Best regards,

FRANK J. REMINGTON,
Professor of Law.

Mr. HUNGATE. The subcommittee stands adjourned and concludes these hearings. Thank you.

[Whereupon, at 12:25 p.m. the committee adjourned, subject to the call of the Chair.]

APPENDIX

U.S. DISTRICT COURT,
DISTRICT OF WYOMING,
Cheyenne, Wyo., January 29, 1975.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: I have your letter of January 27, 1975, in which you request my comments on the proposed amendments to the Federal Rules of Criminal Procedure.

I studied these amendments carefully at the time they were first published. I was of the opinion then, and I am of the opinion now, that they make no improvement on the present Federal Rules of Criminal Procedure.

They do, however, furnish a new and untried vehicle for inmates and defendants in criminal cases to flood the courts with habeas corpus proceedings and also proceedings under "2255."

I know of no trial judge in this circuit who has expressed any desire to amend the present rules. I have been on the bench for twenty years and I have had no difficulty with the present rules.

Sincerely yours,

EWING T. KERR,
U.S. District Judge.

U.S. COURT OF APPEALS,
SIXTH CIRCUIT,
Nashville, Tenn.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN HUNGATE: In response to your letter of January 27, I voted for the amendments to the Federal Rules of Criminal Procedure in my capacity as a member of the Judicial Conference of the United States. The rules were promulgated by the Supreme Court as recommended by the Conference.

I hope that these rules will be approved by the Congress substantially as promulgated. I do not desire to file any additional statement or to testify in person before your Subcommittee.

With best wishes, I am

Sincerely,

HARRY PHILLIPS, *Chief Judge.*

U.S. DISTRICT COURT,
WESTERN DISTRICT OF LOUISIANA,
Lake Charles, La., February 4, 1975.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, Committee on the Judiciary, House Office Building, Washington, D.C.

DEAR CONGRESSMAN HUNGATE: Thank you so much for your letter of January 27, 1975 concerning amendments to the Federal Rules of Criminal Procedure. It is respectfully suggested that the substance of all amendments as promulgated by the Supreme Court should be made effective in August of 1975.

Specifically, I wish to tender my views as to proposed Rule 11. Much has been written on the subject of plea bargaining, much of it unfavorable, and I agree that the public impression is one that has unfavorable connotations. This is unfortunate.

My own views are in accord with those expressed by the Supreme Court of the United States in *Santobello*, that "properly administered, it (plea bargaining) is to be encouraged."

Criticism has been voiced by some because of the fear that an innocent man may be induced to enter a plea of guilty. Surely, this is not a problem where the judge requires a strong factual basis, as we all must do before accepting the plea.

Some critics complain that the rule permits the intrusion of the executive branch into the procedure. Perhaps proposed Rule 11(e) should be clarified so that it cannot be interpreted as allowing the attorneys for the Government to recommend the imposition of a particular sentence without having the consent of the individual district judge. I personally cannot conceive of government counsel making a recommendation without the consent of the judge. One of my colleagues tells me that he *demands* that they give him a recommendation in certain cases, but quickly adds that he seldom follows that recommendation. Personally, I do not believe it is an intrusion by the executive branch for the U.S. Attorney to discuss plea agreements with court approval in appropriate cases pursuant to proposed Rule 11(e). It is required, of course, that disclosure of such a recommendation be submitted to the Court for approval or rejection. Isn't that what happened with Elliot Richardson and Judge Hoffman in the Agnew case? True, those were unusual circumstances. But take the case of a hard-working 20 year-old man, with an excellent prior record who yields to temptation, takes a $100 check from the mail (5 years); forges it (5 years), and cashes it (5 years). When he is told of the possible 15 year sentence it frightens him out of his wits. The case obviously calls for probation, and in my judgment, there is nothing reprehensible in the court's permitting a proposed Rule 11 plea bargaining procedure to be submitted to the court for approval.

There is nothing in the amended Rule 11 to prohibit the individual judge from adding his individual practice to the effect that "plea agreements are permissible if entered into and approved by the court, but I do not permit anyone to enter into them." The suggested Rule 11 cannot help but be a useful tool to dispose of the absurd and incredible post-conviction attacks on guilty pleas, based on alleged broken bargains. There is nothing in Rule 11 which requires a judge to accept a plea bargain or requires a judge to permit the U.S. Attorney to make any recommendations.

With assurances of high esteem, I am,

Sincerely yours,

EDWIN F. HUNTER, Jr.,
Chief Judge.

U.S. DISTRICT COURT,
WESTERN DISTRICT OF TEXAS,
San Antonio, Tex., February 5, 1975.

HON. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice,
Committee on the Judiciary,
House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN HUNGATE: Thank you very much for your letter of January 27, 1975 inviting my comments concerning the amendments to the Federal Rules of Criminal Procedure now due to become effective August 1, 1975.

While there are several of the proposed rules that I may have phrased differently if I had been allowed to write them, the one that concerns me the most is Amended Rule 11, particularly that portion thereof dealing with the "Plea Agreement Procedure". My views in this regard have previously been set forth in a letter sent to Texas Members of the United States Senate and the House of Representatives on June 7, 1974. Rather than repeat what was said in that letter, I am enclosing two copies of it, and I respectfully request that it be considered as a partial answer to your kind inquiry.

In addition, however, I would like to call to the attention of your committee the fact that the rule, as presently proposed, is a far cry from what the American Bar Association recommended, in that its Standards Relating to Pleas of Guilty, Part III, Section 3.3(b), leave to the trial judge "upon request of the parties", the discretion to determine whether or not he will permit counsel to disclose to him the fact "that other charges . . . will be dismissed or that sentence concessions will be granted . . ."[1] In the commentary dealing with Section 3.3(b), it is said, in part, as follows:

> "Section (b) of the above standard recognizes the propriety of certain procedures which, when requested by the parties and consented to by the trial judge, will also allow a greater degree of certainty when the proposed concessions involve the sentence or the dismissal of other charges before the court. It provides that the trial judge, in his discretion, may allow the prosecuting attorney and defense counsel to indicate to him in advance of the plea why they agree that certain concessions would be appropriate, and that he may indicate to them whether he will concur in these concessions if the information in the presentence report is consistent with the representations made to him." (emphasis mine)

I had occasion to comment favorably upon the ABA Standards at the Tenth Circuit Judicial Conference in Jackson Lake, Wyoming, during July of 1969, because they contemplated that all plea negotiations be brought out into the open. See 49 F.R.D. 347, 482. But we have a completely different concept of the trial judge's role in the proposed rule, wherein it is provided that the attorneys "may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will move for dismissal of other charges, or will recommend or not oppose the imposition of a particular sentence, or will do both". The trial judge is thus left with no discretion whatever as to whether or not he will permit disclosures to him of the details of the plea agreement, even if they include a sentencing recommendation.

No one should argue with the proposition that if plea agreements are made the details should be brought out in the open. However, if the prosecutor knows that the trial judge will neither ask for nor receive sentencing recommendations, he will not discuss that phase of the matter with opposing counsel during any plea negotiations. On the other hand, if the trial judge is required to state that "plea agreements are permissible", and the prosecutor is given an open invitation by rule, not only to discuss possible sentencing recommendations with opposing counsel, but to announce them in open court at the time of arraignment, then what is to keep him from doing just that in the interest of expediency or otherwise?

In the Western District of Texas I utilize the Omnibus Procedure which provides for full disclosure in all criminal cases. But I am unalterably opposed to any uninvited intrusion by the Executive Branch into the exclusive prerogatives of the Judicial Branch. If any trial judge wants to encourage sentencing recommendations in his court, then that is between himself and his own conscience, but I do not believe that the judges who do not hold to that philosophy should be saddled with it.

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[1] Part III, section 3.3 of the ABA Standards Relating to Pleas of Guilty, reads as follows:

3.3 Responsibilities of the trial judge.

(a) The trial judge should not participate in plea discussions.

(b) If a tentative plea agreement has been reached which contemplates entry of a plea of guilty or *nolo contendere* in the expectation that other charges before that court will be dismissed or that sentence concessions will be granted, upon request of the parties the trial judge may permit the disclosure to him of the tentative agreement and the reasons therefor in advance of the time for tender of the plea. He may then indicate to the prosecuting attorney and defense counsel whether he will concure in the proposed disposition if the information in the presentence report is consistent with the representations made to him. If the trial judge concurs, but the final disposition does not include the charge or sentence concessions contemplated in the plea agreement, he shall state for the record what information in the presentence report contributed to his decisions not to grant these concessions.

(c) When a plea of guilty or *nolo contendere* is tendered or received as a result of a prior plea agreement, the trial judge should give the agreement due consideration, but notwithstanding its existence he should reach an independent decision on whether to grant charge or sentence concessions under the principles set forth in section 1.8.

The truth of the matter is that the Rules Committee, in trying to correct obvious abuses in the administration of justice, created by "invisible" plea bargaining, made the mistake of failing to follow the ABA recommendation that the trial judge retain the privilege of either permitting or refusing to permit a sentencing recommendation to be made to him in open court. This would be like "throwing the baby out with the bathwater", and I hope that the Congress will see fit to correct it.

In the interest of the proper administration of criminal justice I earnestly hope that a federal district judge will be permitted to retain the right to perform the onerous sentencing burden as God gives him the wisdom to do so, either with or without the assistance of counsel, as he may choose.

With my kindest personal regards and best wishes, I am

Respectfully yours,

ADRIAN A. SPEARS,
Chief Judge.

U.S. DISTRICT COURT,
WESTERN DISTRICT OF TEXAS,
San Antonio, Tex., June 7, 1974.

To the United States Senators and Members of the House of Representatives from Texas:

GENTLEMEN: As you probably know, on April 24, 1974, the Chief Justice reported to the Congress certain amendments and additions to the Federal Rules of Criminal Procedure which will take effect upon the expiration of ninety days after they were reported, unless, of course, the Congress decrees otherwise. See Title 18 U.S.C. § 3771. Also see Public Law 93-12; 87 Stat. 9; 1973 U.S. Code Congressional and Administrative News, Vol. 1, page 11, which suspended the effectiveness of Rules of Evidence transmitted to the Congress by the Chief Justice on February 5, 1973, until approved by Act of Congress.

The purpose of this letter is to call your attention to the proposed amendments to Rule 11, Federal Rules of Criminal Procedure, particularly that portion thereof dealing with "Plea Agreement Procedure" (See The Criminal Law Reporter (15 CrL 3002), Volume 15, No. 4, dated April 24, 1974) and to suggest a change which I believe to be important and necessary to the proper administration of justice.

Section (e) of the Amended Rule 11 reads as follows:

(e) Plea agreement procedure.

(1) In general—The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will move for dismissal of other charges, or will recommend or not oppose the imposition of a particular sentence, or will do both. The court shall not participate in any such discussions.

(2) Notice of such agreement—If a plea agreement has been reached by the parties which contemplates entry of a plea of guilty or nolo contendere in the expectation that a specific sentence will be imposed or that other charges before the court will be dismissed, the court shall require the disclosure of the agreement in open court at the time the plea is offered. Thereupon the court may accept or reject the agreement, or may defer its decision as to acceptance or rejection until there has been an opportunity to consider the presentence report.

(3) Acceptance of plea—If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement or another disposition more favorable to the defendant than that provided for in the plea agreement.

(4) Rejection of plea—If the court rejects the plea agreement, the court shall inform the parties of this fact, advise the defendant personally in open court that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) Time of plea agreement procedure—Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) Inadmissibility of plea discussions—Evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.

It will be noted that in section (e)(1) the attorney for the government and the attorney for the defendant are permitted to engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will move for dismissal of other charges, *or will recommend or not oppose the imposition of a particular sentence, or will do both;* and in section (e)(2), it is provided that "(I)f a plea agreement has been reached by the parties which contemplates entry of a plea of guilty in the expectation that *a specific sentence will be imposed* or that other charges before the Court will be dismissed, the Court shall require the disclosure of the agreement *in open Court at the time the plea is offered.*" (Emphasis mine.)

My objection to the plea agreement procedure presently in the rule relates primarily to the language which allows the attorneys for the prosecution and the defense to enter into an agreement involving the recommendation of a specific sentence which must be disclosed in open Court at the time the plea is offered. Some may argue that the present language leaves the Court with the option to utilize this procedure or not, but that is not the way I read it, especially in light of opinion No. 72-2127 of the Fifth Circuit Court of Appeals in *Bryan v. United States*, dated April 4, 1974, which enthusiastically refers to the rule as a "comprehensive scheme for the regulation of any plea agreements undertaken" and states in unequivocal language that the District Judge *shall* state that "plea agreements are permissible, and that the defendant and all counsel have a duty to disclose the existence and details of any agreement which relates to the plea tendered." (Slip Opinion, page 2303). Under the circumstances, and in order to make absolutely certain that the Court must have given his consent before a particular sentence is recommended, I believe that Section (e)(1) should be amended by inserting after the words, "the attorney for the government will move for dismissal of other charges, or", the words "with the prior consent of the Court," followed by the words "will recommend or not oppose the imposition of a particular sentence, or will do both", so that said section will read as follows:

(1) In general—The attorney for the government and the attorney for the defendant may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will move for dismissal of other charges, or, with the prior consent of the Court, recommend or not oppose the imposition of a particular sentence, or will do both. The Court shall not participate in any such discussion.

In principle, I would rather not give plea bargaining in any form the aura of respectability that will inevitably result if the rule is finally adopted, but I realize that many able lawyers and judges disagree with my position in that regard. Actually, plea bargaining, to the extent that the prosecution may agree with a defendant to move for dismissal of another charge at the time of sentencing is, to my mind, an acceptable procedure; provided, the full facts relative to the agreement are stated in open court and the defendant is advised that the judge is under no compulsion whatever to dismiss any charge, unless, after giving the case full consideration, he believes that justice would be served thereby. Such a procedure has attributes to both the executive and judicial function, but the judge is left with the final decision, and the defendant can be protected on his plea of guilty by a statement from the judge in open court at the time of arraignment to the effect that if a motion to discuss an additional charge is not granted, the defendant will be permitted to withdraw his plea of guilty to the other charge. But when it comes to the imposition of sentence, that is a completely different thing. I do not want to play the role of a robot or automaton in that procedure, and thus make a complete mockery of the doctrine of separation of

powers by allowing the uninvited intrusion of the Executive Branch into what is an *exclusive* function of the Judicial Branch.

In my opinion, and I believe that this is shared by many others, any form of plea bargaining that *requires* the participation of the judge to any substantial degree against his will, and pits his judgment with respect to an appropriate sentence against a recommendation made by the United States Attorney in open court, is reprehensible and should be condemned out of hand by all judges who are unwilling to abrogate their responsibilities and prerogatives in favor of the Executive Branch of the government.

It is not beyond the realm of possibility that the prosecutor, in the interest of expediency, would recommend in open court a suspended sentence for one convicted of a serious offense, such as possession of heroin with intent to distribute it, and that the judge, after studying the presentence report would conclude that the defendant should be confined for a substantial number of years. This would lead, at the time of sentencing, to a direct confrontation between the two branches of government, and, in all probability, it would have an adverse effect upon the defendant and his attitude toward incarceration and rehabilitation. In addition, the present almost universally unfavorable connotation of plea bargaining in the public's mind, would be constantly expanded, thereby adding to the misunderstandings, misconceptions, and misapprehensions already existing. The truth of the matter is that the judges would be under constant pressure to more expeditiously dispose of more cases by acquiescing in the recommendations of the prosecutors.

I do not request a sentencing recommendation from the United States Attorney and I do not permit that office to make a recommendation to me. I certainly do not want to be forced into doing either of these things by a federal rule.

I sincerely hope that each of you will oppose Section (e)(1) of the proposed Rule 11 in its present form, and insist that appropriate language be added to make it abundantly clear that no sentencing recommendations shall be made to the District Judge by the United States attorney *at any time* without the prior consent of the judge.

With my kindest regards to each of you, I am

Sincerely yours,

ADRIAN A. SPEARS,
Chief Judge.

[From the Criminal Law Reporter, Apr. 24, 1974]

FEDERAL RULES OF CRIMINAL PROCEDURE AMENDED

Full Text of Amendments

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

1. That the Rules of Criminal Procedure for the United States District Courts be, and they hereby are, amended by including therein Rules 12.1, 12.2, and 29.1 and amendments to Rules 4(a), 9(a), 11, 12, 15, 16, 17(f), 20, 32(a), 32(c), 32(e), 43 and 50 as hereinafter set forth:

Rule 4. Arrest warrant or summons upon complaint

(*a*) *Insurance of a summons.*—If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the magistrate shall issue a summons for the appearance of the defendant except as provided in subdivision (b)(2).

(*b*) *Issuance of an arrest warrant.*—A warrant shall issue whenever:

(1) a defendant fails to appears in response to a summons; or

(2) a valid reason is shown for the issuance of an arrest warrant rather than a summons; or

(3) a summons having issued, a valid reason is shown for the issuance of an arrest warrant. This showing may be made to a magistrate either in the district in which the summons was issued or in the district in which the defendant is found.

(*c*) *Probable cause.*—The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a summons or

warrant, the magistrate may require the complainant to appear personally and may examine under oath the complainant and any witnesses he may produce. The magistrate shall promptly make or cause to be made a record or summary of such proceeding. More than one warrant or summons may issue on the same complaint or for the same defendant.

(d) *Form.*

(1) *Warrant.*—The warrant shall be signed by the magistrate and shall contain the name of the defendant or, if his name is unknown, any name or description by which he can be identified with reasonable certainty. It shall describe the offense charged in the complaint. It shall command that the defendant be arrested and brought before the nearest available magistrate.

(2) *Summons.*—The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a magistrate at a stated time and place.

(e) *Execution or service; and return.*

(1) *By whom.*—The warrant shall be executed by a marshal or by some other officer authorized by law. The summons may be served by any person authorized to serve a summons in a civil action.

(2) *Territorial limits.*—The warrant may be executed or the summons may be served at any place within the jurisdiction of the United States.

(3) *Manner.*—The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant in his possession at the time of the arrest, but upon request he shall show the warrant to the defendant as soon as possible. If the officer does not have the warrant in his possession at the time of the arrest, he shall then inform the defendant of the offense charged and of the fact that a warrant has been issued. The summons shall be served upon a defendant by delivering a copy to him personally, or by leaving it at his dwelling, house or usual place of abode with some person of suitable age and discretion then residing therein or by mailing it to the defendant's last known address.

(4) *Return.*—The officer executing a warrant shall make return thereof to the magistrate or other officer before whom the defendant is brought pursuant to Rule 5. At the request of the attorney for the government any unexecuted warrant shall be returned to the magistrate by whom it was issued and shall be cancelled by him. On or before the return day the person to whom a summons was delivered for service shall make return thereof to the magistrate before whom the summons is returnable. At the request of the attorney for the government made at any time while the complaint is pending a warrant returned unexecuted and not cancelled or a summons returned unserved or a duplicate thereof may be delivered by the magistrate to the marshal or other authorized person for execution or service.

Rule 9. Warrant or summons upon indictment or information

(a) *Issuance.*—Upon the request of the attorney for the government the clerk shall issue a summons for each defendant named:

(1) in the information, if it is supported by oath; or

(2) in the indictment.

The court shall order issuance of a warrant instead of a summons if the attorney for the government presents a valid reason therefor. The clerk shall deliver the warrant or summons to the marshal or other person authorized by law to execute or serve it. More than one warrant or summons may be issued on the same information and indictment or for the same defendant. If a defendant fails to appear in response to the summons, a warrant shall issue.

Rule 11. Pleas

(a) *Alternatives.*—A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(b) *Nolo contendere.*—A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

(c) *Advice to defendant.*—The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:

(1) the nature of the charge to which the plea is offered; and

(2) the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law for the offense to which the plea is offered; and

(3) that the defendant has the right to plead not guilty, or to persist in that plea if it has already been made; and

(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial.

(*d*) *Insuring that the plea is voluntary.*—The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

(*e*) *Plea agreement procedure.*

(*1*) *In general.*—The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will move for dismissal of other charges, or will recommend or not oppose the imposition of a particular sentence, or will do both. The court shall not participate in any such discussions.

(*2*) *Notice of such agreement.*—If a plea agreement has been reached by the parties which contemplates entry of a plea of guilty or nolo contendere in the expectation that a specific sentence will be imposed or that other charges before the court will be dismissed, the court shall require the disclosure of the agreement in open court at the time the plea is offered. Thereupon the court may accept or reject the agreement, or may defer its decision as to acceptance or rejection until there has been an opportunity to consider the presentence report.

(*3*) *Acceptance of plea.*—If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement or another disposition more favorable to the defendant than that provided for in the plea agreement.

(*4*) *Rejection of plea.*—If the court rejects the plea agreement, the court shall inform the parties of this fact, advise the defendant personally in open court that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(*5*) *Time of plea agreement procedure.*—Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(*6*) *Inadmissibility of plea discussions.*—Evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.

(*f*) *Determining accuracy of plea.*—Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(*g*) *Record of proceedings.*—A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

Rule 12. Pleadings and motions before trial; defenses and objections

(*a*) *Pleadings and motions.*—Pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty, guilty and nolo contendere. All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

(*b*) *Pretrial motions.*—Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before

trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

(1) Defenses and objections based on defects in the institution of the prosecution; or

(2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings); or

(3) Motions to suppress evidence; or

(4) Requests for discovery under rule 16; or

(5) Requests for a severance of charges or defendants under Rule 14.

(c) *Motion date.*—Unless otherwise provided by local rule, the court may, at the time of the arraignment or as soon thereafter as practicable, set a time for the making of pretrial motions or requests and, if required, a later date of hearing.

(d) *Notice by the government of the intention to use evidence.*

(1) *At the discretion of the government.*—At the arraignment or as soon thereafter as is practicable, the government may give notice to the defendant of its intention to use specified evidence at trial in order to afford the defendant an opportunity to raise objections to such evidence prior to trial under subdivision (b)(3) of this rule.

(2) *At the request of the defendant.*—At the arraignment or as soon thereafter as is practicable the defendant may, in order to afford an opportunity to move to suppress evidence under subdivision (b)(3) of this rule, request notice of the government's intention to use (in its evidence in chief at trial) any evidence which the defendant may be entitled to discover under Rule 16 subject to any relevant limitations prescribed in Rule 16.

(e) *Ruling on motion.*—A motion made before trial shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue or until after verdict. Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.

(f) *Effect of failure to raise defenses or objections.*—Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.

(g) *Records.*—A verbatim record shall be made of all proceedings at the hearing, including such findings of fact and conclusions of law as are made orally.

(h) *Effect of determination.*—If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that the defendant be held in custody or that his bail be continued for a specified time pending the filing of a new indictment or information. Nothing in this rule shall be deemed to affect the provisions of any act of Congress relating to periods of limitations.

Rule 12.1 Notice of alibi

(a) *Notice by defendant.*—If a defendant intends to rely upon the defense of alibi, he shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk.

(b) *Disclosure of information and witnesses.*—Upon receipt of notice that the defendant intends to rely upon an alibi defense, the attorney for the government shall inform the defendant in writing of the specific time, date, and place at which the offense is alleged to have been committed. The defendant shall then inform the attorney for the government in writing of the specific place at which he claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom he intends to rely to establish such alibi. The attorney for the government shall then inform the defendant in writing of the names and addresses of the witnesses upon whom the government intends to rely to establish defendant's presence at the scene of the alleged offense.

(c) *Time of giving information.*—The court may fix the time within which the exchange of information referred to in subdivision (b) shall be accomplished.

(d) *Continuing duty to disclose.*—If prior to or during trial a party learns of an additional witness whose identity, if known should have been included in the information furnished under subdivision (b) of this rule, the party shall promptly notify the other party or his attorney of the existence and identity of such additional witness.

(e) *Failure to comply.*—Upon the failure of either party to comply with the requirements of this rule, the court may exclude the testimony of any undisclosed witness offered by such party as to the defendant's absence from, or presence at, the scene of the alleged offense. This rule shall not limit the right of the defendant to testify in his own behalf.

(f) *Exceptions.*—For good cause shown, the court may grant an exception to any of the requirements of this rule.

Rule 12.2 Notice of defense based upon mental condition

(a) *Defense of insanity.*—If a defendant intends to rely upon the defense of insanity at the time of the alleged crime, he shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this subdivision, insanity may not be raised as a defense. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(b) *Mental disease or defect inconsistent with the mental element required for the offense charged.*—If a defendant intends to introduce expert testimony relating to a mental disease, defect, or other condition bearing upon the issue of whether he had the mental state required for the offense charged, he shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(c) *Psychiatric examination.*—In an appropriate case the court may, upon motion of the attorney for the government, order the defendant to submit to a psychiatric examination by a psychiatrist designated for this purpose in the order of the court.

(d) *Failure to comply.*—If there is a failure to give notice when required by subdivision (b) of this rule or to submit to an examination when ordered under subdivision (c) of this rule, the court may exclude the testimony of any expert witness offered by the defendant on the issue of his mental state.

Rule 15. Depositions

(a) *When taken.*—Whenever due to special circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged, be produced at the same time and place. If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court on written motion of the witness and upon notice to the parties may direct that his deposition be taken. After the deposition has been subscribed the court may discharge the witness.

(b) *Notice of taking.*—The party at whose instance a deposition is to be taken shall give to every party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time or change the place for taking the deposition. The officer having custody of a defendant shall be notified of the time and place set for the examination and shall, unless the defendant waives in writing the right to be present, produce him at the examination and keep him in the presence of the witness during the examination. A defendant not in custody shall have the right to be present at the examination upon request subject to such terms as may be fixed by the court, but his failure, absent good cause shown, to appear after notice and tender of expenses in accordance with subdivision (c) of this rule shall constitute a waiver of that right and of any objection to the taking and use of the deposition based upon that right.

(c) *Payment of expenses.*—Whenever a deposition is taken at the instance of the government or whenever a deposition is taken at the instance of a defendant who is unable to bear the expense of the taking of the deposition, the court may direct that the expenses of travel and subsistence of the defendant and his attorney for attendance at the examination shall be paid by the government.

(d) *How taken.*—Subject to such additional conditions as the court shall provide, a deposition shall be taken and filed in the manner provided in civil actions except as otherwise provided in these rules, provided that (1) in no event shall a deposition be taken of a party defendant without his consent, and (2) the scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself. The government shall make available to the defendant or his counsel for examination and use at the taking of the deposition any statement of the witness being deposed which is in the possession of the government and to which the defendant would be entitled at the trial.

(e) *Use.*—At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used as substantive evidence if the witness is unavailable, as defined in subdivision (g) of this rule, or the witness gives testimony at the trial or hearing inconsistent with his deposition. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require him to offer all of it which is relevant to the part offered and any party may offer other parts.

(f) *Objections to deposition testimony.*—Objections to deposition testimony or evidence or parts thereof and the grounds for the objection shall be stated at the time of the taking of the deposition.

(g) *Unavailability.*—"Unavailable" as a witness includes situations in which the deponent:

(1) is exempted by ruling of the judge on the ground of privilege from testifying concerning the subject matter of his deposition; or

(2) persists in refusing to testify concerning the subject matter of his deposition despite an order of the judge to do so; or

(3) testifies to a lack of memory of the subject matter of his deposition; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of his deposition has been unable to procure his attendance by process or other reasonable means. A deponent is not unavailable as a witness if his exemption, refusal, claim or lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his disposition for the purpose of preventing the witness from attending or testifying.

(h) *Deposition by agreement not precluded.*—Nothing in this rule shall preclude the taking of a deposition, orally or upon written questions, or the use of a deposition, by agreement of the parties with the consent of the court.

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: 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; the substance of any 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 which relates to the offense charged. Where the defendant is a corporation, partnership, association, or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who was, at the time either of the charged acts or of the grand jury proceedings, so situated as an officer or employee as to have been able legally to bind the defendant in respect to the activities involved in the charges.

(B) *Defendant's prior record.*—Upon request of the defendant, the government shall furnish to the defendant such copy of his prior criminal record, if any, as is then available to the attorney for the government.

(C) *Documents and tangible objects.*—Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies

or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of his defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

(*D*) *Reports of examinations and tests.*—Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, made in connection with the particular case, 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.

(*E*) *Government witnesses.*—Upon request of the defendant the government shall furnish to the defendant a written list of the names and addresses of all government witnesses which the attorney for the government intends to call in the presentation of the case in chief together with any record of prior felony convictions of any such witness which is within the knowledge of the attorney for the government. When a request for discovery of the names and addresses of witnesses has been made by a defendant, the government shall be allowed to perpetuate the testimony of such witnesses in accordance with the provisions of Rule 15.

(*2*) *Information not subject to disclosure.*—Except as provided in paragraphs (A), (B), and (D) 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 other government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.

(*3*) *Grand jury transcripts.*—Except as provided in Rule 6 and subdivision (a)(1)(A) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury.

(*4*) *Failure to call witness.*—The fact that a witness' name is on a list furnished under this rule shall not be grounds for comment upon a failure to call the witness.

(*b*) *Disclosure of evidence by the defendant.*

(*1*) *Information subject to disclosure.*

(*A*) *Documents and tangible objects.*—Upon request of the government, the defendant shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.

(*B*) *Reports of examinations and tests.*—Upon request of the government, the defendant shall permit the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to his testimony.

(*C*) *Defense witnesses.*—Upon request of the government, the defendant shall furnish the government a list of the names and addresses of the witnesses he intends to call in the presentation of the case in chief. When a request for discovery of the names and addresses of witnesses has been made by the government, the defendant shall be allowed to perpetuate the testimony of such witnesses in accordance with the provisions of Rule 15.

(*2*) *Information not subject to disclosure.*—Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memorada, or other internal defense documents made by the defendant or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by goverment or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys.

(*3*) *Failure to call witness.*—The fact that a witness' name is on a list furnished under this rule shall not be grounds for comment upon a failure to call a witness.

(c) *Continuing duty to disclose.*—If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, or the identity of an additional witness or witnesses, he shall promptly notify the other party or his attorney or the court of the existence of the additional material or witness.

(d) *Regulation of discovery.*

(1) *Protective orders.*—Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon request by a party the court shall permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such a showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) *Failure to comply with a request.*—If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.

(e) *Alibi witnesses.*—Discovery of alibi witnesses is governed by Rule 12.1.

Rule 17. Subpoena

(f)

(2) *Place.* The witness whose deposition is to be taken may be required by subpoena to attend at any place designated by the trial court.

Rule 20. Transfer from the district for plea and sentence

(a) *Indictment or information pending.*—A defendant arrested, held or present in a district other than that in which an indictment or information is pending against him may state in writing that he wishes to plead guilty or nolo contendere, to waive trial in the district in which the indictment or information is pending, and to consent to disposition of the case in the district in which he was arrested, held, or present, subject to the approval of the United States attorney for each district. Upon receipt of the defendant's statement and of the written approval of the United States attorneys, the clerk of the court in which the indictment or information is pending shall transmit the papers in the proceeding or certified copies thereof to the clerk of the court for the district in which the defendant is arrested, held, or present, and the prosecution shall continue in that district.

(b) *Indictment or information not pending.*—A defendant arrested, held, or present in a district other than the district in which a complaint is pending against him may state in writing that he wishes to plead guilty or nolo contendere to waive trial in the district in which the warrant was issued, and to consent to disposition of the case in the district in which he was arrested, held, or present subject to the approval of the United Staes attorney for each district. Upon receipt of the defendant's statement and of the written approval of the United States attorneys and upon filing of an information or the return of an indictment, the clerk of the court for the district in which the warrant was issued shall transmit the papers in the proceeding or certified copies thereof to the clerk of the court for the district in which the defendant was arrested, held, or present, and the prosecution shall continue in that district. When the defendant is brought before the court to plead to an information filed in the district where the warrant was issued, he may at that time waive indictment as provided in Rule 7, and the prosecution may continue based upon the information originally filed.

(c) *Effect of not guilty plea.*—If after the proceeding has been transferred pursuant to subdivision (a) or (b) of this rule the defendant pleads not guilty, the clerk shall return the papers to the court in which the prosecution was commenced, and the proceeding shall be restored to the docket of that court. The defendant's statement that he wishes to plead guilty or nolo contendere shall not be used against him.

(*d*) *Juveniles.*—A juvenile (as defined in 18 U.S.C. § 5031) who is arrested, held, or present in a district other than that in which he is alleged to have committed an act in violation of a law of the United States not punishable by death or life imprisonment may, after he has been advised by counsel and with the approval of the court and the United States attorney, consent to be proceeded against as a juvenile delinquent in the district in which he is arrested, held, or present. The consent shall be given in writing before the court but only after the court has apprised the juvenile of his rights including the right to be returned to the district in which he is alleged to have committed the act, and of the consequences of such consent.

Rule 29.1. Closing argument

After the closing of evidence the prosecution shall open the argument. The defense shall be permitted to reply. The prosecution shall then be permitted to reply in rebuttal.

Rule 32. Sentence and judgment

(*a*) *Sentence.*

(*1*) *Imposition of sentence.*—Sentence shall be imposed without unreasonable delay. Before imposing sentence the court shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment.

(*2*) *Notification of right to appeal.*—After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of his right to appeal and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant.

(*c*) *Presentence investigation.*

(*1*) *When made.*—The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs for reasons stated on the record.

The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or nolo contendere or has been found guilty, except that a judge may, with the written consent of the defendant, inspect a presentence report at any time.

The respect shall not be submitted to the court or its contents disclosed to anyprior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court.

(*3*) *Disclosure.*

(A) Before imposing sentence the court shall upon request permit the defendant, or his counsel if he is so represented, to read the report of the presentence investigation exclusive of any recommendation as to sentence, unless in the opinion of the court the report contains diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons; and the court shall afford the defendant or his counsel an opportunity to comment thereon.

(B) If the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (c)(3)(A) of this rule, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied

on in determining sentence, and shall give the defendant or his counsel an opportunity to comment thereon. The statement may be made to the parties in camera.

(C) Any material disclosed to the defendant or his counsel shall also be disclosed to the attorney for the government.

(D) Any copies of the presentence investigation report made available to the defendant or his counsel and the attorney for the government shall be returned to the probation officer immediately following the imposition of sentence or the granting of probation. Copies of the presentence investigation report shall not be made by the defendant, his counsel, or the attorney for the government.

(E) The reports of studies and recommendations contained therein made by the Director of the Bureau of Prisons or the Youth Correction Division of the Board of Parole pursuant to 18 U.S.C. 4208(b) 4252, 5010(e), or 5034 shall be considered a presentence investigation within the meaning of subdivision (c)(3) of this rule.

(*d*) *Withdrawal of plea of guilty.*—A motion to withdraw a plea of guilty or nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

(*e*) *Probation.*—After conviction of an offense not punishable by death or by life imprisonment, the defendant may be placed on probation if permitted by law.

(*f*) *Revocation of probation.*—The court shall not revoke probation except after a hearing at which the defendant shall be present and apprised of the grounds on which such action is proposed. The defendant may be admitted to bail pending such hearing.

Rule 43. Presence of the defendant

(*a*) *Presence required.*—The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence except as otherwise provided by this rule.

(*b*) *Continued presence not required.*—The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived his right to be present whenever a defendant, initially present,

(1) voluntarily absents himself after the trial has commenced (whether or not he has been informed by the court of his obligation to remain during the trial), or

(2) engages in conduct which is such as to justify his being excluded from the courtroom.

(*c*) *Presence not required.*—A defendant need not be present in the following situations:

(1) A corporation may appear by counsel for all purposes.

(2) In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial, and imposition of sentence in the defendant's absence.

(3) At a conference or argument upon a question of law.

(4) At a reduction of sentence under Rule 35.

2. That the foregoing amendments and additions to the Rules of Criminal Procedure shall take effect on July 1, 1974, and shall govern all criminal proceedings thereafter commenced and, insofar as just and practicable, in proceedings then pending.

3. That The Chief Justice be, and he hereby is, authorized to transmit to the Congress the foregoing amendments and additions to the Rules of Criminal Procedure in accordance with the provisions of title 18, United States Code, section 3771.

Mr. Justice Douglas is opposed to the Court being a mere conduit of Rules to Congress since the Court has had no hand in drafting them and has no competence to design them in keeping with the titles and spirit of the Constitution.

RULES OF EVIDENCE, CIVIL PROCEDURE AND CRIMINAL PROCEDURE—APPROVAL BY CONGRESS

PUBLIC LAW 93-12; 87 STAT. 9
[S. 583]

An Act to promote the separation of constitutional powers by suspending the effectiveness of the Rules of Evidence for United States Courts and Magistrates, the Amendments to the Federal Rules of Civil Procedure, and the Amendments to the Federal Rules of Criminal Procedure transmitted to the Congress by the Chief Justice on February 5, 1973, until approved by Act of Congress.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

Notwithstanding any other provisions of law, the Rules of Evidence for United States Courts and Magistrates, the Amendments to the Federal Rules of Civil Procedure, and the Amendments to the Federal Rules of Criminal Procedure, which are embraced by the orders entered by the Supreme Court of the United States on Monday, November 20, 1972, and Monday, December 18, 1972, shall have no force or effect except to the extent, and with such amendments, as they may be expressly approved by Act of Congress.

Approved March 30, 1973.

CHAPTER 237—RULES OF CRIMINAL PROCEDURE

Sec.
3771. Procedure to and including verdict.
3772. Procedure after verdict.

§ 3771. Procedure to and including verdict

The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of pleading, practice, and procedure with respect to any or all proceedings prior to and including verdict, or finding of guilty or not guilty by the court if a jury has been waived, or plea of guilty, in criminal cases and proceedings to punish for criminal contempt of court in the United States district courts, in the district courts for the District of the Canal Zone and the Virgin Islands, in the Supreme Court of Puerto Rico, and in proceedings before United States magistrates. Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

June 25, 1948, c. 645, 62 Stat. 846; May 24, 1949, c. 139, § 59, 63 Stat. 98; May 10, 1950, c. 174, § 1, 64 Stat. 158; July 7, 1958, Pub. L. 85-508, § 12(k), 72 Stat. 348; Mar. 18, 1959, Pub. L. 86-3, § 14(g), 76 Stat. 11; Oct. 17, 1968, Pub. L. 90-578, Title III, § 301(a)(2), 82 Stat. 1115.

§ 3772. Procedure after verdict

The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of practice and procedure with respect to any or all proceedings after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty, in criminal cases and proceedings to punish for criminal contempt in the United States district courts, in the district courts for the District of the Canal Zone and the Virgin Islands, in the Supreme Court of

Puerto Rico, in the United States courts of appeals, and in the Supreme Court of the United States. This section shall not give the Supreme Court power to abridge the right of the accused to apply for withdrawal of a plea of guilty, if such application be made within ten days after entry of such plea, and before sentence is imposed.

The right of appeal shall continue in those cases in which appeals are authorized by law, but the rules made as herein authorized may prescribe the times for and manner of taking appeals and applying for writs of ceteriorari and preparing records and bills of exceptions and the conditions on which supersedes or bail may be allowed.

The Supreme Court may fix the dates when such rules shall take effect and the extent to which they shall apply to proceedings then pending, and after they become effective all laws in conflict therewith shall be of no further force.

Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

June 25, 1948, c. 645, 62 Stat. 846; May 24, 1949, c. 139, § 60, 63 Stat. 98; July 7, 1958, Pub. L. 85-508, § 12(*l*), 72 Stat. 348; Mar. 18, 1959, Pub. L. 86-3, § 14(h), 73 Stat. 11.

U.S. DISTRICT COURT,
EASTERN DISTRICT OF MISSOURI.
St. Louis, Mo., February 7, 1975.

WILLIAM L. (BILL) HUNGATE,
Congressman, Washington, D.C.

DEAR BILL: Undoubtedly by now you have read the recent article published in the St. Louis Post-Dispatch about plea bargaining. The publication of that article prompts this letter.

In my 26 years as a judge, I have observed the conduct of criminal dockets in both state and federal courts, and in that observation I have perceived that plea bargaining was introduced in those courts that were not current in their criminal dockets. I have never known a court employing plea bargaining to catch up. Ergo I consider it not to be an efficient system.

In the Post-Dispatch article it sets forth the position of the Justice Department as being that they should have some input in the sentencing procedure. To me there is something improper about the authority charged with the prosecution making a determination as to the type, nature and extent of the sentence to be imposed.

From everything I read in the newspaper, you are going to have a very busy term.

I wish you well and God Speed.

Yours very truly,

JOHN K. REGAN.

[From the St. Louis Post Dispatch, Feb. 5, 1975]

PLEA BARGAINING RULES NEAR

(By Ted Gest)

WASHINGTON.—Congress is likely this year to establish the first formalized plea bargaining procedure for the federal courts, says Representative William L. Hungate (Dem.), Troy, who heads a subcommittee studying the proposal.

In fact, if Congress does not act by this summer, a "plea agreement procedure" and many other changes proposed by the Supreme Court last year will go into effect automatically. The changes apply to the rules under which federal criminal cases are handled.

Hungate's subcommittee is at the center of a conflict involving which of the three branches of Government should set the rules of operation for the federal courts.

An initial phase of the issue was resolved last month, when President Gerald R. Ford signed a set of federal rules of evidence that Congress approved in late December.

Congress excluded most of the controversial provisions of the rules that had been proposed by the Supreme Court. It was the first time that the Legislative Branch had significantly altered rules for court operation that had been laid down by the Supreme Court.

In the evidence rules that finally emerged, the major questions of controversy involved issues such as the definition of "hearsay" and when records of prior criminal involvement of witnesses could be introduced into trials.

Although those provisions will be of great interest to lawyers and judges, they probably will not affect the average citizen unless he happens to be called into court as a defendant or witness.

But plea bargaining is expected to provoke much more debate.

In the plea discussion process, which is prevalent in state courts but not officially condoned in the federal system, a defendant agrees to plead guilty in exchange for a reduction in the charge—and maximum penalty—to which he subjects himself.

The propriety of plea bargains has been debated off and on for years, but the public has become more aware of it recently as a result of what many say were small penalties imposed on former Vice President Spiro T. Agnew and figures in the Watergate scandal after they agreed to plead guilty.

The judiciary's plea bargaining proposal was drafted by a committee that included Judge William H. Webster of the St. Louis-based United States Court of Appeals for the Eighth Circuit.

Noting that up to 95 per cent of criminal cases were disposed of through guilty pleas, the committee concluded that "there is increasing acknowledgment of both the inevitability and the propriety of plea agreements."

The Supreme Court's final recommendation was that results of plea discussions between a prosecutor and defendant must be disclosed in open court. If a judge rejects the proposal, a defendant may withdraw the plea and demand a trial.

Hungate would not offer a prediction on how his reorganized, seven-member subcommittee might change the Supreme Court proposals on plea bargaining and other guidelines regulating the handling of criminal cases.

But some judges and prosecutors already have squared off on the separation of powers issue inherent in the dispute.

U.S. District Judge John K. Regan of St. Louis wrote to Hungate, "In my judgment this proposed rule is a step backward and is not in the best interest of either the defendant or the Government."

Regan explained that he did not believe that prosecutors without the benefit of a presentence report on a defendant or the experience of a judge should be in effect deciding how long a sentence should be.

Hungate told the Missouri Bar last fall that "some judges consider plea bargaining an invasion by the Executive Branch of the judicial function."

The Department of Justice, not surprisingly, disagrees strongly with that point of view.

A justice department spokesman told Hungate's subcommittee that the judge's power to reject a plea bargain might be "an unwarranted infringement by the judiciary on the powers of the executive."

A decision on what charges to place against a defendant is "traditionally reserved for the exercise of prosecutorial discretion," said W. Vincent Rakestraw, an assistant attorney general.

Rakestraw proposed that judges not be allowed to reject a plea bargain simply because they do not agree with prosecutors' decision to drop certain counts or charges from the case.

A judge should be considering only the appropriateness of a sentence to the charge that is still pending, Rakestraw said.

The other major area of dispute in the proposed changes in the criminal procedure rules is in the area of "discovery," or the extent to each other before the trial.

The proposed rules say that prosecutors must furnish to defendants the names and addresses of their expected witnesses at the trial and "the substance of any oral statement" made by the defendant to federal agents that is to be introduced in a trial.

Defendants, likewise, must provide a witness list to prosecutors.

Rakestraw told the Hungate subcommittee that the Justice Department "cannot overstate its opposition" to the mandatory disclosure of witness lists.

"The consequences of such a rule are both dangerous and frightening in that Government witnesses and their families will even be more exposed than they are now to threats, pressures and physical harm," he said.

The drafting committee pointed out, however, that parties in a criminal case might request judges to keep the name of a witness secret "when it believes disclosure will create an undue risk of harm to the witness."

In all, the Justice Department submitted 33 pages of objections to the proposed changes, many of them to relatively technical alterations.

After hearing from the Justice Department, the subcommittee approved a bill, which subsequently was passed by Congress, delaying the effective date of the criminal rules for a year to allow more time to study them.

The rules of evidence will become effective July 1. They were approved by Congress Dec. 18—two days before adjournment—and signed by Mr. Ford Jan. 2 without comment.

Establishment of uniform rules of evidence was the culmination of a process started in 1961 when the Supreme Court named a committee to begin drafting a code to make evidence rules standard for the first time in the 93 federal judicial districts.

As initially proposed, the rules would have changed substantially the current law on privileged information by making confidential conversations between doctors, lawyers, clergymen and the persons they serve unvailable as evidence in a case.

When that subject proved to be controversial and other professionals such as news reporters and social workers sought to obtain privileges also, the Hungate subcommittee decided that the whole topic of privileges was not proper to include in rules of evidence but rather should be considered separately.

To minimize the conflict with the judicial Branch over the rules, Hungate pointed out that about half of the Supreme Court's proposed evidence rules were adopted by Congress without change.

The importance of the evidence rules approved by Congress is more in what they omit than what they include, Hungate said.

And Congress established the point that there should be some uniform rules of evidence, Hungate said. One member of his subcommittee, Representative Elizabeth Holtzman (Dem.), New York, told the House that no such nationwide rules were necessary.

U.S. DISTRICT COURT,
U.S. COURTHOUSE,
New York, N.Y., February 14, 1975.

HON. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice of the Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN HUNGATE: I am pleased, in answer to your invitation, to submit my comments and views respecting the proposed Amendments to the Federal Rules of Criminal Procedure.

I write from the vantage point of more than fifteen years' experience as a judge of the United States District Court for the Southern District of New York and prior to that more than twenty-one years as a trial lawyer, including three years as Chief Assistant United States Attorney and United States Attorney for the Southern District of New York.

I have presided over hundreds of criminal trials involving substantially every type of federal crime. Significantly, I was the trial judge in *United States* v. *Bentvena*, 319 F.2d 916 (2d Cir. 1963), a major multi-defendant narcotics conspiracy case where almost eight years before the Supreme Court's decision in *Illinois* v. *Allen*, 397 U.S. 337 (1970), I was forced to gag and handcuff several defendants in order to prevent their continued violent disruption of the trial.

I object to several of the proposed Amendments to the Federal Rules of Criminal Procedure on the ground that they are unnecessary, unsound, unrealistic and, in some instances, dangerous:

Rule 11(e)

The proposed amendment to Rule 11(e) which provides for plea bargaining is particularly unsound.

Plea bargaining, long practiced in the state courts, has been a disaster. A current study of the subject, showing justifiable public outrage with the consequences of plea bargaining, is now appearing daily in The New York Times. I enclose the first article in the series which was published on February 11, 1975. It shows that in over 80 percent of the serious felony cases instituted in the criminal courts of the City of New York, the defendant pleads to a lesser offense, resulting not in protecting the public from dangerous criminals, but in their return to the streets after serving little or no prison sentence.

Wholly apart from the deplorable social consequences, the plea bargaining procedure places the judge in a compromising position, for no matter what the safeguards his participation in plea bargaining always leaves him vulnerable to a charge of corruption, actual or apparent, not only in cases where the sentence appears to be too lenient, but also in cases where, after the bargain is made, unscrupulous attorneys tells their duped but credulous clients that they can ensure a sentence of only "X" months or years if the client will put up cash for the judge. Nothing could bring more discredit on the judiciary and the entire system of criminal justice, and such charges, often totally irresponsible, are all too easy to make by anyone.

Finally, the complex and time-consuming plea bargaining procedure proposed by the amended rule will serve not to expedite or facilitate the disposition of criminal cases but to prolong and complicate the sentencing procedure, resulting in further delays in disposing of criminal cases and greater backlog and congestion in the district courts. Moreover, the proposed procedure will open up new issues for judicial determination involving time-consuming hearings and opinions in the district courts followed by interminable appeals.

Rule 12.1

The proposed amendment to Rule 12.1 (alibi rule) is unnecessary and undesirable. Worse, proposed Rule 12.1(b), by requiring the prosecutor to reveal the names of witnesses, jeopardizes the entire trial process for it exposes the witnesses to serious, if not mortal, danger.

Rule 29.1

The proposed amendment to Rule 29.1 which provides for a change in the traditional common law number and order of summations is again unnecessary and undesirable.

As matters now stand, any judge who wishes to use the proposed procedure of requiring the prosecutor to make an opening argument, followed by a reply by the defense, followed by a rebuttal by the prosecutor, may do so in his discretion.

I am aware that the proposed procedure is employed in some states. In my view, this innovation is objectionable. It will prolong the trial and most criminal trials are already too long. It will provide a fertile ground for litigation of issues involving a claim of deception, surprise, prejudice, prosecutorial misconduct, etc., for defendants will claim that the prosecutor saved his good arguments until his final rebuttal for the deliberate purpose of depriving the defendant of his right to reply. Finally, it further weights the scales of justice in favor of the accused.

Rule 32

The proposed amendment to Rule 32(c)(3)(A) providing for disclosure of the presentence report is impossible to administer in its requirement that the court shall afford the defendant or his counsel an opportunity to comment when the court has refused to allow the defense to read the report, because it might seriously disrupt a program of rehabilitation, breach a promise of confidentiality or result in harm, physical or otherwise, to the defendant or other persons. Obviously, intelligent comment cannot be made by the defense without disclosure and knowledge of the contents of the presentence report. An opportunity to comment thus defeats the purpose of denying disclosure in the first place.

The proposed amendment to Rule 32(c)(3)(B) suffers the same defect.

Rule 43

Pretrial conferences have become a useful and desirable procedure in the administration of the criminal law. Such conferences, dealing as they do with scheduling a trial date, discovery and preliminary motions, do not require the presence of the defendant. Moreover, it is difficult to schedule conferences if the presence of the defendant, whether detained or out on bail, is required. The pro-

posed amendment to Rule 43(a) should make clear that the defendant's presence is not required at pretrial conferences.

The proposed amendment to Rule 43(b) is unnecessary and undesirable. Case law, notably *Illinois* v. *Allen*, *supra*, and *United States* v. *Tortora*, 464 F.2d 1202 (2d Cir. 1972), already define the circumstances when a trial may be continued in the defendant's absence. The subject is one of continuing development, and it is unwise to codify the rule. All of the circumstances under which it might be perfectly proper to try a defendant *in absentia* cannot be foreseen or stated, and the subject should therefore be left to development by case law.

The proposed amendment to Rule 43(c)(2) is a verbatim copy of existing Rule 43(c)(2) and therefore unnecessary. However, the existing rule should be amended so as to permit a defendant to consent to trial in his absence, even though the defendant's absence is involuntary and *the offense is punishable by fine or imprisonment for more than one year or both.*

The precise situation occurred in *United States* v. *Grunewald*, 233 F.2d 556 (2d Cir. 1956), where a principal defendant charged with several offenses, each punishable by fine or imprisonment for more than one year or both, suffered a heart attack near the close of a lengthy trial. The pretrial preparation and trial had been time consuming and expensive for all parties. The stricken defendant gave his written consent to completion of the trial in his absence, thereby preventing a mistrial as to him. A mistrial would have resulted in a retrial and duplication of effort and expense not only on the part of the government but also upon the part of the stricken defendant. Surely, the avoidance of a mistrial should be fostered not hampered by the rules. There is no conceivable reason why a defendant should not be able to waive or consent to trial in his absence, even though his absence is involuntary and whatever the penalty for the offense.

I very much appreciate the opportunity to comment on the proposed amendments and hope that my comments will be both helpful and effective.

Sincerely yours,

LLOYD F. MACMAHON,
U.S. District Judge.

[From the New York Times, Feb. 11, 1975]

LOWER COURTS ARE SETTLING 80 PERCENT OF CITY FELONY CASES

(By Marcia Chambers)

The huge volume of felony cases cut to misdemeanors by plea-bargaining or dismissed outright in Criminal Court here increased markedly last year, according to records of the Police Department and the city's five District Attorneys.

The Criminal Courts, technically empowered to adjudicate only misdemeanors, disposed of 81,351 of the 101,748 felony arrests in the city in 1974, a total of 80 per cent. In 1973, these courts disposed of 66,710 of 91,043 felony cases, or 73 percent.

Struggling to keep up with an ever-increasing case load, the Criminal Courts have come to supervise plea bargaining and sentence bargaining with the tacit aim of reducing felonies to misdemeanors as often as possible at a defendant's first appearance before the bar of justice.

Under the law, felonies carry severe penalties—at least more than a year's imprisonment—and are supposed to be disposed of in the State Supreme Court. The felonies that never get to the Supreme Court are disposed of in a variety of ways in Criminal Court.

Some charges are reduced to misdemeanors, which carry a maximum sentence of one year in jail, a $1,000 fine or three years' probation. Criminal Court judges also have given conditional or unconditional discharges on a guilty plea, or have granted an "A.C.D."—an adjournment in contemplation of dismissal.

Interviews with judges, prosecutors, defense lawyers, police officers and defendants indicate that the effort to prevent the criminal case load from becoming unmanageable has generated a system of concession and compromise that puts administration ahead of justice and cuts across the spectrum of felony charges.

Every day there are hundreds of compromised cases that the general public never hears about. Occasionally, a notorious case draws attention not only to itself, but also to the system of plea-bargaining and its shortcomings.

CITYWIDE RECORDS ON FELONY CASES

	1973 felony arrests	Felonies disposed of by the lower court [1]	Percent	1974 felony arrests	Felonies disposed of by the lower court	Percent
Manhattan	31,098	23,846	77	32,830	26,752	81
Brooklyn	24,907	17,858	72	27,744	22,924	80
Bronx	21,411	16,466	77	24,501	20,172	82
Queens	11,929	7,543	63	13,775	10,340	76
Staten Island	1,698	1,018	60	1,898	1,163	61
Total	91,043	[2] 66,710	73	101,748	81,351	80

[1] Disposition through plea and sentence bargaining to a misdemeanor, adjournment in contemplation of a dismissal, probation, conditional or unconditional discharge.

[2] The remaining 24,333 cases were sent to grand jury and resulted in indictment, dismissal or return to the criminal court. A small percentage of the grand jury cases originate in district attorney's bureaus and not the criminal courts. Figures were not available for these cases.

Source: The New York City Police Department and Offices of City District Attorneys.

The case of Melvin Lewis, the alleged slayer of Frank J. Walker, a widower with six children, is a recent example. But it could just as easily have been the case of Willie Poinsette or John Stevens.

Willie Poinsette was 48 years old and had a record of 21 previous arrests when, on April 8, 1973, he was charged with robbery and possession of a gun, both felonies. If convicted on these charges he would have faced up to 32 years in prison. Two days later in Criminal Court, Mr. Poinsette pleaded guilty to petit larceny, a misdemeanor, and was sentenced to two months in city jail.

John Stevens was 23 and had a record of seven previous arrests when, on Jan. 18, 1973, he was charged with robbery and possession of a knife, both felonies. If convicted on these charges he would have faced up to 32 years in prison. The next day, Mr. Stevens pleaded guilty in arraignment court to possession of a weapon, a misdemeanor, and was sentenced to 11 months in city jail.

Melvin Lewis was 19 and had a record of 13 previous arrests when, on Aug. 29, 1973, he was charged with possession of a knife and attempted robbery, both felonies. If convicted on these charges, he would have faced up to 14 years in prison. The same day in arraignment court, Mr. Lewis pleaded guilty to attempted grand larceny, a misdemeanor, and was sentenced to 10 months in city jail. He was conditionally released on parole to a rehabilitation center three months later.

Mr. Lewis, who used the name Raymond Tubar, is the best known of these defendants. Shortly after disappearing from the rehabilitation center on Jan. 21, he was arrested for assaulting two civilians and a police officer. A week later he was charged with wounding a police officer and killing Mr. Walker, during an incident in St. Vincent's Hospital.

Mr. Lewis's case made the headlines; Mr. Stevens and Mr. Poinsette's did not. Yet the three men share a common experience: each was allowed to bargain over the pleas they would enter and the sentences they would receive. The charges were reduced from felonies to misdemeanors in either arraignment or Criminal Court and the men were given the kind of sentence that virtually assured their return to the streets within several months.

Subsequently, all three defendants were arrested again on a variety of charges.

In the past, felony arrests moved through the Criminal Court system to the Supreme Court. The Criminal Courts arraign defendants and then determine whether there is sufficient evidence for grand jury action.

BAIL QUALIFICATION WEIGHED

In arraignment court, the first step in the process, the accused is acquainted with the charge against him and a judge determines qualifications for bail and sets a date for a preliminary hearing. The bulk of the felony cases are disposed of at the next step in the process, the preliminary hearing, which generally takes place several days after arraignment. It is during these two procedures that most felonies are disposed of.

Even so-called high-grade arrests by undercover or decoy police officers are churned into the plea- and sentence-bargaining machinery of the Criminal Court.

Based on figures for Manhattan, Brooklyn and the Bronx from the State Select Committee on Crime, only 22 per cent of the adults arrested for felony robberies in 1973 by the anticrime police units were, in fact, convicted of felonies. The others, the year-long study released this week shows, were either dismissed, discharged, placed on probation or sent to a drug-treatment center.

State Senator Ralph J. Marino, Republican of Oyster Bay, L.I., the chairman of the committee on crime, said yesterday that the plea-bargaining situation had become so serious that he intended to hold public hearings in March to try to establish guidelines for felony reductions.

Even the new, stringent drug law, designed to keep narcotics sellers and addicts off the streets through the imposition of stiff sentences, can be circumvented by the power of the Criminal Court, in which, prior to indictment, plea and sentence bargaining is permitted in certain drug cases.

Police statistics show that in 1974 there were 7,634 felony narcotics arrests in the five boroughs. During the same year there were 3,357 drug indictments, according to Christine McKay, administrative assistant to Frank Rogers, the city-wide narcotics prosecutor.

Some of these arrests, Mrs. McKay said had not resulted in indictment by year's end when the statistics were compiled. Some charges, such as those involving the possession or sale of methadone, marijuana or tranquilizers, were reduced to misdemeanors through plea bargaining in Criminal Court.

William Boran, 20 years old, of 115 St. Marks Place, had been arrested on Sept. 10, 1974 for selling an undisclosed number of pills to an undercover Detective, Joseph Rauchet, in Bryant Park. Detective Rauchet found 111 tranquilizers in Mr. Boran's pocket.

Mr. Boran was charged with the sale and possession of drugs, both Class D felonies, each punishable by up to seven years in prison. But Mr. Boran's case was not held for grand jury action, possibly because his only prior arrest was for loitering, possibly because he had a legal prescription for the pills—even though it is illegal to sell them.

In an interview, Detective Rauchet recalled that there had been some dispute over how many pills Mr. Boran had offered to sell him. Judge Hyman Solniker, presiding, that day over arraignment court, held a brief bench conference with the prosecutor and Legal Aid Society lawyer, all off the record. A bargain was struck. Mr. Boran agreed to plead guilty to possession as a misdemeanor. Judge Solniker sentenced Mr. Boran to a conditional discharge.

Had Mr. Boran's case been held for a preliminary hearing, Detective Rauchet would have testified about the arrest for a judge to determine if there was probable cause that a crime had been committed and sufficient evidence to send the case to the grand jury.

"It was a strange case," Detective Rauchet recalled. "I thought it would go to a preliminary hearing, but the main function of a judge these days is to knock what he can down, and that is what the judge did. It's not at all unusual. I'm callous to it."

On Dec. 11, the day Mr. Boran stood before Judge Solniker, the judge's calendar listed 77 cases. By 5 p.m., the judge had disposed of 47 cases. Thirteen of the 38 felony arraignments had been reduced to misdemeanors and disposed of in arraignment court.

The three arraignment courts in Manhattan, including night court, had 269 cases on the Dec. 11, 1974, calendars. That volume goes a long way toward explaining the reasons so many cases are so quickly adjudicated through plea bargaining. For example, last year 66,932 of the 179,643 citywide arraignments for all crimes for the first 11 months of 1974 were handled in Manhattan.

The case load in the city's courts has risen sharply over the last 15 years. In 1960, there were some 30,000 felony arraignments citywide, when almost all felony arrests were arraigned as felonies, according to the 1960 annual report of the courts. Last year, there were 101,748 felony arrests in the five boroughs, an increase of nearly 12 per cent over 1973.

In defense of the sentence-bargaining system, a system that has been upheld by the courts, judges and others point to the increase in arrests. It is so staggering and the consequences of overcrowded jails so fearful, the pressure is on everyone in the system to keep the cases flowing in and out but not to trial, they say.

Thus, the objective, according to criminal court judges who preside over the courts in Manhattan, is to stop certain cases at intake, because annual budgets do not provide enough funds for the courtrooms, judges and prosecutors needed to try all cases.

In Manhattan, this means half the arrests never go to a preliminary hearing. In the other boroughs, which have fewer cases only 20 to 30 per cent of the arrests are disposed of at arraignment. Most of the remainder are bargained down at the preliminary hearing.

David Ross, the city's administrative judge said in a recent interview, "We have a theory: that the great bulk of the cases are low gravamen [substance] offenses. The trick is to get a good judge in an upfront part [courtroom], who can separate the wheat from the chaff and dispose of the cases."

And that is why the criminal court calendar is now up to date, said court officials.

How does Justice Ross explain that last year 81,351 felony cases of 101,748 felony arrests were disposed of in criminal court?

"The police call them felonies. We don't take the gravamen of a crime from the police. We don't take their label."

Said one criminal court judge, "Ninety percent of all felonies are solid misdemeanors."

Police officials disagreed vigorously.

Inspector Michael J. Farrell, commander of the Police Department's criminal justice bureau, said in an interview that every felony arrest was reviewed twice once by a superior officer and the second time by an assistant district attorney who draws up the felony charge in the complaint room in the courthouse.

"The Police Department is quite willing to take the responsibility for poor arrests whatever that number may be," Inspector Farrel said. "But what concerns us in the vast majority of cases in which the court takes guilty pleas on felonies to lesser charges. There are a large number of good arrests, valid arrests, that walk out of court."

Senator Marino said his recent analysis of 710 robbery arrests showed that "the excellent work by the Police Department is being wasted."

"The judges and assistant district attorneys, in reducing the cases, are often ignoring the very serious criminal records of the defendants, which indicate they are a continuing menace to society," he said.

"If there is no serious injury, the cases are being reduced in order to control the volume in Supreme Court. Arraignment court is the key. The only reason Supreme Court is functional is that arraignment part is taking pleas," Senator Marino added.

Lester Goodchild, the chief executive officer for the city's courts, said that 45,000 cases in 1974 of all Manhattan arrests, including arrests for misdemeanors and violations, never reached arraignment court. These are the so-called "bad arrests."

The cases that do make it to arraignment as a felony have initially been screened by a prosecutor. Once the case goes before a criminal court judge, however, there are any number of factors that can lead to a reduction to a misdemeanor.

Mr. Lewis's robbery case, for example, illustrates one of the major problems: complainants who do not show up in court to press charges.

Mr. Lewis was charged with attempting to rob Rafael Acevedo of Horatio Street in Greenwich Village, by holding him up at knifepoint. But Mr. Acevedo did not appear in court and it seemed unlikely to the prosecutor on duty that day in arraignment court that he would be a witness if the case ever went to trial.

"We looked at the case this way: we've got a dismissal on our hands or we're going to grab what we can get," said Ronald Lankler, the chief of the criminal courts bureau of the Manhattan District Attorney's office.

"We took the 10-month sentence," he said.

This winnowing out, many in the court system agree, tends to give the defendant the upper hand in bargaining about sentences in Criminal Court. The repeaters know this from experience. The novice learns it from friends or his lawyer.

"We've got an edge," said one defense attorney.

The actors in the three-minute arraignment drama, in which pleas are entered and sentences ironed out in off-the-record bench conferences, speak of conflicting pressures.

"A plea bargain often represents nothing more than an honest evaluation by the prosecutor and the defense attorney of the strengths and weaknesses of his case," said Judge Richard A. Brown, of Criminal Court, former Mayor John V. Lindsay's Albany lobbyist. Judge Brown, 15 months on the bench, presided over about 10,000 cases, most of them in arraignment court.

But an honest evaluation is dependent upon several factors, said judges, prosecutors and Legal Aid attorneys.

Did the prosecutor overcharge in the complaint room?

"There is some puffing [of charges] on the part of the prosecutor, and it varies from case to case," said William J. Gallagher, the lawyer in charge of the criminal defense division of the Legal Aid Society.

Acting Supreme Court Justice Irving Lang asked:

"Would the defendant, in any event, receive no more than one year in jail? And, if so, why not accept a plea in arraignment court with all parties present instead of waiting months longer?"

Was the complainant a friend of the suspect's? Or a member of his family who decided not to press charges? Was there an illegal search and seizure that could not stand up in court? Was the victim injured?

Sometimes a complainant or witness will wait all day in court to have his case called. "What if he tells you he's had enough and refuses to return if the case is adjourned again?" asked one assistant prosecutor.

Does the prosecutor know, as he knew in Mr. Lewis's robbery arrest, that he has a weak felony case and to obtain a conviction he has to accept a misdemeanor?

JUDGES POSE QUESTIONS

Judges who were interviewed posed all of these questions in one form or another. They all made sure to point out that it was the assistant district attorney who first had to consent to lower the charge. They insisted that they were passive during negotiations between prosecutor and defense attorney. But privately they acknowledged that they "twist arms," as one criminal court judge put it, to get pleas.

In the end, with all the shifting of responsibility, the statistics tell much of the story. Only 20 per cent of the felony arrests in the city in 1974 ever reached the grand jury for possible felony indictment.

The grand jury may then indict, dismiss the case, or return it to criminal court. Few defendants indicted on felony charges ever go to trial, for these cases, too, are often plea-bargained to a lesser charge when they reach Supreme Court.

Serious as well as minor felonies are bargained down, and the defendant rarely pleads guilty to the original charge. Court statistics show, for example, that only 8 per cent of the 14,444 assault arrests citywide for the first 11 months of 1974 ended in an indictment charging assault.

Even the most serious of all felonies—homicides—are not exempt from plea bargaining. A recent study by the New York Times found that eight of 10 defendants accused of homicide in New York City (during 1973) pleaded guilty to a reduced charge.

U.S. DISTRICT COURT,
DISTRICT OF MARYLAND,
Baltimore, Md., February 20, 1975.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN HUNGATE: I have your letter of January 27, 1975, requesting the comments of the members of this Court in regard to the Proposed Amendments to the Federal Rules of Criminal Procedure, the effective date of which was postponed by Public Law 93-361 from August 1, 1974 to August 1, 1975.

As you will no doubt recall, several members of this Court (Judges Kaufman, Miller and Blair) and Judge Winter of the U.S. Court of Appeals for the Fourth Circuit, have previously voiced their objections to various sections of proposed Rule 11, and Judge Blair, under date of June 10, 1974, submitted his suggested revision of Rule 11 at your request.

All of the active judges and one senior judge of this Bench take objection to proposed Section (e) which involves plea bargaining because, as the Amendment is presently drafted, acceptance of the plea binds the judge to impose a sentence

not less favorable to the defendant than the one provided for in the plea agreement. This, we feel unnecessarily makes the judge a party to the plea agreement and unduly limits his discretion as to the sentence which should be imposed. While we recognize that the judge may obtain a presentence report prior to acceptance of the plea and may reject the plea if he is not then satisfied that it would serve the interests of justice, we view this as an unsatisfactory alternative.

For your information, I am enclosing herewith copies of the prior correspondence from members of this Bench and Judge Winter, which set forth more fully some of the objections we perceive.

Six of the active judges and one senior judge of this Bench believe that Rule 11, as it is presently written, provides all necessary safeguards of a defendant's rights while retaining for the court an exercise of discretion unfettered by being a party, in effect, to the plea agreement. We wish to again voice our unqualified opposition to the proposed Amendment.

Thanking you for the opportunity to express our views on the subject, I am,

Sincerely yours,

EDWARD S. NORTHROP.

U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT,
June 12, 1974.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN HUNGATE: I am sorry that attendance at a term of court in Richmond has delayed my reply to your kind letter of May 28, 1974. You ask my views on three questions, and I am most happy to state them. I will respond to them in inverse order because I think that my answer to your third question reveals the basic philosophic difference between my views and the concept embodied in proposed Rule 11.

I sincerely think that sentence should be eliminated as an area of plea agreement. The purposes of sentence are twofold—to serve as a vehicle for rehabilitation of an offender, and/or to deter others from committing the same or similar crime. Given these purposes, and if they have validity, it seems to me that the prosecutor and the defendant are singularly inappropriate as persons to fix sentence. Neither the defendant, whose sole interest is in getting off lightly, nor the prosecutor, whose principal interest is in obtaining a conviction, has the objectivity of the judge in appraising how society's interest in rehabilitation and/or deterrence can best be served. In medicine, one does not permit the patient to prescribe his cure. No less in law do I think the offender should have a say in his punishment, even by the quasi-adversary process of plea bargaining.

If sentence is eliminated as an area of plea agreement, I do not think that the number of guilty pleas will be substantially reduced; hence, I do not think that the elimination would substantially reduce the impact of Rule 11(e) on the criminal trial docket. My opinion is, of course, a subjective one based upon my slightly less than five years experience as a district judge in the District of Maryland. My practice, which was well known and I think the practice of the other district judges at that time, was not to permit the prosecutor to make any recommendation as to sentence. My impression was that Maryland was not below the other districts in the percentage of criminal cases disposed of by a plea of guilty. I know that this practice presently obtains in the District of South Carolina, and it may in other districts also. I do not think that if these other districts can be identified it would be too difficult to obtain statistics from the Administrative Office of the United States Courts to show what has been the experience in them and in South Carolina. In this way, an accurate answer to your question could be obtained, but let me add, I would think that the price of a few additional trials would be worth the cost of avoiding the unseemliness of permitting a defendant to negotiate his own punishment.

With respect to Rule 11(e)(2), which permits a district judge to defer action on a plea agreement until after consideration of a presentence report, I agree that use of this procedure would relieve pressure on the district judge to accept an agreement as to sentence negotiated by the parties. I suppose that if the recommendation in the presentence report is in line with the agreement of the parties, acceptance of the agreement is easy. Conversely, if they are grossly

disparate, rejection of the parties' agreement is easier. Use of the procedure, however, may well cause the unnecessary preparation of presentence reports, i.e., plea agreement is rejected and defendant is acquitted at trial; and it would not obviate my philosophical objection to expanding the sentencing function beyond the judge and the qualified, objective experts who are provided to assist him.

Thank you again for the opportunity to express my views.

Respectfully yours,

HARRISON L. WINTER.

CONGRESS OF THE UNITED STATES,
COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Washington, D.C., May 28, 1974.

Hon. HARRISON L. WINTER,
U.S. Circuit Judge, U.S. Court of Appeals, Fourth Judicial Circuit, Baltimore, Md.

DEAR JUDGE WINTER: Thank you for your letter of May 21, 1974, setting forth your views on some of the proposed amendments to the Federal Rules of Criminal Procedure.

I would like you to consider the following questions and comment further upon Rule 11, "Plea agreement procedure." First, Rule 11(e)(2) permits the court to defer acceptance or rejection of a plea agreement until after consideration of the presentence report. Do you feel that this provision might reduce the pressure on the District Judge to accept a disposition involving sentence, especially if the presentence report indicates that the sentence recommended by the United States Attorney is not in the public interest? Second, will eliminating sentence as an area of plea agreement result in substantially reducing the impact of Rule 11(e) on the criminal trial docket? Third, should sentence be entirely eliminated as an area of plea agreement?

I am enclosing a copy of House Document 93-292, which reproduces the proposed amendments together with the Notes of the Advisory Committee, so that you will be aware of the Advisory Committee's explanation of the Rule.

Sincerely yours,

WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice.

U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT,
May 21, 1974.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommmittee on Criminal Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN HUNGATE: Chief Judge Haynesworth has told me that you have sought his views on the proposed amendments to the Federal Rules of Criminal Procedure transmitted to the Congress by the Chief Justice on April 22 and referred to your Committee on April 23, and that he has written to you expressing his approval of them. When I mentioned that I have a serious reservation about one provision of the new rules, Judge Haynsworth told me that he would not consider it inappropriate if I expressed myself to you.

Rule 11(e), as amended, spells out a "Plea agreement procedure." While I applaud the policy of placing plea agreements on the record where they will be out in the open, under the particular procedure which is prescribed I fear the likelihood of one very unfortunate consequence. Rule 11(e)(1) specifies that government counsel and a defendant or his attorney may bargain toward reaching an agreement, inter alia, on the recommendation that the government will make as to the imposition of sentence. Rule 11(e)(3) and (4) provide respectively that if the court accepts the plea agreement, it shall inform the defendant that it will adopt the disposition provided for in the plea agreement, or another disposition more favorable to the defendant than that provided in the plea agreement, but if the court rejects the plea agreement, the defendant shall be given the opportunity to withdraw his plea and, hence, to go to trial on a plea of not guilty.

I am satisfied that if the government and the defendant bargain as to the disposition of a case upon a plea of guilty or a plea of nolo contendere, due process would not require the trial judge to permit a defendant to withdraw his plea if the trial judge concludes not to make a disposition at least as lenient as that provided in the agreement, provided that the trial judge has made perfectly clear to the defendant, as a condition of taking the plea, that the court would not be bound by the agreed disposition and might impose a more severe sentence, and the defendant nevertheless affirms that he wishes to tender the plea. As one who sat as a district judge for a little over four years in a busy metropolitan district court, I am certain, however, that, if Rule 11(e)(3) and (4) are adopted as presently drafted, a district judge would not often reject a disposition of a case negotiated by the government. This is so because he would be under great pressure not to add to a heavy docket the trial of a case which could otherwise be avoided. To me, the inescapable, practical result is that the sentencing power, under Rule 11(e), as it will operate, will be transferred in large part to United States attorneys and removed from district judges. The wisdom of such a policy, to my mind, is highly debatable and that policy should not be adopted without very careful consideration. My personal view is that the sentencing power of the district judge should remain unimpaired and district judges should be neither pressured nor encouraged to delegate the fixing of sentences to others.

Of course, in a number of districts the practice is well established that the district judges will not permit the United States Attorney to make a recommendation as to the disposition of a case except in those rare instances when the court might request such a recommendation. This is the procedure I followed when I was a district judge, and I happen to think that it is to be desired over one in which the United States Attorney is permitted to volunteer a recommendation. In a district which does not permit recommendations except where requested, and when the request is rare, the practical effect that I envision from adoption of amended Rule 11(e) will not arise. I have no valid statistics, but it is my impression that many more districts permit recommendations than do not permit recommendations and therefore I think that the problem I point out is real.

If you would like me to elaborate on these views in further detail, I will be most happy to receive your request.

Respectfully yours,

HARRISON L. WINTER.

U.S. DISTRICT COURT,
DISTRICT OF MARYLAND,
Baltimore, Md., June 14, 1974.

Re: Proposed Amendments to Federal Rules of Criminal Procedure, Rule 11

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN HUNGATE: I believe the proposed revisions to Rule 11 of the Federal Rules of Criminal Procedure, relating to plea bargains in guilty pleas, while well-intentioned, are philosophically in error, will create substantial practical difficulties in administration of justice and are not required to protect the rights of criminal defendants. I believe that Congress should exercise its prerogative to prevent the implementation of that Rule in order that an appropriate alternative can be adopted. I have no objection to plea bargaining, and, in fact, am in favor of them. The proposed Rule in subsection (e)(1) thereof properly acknowledges that the defense and prosecuting attorneys may discuss proposed plea bargains with a view that ". . . the attorney for the government will move for dismissal of other charges, or will recommend or not oppose the imposition of a particular sentence, or will do both." The Rule states that "The court shall not participate in any such discussions." This paragraph properly acknowledges that the plea bargain is between the prosecution and the defense and relates solely to an agreement of the parties that the government attorney will make certain recommendations to the court or not oppose certain actions to be taken by the court. In no sense is the court itself by Rule 11(e)(1) made out to be a party to or bound by the bargain. This view of plea bargains is that which the Supreme Court held in *Santobello* v. *New York*, 404 U.S. 257

(1971), and is the only proper view. The judge should not be in the position of bargaining with the defendant as to the sentence which the judge will impose. The only bargaining should be between the representative of the government, and the representative of the defendant, as to the recommendation of the prosecutor to the judge.

The difficulty with the proposed Rule is that it goes on in subsection (2), (3) and (4) to require the judge, although he has had no part in formulating the bargain, to accept or reject the bargain. In other words, the defense and the prosecution are placed in the position of making the bargain for the judge. The plea agreement procedure was never intended to make a bargain for the judge, but was merely intended to make the prosecutor commit himself as to what his recommendation would be and require that, once committed, the prosecutor live up to that commitment. See *Santobello* v. *New York*, supra; *Walters* v. *Harris*, 460 F.2d 988 (4th Cir. 1972), cert. denied *sub nom Wren* v. *United States*, 409 U.S. 1129 (1973).

Under the procedures proposed in the new Rule, the sentencing judge would be in the position of having to accept or reject a bargain made for him by someone else, when the judge does not know the facts behind the case in detail, has not had a presentence report, and has little objective information upon which to act except blind faith in what is told to him by the prosecutor and the defense attorney at the time that the plea is entered. If the court decided to ". . . defer its decision as to acceptance or rejection [of the plea agreement] until there has been an opportunity to consider the presentence report," the defendant could withdraw his guilty plea if, after reviewing the presentence report at a later date, the judge decides the interests of society as well as of the defendant would make it inappropriate to sentence the defendant to a disposition equal to or more favorable to him than that provided for in the plea agreement. In other words, proposed Rule 11(e)(4) gives the defendant an absolute right to withdraw his plea of guilty if the judge does not sentence in accordance with the plea agreement. The plea agreement, then, becomes more than an understanding between the defendant and the prosecuting attorney but is really made to become a binding commitment upon the sentencing judge in default of which commitment by the judge the defendant is allowed to withdraw his plea.

Constitutional principles do not require that the sentencing judge be bound by the plea agreement nor that the defendant be guaranteed a certain disposition of his case before his plea of guilty will be binding upon him. In *Santobello*, supra, the Court recognized that the Constitution does not require a defendant to be guaranteed a certain disposition of his case in order to enforce his plea of guilty. 404 U.S. 257, at 263. On the contrary, the Court in *Santobello* made it clear that the only thing that is required is that the prosecuting attorney do that which he has agreed to do in return for the entry of the plea of guilty by the defendant.

The proposed new Rule would have the unfortunate result of encouraging a judge to engage in open debate with a defendant as to the sentence the defendant will receive. If the defendant does not obtain from the judge the sentence which the government attorney has recommended, or a more favorable sentence, the defendant would have an absolute right to withdraw his plea of guilty under proposed Rule 11(e)(4), since any less favorable sentence by the judge would constitute automatically a rejection of the plea agreement.

Without doubt, a plea agreement should be brought out into the open. Under *Santobello*, this is now constitutionally required. The proposed new Rule is not needed for that. It is also not open to debate that the prosecuting authority, once having entered into a plea agreement in reliance upon which a plea of guilty or nolo contendere was entered by the defendant, is required to comply with that agreement. Without doubt, the sentencing court should and must make clear to the defendant that he has the right to refuse to follow the recommendation of the prosecuting authority made pursuant to the plea bargain and that, while taking into consideration the prosecuting authority's recommendation, has the right to impose up to the maximum sentence authorized by law, in default of which understanding by the defendant the plea would not be voluntarily or intelligently made and should be stricken. But what is not constitutionally required, what is not philosophically or practically desirable, and what this proposed Rule accomplishes is the imposition of a requirement that the defendant be allowed to withdraw his plea of guilty in every instance in which the sentencing judge decides that justice

would not be served through the imposition of sentence recommended by the prosecuting authority pursuant to a plea bargain.

The proposed Rule vastly increases the scope of the plea agreement, binds the sentencing judge to an agreement not made by him, creates circumstances under which the defendant is free to decide the maximum sentence which can be imposed upon him if he is to plead guilty, and creates the potential of substantial amounts of wasted time in the ordering and preparation of presentence reports and other procedures ordinarily attendant upon the acceptance of the guilty plea in those circumstance where the defendant elects to withdraw his plea of guilty after the judge tells him at sentencing what the sentence is going to be. I urge that deeper thought be given to this Rule and that the Congress act to prevent its implementation at this time.

Very truly yours,

JAMES R. MILLER, Jr.,
U.S. District Judge.

U.S. DISTRICT COURT FOR THE DISTRICT OF MARYLAND,
Baltimore, Md. July 3, 1974.

Re: Proposed Amendments to Federal Rules of Criminal Procedure, Rule 11

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives.

DEAR CONGRESSMAN HUNGATE: I would like to join with several other members of this Court who have written to you suggesting changes in the proposed amendments to Rule 11 of the Federal Rules of Criminal Procedure. It seems to me that if the sentencing judge requires a full recital, at the time he accepts the guilty plea, of the plea bargain and specifically and carefully advises and warns the defendant that the judge retains the discretionary authority to sentence within the maximums established by statute, that the judge may or may not accept the plea bargain, and that in many instances judges do not accept plea bargains, it becomes inadvisable to permit the defendant who after such advice and warning enters his guilty plea to have the automatic right to withdraw his guilty plea at the time of sentencing if the judge imposes a sentence in excess of that called for by the plea bargain. By the time of sentencing, under the practice which has been in force in this Court for many years, the defendant's counsel and the defendant have had access to all parts of the presentence report except for the portion of that report which contains the recommendations to the Court from the investigating probation officer. The presentence report often reveals information which the defendant hoped would not come to the attention of the Court. In addition, there are many times comments in the report, or at least inferences to be drawn from the language used in the report, which indicate to a defendant that the probation officer may well have recommended a sentence in excess of that indicated in the plea bargain or in excess of what the defendant hopes will be imposed.

It seems to me that if the proposed amendments are adopted, there will many a ringwise defendant who if he is able to arrive at a plea bargain acceptable to him, will plead guilty, wait and take a look at the presentence report, get a further "feel" therefrom, and then determine whether to exercise his automatic right to withdraw his guilty plea in the event the Court indicates that it is going to sentence in excess of the plea bargain. Such a result in my judgment would be most unfortunate. It not only gives the defendant an opportunity which I do not think the defendant is entitled to have, but it will also mean that the judge who has seen the presentence report will almost surely not be able to preside in a non-jury trial and may not feel that he is able to preside in a jury trial, particularly if there are close factual questions raised in connection with suppression or other motions which require factual determination by the Court rather than by the jury. In one and two judge districts in which the Court sits far away from places of residence of other district judges, this will almost surely cause delays and burdens.

From my point of view, the defendant, at the time he tenders his guilty pleas, should be told everything which the Government expects to bring to the Court's attention at the time of sentencing. If that is done and if the Court's warnings

and advice to the defendant are as specific and detailed as I have suggested above in this letter, it would seem to me that the proposed amendment, pursuant to which a defendant will have the absolute right to withdraw his guilty plea at the time of sentencing if the court is not going to accept the plea bargain, is unwise.

I know that it is possible for a sentencing judge at the time a guilty plea is tendered to delay accepting that tender and to ask the defendant to waive the provisions of Federal Criminal Rule 32 which otherwise prohibits the sentencing judge from receiving the presentence report prior to acceptance of the guilty plea. The use of that technique in every instance in which a plea bargain is involved would permit the Court to consider the presentence report before accepting the plea of guilty. Further, there would not seem to be any need for the Court to show the presentence report to the defendant prior to accepting the tender of the plea of guilty. Accordingly, it would be possible for the Court, after holding the tender of the plea in abeyance and after receiving and considering the presentence report, to advise the defendant prior to accepting the tender of the plea of guilty whether the Court was going to stay within the parameters of the plea bargain. But that procedure would still not do away with the question of whether the judge involved would thereafter be able to handle the case as a non-jury judge or to handle the case under some circumstances as a judge in a jury trial.

The subject of sentencing poses so many problems that while I currently hold the views which I have stated in this letter with a considerable degree of conviction, I still have some hesitancy in submitting them. However, I do bring them to your attention for whatever help they may be in connection with consideration of the problem by your Committee.

Very truly yours,

FRANK A. KAUFMAN.[1]

U.S. DISTRICT COURT,
DISTRICT OF MARYLAND,
Baltimore, May 28, 1974.

Re: Proposed Amendments to Federal Rules of Criminal Procedure.

HON. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN HUNGATE: I write with reference to the amendments to the Federal Rules of Criminal Procedure recently transmitted by the Supreme Court to Congress.

While I certainly do not oppose many of the changes proposed by the distinguished Advisory Committee and adopted by eight members of the Supreme Court, I do wish to register my opposition to two changes in particular.

Rule 11. Pleas.—The amendments to this rule bring about a substantial change in the acceptance of pleas of guilty or nolo contendere which result from a plea agreement entered into between the United States and the defendant. At the outset let me say that I regard the disposition of criminal charges through the so-called plea bargaining method as a desirable and in fact essential part of the administration of justice in federal criminal cases so long as the court is scrupulous in determining that the plea is voluntarily, knowingly and intelligently entered by the defendant with a full understanding of his constitutional rights and the direct consequences that may come from acceptance of the plea.

Under our present procedure, the trial judge after searching inquiry either accepts or rejects the offered plea. Rule 11(e)(3) as transmitted to the Congress would radically alter this procedure in that under the new rule the trial judge would accept not merely the plea but the plea agreement. Under the present procedure, if a part of the plea agreement is that the United States will recommend a particular sentence, the prevailing practice is, I believe, for the judge to inform the defendant that he is not bound by the recommendation and indeed may not follow it at the time of sentencing. The defendant is cautioned in this respect before the plea is accepted. In the usual case, the judge then obtains a presentence report and imposes a sentence in light of all information properly cognizable, including the recommendation as to sentencing contained in the plea agreement. I would venture the thought that in most cases the sentence does

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[1] See also p. 290.

not exceed the one recommended by the United States as a part of the plea agreement but there are a number of cases in which the sentence may be more or less than the recommended sentence for reasons that are good and sufficient.

As I read the proposed change in this procedure, the judge will now become a party to the plea agreement. If he does not accept the plea agreement, his choice is to reject the plea and advise the defendant that if he persists in offering the plea a sentence less favorable than the one recommended may be imposed. There is a considerable amount of criticism of plea bargaining generally and a good deal of misunderstanding on the part of the public as to how plea bargaining works and whether it is a proper procedure in the criminal justice system. For the most part, I think this criticism is unwarranted. It is my judgment, however, that if the judge becomes a party to the plea agreement, as he will under the new rules, critical comment and public misunderstanding will increase. While there are a few exceptional cases which even under our present procedure may warrant the judge entering into a plea agreement, I think the practice generally has odious connotations. For my part, I have no desire whatever to become a party to the bargain (by acceptance) and I have scrupulously avoided doing so in all cases.

Quite apart from my personal distaste for entering into a plea agreement with a defendant, I submit that there are serious practical problems which will arise under the proposed procedure which will impede the efficient administration of justice. The first one is that in the conscientious discharge of responsibility the judge will be unwilling in most cases to accept the plea agreement at the time it is offered for the obvious reason that he will have insufficient knowledge about the defendant and his prior history. Therefore, he will, in all likelihood, condition his possible acceptance of the plea agreement upon an agreement by the defendant to waive his rights under Rule 32(c) so that the court may obtain and read a presentence report before deciding whether to accept the plea. If after obtaining a presentence report (about eight weeks later) the judge is of the opinion that he should not accept the plea agreement, he is required under Rule 11(e)(4) to reject the plea agreement and inform the defendant that he may withdraw his plea. Under these circumstances and assuming that he does inform the defendant that the plea agreement is unacceptable, it is more than likely that the defendant will exercise his right to withdraw the plea. If the plea is withdrawn, it would also seem likely that the defendant will request that the case be reassigned to another judge for the reason that the judge who rejected the plea agreement has clearly indicated that he thinks a sentence in excess of that contained in the plea agreement is warranted.

A second problem arises where the judge rejects the plea agreement. As I have indicated, I think it reasonable to expect in such a case that most defendants will exercise the right to withdraw the plea. In the course of the proceedings in which the defendant has offered the plea the defendant will, in all likelihood, have provided incriminating testimony against himself. Thus when the judge rejects the plea agreement, it is reasonable to anticipate that the defendant will move that the judge disqualify himself from further proceedings in the case. Such a motion may well have merit depending on the particular circumstances involved.

If these problems are as real as I believe them to be, they will not only cause a further lessening of confidence in plea agreements generally on the part of the public but will offer the defendant a ready means of judge-shopping to assure that he will not receive a sentence in excess of that which he has agreed to in negotiations with the United States. If there are evils in our present system, I fail to perceive them. Unless there are evils, I can see no justification for the proposed change in Rule 11.

It is worth observing that while the Advisory Committee Notes to the Rules are quite extensive, both in explaining the proposed changes and in most instances setting forth the reasons for the changes, they do not in this instance explain the rationale behind the change in Rule 11(e)(3) and (4). The rule is covered in the Advisory Committee Notes at Pages 34 and 35 of House Document 93-292 (please note that citations therein to the subdivision sections are in error). I find it remarkable that changes of this significance would not be clearly supported by reasons stated by the Advisory Committee.

Rule 16. Discovery and Inspection.—Subsection (a)(1)(E) of the new rules requires in part that the government shall furnish to the defendant a written list of the names and addresses of all government witnesses which the attorney for the government intends to call in the presentation of the case in chief. This is a

radical departure from present practice. At present a witness list is required only in capital cases (a minuscule number) pursuant to the provisions of Title 18, U.S.C., § 3432. With full recognition that subsection (d)(1) of the rules as changed vests in the court discretion to issue a protective order under appropriate circumstances, I nonetheless strongly oppose the inclusion of this provision in the rules. Under the new rules, the defendant is presumptively entitled to a list of the witnesses and their addresses. The limitation or denial of such a list by the court under a protective order would, of course, be in the exercise of sound discretion subject to appellate review.

My own experience suggests very strongly that in a significant number of serious cases the witness or witnesses once disclosed will not be available to testify at trial. Plainly stated, I would fully expect that in a significant number of cases prospective witnesses will be intimidated or meet an untimely death. The drafters of this proposed change apparently recognize the same possibility in that subsection (E) authorizes the government to perpetuate the testimony of such witness in accordance with the provisions of Rule 15. I would further suggest that this change will impact adversely on the availability of information from confidential informants. Since the list of witnesses is required in advance of trial, a prudent prosecutor might feel compelled to disclose a confidential informant who he hopes not to call in the course of the proceedings solely for the reason that unless he does so he will not be able to call the witness if needed in the course of the trial.

The Advisory Committee Notes as they appear at Page 60 of House Document 93–292 point out 22 states which by rule of statute presently require the disclosure of the names and addresses of prosecution witnesses. While the number is impressive, there are two observations I would make. Apparently the majority of the states do not require disclosure. Of the 22 which do, it is doubtful (with the possible exception of California, Michigan and Indiana) that these states experience either a high rate of crime or a high incidence of organized crime.

I submit these comments to you with the hope that the perspective of one in the trenches may assist you in your deliberations on the proposed rules.

Very truly yours,

C. STANLEY BLAIR.

CONGRESS OF THE UNITED STATES,
COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Washington, D.C., June 4, 1974.

HON. C. STANLEY BLAIR,
U.S. District Judge, U.S. District Court, District of Maryland, Baltimore, Md.

DEAR JUDGE BLAIR: Thank you for your thoughtful letter of May 28, concerning the proposed amendments to the Federal Rules of Criminal Procedure. The Subcommittee will give your views careful consideration.

It seems that Rule 11 might be amended to meet your criticism of the plea agreement procedure if the Committee finds it wise. Would you care to suggest an amendment that would modify the rule to meet your criticism? I will be glad to call it to the attention of the Committee.

Sincerely yours,

WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice.

U.S. DISTRICT COURT,
DISTRICT OF MARYLAND,
Baltimore, June 10, 1974.

Re: Proposed Amendments to Federal Rules of Criminal Procedure

HON. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN HUNGATE: In response to your letter of June 4, 1974, a copy of which is enclosed, requesting my recommendations for change in Rule 11 of the Federal Rules of Criminal Procedure, I have the following suggestions to make. The bracketed material represents language in the rule which I would delete and new language which I would add is capitalized.

Subsection (a)(2)—[Notice of such agreement.] ACCEPTANCE OR REJECTION OF PLEA.—If a plea agreement has been reached by the parties which contemplates entry of a plea of guilty or nolo contendere [in the expectation] WITH THE RECOMMENDATION that a specific sentence will be imposed or that other charges before the court will be dismissed, the court shall require the disclosure of the agreement in open court at the time the plea is offered. WHEN A PLEA AGREEMENT HAS BEEN DISCLOSED, THE COURT SHALL BEFORE ACCEPTING THE PLEA INFORM THE DEFENDANT IN OPEN COURT THAT THE COURT HAS NOT PARTICIPATED IN THE NEGOTIATIONS LEADING TO THE AGREEMENT, IS NOT A PARTY TO NOR IN ANY SENSE BOUND BY THE AGREEMENT, AND THAT IF THE PLEA IS ACCEPTED THE COURT IS FREE TO SENTENCE THE DEFENDANT WITHIN THE LIMITS OF THE LAW AFTER GIVING DUE CONSIDERATION TO ALL FACTORS BEARING ON AN APPROPRIATE SENTENCE INCLUDING THE RECOMMENDATION THAT A PARTICULAR SENTENCE BE IMPOSED AS CONTAINED IN THE PLEA AGREEMENT. UNLESS THE COURT IS SATISFIED THAT THE DEFENDANT UNDERSTANDS THOSE MATTERS SET FORTH IN SUBSECTION (C), THAT THERE IS A FACTUAL BASIS FOR THE PLEA AS SET FORTH IN SUBSECTION (F), AND THAT THE PLEA IS PROVIDENTLY OFFERED, THE COURT SHALL REJECT THE PLEA. [Thereupon the court may accept or reject the agreement, or] THE COURT may defer its decision as to acceptance or rejection until there has been an opportunity to consider the presentence report.

(3) Acceptance of plea.—delete in its entirety.

(4) Rejection of plea.—delete in its entirety.

(6) Inadmissibility of plea discussions.—Evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, [or of statements made in connection with any of the foregoing pleas or offers], is not admissible in any civil or criminal proceeding against the person who made the plea or offer.

While I am fully in accord with that portion of subsection (6) which prohibits the use in any other proceedings of evidence that the defendant has offered a plea of guilty, later withdrawn, or sought to enter a plea, I would certainly recommend deletion of the language bracketed above. I don't think this is at all academic for two reasons. The first is that it is quite conceivable that in the course of offering a plea of guilty a defendant has testified to matters which he will contradict in later proceedings. It seems to me that such a situation is analogous to the principles enunciated in *Harris* v. *New York*, 401 U.S. 222 (1971), which permitted a defendant's statement inadmissible in itself under Miranda to be used for impeachment purposes to attack the credibility of the defendant's trial testimony. The second is that in proceedings in which the defendant offers a plea of guilty or nolo contendere I administer an oath to the defendant so that all of the information he provides in the course of the proceeding is sworn testimony. Thus it would seem that if he perjures himself in the course of the proceeding there is no reason that that perjury shouldn't be actionable in another criminal proceeding. The way I read subsection (6) this would not be possible.

Thank you for this opportunity to present my additional views on this subject.

Sincerely,

C. STANLEY BLAIR.

U.S. DISTRICT COURT,
Denver, Colo., February 20, 1975.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN HUNGATE: In response to your letter of January 27, 1975, I enclose herewith our court's comments on the pending amendments to the Federal Rules of Criminal Procedure. These comments were approved by all of the judges of our court.

We appreciate very much your courtesy in permitting us to make and forward these comments to you.

Sincerely yours,

ALFRED A. ARRAJ.

Enclosures.

RULE 4 ARREST WARRANT OR SUMMONS UPON COMPLAINT

We endorse the preference for the use of a summons expressed in this rule. This approach is consistent with the spirit and purpose of the Bail Reform Act and in this district we have little difficulty with failures to appear. In our view pre-trial custody and the role of the bondsman should be kept to a minimum.

RULE 9 WARRANT OR SUMMONS UPON INDICTMENT OR INFORMATION

Here too we favor the use of the summons. The only suggestion for change is that the magistrate could be authorized to determine whether there is a valid reason for the issuance of a warrant.

RULE 11 PLEAS

The judges of this Court strongly object to the plea agreement procedure in (e). While we agree that there is a proper place for the disposition of criminal charges by agreement between the prosecutor and the accused, we vigorously disagree with the view that this should include either the use of a nolo contendere plea or any proposal for sentence. The nolo plea should be reserved for the rarest of circumstances. There should be no opportunity for equivocation on the question of guilt and if a person is guilty of a particular offense, all of the consequences should follow, including any civil liability.

A full awareness and acceptance of the criminality of one's conduct is often of the utmost importance in achieving both individual rehabilitation and societal retribution for the offense.

To include the expectation of a particular sentence in the plea bargaining process will result in an unfortunate oversimplification of the complex question of sentencing and it will focus attention on the issue of the amount of the loss of freedom. We cannot imagine that any defendant or defense counsel will do other than to seek to minimize that loss without any recognition of the other important factors such as the need for an institutional drug abuse program, remedial or vocational education and the other treatment apparatus available in the Federal prison programs.

Quite apart from these policy objections, we see practical difficulties in the implementation of this proposal. The kind of candor required of a defendant in the preparation of a pre-sentence report will be difficult to achieve when he is bargining with the court. We have no doubt that a judge who refuses to accept the "tendered" sentence must recuse himself to avoid any appearance of unfairness in the trial. That, in turn, will create practical problems in calendar control.

We are well aware that there are those who believe that the opposition of judges to this proposal is a kind of egocentric reaction to any invasion of the prerogative of sentencing. We sincerely believe, however, that this aspect of the rule will result in an increased cynicism on the part of the accused, the bar and the public at a time when there is already a great concern about a lack of confidence in our legal institutions.

For these reasons we suggest that this section of the rule be rewritten to eliminate any reference to an agreement for a plea of nolo contendere and to eliminate any suggestion of an agreement on the time or type of sentence.

RULE 12 PLEADINGS AND MOTIONS BEFORE TRIAL; DEFENSES AND OBJECTIONS

The specification of additional motions and requests which must be made before trial, including motions to suppress, is a significant improvement. Our only caveat to an enthusiastic approval of this proposed rule is that it authorizes oral motions. While there is the limitation of the discretion of the judge, we wonder whether it will not lead to some confusion as to whether such authority has been given and as to the precise nature of the motion made. There would appear to be no need for the informality of an oral motion and to create any uncertainty in the record of a criminal case is to invite efforts to obtain post-conviction relief.

RULE 12.1 NOTICE OF ALIBI

RULE 12.2 NOTICE OF DEFENSE BASED UPON MENTAL CONDITION

We support these provisions requiring the defendant to identify these troublesome issues in advance of trial. The reference to the "defense of insanity" seems confusing because there is no plea of insanity. It would appear to be more accurate to say "If a defendant intends to raise the issue of insanity . . ."

RULE 15 DEPOSITIONS

We approve this rule and we believe that it can be very useful. One important application of this rule may be the unusual case in which there is some anticipation of an effort to intimidate witnesses.

RULE 16 DISCOVERY AND INSPECTION

We are bothered by the practical difficulties apparent in the very broad discovery provisions of this rule and we predict that its adoption will generate such delay and time consuming pre-trial discovery hearings as will be a very real impediment to implementing the recently adopted Speedy Trial Act. The comment in advisory committee notes that discovery should be accomplished by the parties themselves without the necessity of court orders simply platitudinizes the issue. The committee has apparently ignored or failed to recognize the extent to which civil cases generate discovery disputes which cannibalize the trial capacity of our courts. The danger to witnesses from the exposure of their names and addresses under this rule cannot be avoided by the use of protective orders and depositions. It is not just prosecutor's paranoia that will lead to almost routine motions to avoid disclosure; defense counsel also may have a realistic concern for the effect of investigative interviews and other acts by government agents with respect to their witnesses.

The thought of a court appearance as a witness is frightening to most people. To compound those fears by exposing their names and addresses before trial may have such a chilling effect upon citizens cooperation as to inhibit seriously the investigation and trial of criminal offenses.

In expressing this concern, we recognize the existence of many state laws requiring the prosecution to disclose the names of its witnesses well before trial. Colorado is one such state. In our state courts, the names of witnesses are endorsed on the indictments. What we do not know, however, is the true dimension of the deterrent which may result from this practice. We suggest that before subsections (a)(1)(E) and (b)(1)(C) are adopted, there be some empirical evaluation of the effect of these state procedures.

This criticism is not applicable to the exchange of information concerning documents and tangible objects and the reports of examinations and tests. These are important, necessary and workable provisions which we support. Much of that information is routinely exchanged in our district under present practices.

RULE 32 SENTENCE AND JUDGMENT

The controversial part of this proposed rule is subsection (c)(3) providing for disclosure of the report of the presentence investigation. The judges of this court are divided in their reaction to this proposal on the basis of well known arguments to which reference is made in the notes of the advisory committee. The older and more experienced judges oppose disclosure.

RULE 43 PRESENCE OF DEFENDANT

We approve this rule and we believe it is necessary because of the frequency of the use of disruptive tactics by defendants.

U.S. COURT OF APPEALS,
February 21, 1975.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, Congress of the United States, House of Representatives, Washington, D.C.

MY DEAR CONGRESSMAN HUNGATE: Our Chief Judge has indicated that, in your capacity as Chairman of the Subcommittee on Criminal Justice, you have invited comments on the proposed amendments to the Federal Rules of Criminal Procedure.

I should like to recommend most strongly against the proposal to make the pre-sentencing report available to criminal defendants as a matter of course. The only effect which this is likely to have is to cause informants to refuse to be candid with probation officers, and eventually to cause judges either to cease obtaining or to pay no attention to such reports. The reasons for this are obvious: No one is likely to talk to any probation officer with any great candor knowing that whatever he says on the subject of the defendant will be immediately available to him. Of course, there is the obvious danger that one who knows he will not be repeated may feel free to say poisonous things. However, I think that the probation officer and the trial judge are likely to be adept at weeding out such disingenuous statements and that the confidential report, on balance, is more useful.

I am also told that there is on foot a proposal, whether included in any form of the present amendments or not, to permit preemptory challenges of federal judges. I understand that this has functioned satisfactorily in the state courts of California. If this *is* being considered, I would like to suggest that it is a bad idea for the Federal courts. In such a place as Los Angeles, for example, where there are over a hundred judges to try cases, this is no severe inconvenience. But there are no Federal districts with any such judge-power, and many of them have only two or three judges.

With thanks for whatever attention this communication may receive, I am.

Yours faithfully,

THOMAS GIBBS GEE.

BIGGS AND BATTAGLIA,
Wilmington, Del., February 25, 1975.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR REPRESENTATIVE HUNGATE: I have been designated by the President of the Delaware State Bar Association to submit comments on the proposed amendment to the Federal Rules of Criminal Procedure, on behalf of the Delaware Bar Association.

There has been a gradual but inexorable movement in the direction of providing greater discovery rights for the prosecution and for the defense in the trial of criminal cases. The progress in this regard has not paralleled the development of discovery techniques used in civil procedures. The struggle has constantly reflected the demand of the defense for more discovery rights to the prosecutor's evidence while, at the same time, the defense has resisted discovery procedures relating to defense evidence on the basis that constitutional protection available to the defendant prohibits rules which would require the defendant to engage in meaningful discovery.

The history of the Federal Rules of Criminal Procedure reflects this struggle and in each case where there has been a change in the Federal Rules relating to discovery techniques, one can see the evidence of the bartering on each side. The Federal Rules of Civil Procedure have expedited civil litigation. The discovery techniques have stripped civil cases of the element of surprise and have greatly cut down on the "gamesmanship" involved in the trial of civil cases. It is to be earnestly hoped that the Rules of Criminal Procedure will continue to move forth in the direction of greater discovery in order to insure that cases will

move forward at a deliberate speed and that some inroads will be made toward eliminating the "gamesmanship" that still endures with respect to the trial of criminal cases.

I will comment on the proposed Federal Rules of Criminal Procedure in the order in which they occur.

1. Proposed Rule 4 of the Federal Rules of Criminal Procedure appears designed to enlarge the use of the summons for the appearance of a defendant. This, we believe, is a desirable concept. As the Rule proposes, a summons should be used wherever possible unless it appears that there is a valid reason for the issuance of a warrant. Then, the Government is given the right to request the use of the warrant in lieu of the summons. This is a desirable concept.

The issuance of a warrant or summons represents the initiation of the criminal process. It allows the defendant's first contact with the judicial system to reflect the precept that he is charged with an offense, but that he is, of course, presumed to be innocent. It has the further desirable effect of relieving Federal authorities of the duty of executing a warrant. The issuance of a summons would certainly seem to be less scandalous with respect to the defendant and, therefore, less apt to produce pretrial publicity.

An increase in the use of the summons carries with it benefits to both the Government and the defendant.

Rule 4 expressly provides that a determination of probable cause may be based upon hearsay evidence. This provision is beneficial in that it allows an officer seeking the issuance of criminal process to rely upon hearsay evidence. This will frequently mean that the person who is the victim of a crime will have one less hearing on the road to trial.

2. Modification of Rule 9 tracks the modification discussed in Rule 4, placing greater emphasis on the use of the summons in lieu of the warrant following indictment.

3. The proposed modification of Rule 11 contains, we believe, the most important of the proposed changes of the Rules of Criminal Procedure. Rule 11 details the plea alternatives of the defendant. The proposal involves the Court, for the first time, in plea bargaining. We believe that it is a desirable concept to have the plea bargaining be done openly and for the record. We do not agree, however, that it is desirable for the Court to be involved in any agreement with respect to any specific sentence. We believe that plea bargaining should be limited to the negotiation of a plea to the offense charged or to a lesser offense. We think it not improper for the Government to take the position that if a negotiated plea is entered that the Government will not take a position with respect to the defendant's possible sentence or that the Government will recommend to the Court a proposal for sentencing. The Court should, however, we believe, retain the complete discretion to dispose of the case on the basis of its judgment and on the basis of the presentence investigation without being restricted by the terms of the agreement between the Government and the defendant. We view the proposed change which would authorize the Court to become involved in a commitment for a specific sentence as a lessening of the Court's authority to deal with a specific defendant in the manner which the Court deems just. It carries with it the suggestion that defendants who are or who have been similarly situated may be treated unequally. It places a responsibility in the prosecutor's hand for which he has no expertise or training.

We strongly urge that the proposed revision of Rule 11 designed to involve the Court in the plea bargaining practice be viewed with extreme caution. Recent occurrences, including the Watergate investigation, require the conclusion that the independence and the discretion of the judiciary should not be limited in any way.

Rule 11 in its present form, and in the proposal, continues the nolo contendere plea. It is respectfully suggested that consideration should be given to abolishing that plea and to modify the existing law so that a guilty plea would have no significance in any related civil matter.

4. Rule 12 creates an orderly procedure for the handling of presentence motions and establishes a pretrial method for obtaining rulings in advance of trial with respect to the properiety of using specified evidence. This is an improvement over the existing rules and we urge the adoption of Rule 12 as modified.

5. Rule 12.1 establishes a requirement that the defendant who will rely upon alibi as a defense give prior notice of his intention. This is a desirable rule. The

exchange of information which is mandated by the Rule will help both the defendant and the Government avoid surprise at trial. Both parties should be in a better position to deal with issues raised by the other party as a result of the notice requirements of this Rule. We urge that this proposal be adopted as written. Subparagraph (e) of the proposal indicates that the Court may exclude testimony of any undisclosed witness. It is recognized that the proposal does not require the Court to exclude such testimony. It would appear that there are other more reasonable alternatives to the provision of subparagraph (e), including mistrial and continuance.

6. Rule 12.2 requires the defendant who intends to rely upon insanity as a defense, or who intends to utilize expert testimony relating to any mental condition of the defendant bearing upon the question of the mental state required for the offense charged, give notice to the Court and to the Government of the intent to rely upon the defense of insanity or the intent to use such expert testimony. This is a desirable concept and the Rule should be adopted. Section (b) of the Rule, however, should have application with respect to attempt by any party to introduce expert testimony relating to mental condition in such cases.

7. Rule 15 is proposed to be modified so as to permit the taking of depositions by either party. This is a right which has existed in civil litigation for many years. The proposal limits the right to take depositions, however, to the requirement that special circumstances exist and that it be in the interest of justice that a deposition be taken. This enlargement of the right to take depositions is desirable and the Rule should be adopted.

8. The proposed modification of Rule 16 greatly broadens the right of both parties to require the other party to produce evidence relevant to the case prior to trial. On request by the other party evidence is required to be produced initially without the intervention of the Court. The procedure for obtaining production is greatly simplified. This enlargement of the right to require production of evidence and the simplification of the procedures are desirable reforms and the changes should be enacted as proposed.

9. The proposed modification of Rule 17(f) allows depositions to be taken at any place designated by the Court. Limitations relating to the location of the witness have been removed. The proposed simplification of this Rule is desirable and the modification should be adopted as proposed.

10. The proposed modification of Rule 20 would permit a defendant to have his case disposed of in any district where he is present, provided the Government agrees to such election. This is a desirable modification and should expedite the resolution of charges. Its provisions should be a convenience to both the Government and the defendant. It can render unnecessary the transfer between districts of some defendants.

11. The proposed addition of Rule 29.1 merely formalizes the general practice already followed in most districts. It controls the order of argument at the close of all evidence. To the extent that there has been a lack of uniformity in this regard, the proposed addition is desirable.

12. The proposed amendment of Rule 32 tracks the proposed amendment of Rule 11. It provides that the Judge to which the negotiated plea is offered may view the presentence report before agreeing to the plea bargain. If Rule 11 is amended as described in paragraph #3 of this report, then the amendment suggested for Rule 32 should be adopted.

13. The proposed amendments to Rule 43 are designed to prevent the frustration of trial by the voluntary absence of the defendant or an absence caused by the defendant's misconduct. The modification is desirable and the Rule should be adopted as written.

The evaluation of the Rules of Criminal Procedure has not kept pace with the development of enlightened Rules of Civil Procedure. The lag in the development of the Rules of Criminal Procedure can be attributed to a number of reasons. The one principal reason, however, appears to be the relative lack of strength of the criminal bar. It frequently appears that the most numerous and prestigious members of the bar have devoted their time and abilities to civil matters.

From the ranks of prestigious lawyers most frequently come the members of the judiciary. The bias in favor of civil matters is thereby enlarged. Career prosecutors and, more recently, even the judiciary are not compensated in a manner commensurate with the earning ability of accomplished lawyers. The

segment of the bar that deals with criminal cases thus does not include the strength of the legal community.

Some method must be found to insure the continued improvement of the Rules of Criminal Procedure. The modernization of the rules of procedure is a delicate and sophisticated endeavor, the ultimate goal of which is to achieve a just and speedy resolution of criminal charges. The nature of the assignment is such that the impetus for change must come from within the legal profession. Within the legal profession it appears necessary that the judiciary take a more aggressive role in this process.

Should you have any questions with regard to the comments in this letter, I shall be at your disposal.

Respectfully,

VICTOR F. BATTAGLIA.

U.S. DISTRICT COURT,
Albany, N.Y., February 25, 1975.

Congressman WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, Congress of the United States, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN HUNGATE: Upon receipt of your letter of January 27, 1975, inviting my comments about certain amendments to the Federal Rules of Criminal Procedure, promulgated April 1974 by the Supreme Court, I discussed the controversial ones again with my colleague, Judge Port; and Chief Probation Officer Frank T. Waterson. Judge Port was an Assistant United States Attorney for many years, and then United States Attorney in this District Court. Frank Waterson has been a probation officer here for upwards of 25 years and is an outstanding one. When I received your memorandum of May 8, 1974, previously requesting comments on these amendments, I also canvassed their views. Neither one has any particular objection to the proposed amendments.

The result of the previous request for their observations was my letter to you of June 25, 1974. I enclose a copy of that letter for convenient reference. In the letter, my endorsement of the amendments was unqualified. I stated therein that they were completely satisfactory. I also said that a number of these new procedures have been used as common sense, practical methods in the District Courts. By that I meant that the Judges of this Court and I, personally, have always urged the prosecution to make available to the defense previous to trial the written confessions, reports of oral admissions, names of witnesses, and other materials that would not impair in any way the interests of the prosecution. Such attitudes favoring disclosure in my experience do away with the filing of many motions, and benefit greatly the expeditious processing and trial of criminal cases inasmuch as pleas usually result when the strength of the prosecution case is seen. I have found in recent years that omnibus hearings in cases with a number of defendants and joinder of several indictments for trial reduce substantially the filing of motions. The advantages of full discovery and deposition in civil litigation were demonstrated notably when the liberal provisions of the Federal Rules of Civil Procedure in that regard became effective years ago.

I did read again the interesting commentary of July 1974, published by your Subcommittee on the proposed amendments. There is no doubt from the strong expressions in a number of the communications from the Bench and Bar that there is concern, particularly, about the plea agreement procedures provided in Rule 11(e), and the discovery and deposition procedures of Rule 16. My second thoughts in regard to Rule 11(e) are that problems possibly may arise by the terms of Rule 11(e)(4) that if the court rejects the plea agreement, the defendant should be so advised *personally in open court*. I am somewhat apprehensive that in our news conscious day much could be made out of such open court rejection that might later prejudice the right of the defendant to a fair trial before an impartial jury. By that remark I mean that the press, radio and TV reviews might impress the local community, particularly in smaller districts, that the defendant must surely be guilty because the judge rejected the agreed upon plea and sentence. I think consideration should be given to rephrasing this portion to state that the defendant must be advised *on the record*, leaving it in the discretion of the judge to express himself in open court or in

Chambers, of course, with the defendant and counsel present. I enclose a copy of a bill recently introduced in the New York State Senate here in Albany which simply states: "If a plea agreement has been reached, the terms of such agreement must be placed on the record, ..."

I have been a district judge a long time, since February 1949, and have presided at criminal cases not only in this District, but in the Southern and Eastern Districts of New York. In this District, plea agreements are not a must, but with the increasing number of criminal proceedings in the large metropolitan areas, the procedure may be necessary for survival. The plea agreement procedures are optional under Rule 11, and the prosecution should be able to make sound judgments concerning the need for invoking procedures in particular districts and for particular cases. Despite sincere concern about certain features of it, there is strong support for its optional use by distinguished individuals and groups named in the Advisory Committee Note on Rule 11. The United States Supreme Court remarks in *Santobello* v. *New York*, 404 U.S. 257, 260 (1971), that plea agreement or "bargaining" is to be encouraged—is a recommendation to be accorded great weight. Very recently, a task force of the National District Attorneys Association-American Bar Association stated that plea bargaining is a "necessary and effective part of the criminal justice system" (16 Criminal Law Rptr. pp. 1073–1074, 2427). Any doubts I may have about plea agreement procedures are resolved in favor of these endorsements from such knowledgeable sources. Another compelling reason for its use is the provisions of the Speedy Trial Act of 1974, which will reduce drastically the time periods for the processing and trial of criminal cases.

There is also fear expressed in the commentary about discovery procedures of Rule 16 that they might be overbroad and place in physical danger complainants, witnesses and informants. The protective provisions of Rule 6(d)(1) should afford reasonable safeguards against such possible endangerment. The type of case in which unusual caution should be exercised should be easily identifiable in my judgment by the prosecution for the judge, and there must be faith that the judge will act sensibly and carefully in any of those situations.

In conclusion, it is my judgement after further reflection that on the whole the amendments are satisfactory and should provide worthwhile and practical procedures to assist the federal courts in these days of ever increasing caseloads. I am confident that your Subcommittee, and the 'famed' Committee on the Judiciary, House of Representatives, will refine the language of the proposed amendments where necessary so they will be more adaptable to promote the interests of justice.

Sincerely,

JAMES T. FOLEY,
Chief Judge, U.S. District Court,
Northern District of New York.

Enclosures.

STATE OF NEW YORK, 1975–76 REGULAR SESSIONS

IN SENATE JANUARY 8, 1975

AN ACT To amend the criminal procedure law, in relation to the acceptance and withdrawal of guilty pleas

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The criminal procedure law is hereby amended by adding thereto a new section, to be section 220.70, to read as follows:

EXPLANATION—Matters in *italics* is new; matter in black brackets [ ] is old law to be omitted.

§ 220.70 Plea receiving and acting upon the plea

1. The court may not accept a plea of guilty under section 220.10 without first determining that the plea is voluntary and that there is a factual or legal basis for the plea; provided that the court may accept a plea of guilty where the defendant refuses to respond to the court's inquiry concerning the factual or legal basis for the plea. In the event that the court shall not have participated in prior plea discussions with the district attorney and the defendant's attorney the court

must determine whether the tendered plea is the result of prior plea discussions between the district attorney and defendant's attorney. If a plea agreement has been reached, the terms of such agreement must be placed on the record, and the attorney for the defendant shall then request that the court accept the defendant's plea based upon the terms of the agreement. If the agreement provides for charge or sentence concessions, which must be approved by the court, the court must advise the defendant and his attorney that the recommendations for sentence concessions are not binding on the court even though the court may have participated in prior plea discussions with the district attorney and the defendant's attorney and that only the court has the power to pass sentence. The court shall then address the defendant and his attorney to determine whether any other promises, threats or inducements were used to obtain the plea which were not set forth in the agreement.

2. If prior to sentencing and where the court has been a party to the agreement, the court determines that it is unwilling to comply with the terms of the agreement regarding the charge or sentence concessions, it must so inform the defendant and the defendant's attorney and then call upon the defendant to either affirm or withdraw his plea. If the defendant withdraws his plea, the terms of the agreement shall not: (i) be binding upon him or (ii) be used or received against him in any criminal trial of the matter.

3. Except in a city court, town court or village court as defined in section 10.10, a verbatim record of the proceedings at which the defendant enters a plea of guilty must be made and preserved. The record should include (i) the inquiry into the voluntariness and the factual or legal basis of the plea (as required in subdivision one); and (ii) if the court is unwilling to comply with the terms of the agreement, the court's advice to the defendant and the defendant's attorney and the defendant's affirmation or withdrawal of his pleas (as required by subdivision two).

§ 2. This act shall take effect on the first day of September next succeeding the date on which it shall have become a law.

JUNE 25, 1974.

Re: Proposed Amendments to Federal Rules of Criminal Procedure.

Congressman WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, Congress of the United States, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR REPRESENTATIVE HUNGATE: Shorty after receipt of your memorandum of May 8, 1974, requesting my comments and observations on the Proposed Amendments to Federal Rules of Criminal Procedure, I requested Judge Port, our United States Attorney, our Chief Probation Officer, and several Magistrates to give me their views. No specific objections have been registered to any of the Amendments by my colleague and the officers of the Court who have particular interest in the Criminal Rules.

I have refreshed my own mind by reading the Amendments with care again. I did serve as a member of the Trial Practice and Technique Committee of the Second Circuit for several years. In 1971 we did study the preliminary draft of these Amendments and reported to the Second Circuit Conference on our approval and disapproval. For the information of your staff, our Report, dated July 15, 1971, was approved by our Circuit Conference, and it did result in certain changes by the Advisory Committee. The Chairman of the Committee at that time was Judge Charles H. Tenney of the Southern District of New York. My files also show that our Committee found a Report By the Committee on the Federal Courts and Committee on Federal Legislation of The Association of the Bar of the City of New York on the Proposed Amendments, dated March 31, 1971, to be a comprehensive and balanced study of the proposed changes. The Chairman of that Bar Committee was Attorney Barry H. Garfinkel, 919 Third Avenue, New York, New York 10022.

My own personal evaluation, after rereading, is that the final Proposed Amendments are completely satisfactory. To my mind, the new provisions will be most helpful in expediting the processing of criminal matters. The Amendments are expressed in plain language, are sensible and easily applicable to the situations that arise day-to-day in the courts in criminal prosecutions. The alibi, insanity, deposition and discovery, and plea agreement Amendments are particularly well-worded innovations that should be welcomed by the Bench and Bar. Attitudes

will result, I think, from these new approaches and guides that will benefit both the prosecution and defense in preparation and presentation of their respective positions. The protections and safeguards that are so essentially a part of our system of criminal justice for the accused are fairly maintained. Frankly, a number of these new procedures have been followed by the District Courts on their own as common sense, practical methods that are legally acceptable.

It is my personal belief the Proposed Amendments are worthy of Committee approval without exception. I hope the remarks and references herein are of assistance to the Committee and its staff.

Sincerely,

JAMES T. FOLEY,
Chief Judge, U.S. District Court,
Northern District of New York.

UNITED STATES DISTRICT COURT,
Brooklyn, N.Y., February 26, 1975.

Re: Proposed Amendments to Federal Rules of Criminal Procedure.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN HUNGATE: Chief Judge Kaufman of the Second Circuit has circulated among the Judges of this District your letter, dated January 27, 1975, inviting the submission of comments on the proposed amendments to the Federal Rules of Criminal Procedure. I have already submitted my comments to you in my letter dated May 22, 1974, to which you were kind enough to reply on May 28, 1974, and also in my May 30, 1974 letter to you, a copy of each of which I am enclosing herewith for your information.

Again expressing my appreciation for the opportunity to make these comments, I am

Sincerely yours,

JOHN R. BARTELS,
U.S. District Judge.

Enclosures (3).

U.S. DISTRICT COURT,
Brooklyn, N.Y., May 22, 1974.

Re: Proposed Amendments to Federal Rules of Criminal Procedure.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN HUNGATE: Chief Judge Mishler of this Court has circulated among the Judges of this District your letter, dated May 8, 1974, seeking comments from them on the proposed amendments to the Federal Rules of Criminal Procedure. I wish to record my disagreement with subdivision (e), (1) to (5), inclusive, of Rule 11 insofar as it permits the United States Attorney in connection with entering a plea of guilty to recommend or propose a particular sentence as part of his bargain, for the following reasons:

(1) To begin with, in any metropolitan or thickly populated area the United States Attorney does not have time to review each case and make his recommendation. If he attempts to do so, it can only be a superficial review and recommendation. Instead, from my experience, he leaves this task to the Assistant United States Attorney who is generally a young man with one to four years experience at the most and who has no particular expertise or experience or judgment to make a reasonable recommendation in connection with the offense charged. In fact, he has already in most cases reduced the charged offense to a lesser or related offense carrying a much lesser penalty. This would seem to be sufficient bargaining power to any United States Attorney to induce a plea of guilty.

(2) The recommendation of this young man, sometimes just out of law school, will unquestionably from my experience be a very light sentence if not probation.

(3) Such a recommendation places the Court in a very embarrassing position inasmuch as the Court will be under pressure to accept the recommendation for the reason that it wishes to dispose of the case by accepting the plea of guilty and in addition does not wish to publicly appear unreasonable by rejecting the plea.

(4) In spite of the option left to the Court to accept or reject the recommendation, the result, upon giving consideration to the fact that the Assistant United States Attorney has already reduced the charge, is to place the sentencing procedure in the hands of a young and inexperienced Assistant United States Attorney rather than in the hands of the Court.

This amendment upon reading may seem innocuous on the ground that the Court should have the stamina and will-power to reject the recommendation of the Assistant United States Attorney. But judges are human beings and the probability of rejecting this inexperienced recommendation is very small. While I am not in favor of plea bargaining by the Court for the reasons set forth in the Advisory Committee Notes, it is my humble opinion that it would be more in accordance with the judge's function to enter into a plea bargaining instead of permitting an Assistant United States Attorney to take over what in effect is a sentencing procedure. The administration of justice is more important than the accumulation of statistics. If crowded criminal calendars are to be reduced, this can be done by other methods including, in particular, the appointment of more judges rather than placing the sentencing procedure in the hands of the United States Attorney.

Sincerely yours,

JOHN R. BARTELS,
U.S. District Judge.

CONGRESS OF THE UNITED STATES,
COMMITTEE ON THE JUDICIARY,
Washington, D.C., May 28, 1974.

Hon. JOHN R. BARTELS,
U.S. District Judge,
Eastern District of New York, Brooklyn, N.Y.

DEAR JUDGE BARTELS: Thank you for your letter of May 22, 1974, setting forth your comments on proposed Rule 11(e) ("Plea agreement procedure") of the Federal Rules of Criminal Procedure.

In order to fully understand your point of view, I would like to ask you to consider the following questions and give the Subcommittee the benefit of your comments. First, Rule 11(e)(2) permits the court to defer accepting or rejecting a plea agreement until after consideration of the presentence report. Might this provision reduce the pressure on the court to accept a plea agreement involving sentence, especially if the presentence report indicates that the agreed upon sentence is not in the public interest? Second, the plea agreement procedure is designed to reduce the criminal trial docket. If sentencing is eliminated as an area of plea bargaining, will the Rule's impact on the criminal trial docket be substantially reduced?

I appreciate your taking the time to write, and I hope my request for further comments will not interfere with your busy schedule.

Sincerely yours,

WILLIAM L. HUNGATE,
Chairman.

U.S. DISTRICT COURT,
Brooklyn, N.Y., May 30, 1974.

Re: Proposed Amendments to Federal Rules of Criminal Procedure.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN HUNGATE: I appreciate very much your letter in answer to my letter of May 22nd, in which you suggest that perhaps the provision of Rule 11(e)(2) permitting the court to defer its decision on accepting or rejecting a plea agreement would obviate some of my objections. I regret to say that it is my opinion that this subdivision does not relieve the strain upon the judge to accept or reject the plea and, moreover, raises further questions. In

reality, no judge is in a position to intelligently and fairly accept or reject a plea before the probation report is received.

If the judge waits for the probation report and in spite thereof attempts to reject the recommendation, he must resist the unpopularity of appearing to be a harsh judge and in addition the strong inducement to follow the easier course of accepting the recommendation of a light sentence (which after all is what we are talking about). Moreover, if a judge waits for the probation report, which is generally six weeks after the plea agreement, questions are raised as far as the defendant and his family are concerned, whether or not he and they will make available to the probation department all necessary information concerning the defendant in view of the fact that if the court rejects the recommendation, the defendant might wish to invoke the Fifth Amendment in case he pleads not guilty. Therefore that information will probably be withheld. At all events defendant must be given a *Miranda* warning.

It has further occurred to me that if this additional power is to be reposed in the United States Attorney and his Assistants, there is a greater possibility that favoritism will be shown by the various United States Attorneys or their Assistants to certain attorneys than would otherwise be possible if there were no power of recommendation. It is to be noted that the tenure of the United States Attorneys and their Assistants is relatively short.

Referring to the reduction of the criminal trial docket, it seems to me that the present ability of the United States Attorney and his Assistants to plea bargain by reducing the charge to a lesser one is a powerful weapon and has been quite effective in reducing the docket.. While I agree that the ability to make recommendations would probably further reduce the criminal trial docket, the question is one of whether society and the public interest would be best served by vesting the United States Attorneys and their Assistants with such power.

In conclusion, may I suggest that if Rule 11(e) is going to be adopted, any recommendation with respect to sentencing be approved not by any young Assistant United States Attorneys (sometimes one year out of law school) but by the United States Attorney himself after consultation with the more mature Assistants on his staff.

Appreciating your courtesy in entertaining my views, I am

Sincerely yours,

JOHN R. BARTELS,
U. S. District Judge.

U. S. DISTRICT COURT,
NORTHERN DISTRICT OF MISSISSIPPI,
Greenville, Miss., February 26, 1975.

HON. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice,
Washington, D.C.

DEAR MR. CHAIRMAN: I have your letter of January 27, seeking my comments as a trial judge on the proposed amendments to the Federal Rules of Criminal Procedure. Due to press of court business, I have been literally unable to reply earlier and now find it impossible to do so at a length commensurate with my interest. However, I, along with most district judges, have a profound concern with the amendments under consideration. Although I would prefer to fully express my views on all the amendments (as well as the concept of rule-making), I restrict my comments to certain aspects of Rules 11 and 16.

Rule 11—Pleas and Plea Bargaining.

A highly controversial subject, plea bargaining at the present time has a bad odor with the public at large. In our two-judge judicial district, regarded as one of the smaller districts in terms of criminal prosecutions, plea bargaining never existed in any form prior to January 1, 1974. Our court's experience with it during the past year has, quite frankly, been disappointing, attended by difficulties and frustrations which are inappropriate to discuss here but which are unrelated to the desirability of plea bargaining as a judicial tool. Suffice it to say that the need for plea bargaining to any extent varies greatly from district to district. In metropolitan districts where it is not now possible to accord a speedy trial to all or most defendants, I can readily appreciate that plea bargaining may be a useful device, when handled properly, particularly since the Supreme Court

in *Santobello* has recognized it as legitimate. In many districts, however, such as the Northern Judicial District of Mississippi, there is small, if any, justification for plea bargaining. Our dockets are not crowded; we can accord every defendant who wants a trial a speedy trial; and my colleague and I are at the present time achieving disposition of crimnial cases within the guidelines mandated by the recently passed Speedy Trial Act of 1974.

Because of these considerations, I urge that you and your committee do not approve Rule 11 in any terms which would make plea bargaining procedure *mandatory* in every judicial district, irrespective of prevailing docket conditions and other trial factors. To the contrary, it should be clearly spelled out, I think, that the existence of a plea bargaining procedure *in any judicial district* must have the explicit approval of the judges of that court. Sentencing is, of course, essentially a judicial function; and while prosecution and defense counsel might be heard *if the court is willing*, under appropriate conditions, it would be quite wrong to surrender this important judicial function in any degree to trades being worked out between counsel for the government and the defendant. Any version of Rule 11 which countenances or encourages abdication by the judiciary in this vital area is a decided step backward. Accordingly, I most emphatically disagree with most of the Rule II recommendations made by Honorable W. Vincent Rakestraw, Assistant Attorney General, in a written submission to your committee under date of September 17, 1974.

In my opinion, one of the worst features in the administration of criminal justice in many state jurisdictions is that criminal sentencing, all too often, has become a matter bargained between counsel for the prosecution, who are frequently zealous to impose heavy sentences, and defense counsel, who are under a duty to their clients to contend for the lightest sentence possible. When the adversaries are unequal in skill or dedication, the rights of the accused may be bartered away, out of sight of the court which might otherwise act as a safeguard against ineffective counsel. All too often, the sentencing judge may rubberstamp such a deal. Given the natural inclinations of human nature, a defendant afraid of being convicted may well be persuaded to plead guilty under pressure from his own counsel that unless the trade is accepted, worse may likely happen in case of trial and conviction. You are, no doubt, aware of the many writers in the criminal justice field who argue that the chances for rehabilitation are slight for a criminal defendant who pleads guilty as a result of pressure, overt or covert, that unless he does so a worse fate awaits if he goes to trial. Any wording of Rule 11 which would tend to bring about that dire result would be most unfortunate. Hopefully, you may find elements of merit in my general approach.

Rule 16—Discovery and Inspection.

Although there are many aspects of this rule which I would like to discuss, I will mention only my thoughts with respect to requiring the prosecution to disclose, in every case, the names and addresses of all government witnesses. I can understand the Justice Department's opposition to this broad rule as submitted by the Supreme Court which apparently permits of no exception. Certainly, there may arise reasonable fears in some cases that physical danger to or intimidation of government witnesses might result from pretrial disclosure. At the same time, I also agree that the time has arrived for a greater measure of pretrial discovery in criminal cases generally and in the proper utilization of omnibus procedures designed to (a) shorten the length of criminal trials, (b) save the government from unnecessary, yet often great, expense in producing witnesses whose testimony covers matters not in controversy, (c) give the defendant a more informed judgment on the basis of which he may decide to tender a guilty plea, and (d) avoid surprise at trial. These opposing considerations can, of course, be balanced. Therefore, I suggest that the names and addresses of government witnesses be disclosed unless the prosecution can show the court cogent reasons for nondisclosure such as reasonable belief of phyical danger to or intimidation of government witnesses, or other bona fide prosecution needs. By Rule 16, the district court should have the discretion of whether to order withholding disclosure of the names of prosecution witnesses or other prosecution evidence. In this regard, the rule might very well provide that government counsel should have opportunity, *in a rare case*, to apply ex parte to the court for an order of nondisclosure, for conceivably in some criminal prosecutions, it might be against the public interest for government counsel to disclose to defense

counsel the prosecution's apprehensions concerning a factor of physical danger, intimidation, etc. Here, too, the district judge, acting under *Presidential appointment, Senate confirmation, and the Constitution*, may be trusted to exercise sound discretion in deciding what the ends of justice do require in a given case. District judges, therefore, should be expressly given, under Rule of 16, the power to order or withhold disclosure concerning names and addresses of government witnesses.

Sincerely yours,

WILLIAM C. KEADY.

CONNECTICUT BAR ASSOCIATION,
Hartford, Conn., March 4, 1975.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, Congress of the United States, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. HUNGATE: I thank you for your letter of January 28, 1975 inviting submission of the comments of the Connecticut Bar Association in connection with proposed amendments to the Federal Rules of Criminal Procedure.

The Federal Bench Bar Relations Committee of the Association has conducted a study of the proposed amendments as promulgated and has concluded that all of the proposed changes except one would constitute improvements in the rules and should be approved. A memorandum setting forth in greater detail the comments of the subcommittee studying the changes with respect to each amendment is attached hereto and submitted herewith. The subcommittee's report respecting the proposed change in Rule 11, however, was rejected by the committee as a whole for various reasons, including a desire not to involve the Court so extensively in the plea bargaining process. Both the conclusion of the Federal Bench-Bar Committee and the approved comments of the subcommittee have been reviewed by the Board of Governors of the Connecticut Bar Association and may be considered by your committee to express the view of our association.

We thank you for your consideration.

Sincerely,

WILLIAM K. COLE.

EXCERPT FROM MINUTES OF THE FEDERAL BENCH BAR RELATIONS COMMITTEE MEETING HELD AT MORY'S ON FEBRUARY 10, 1975

Re Proposed changes in proposed rules of criminal procedure.

The subcommittee established to study the proposed changes in the Federal Rules of Criminal Procedure submitted its report. The subcommittee's report was essentially the same as that submitted by it to the full committee in June of 1974. The report recommended the approval of all the proposed changes. However, the subcommittee did recognize that the full committee had rejected the proposed change in Rule 11 relating to plea arrangements. An extended discussion followed regarding the proposed change in Rule 11 relating to plea arrangements.

It was then moved that the proposed change in Rule 11 relating to plea arrangements be approved. The motion was seconded. Upon a vote, the motion was defeated.

It was then moved and seconded that the position of the full committee taken in June of 1974 regarding proposed changes in Rules of Federal Criminal Procedure be reaffirmed and that such action be reported to the Board of Governors.

The proposed amendments to the Federal Rules of Criminal Procedure are scheduled to go into effect on August 1, 1975 unless vetoed by the Congress. As you know, the Rules were transmitted from the Supreme Court to the Congress in April, 1974, to go into effect on August 1, 1974. However, Congress, via P.A. 93-361 postponed the effective date until August 1, 1975.

Last June, this Subcommittee of the Federal Bench Bar Relations Committee reported on the proposed changes in the rules and recommended their approval. At the June 24, 1974 meeting, the full committee recommended approval of the subcommittee's report with the exception of that part relating to Rule 11 as it deals with plea agreements. A synopsis of the changes appears below.

Rule 4—Arrest or summons upon complaint

The proposed change makes the issuance of a summons rather than a warrant of arrest the preferred vehicle for bringing a defendant before the Court.

Under the present practice, when a complaint is signed and filed with a magistrate, the magistrate almost uniformly issues a warrant of arrest, with the result that the defendant is arrested and immediately brought before a magistrate. Under the proposed change, the magistrate would issue a summons rather than a warrant of arrest. The summons would direct the defendant to appear before the magistrate or the court at a designated time and place. Under the change, the United States would have to make a specific request giving a valid reason for a warrant to be issued rather than a summons. Valid reasons for the issuance of a warrant rather than the summons would be expectancy of flight, previous non-appearance, etc.

Rule 9—Warrant or summons upon indictment or information

The same rationale as the proposed change in Rule 4 above.

Rule 11—Pleas

The changes in this rule provide that the dictates of the McCarthy case be carried out on taking a plea of guilty or nolo contendere.

It also addresses itself to the problem of plea bargaining which is given the name plea arrangements in the Rule. The Rule states that the details of the plea arrangement or agreement be disclosed to the Court before the actual time for taking the plea. Matters such as agreement by the Government to dismiss other charges, recommendations for sentence and objection to the imposition of a particular sentence must be disclosed. The Court must then inform the defendant whether it will impose the agreed-upon arrangement or one more favorable to the defendant in its judgment. If, however, the Court rejects the plea arrangement, it must inform the defendant of the rejection and let the defendant withdraw from the agreement. If the defendant elects to go ahead with the guilty or nolo contendere plea, the Court can impose a more severe sentence than that provided for in the plea arrangement. If the Court rejects the plea agreement, the Court must personally advise the defendant that "if he persists in his guilty plea or plea of nolo contendere, a harsher penalty may be imposed.

Plea arrangements and the discussions leading thereto are not admissible in any civil or criminal proceeding against the defendant.

Rule 12

The changes in Rule 12 set up the schedule for pretrial motions and defines what must be done by pretrial motions. This now includes motions to suppress evidence, discovery under Rule 16, and motions for severance in those which must be made prior to trial. These motions may be made at arraignment or as soon thereafter as practicable. Local rules may vary this.

A significant innovation, i.e. a right afforded the defendant to have the government disclose its intention to use specified evidence at trial so the defendant can move to suppress it. However, this is not meant to expand the area of discoverable information; the information must be discoverable under Rule 16.

The Government may also voluntarily disclose its intention to use certain evidence, in which case the defendant is given the opportunity to move to suppress it.

This disclosure by the Government, either voluntarily or upon motion of the defendant places the onus on the defendant to file a motion to suppress it before trial. If he does not move to suppress it, it would appear that he can not do so at trial.

Rule 12.1 Notice of Alibi

This is a new rule. Within the time for pretrial motions the defendant must give notice to the government of his intent to use an alibi defense. The government must then inform the defendant of the date, time and place of the alleged offense. The defendant must then disclose to the government where he claims he was at the time of the alleged offense and the names and addresses of his alibi witnesses. The government must then inform the defendant of the names and addresses of the witnesses the government relies upon to prove the defendant was at the scene of the alleged offense. All of these disclosures, both by the defendant and by the government must be in writing. If either side should fail to disclose as required by this rule, the party failing to disclose this can be precluded from offering evidence unless the court excuses the non-disclosure for good cause.

Rule 12.2 Notice of defense based upon mental condition

This rule provides that if the defendant intends to base his defense on insanity or mental deficiency, he must disclose this to the government. Failure to disclose may be deemed a waiver. If a defendant discloses reliance upon such condition, the Court may order a psychiatric examination.

Rule 15 Depositions

The changes in this rule appear to be that a defendant in custody has a right, if he so desires, to be brought to the deposition. Of course, a defendant not in custody can go to the deposition. Furthermore, the rule states that a deposition of a party defendant can only be taken with his consent. A significant change is the fact that the scope of the deposition can only go to that which may be used at trial, i.e. narrower than the civil rule. Also, the government must hand over to the defendant any statement of the deponent or Jenks Act material which would have to be handed over at trial. Objections must be made at the time of the taking of the deposition.

Rule 16

The significant change in this rule relates to the disclosure of witnesses and statements made by the defendant. The changed rule provides that the government must disclose to the defendant the names and addresses of all witnesses the government intends to call in the presentation of its case in chief, together with the felony record of any such witness known to the government. The disclosure by the government is only necessary upon motion of the defendant. When it has been disclosed, the government may depose the witnesses. So too, upon motion by the government, the defendant must furnish the names and addresses of the witnesses the defendant intends to call at the presentation of his case in chief. When such request has been made by the government, the defendant may depose his witnesses.

Both parties are under a continuing duty to disclose, i.e. if they learn after the filing of the discovery of the existence of other witnesses, they must promptly disclose such identity to the other party.

The failure to call a witness disclosed may not be commented upon.

Rule 17 Subpoenas

The change merely provides that the defendant may be subpoenaed for the taking of a deposition to any place designated by the trial court.

Rule 20 Transfer from the District for plea and sentencing.

The change merely eliminates the provisions relating to the issuance of a summons for initiating the transfer proceedings.

Rule 29.1 Closing argument.

The change merely defines the order for the closing argument. The order is:

1. Prosecution opening.
2. Defense reply.
3. Prosecution rebuttal.

Rule 32 Sentence and judgment

The first change relates to the court's giving a defendant notice of its right to appeal. The change merely states that the Court is under no duty to inform a defendant who has pleaded guilty or nolo contendere of the right to appeal.

The significant change in Rule 32 relates to disclosure of the contents of presentence reports. The general rule under the change will be that the defendant, upon request, shall be allowed to read the report, excluding however any recommendation as to sentence unless the court believes the report contains a diagnostic opinion which might disrupt a program of rehabilitation, information obtained upon a promise of confidentiality, or other information which if disclosed might result in harm to the defendant or other persons. The court shall be given the opportunity to comment upon the information disclosed in the report.

If the court decides not to disclose the full report to the defendant, the court must state a summary of the factual information contained therein and not disclose which the court intends to rely upon. This statement may be made in camera. Of course, any information disclosed to the defendant must also be

disclosed to the United States. Copies of the presentence report must be returned to the probation officer and neither the government, the defendant, nor his counsel are allowed to make copies thereof.

Rule 43 Presence of the Defendant

This is the only change in the rules which was also contained in the January, 1973 preliminary draft. The change would permit the criminal trial to proceed against a defendant who has personally entered a plea and has been personally advised of the trial date who "voluntarily, knowingly and without justification" fails to appear for trial.

The subcommittee recommends the reaffirmation of the approval of the changes. It realises of course that the full committee may well disagree regarding the new Rule 11 provisions relating to plea agreements.

U.S. DISTRICT COURT,
DISTRICT OF ARIZONA,
Phoenix, Ariz., March 5, 1975.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, U.S. House of Representatives, Washington, D.C.

DEAR CONGRESSMAN HUNGATE: Thank you for your letter of January 27, concerning the amendments to the Federal Rules of Criminal Procedure. I have attended several seminar sessions on the amendments to the Rules of Criminal Procedure.

It is my opinion and the opinion of the District Judges of Arizona, that the new Rules of Criminal Procedure proposed by the Supreme Court are very good rules and should be approved as submitted. It should be borne in mind that the proposed new rules were the product of several years of endeavor and contributions to the rules as presented were made not only from the Conference Committee and the Supreme Court, but from judges, lawyers, and scholars across the nation.

Undoubtedly, any given person may not agree with the draftsmanship of every rule, and any given person might suggest semantic changes of even a substantive nature. Happily, the old rules and the new rules are not chiseled in granite, and unquestionably, as we work with the new rules over a period of years, further recommendations for modification or change might come forward.

At this time, however, we believe that the rules as proposed by the Supreme Court are the best product we can come up with and we should try them as presented without additional tampering, modification, or change. It seems only logical that the rulemaking power of the Federal Judicial System should be vested in the Supreme Court of the United States with the power in the circuits and the districts to supplement the rules promulgated to meet local conditions. This, I think, is as it should be. I seriously doubt that the Congress has the time, the inclination or the expertise to undertake to exercise the rule-making power for the disposition of litigation in the Federal courts.

An example of misguided effort by the Congress is the Speedy Trial Act of 1974. The Federal judges across the nation are, and have been, fully aware of the desirability of speedy trials in criminal cases and in those districts such as my own, where there is an inordinately heavy caseload, criminal cases have taken precedence to the disadvantage of civil litigants, because of the lack of judicial manpower and supporting personnel.

Nevertheless, each of us had, long prior to the passage of the Speedy Trial Act of 1974, submitted and put into effect under Rule 50(b), plans for achieving prompt disposition of criminal cases.

While Mr. Justice Douglas' dissent from the proposed amendments to the Rules of Criminal Procedure has been noted, it seems to me the rule-making power should be unchanged and should be left with the Supreme Court of the United States to develop and promulgate the rules, subject to assistance and expertise as may be available to it.

Thank you kindly for the opportunity to comment on the subject matter of your letter of January 27.

Very truly yours,

WALTER E. CRAIG,
Chief Judge.

ST. LOUIS, MO., *March 14, 1975.*

TOM HUTCHISON,
Staff Counsel, Committee on the Judiciary, House of Representatives.

DEAR MR. HUTCHISON: This paper is being sent to you in connection with a phone conversation between Professor Ronald Carlson, Washington University School of Law, and yourself in late October 1974. The paper was prepared for a Corrections Seminar at Washington University Law School.

I hope the paper will be helpful in the hearings on the Federal Rules of Criminal Procedure when Rule 32(c)(3) is discussed. I appreciate your considering my paper.

Sincerely,

MARILYN A. KUEPER.

PRESENTENCE INVESTIGATION REPORTS: CONTENT, USE, AND DISCLOSURE

(By Marilyn Kueper)

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INTRODUCTION

Presentence investigation reports play an important role in our criminal justice system. Such reports, as interpreted and evaluated by the sentencing judge, influence what function the correctional process will perform in an offender's treatment.

This paper will focus on three aspects of the presentence investigation reports: its use, its content, and its disclosure thereof to the defendant. The first problem facing the probation officer is deciding when to utilize the presentence investigation report. When the decision to use the report has been made, the officer must then determine what facts to include. Disclosure of the report's contents to the defendant becomes an issue when the report is introduced at the sentencing hearing.

Treatment of presentence investigation reports and particularly the disclosure issue is not new and has in fact been a much debated topic. This paper will evaluate the different positions and how we have reached the stand taken by the approval of the amended Federal Rules of Criminal Procedure.

I. PRESENTENCE INVESTIGATION REPORTS—INFORMATION TO BE INCLUDED

Although there has been debate on what to include in the presentence investigation report as well as whether the report is of any value at all, most statutes and studies call for the same general factors to be included.

The Federal Rules of Criminal Procedure, Rule 32(c)(2)[1] states generally that prior criminal record, financial condition, characteristics and circumstances

[1] The Federal Rules of Criminal Procedure as cited throughout this paper are the newly proposed Rules of Criminal Procedure which are slated to take effect August 1, 1975. The Rules are expected to be approved as now appearing but hearings are being held by the House Judiciary Committee and some changes may result. "The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful to imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court." Federal Rules of Criminal Procedure, Rule 32(c)(2).

affecting the defendant's behavior may be helpful in the sentencing decision. Such a rule provides little or no guidance to the sentencing court in the determination of the weight to be attributed to the various factors used. The Federal Rules present merely a suggestion as to what might be included in the report, leaving the specifics to the discretion of the court and probation service.

The Model Penal Code section 7.07(3) is more specific by including circumstances surrounding commission of the crime, defendant's history of delinquency, physical and mental condition, education, occupation, personal habits, and any other factors the probation officer or court deems relevant.[2] The Model Penal Code section sets forth the basic background material that aids in deciding what circumstances may have precipitated the criminal activity as well as what needs must be fulfilled in order to arrest the continuing criminalization of the defendant.

The Missouri Rule is patterned after the Federal Rule by stating only in generalities what information the report should include.[3] The Illinois statute[4] uses the Model Penal Code as its model in listing the common factors to be included within the report. The Illinois statute also includes the directive that resources available for the rehabilitation of each individual should be researched and indicated in the report. This guideline is based on the ABA Sentencing Standards recommendations and lays down more concrete factors to consider. It is especially useful that rehabilitation resources be evaluated to devise the best dispositional alternative for each individual.

The Model Sentencing Act[5] lists only general suggestions of what information to include in the report. In contrast to this is the ABA Report on Standards for Criminal Justice, Standards Relating to Probation[6] which lists ten factors to

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[2] "The presentence investigation shall include an analysis of the circumstances attending the commission of the crime, the defendant's history of delinquency or criminality, physical and mental condition, family situation and background, economic status, education, occupation and personal habits and any other matters that the probation officer deems relevant or the court directs to be included." American Law Institute, Model Penal Code (1962) Section 7.07(3), (hereinafter cited as Model Penal Code).

[3] "* * * The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition, his social history and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant. The probation officer shall secure such other information as may be required by the court and, whenever it is practicable, such investigation shall include a physical and mental examination of the defendant." Missouri Rules of Criminal Procedure, § 27.07(b).

[4] Presentence Report:

(a) The presentence report shall set forth: (1) the defendant's history of delinquency or criminality, physical and mental history and condition, family situation and background, economic status, education, occupation and personal habits; (2) information about special resources which might be available to assist the defendant's rehabilitation, including treatment centers, special educational facilities, rehabilitative programs of various institutions to which the defendant might be committed, and special programs which are particularly relevant to the defendant's situation; (3) any other matters that the investigatory officer deems relevant or the court directs to be included. Ill. Rev. Stat. c. 38 § 1005-3-2(a) (1972).

[5] "Whenever an investigation is required the probation officer shall promptly inquire into the characteristics, circumstances, needs, and potentialities of the defendant; his criminal record and social history; the circumstances of the offense; the time the defendant has been in detention; and the harm to the victim, his immediate family, and the community. All local and state mental and correctional institutions, courts, and police agencies shall furnish to the probation officer on request the defendant's criminal record and other relevant information. The investigation shall include a physical and mental examination of the defendant when it is desirable in the opinion of the court." Advisory Council of Judges of the National Council on Crime and Delinquency, Model Sentencing Act § 3, (hereinafter cited as Model Sentencing Act).

[6] Content, scope and length of report. Presentence reports should be flexible in format, reflecting differences in the background of different offenders and making the best use of available resources and probation department facilities. Each probation department should develop gradations of reports between:

(i) a short-form report for primary use in screening offenders in order to assist in determination of when additional and more complete information is desirable. Short-form reports could also be useful in courts which do not have adequate probation services;

(ii) a full report, which normally should contain the following items:

(A) a complete description of the offense and the circumstances surrounding it, not limited to aspects developed for record as part of the determination of guilt;

(B) a full description of the educational background of the offender;

(C) a description of any prior criminal record of the offender;

(D) a description of the employment background of the offender;

(E) the social history of the offender, including family relationships, marital status, interests and activities, residence history, and religious affiliations;

(F) the offender's medical history, and, if desirable, a psychological or psychiatric report;

(G) information about environments to which the offender might return or to which he could be sent should probation be granted;

include in the report. The ABA Report on Probation states that the reports should be flexible in order to handle diverse needs and also provides for a short form as well as a full report.

The ABA Report on Probation recommends the use of the short form in cases where inadequate probation services are available to the court. This information can be collected during an initial screening of the individual which is similar to a bail project interview. In cases where additional information is desired and can be obtained, a full report may be made. The Report also provides for including the defendant's version of the offense in order to determine his motivations and attitudes.

The ABA recommends that the criminal record be limited to charges resulting in conviction. This is an attempt to remove misleading and damaging information from the court's consideration as well as making it difficult to mistake an arrest for a conviction. This is significant because the court relies heavily on one's past record in sentencing.

The ABA Report on Probation also stresses the environment to which the offender will be returned along with the alternative community resources which can be used in rehabilitation. The environment is an important consideration in the granting of probation whereas the evaluation of available resources is essential in providing the best treatment plan for the offender whether within an institution or in the community setting.

Evaluation

Some of the statutes such as the Federal Rules, Model Sentencing Act, and the Missouri Rule do not provide adequate guidelines as to what should be included in the presentence report. The ABA Report on Probation is a good model to follow as it states the specific factors which should be included as well as a section designing a rehabilitation program for each individual offender.

Some states such as Illinois,[7] Indiana,[8] Michigan,[9] and California[10] have already incorporated the ABA Report on Probation suggestions into their statutes. More states should follow their example whereby probation services will have solid guidelines to follow.

Basic information which contributes to an understanding of the offender's personality such as prior criminal record, education, employment, social history, religion, and medical and psychiatric reports should be included within the presentence report. An account of the offense charged from the offender's as well as the police officer's viewpoint can be a significant consideration in the sentencing decision. Information about special resources available for the treatment program of the offender can aid the judge in choosing an alternative to prison. Community resources should be fully explored to allow for a rehabilitation plan within the community setting.

The ABA Report on Probation considers the staffing shortage by recommending a short form for use when resources are inadequate for a full report. Such a step can provide an interim solution until adequate resources can be made available. This halfway approach to handling the problem recognizes the importance of individualization in the sentencing process.

Revision of particular state legislation can provide more complete guidelines to be followed. By making more use of the reports and analyzing their effect on the sentencing decision, conclusions as to what factors should be included can be intelligently made and utilized.

(H) supplementary reports from clinics, institutions, and other social agencies with which the offender has been involved;

(I) information about special resources which might be available to assist the offender, such as treatment services, residential facilities, vocational training services, special educational facilities, rehabilitative programs of various institutions to which the offender might be committed, special programs in the probation department, and other similar programs which are particularly relevant to the offender's situation;

(J) a summary of the most significant aspects of the report, including specific recommendations as to the sentence if the sentencing court has so requested.

A special effort should be made in the preparation of presentence reports not to burden the court with irrelevant and unconnected details. ABA Report on Standards for Criminal Justice, Standards Relating to Probation (1970) § 2.3 (hereinafter cited as ABA Report on Probation).

[7] Ill. Rev. Stat. c. 38 § 1005-3-2(a)(1972).

[8] Ind. Stat. Ann. § 9-2252 (I.C. 1971, 35-8-1-2).

[9] Mich. Comp. Laws Ann. § 771.14 (Mich. Stat. Ann. § 28.1144).

[10] Calif. Pen. Code § 1203 (1966 Supp).

II. PRESENTENCE INVESTIGATION REPORTS—AVAILABILITY AND USE

A judge faced with rendering a sentencing decision may call upon the court's probation officer to conduct a presentence investigation report. The judge's conduct is governed by statutes which have traditionally left the use decision within his discretion.

A new position has been taken by the Federal Rules of Criminal Procedure which state:

"The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs for reasons stated on the record." [11]

The Federal Rule still leaves the sentencing court discretion in initiating use of the report, but qualifies that discretion by requiring a written statement in the record of the reason for proceeding without a presentence investigation report. Such a requirement at least forces the sentencing judge to rationalize his behavior by thinking through his decision not to utilize the sentencing aid which was made available to him in the form of the presentence report. The Federal Rule's position can be contrasted with most existing state statutes which allow for use of the report, but only when the court actively requests it.[12]

The Missouri Rule [13] is similar to the Federal Rule. It states that the probation officer, if available to the court, shall make a report unless otherwise directed by the court. The Missouri Rule, however, contains no requirement for a written record of the reason for not utilizing the report.

The Model Penal Code [14] allows for use of the presentence investigation report in any case when the court orders one but requires the report only in cases when (1) defendant has been convicted of a felony; (2) defendant is less than 22 years of age and has been convicted of a crime; (3) defendant will be placed on probation or sentenced to imprisonment for an extended term.

The Model Penal Code stance is typical of state statutes which often permit utilization of the report in all cases while making its use mandatory in certain situations. These statutes require the court to take positive steps to institute use of the report in the non-mandatory instances.

The Illinois statute [15] is patterned after the Model Penal Code making a report mandatory in felony cases and permitting use of the reports in all cases. The Illinois statute also contains a waiver provision whereby the defendant can knowingly waive the investigation and report.

The Model Sentencing Act [16] follows the Model Penal Code format by requiring the reports in cases of crimes involving moral turpitude and sentences of one year or more, while giving the court the discretion to order an investigation in the case of a youthful offender or a defendant convicted of a lesser offense. The accompanying commentary stresses that the court just have adequate information to sentence intelligently.

The ABA Report on Minimum Standards for Criminal Justice, Standards Relating to Sentencing Alternatives and Procedures [17] takes the stand that the

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[11] Federal Rules of Criminal Procedure, Rules 32(c)(1).

[12] See, e.g. Minn. Stat. Ann. § 609–115(1) (1964); Fla. Stat. Ann. § 948.01 (1966 Supp); N.M. Stat. Ann. § 41–17–23 (1964); N.C. Gen. Stats. § 15–198 (1965).

[13] "When a probation officer is available to any court having original jurisdiction to try felony cases and to the St. Louis Court of Criminal Correction, such probation officer shall, unless otherwise directed by the court, make a presentence report to the court before the imposition of sentence or the granting of probation * * *" Missouri Rules of Criminal Procedure, § 27.07(b).

[14] Model Penal Code (1962), section 7.07(1).

[15] "A defendant shall not be sentenced before a written presentence report of investigation is presented to and considered by the court where the defendant is convicted of a felony. The defendant may waive the presentence investigation and written report. The court may order a presentence investigation of any defendant." Ill. Rev. Stat. c. 38 § 1005–3–1 (1972).

[16] "No defedant convicted of a crime involving moral turpitude, or a crime the sentence for which may include commitment for one year or more, shall be sentenced or otherwise disposed of before a written report of investigation by a probation officer is presented to and considered by the court. The court may, in its discretion, order a presentence investigation for defendant convicted of any lesser crime or offense or adjudicated a youthful offender." Model Sentencing Act (1963) § 2.

[17] Presentence report: general principles.

(a) The legislature should supply all courts trying criminal cases with the resources and supporting staff to permit a presentence investigation and report in every case.

(b) The court should explicitly be authorized by statute to call for such an investigation and report in every case. The statute should also provide that such an investigation and report should be made in every case where incarceration for one year or more is a possible disposition, where the defendant is less than (21) years old, or where the defendant is a first offender, unless the court specifically orders to the contrary in a particular case. ABA Project on Standards for Criminal Justice, Standards Relating to Sentencing Alternatives and Procedures 4.1 (hereinafter cited as ABA Sentencing Standards).

court should be authorized by statute to make reports in all cases and required to do so in cases of incarceration for one year or more, when the defendant is less than 21 years old, or when the defendant is a first offender.

The ABA Sentencing Standards Report emphasizes the need for adequate resources to accomplish the goal of providing sufficient information to the sentencing court. The ABA Report also stresses the point that presentence reports should not be omitted in cases of misdemeanants and first offenders, but in fact, that use of the reports can lead to creative dispositions in those cases and help divert people from penal institutions by utilizing other alternatives.

Evaluation

The Federal Rules have taken the position of utilizing the reports unless otherwise stated on the record. This stand goes further than most state statutes which allow the court's discretion in initiating use of the report. Such a position, requiring written reasons for not using the report, is a step toward the establishment of scientific sentencing standards.

The Model Penal Code, Illinois statute, Model Sentencing Act and ABA Report on Sentencing Standards permit use of the report in all cases while requiring it in cases where the need is thought to be the greatest. While viewpoints differ as to when a report is most helpful, common factors found in statutory materials are felonies, youthful offenders, probation consideration, and long term sentences. By singling out these factors, existing resources can be channeled into areas where they can be most productive. Youthful offenders can be aided by such a report if it includes alternatives to incarceration that are available within the community. The success of a possible probationer can be better evaluated by the background material that the report presents to the sentencing judge. The report can be utilized in cases of felons and extended sentences to determine the best rehabilitation plan to be undertaken by the correctional system .

Although existing resources do not permit the presentence investigation reports in all cases, its importance should not be understated. When viewed in light of the goals of the correctional process, the report becomes an essential instrument in furthering rehabilitative goals and determining the best dispositional alternative for each individual.

III. PRESENTENCE INVESTIGATION REPORTS—DISCLOSURE

When plea bargaining has taken place, the sentencing hearing provides the judge his only opportunity to observe the defendant before handing down the sentence. In such situations, which occur in a majority of the cases coming to trial, where the guilt or innocence of the individual is not at issue, the defendant is primarily concerned with the sentence to be imposed.[18] The sentencing hearing following a guilty plea enables the sentencing judge to become familiar with the defendant's background and allows for individualization in the sentencing process. Sentencing is always a critical stage of the criminal justice system but its significance becomes intensified when a trial has been waived.

Arguments Against Disclosure

The five most common arguments against disclosure were summed up in an article by Albert Roche,[19] a staunch defender of the non-disclosure position. The arguments are:

(1) Sources will dry up as social agencies which provide most of the information need confidentiality concerning the services they render;

(2) It may weaken family solidarity if the defendant has knowledge of the information submitted by other family members;

(3) It may harm the defendant psychologically if he must hear the remarks people are making about him;

(4) Probation officers are competent people who will make as accurate reports as possible;

(5) A delay in sentencing may result.

The main argument against disclosure is that sources of the information will dry up.[20] Advocates of non-disclosure stress that confidentiality is necessary for social agencies to function. It is feared that many people providing background

[20] Id. at 221.

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[18] Discovery in Federal Criminal Cases, 33 F.D.R. 47 (1963).

[19] Roche, The Position for Confidentiality of the Presentence Investigation Report, 29 Albany L. Rev. 206 (1965).

information may hesitate to do so if they are not guaranteed anonymity.[21] The non-disclosure faction emphasizes the importance of adequate sentencing information and strongly declares that confidentiality is a just price for such needed material.

The "weakening of family solidarity" argument is considered significant. Next to the defendant himself, the family is the most important source of information.[22] While they may wish to disclose information to the investigator hoping it will benefit the defendant at the sentencing hearing, they do not want to risk family disloyalty or retaliation on the part of the defendant. If this information is relayed to the defendant it may cause deterioration of family ties when support is most needed to aid in the rehabilitation effort. This position is carried one step further in stating that not only should information remain confidential, but in fact, confidentiality of the information tendered is necessary as the defendant can deduce its source from the contents of the report.

The third argument has a psychological foundation. This point takes into consideration the effect which negative statements may have upon the defendant. Support for this view comes from the practice of competent psychiatrists in not disclosing the details of their diagnoses. It is felt that such a practice would be wise in penology as well.[23] Others argue that the defendant's morale will be lowered if he is to read all the information gathered about him.

The second and third arguments against disclosure were taken into account in the new Federal Rules. The Federal Rule's position permits the judge to state orally or in writing a factual summary of information he feels "might result in harm, physical or otherwise, to the defendant." [24] This procedure presents the defendant and his counsel with a knowledge of the factual information which the court is considering, while allowing the court to keep the sources of the report confidential.

Supporters of non-disclosure believe that probation officers are competent professionals who perform their jobs without bias or prejudice in preparing accurate reports.[25] They assert that while error can occur in preparing the reports, the officers will detect these discrepancies and correct them before the report is submitted to the court. The judge at the sentencing hearing is also thought to provide another checkpoint for accuracy.[26] The emphasis placed on the professionalism of the probation officer is good. However, accuracy often depends not on professionalism, but on knowledge of the facts. No one is in a better position than the defendant to determine if the information gathered is correct. By allowing disclosure, an outside check would be placed upon the sentencing procedure.

The last argument raised against disclosure stresses that sentencing will be delayed by mandatory reports and disclosure. Advocates argue that delay will be twofold: in the initial preparing of the report, and again by defense counsel in preparing his rebuttal to the report.[27] What this argument fails to consider is that the practice of sentencing without the report can often result in unjust sentences and lengthy prison terms. Although time is needed to prepare and verify the report, the detriments of a short delay are far outweighed by the benefits of adequate sentencing information. At issue here is the long term liberty of the individal, not a temporary slow-down of the system.

Arguments For Disclosure

Common arguments favoring disclosure of the presentence investigation report to the defendant are: (1) There is no loss of sources or drop in quality of the report when disclosure is practiced; (2) defendant can clarify or refute data thereby improving accuracy in the report: (3) defendant will have a better chance of rehabilitation if he feels a part of the entire process and knows the basis of the court's decision; (4) disclosure permits the scope of the hearing to be narrowed to the relevant and important facts only; (5) defendant is entitled to fundamental fairness at all stages of the judicial system.

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[21] Ibid.
[22] Ibid.
[23] Hincks, In Opposition to Rule 34(c)(2), Proposed Federal Rules of Criminal Procedure, 8 Fed. Prob., Oct.-Dec. 3, 5 (1944).
[24] Federal Rules of Criminal Procedure, Rule 32(c)(3)(B).
[25] Roche, supra note 19 at 220.
[26] Ibid.
[27] Hincks, supra note 23 at 7.

Advocates of disclosure assert that sources do not dry up and adequate information will remain available to the court under the practice of disclosure. Authority for this position is tendered by District Court Judge Thomsen in an article describing the disclosure practice in the District of Maryland:

"My Chief Probation officer tells me that he and his associates in our District have not found our practice has affected their gathering of information, nor has it unduly influenced the writing of their reports. Certainly, the judges have not found any such weakness in the reports which we have received." [28]

A West Virginia study has also found that courts which practice disclosure have not been hampered to any significant degree by a loss of information.[29]

The strongest argument for disclosure is that such a practice will improve the accuracy of the reports.[30] By allowing the defendant a chance to refute the contents of the report, it can be assured that only correct information will be presented to the sentencing judge. Accuracy of the reports is stressed because the purpose of the report is determining the correct disposition and treatment plan for the individual. If the judge receives an inaccurate picture of the individual and his lifestyle, the report will be of no value to him.

Supporters of disclosure argue that it aids in making the defendant feel that he is a part of the entire process. They state that if the defendant is aware of the court's decision, he will be more adaptable to rehabilitation. It is important that the defendant knows the basis of the court's decision and feels that the court is treating him fairly.

Contrary to the belief that use of the reports and disclosure will add to delay in sentencing, it has been found that disclosure allows for narrowing the issues considered at the hearing.[31] The defendant who has access to the report can point out the problem areas and narrow the focus of the factors which the judge should consider. This saves time as well as adding to the accuracy of the report. Efficiency in sentencing is of no value is incorrect and irrelevant information are the basis of the decision.

The last argument for disclosure combines a fundamental fairness theory with the accuracy issue. Authorities believe that fairness within our criminal justice system requires that the defendant be given the opportunity to rebut or clarify statements used in the sentencing decision. The accuracy and fairness arguments were endorsed by Justice Douglas in his dissent to the proposed amendments to the Federal Rules of Criminal Procedure in 1966 when he stated:

"Whatever should be the rule for the federal courts, it ought not be one which permits a judge to impose sentence on the basis of information of which the defendant may be unaware and to which he has not been afforded an opportunity to reply." [32]

The judge cannot know whether the report is inaccurate on its face because he may not be familiar with the facts presented to him. Only when the defendant is given the opportunity to scrutinize the basis of the sentencing decision, can the judge be sure he has an accurate report before him and that a fair decision can be then rendered.

Statutory Authority Favoring Disclosure

The basis for disclosure is usually found in the federal and state statutes. No statute specifically denies the right to disclosure, but silence on this issue has been interpreted by many to mean non-disclosure is a permissible and totally discretionary decision of each individual judge.[33]

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[28] Thomsen, Confidentiality of the Presentence Report: A Middle Position, 28 Fed. Prob. 8, 9 (1964). The disclosure practice in Maryland is that the facts set forth in the report are disclosed to defendant's counsel but the recommendations of the probation officer are kept confidential. This has been in operation for over ten years and no loss of sources or effectiveness have been recorded.

[29] Lorenson, The Disclosure to Defense of Presentence Reports in West Virginia, 69 S. Va. L. Rev. 159, 163 (1967).

[30] Commentary, Federal Rules of Criminal Procedure, Rule 32(c)(3).

[31] Higgins, Confidentiality of Presentence Reports, 28 Albany L. Rev. 12, 32 (1964).

[32] Amendments to Rules of Criminal Procedure, 39 F.R.D. 69, 278–79 (1966). The proposed amendment at that time which was later accepted and remains in effect until August 1, 1975 made disclosure permissible rather than mandatory.

[33] Katkin, Presentence Reports: An Analysis of Uses, Limitations, and Civil Liberties Issues, 55 Minn. L. Rev. 15, 24 (1970).

Mandatory disclosure was recently approved in the amended Federal Rules of Criminal Procedure.[34] The statute requires disclosure when requested by the defense counsel rather than leaving it within the court's discretion as under the old Federal Rules. The statute does exempt recommendations of sentence from disclosure. Further circumstances where disclosure is not required are listed as: "* * * unless in the opinion of the court the report contains diagnostic opinion which might seriously disrupt a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons * * *"[35]

These limitations allow the judge some discretion and take into account information which may be harmful to the defendant or which is received under a promise of confidentiality. The statute answers some of the arguments against disclosure by allowing the court the discretion to withhold confidential sources or potentially harmful information. The Federal Rules do require that a written or oral summary of factual information which is not disclosed be presented to the defendant and his counsel so they may comment thereon.[36] Although disclosure of the report's contents is not required, the defendant is given the opportunity to know the factual information that the court is considering in the sentencing decision. By having a knowledge of the factual information contained in the report, the defendant is able to correct any inaccuracies which might be found therein. The rule stresses that disclosure should occur absent any compelling reason for withholding the report from the defendant and his counsel.

The Federal Rules also require that any copies of the report make available to parties at the sentencing hearing be returned to the court when the sentence has been imposed.[37] The report is not to become a public record but is available for use at the sentencing hearing only to insure a better basis for the sentencing decision.

The Model Penal Code Sentencing Provisions[38] require the court to advise the defendant of the factual contents and conclusions presented in the report and to allow him an opportunity to controvert them. The Code also exempts the sources of confidential information from disclosure. The Model Penal Code's liberal position on disclosure was one of the factors which lead to the recent adoption of the mandatory disclosure provision in the new Federal Rules.

The Model Sentencing Act requires disclosure only in cases involving dangerous felons or first degree murder thereby leaving disclosure to the judge's dis-

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[34] Diclosure:

(A) Before imposing sentence the court shall upon request permit the defendant, or his counsel if he is so represented, to read the report of the presentence investigation, exclusive of any recommendations as to sentence, unless in the opinion of the court the report contains diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons; and the court shall afford the defendant or his counsel an opportunity to comment thereon.

(B) If the court is of the view that there is information in the presentence report which should not be disclosed under subdivisions (c)(3)(A) of this rule, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determininng sentence, and shall give the defendant or his counsel opportunity to comment thereon. The statement may be made to the parties in camera.

(C) Any material disclosed to the defendant or his counsel shall also be disclosed to the attorney for the government.

(D) Any copies of the presentence report made available to the attorney for the government and to the defendant or his counsel shall be returned to the probation officer immediately following the imposition of sentence or the granting of probation. Copies of the presentence investigation report shall not be made by the defendant, his counsel, or the attorney for the government.

(E) The reports of studies and recommendations contained therein made by the Director of the Bureau of Prisons or the Youth Correction Division of the Board of Parole pursuant to 18 U.S.C. §§ 4208(b), 4252, 5010(e), or 5034 shall be considered a presentence investigation within the meaning of subdivision (c)(3) of this rule.

Federal Rules of Criminal Procedure, Rule 32(c)(3). Mandatory disclosure was proposed in the amended rules in 1966 but rejected in favor of a discretionary right to disclosure. See Federal Rules of Criminal Procedure, Rule 32(c)(2) (1966).

[35] Federal Rules, supra note 34, Rule 32(c)(3)(A).

[36] Federal Rules, supra note 34, Rule 32(c)(3)(B).

[37] Federal Rules, supra note 34, Rule 32(c)(3)(D).

[38] "Before imposing sentence, the court shall advise the defendant or his counsel of the factual contents and conclusions of any presentence investigation or psychiatric examination and afford opportunity, if the defendant so requests, to controvert them. The sources of confidential information need not, however, be disclosed." Model Penal Code, Section 7.07(5).

cretion in all other cases.[39] When disclosure is required, the Act permits the defendant the right to cross-examine those individuals who provide the court with sentencing information.[40]

The ABA Sentencing Standards Report[41] recommends that disclosure be practiced except in unusual circumstances when it might harm the rehabilitation efforts of the defendant. Their recommendations were adopted in substance by the newly amended Federal Rules of Criminal Procedure.[42] The ABA supports its stance as consistent with fundamental fairness. The ABA Sentencing Standards Report found that fairness to the defendant was reason enough to demand that he be advised of the contents of the report and allowed to refute it.

The Missouri Rule does not state whether disclosure to defendant and his counsel is required. The Rule reads:

"The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty."[43]

The Rule remains silent on the disclosure issue which has been interpreted by many courts as a license to refrain from practicing disclosure.[44]

The Illinois statute authorizes availability of the presentence reports to the parties as well as the correctional institution to which the defendant is later committed.[45] The statute contains no provision for preserving confidential information and is one of the more liberal statutes permitting disclosure.

The California Penal Code has been heralded as a model statute requiring disclosure. It states:

"* * * the report shall be made available to the court and the prosecution and defense attorneys at least two days or, upon request of the person, five days prior to the time fixed by the court for the hearing and determination of the report."[46]

The Code was amended in 1969 to permit the defendant to request the report five days prior to sentencing in order to adequately prepare for the hearing.

Several other states make the report available upon the request of the defendant but in the absence of such request, do not require disclosure.[47]

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[39] "As to defendants sentenced under section 9 of the Act, the judge may, in his discretion, make the investigation reports or parts thereof available to the defendant or others, or he may make the report or parts of it available while concealing the identity of persons who provided confidential information. As to defendants sentenced under section 5 or section 7 of the Act, the judge shall make the presentence report, the report of the diagnostic center, and other diagnostic reports available to the attorney for the State upon request. Subject to the control of the court, the defendant shall be entitled to cross-examination of those who rendered reports to the court. Such reports shall be part of the record but shall be sealed and opened only on order of the court. If a defendant is committed to a state institution the investigation report shall be sent to the institution at the time of commitment." Model Sentencing Act § 4.

[40] Ibid.

[41] Presentence reports: disclosure; parties.

(a) Fundamental fairness to the defendant requires that the substance of all derogatory information which adversely affects his interests and which has not otherwise been disclosed in open court should be called to the attention of the defendant, his attorney, and others who are acting on his behalf.

(b) This principle should be implemented by requiring that the sentencing court permit the defendant's attorney, or the defendant himself if he has no attorney, to inspect the report. The prosecution should also be shown the report if it is shown to the defense. In extraordinary cases, the court should be permitted to except from disclosure parts of the report which are not relevant to a proper sentence, diagnostic opinions which might seriously disrupt a program of rehabilitation, or sources of information which has been obtained on a promise of confidentiality. In all cases where parts of the report are not disclosed under such authority, the court should be required to state for the record the reasons for its action and to inform the defendant and his attorney that information has not been disclosed. The action of the court in excepting the information from disclosure should be subject to appellate review.

(c) The resolution of any controversy as to the accuracy of the presentence report should be governed by the principle stated in sections 4.5(b), 5.3(d), 5.3(f), and 5.4(a). ABA Sentencing Alternatives § 4.4.

[42] See Federal Rules of Criminal Procedure, supra note 34.

[43] Missouri Rules of Criminal Procedure, § 27.07(b).

[44] Discovery in Federal Criminal Cases, 33 F.R.D. 47, 123 (1963).

[45] Disclosure of reports:

(b) Presentence reports shall be open for inspection only as follows:

(1) to the sentencing court;

(2) to the states attorney and the defendant's attorney at least 3 days prior to the imposition of sentence, unless such 3 day requirement is waived;

(3) to an appellate court in which the conviction or sentence is subject to review;

(4) to any department, agency, or institution to which the defendant is committed;

(5) to any other person only as ordered by the court. Ill. Rev. Stat. § 1005–3–4(b) 1972).

[46] Cal. Pen. Code § 1203 (1966 Supp).

[47] Va. Code Ann. § 53–278–1 (1967); Maryland Code Art 41 § 124.

Constitutional Basis for Disclosure

No Supreme Court decision has specifically dealt with the constitutionality of non-disclosure of the presentence report. Several cases do lay a foundation in support of the argument that the failure to disclose is a violation of the due process clause.

It is not clear whether *Townsend* v. *Burke*[48] was decided on the right to counsel issue or disclosure. The Court stated:

"In the case counsel might not have changed the sentence, but he could have taken steps to see that the conviction and sentence were not predicated on misinformation or misleading of court records, a requirement of fair play which absence of counsel withheld from this prisoner."[49]

The case did not mention disclosure specifically but instead discussed accuracy of sentencing information. Absence of counsel was such an apparent injustice that the Court did not reach the question of what procedures would be required if counsel were present. With the Court emphasizing accuracy so heavily, disclosure could be deemed constitutionally required since this is the best method of assuring accuracy.

The *Townsend* decision could not have depended solely on the lack of counsel at sentencing. *Betts* v. *Brady*[50] was the precedent at that time and appointment of counsel was not held essential to a fair trial. Still, lower courts have read *Townsend* in light of the right to counsel rather than disclosure.

Williams v. *New York*[51] is often cited as authority for non-disclosure. In *Williams* the defendant was found guilty of first degree murder. The jury recommended a life sentence but the judged imposed the death penalty. The judge based his sentencing decision on information contained in the presentence report which had not been made available to the jury. The issue in *Williams* was what standard of evidential rules governed which information the jury could consider in recommending a sentence.

The Court took the position that information helpful to the sentencing judge could not always be obtained if it had to be presented in court with witnesses subject to cross-examination.[52] This is similar to the drying up of sources argument vocalized by non-disclosure advocates. The Court's fears were taken into consideration by the new Federal Rules which permit exception to the disclosure requirement when necessary for confidentiality.[53]

The defendant in *Williams* was represented by three lawyers who were present at the sentencing hearing and spoke in his behalf. The defendant and his counsel were aware of the information available to the judge for the sentencing decision.

"The accuracy of the statements made by the judge as to appellant's background and past practices was not challenged by appellant or his counsel, nor was the judge asked to disregard any of them or to afford a chance to refute or discredit any of them by cross-examination or otherwise."[54]

The result in *Williams* can be justified without reaching the constitutionality of non-disclosure.

Justice Douglas in his dissent in *McGautha* v. *California*[55] elaborated upon the due process issue addressed in *Williams*.

"We said, 'The due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure.' Id at 251. But so far as I can ascertain we never have intimated that a State can, consistently with procedural due process close the 'intelligent imposition of sentencing' either by judge or juries."[56]

Douglas' language stresses that the Court in *Williams* never meant that due process did not apply at sentencing. The case needs to be more carefully read and the language should be limited to the narrow holding rendered by the Court.

The problem of disclosure has been considered more recently in a slightly different context in *Kent* v. *United States*.[57] The disclosure of information upon

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[48] 334 U.S. 736 (1948).
[49] 334 U.S. at 741.
[50] 316 U.S. 455 (1942).
[51] 337 U.S. 241 (1949).
[52] 337 U.S. at 250.
[53] Federal Rules, supra note 34.
[54] 337 U.S. at 244.
[55] 402 U.S. 183 (1970).
[56] 402 U.S. at 246, 247.
[57] 383 U.S. 541 (1966).

which the court based its decision to waive jurisdiction in a juvenile case was at issue in *Kent*. The Court held that:

"With respect to access by the child's counsel to the social records of the child, we deem it obvious that since these are to be considered by the decision to waive, they must be made available to the child's counsel." [58]

The Court states that access to the records to be considered at the waiver hearing is necessary for a fair hearing.[59] The opinion stresses that substantial rights of the juvenile are at stake and that due process calls not only for counsel but effective counsel at such a stage.

One basis for the Court's decision in *Kent* was a District of Columbia statute which called for withholding records from public inspection.

"* * * except that such records or parts thereof shall be made available by rule of court on special order of court to such persons * * * as have a legitimate interest in the protection * * * of the child * * *" [60]

While the Court in *Kent* had a statutory basis for its disclosure holding, the decision had underpinnings in the due process clause. The Court did not confine its holding to the District of Columbia statute, but spoke more broadly of the due process clause requiring disclosure to insure a fair hearing.[61]

The ABA Sentencing Standards Report discusses *Townsend*, *Williams*, and *Kent* in conjunction with the basis required for disclosure. The ABA Report prefers to base disclosure on a policy consideration rather than giving it a wholly constitutional foundation.[62] This can in part be explained by the lack of clear constitutional precedent on the disclosure issue. The ABA decision is also based on the consideration that the policy argument takes into account fairness of the system both in appearance and practice. The ABA Sentencing Standards Report stresses that the defendant should be given every opportunity to be fairly sentenced. The ABA Report concludes that disclosure of the report is the best way of insuring that only accurate and relevant information will be considered in sentencing.

Role of Defense Counsel at the Sentencing Hearing

Supreme Court decisions have assured the right to appointed counsel at sentencing.[63] *Gideon* v. *Wainwright* established the principle that the accused is entitled to appointed counsel at every stage of the criminal proceeding where his rights may be substantially affected.[64] The Court in *Mempha* v. *Rhay* held "that a lawyer must be afforded at this proceeding whether it be labeled a revocation of probation or a deferred sentencing." [65]

The importance of counsel was first emphasized in *Townsend* v. *Burke* where the Court stated:

"Consequently, on this record we conclude that, while disadvantaged by lack of counsel, this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand." [66]

The Court stressed that the decision was not based on the fact that the sentence was harsh but that the defendant lacked the opportunity to correct false assumptions because he was without the services of counsel. The Court concluded that due process was lacking in the proceeding.

With the right to counsel firmly established by the preceding precedent,[67] the role of counsel at the sentencing hearing must be examined. Defense counsel can take the following steps to prepare for sentencing: (1) Familiarize himself with all sentencing alternatives; (2) explain the alternatives to his client; and (3) verify factual basis for sentence and supplement the record where it is inadequate.[68]

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[58] 383 U.S. at 562.
[59] 383 U.S. at 561.
[60] D.C. Code § 11-919 (1966), now § 11-1586(b) (Supp. IV, 1965).
[61] 383 U.S. at 561.
[62] ABA Sentencing Standards, supra note 17 at 224.
[63] Gideon v. Wainwright, 372 U.S. 335 (1963), Mempha v. Rhay, 389 U.S. 128 (1967).
[64] 389 U.S. at 134.
[65] 389 U.S. at 137.
[66] Townsend v. Burke, 334 U.S. 736, 741 (1948).
[67] 334 U.S. 736 (1948), 372 U.S. 335 (1963), 189 U.S. 128 (1967).
[68] Portman, Role of Defense Lawyer in Sentencing, 34 Fed. Probation 3 (1970).

The first two duties can be adequately handled by knowing the possible and probable sentences which could be given. The success of the remaining defense role focuses on the contents of the presentence investigation report. Although defense counsel can prepare his own presentence report, he still remains at a disadvantage when not informed of the facts before the sentencing court.

It is a hollow right to allow the defendant to be present at the sentencing hearing and to offer mitigating evidence if he is not allowed access to the presentence report which is the focal point of the hearing. The value of counsel at sentencing is materially diminished and perhaps rendered ineffective if he is not aware of those factors which are apt to influence the sentencing court in making its decision.[69]

It is not necessary to turn the sentencing hearing into a full scale trial adopting all of its formalized rules. The hearing should remain informal and flexible. It must continue to serve the best interests of the defendant, the criminal justice system, and the public in the determination of the best dispositional alternative to be handed down. Cross-examination of persons supplying sentencing information is crucial and cannot be successful without the defense gaining access to the report. "The key to sentencing is usually in the undisclosed report."[70]

Evaluation

The arguments against disclosure have not proven true in jurisdictions which practice disclosure. To the contrary disclosure has been found to narrow the focus of the hearing and to provide a more accurate basis for sentencing.

The right to appointed counsel at sentencing is now accepted and should be a right in practice as well as in theory. The Court in *Kent* suggests that facts available to the court should be disclosed in order to assure effective use of counsel.

It should be noted that no statute forbids the practice of disclosure. Most statutes are silent on this issue, leaving the disclosure decision to the court's discretion. Courts have too long failed to exercise their authority or have consistently chosen to exercise it by not disclosing. The recent change in the Federal Rules of Criminal Procedure will hopefully prove to be the initial step toward a standard practice of disclosure. The Federal Rules require disclosure, indeed strongly encourage it under most circumstances, except in those few cases where such a practice would be detrimental. With disclosure being practiced under the Federal Rules, a new trend should develop in state statutes which may result in more liberal disclosure clauses.

UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF MISSOURI,
Kansas City, Mo., March 15, 1975.

HON. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, Congress of the United States, House of Representatives, Washington, D.C.

Re: Proposed Amendments to Federal Rules of Criminal Procedure.

DEAR CONGRESSMAN HUNGATE: This letter is being dictated at a meeting of the Court en banc of the United States District Court for the Western District of Missouri.

The Judges of this Court unanimously recommend that the proposed amendments to the Federal Rules of Criminal Procedure be permitted to become effective as proposed by the Judicial Conference of the United States and the Supreme Court of the United States. If it is necessary to make any minor amendments in existing statutes in order to fully implement the proposed amendments to the Federal Rules of Criminal Procedure, the Judges of this Court recommend that minor amendments to the statutes be made for this purpose.

With best regards from the Judges of this Court, I am

Sincerely yours,

WILLIAM H. BECKER,
Chief Judge.

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[69] Barkin, Legal Problems in Sentencing, 54 F.R.D. 285, 289 (1968).
[70] Kuh, For a Meaningful Right to Counsel in Sentencing, 57 ABAJ 1096 (1971).

UNITED STATES DISTRICT COURT,
DISTRICT OF NEW JERSEY,
Newark, N.J., March 18, 1975.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, Congress of the United States, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN HUNGATE: Your letter dated February 7th is hereby answered, I regret belatedly.

I am enclosing Judge Biunno's recommendations with respect to the proposed amendments to the criminal rules. I asked him to do some research on this. I agree with everything Judge Biunno says, with the following exceptions:

(1) His first sentence with respect to Rule 32—this is now covered by Rule 46(c).

(2) I would like to see Rule 12.1(a), Rule 12.2(a) and Rule 12.2(b) rephrased to provide for the original notice to be filed with the Clerk with a copy to the United States Attorney. It would read:

12.1(a) Notice by defendant—If a defendant intends to rely upon the defense of alibi, he shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the court in writing of such intention by filing the same with the Clerk and serving a copy on the Attorney for the government.

12.2(a) Defense of Insanity—If a defendant intends to rely upon the defense of insanity at the time of the alleged crime, he shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the court in writing of such intention by filing the same with the Clerk and serving a copy on the Attorney for the government.

12.2(b) Mental Disease or defect inconsistent with the mental element required for the offense charged—If a defendant intends to introduced expert testimony relating to a mental disease, defect, or other condition bearing upon the issue of whether he had the mental state required for the offense charged, he shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the court in writing of such intention by filing the same with the Clerk and serving a copy on the Attorney for the government.

Please direct any future correspondence in this matter directly to Judge Biunno.

Very truly yours,

LAWRENCE A. WHIPPLE,
Chief Judge.

UNITED STATES DISTRICT COURT,
February 20, 1975.

To: Chief Judge Whipple
From: Vincent P. Biunno, U.S.D.J.
Subject: Federal Rules of Criminal Procedure (Request of Hon. William L. Hungate).

Rule 4.—Proposed text is satisfactory.

Rule 9.—Proposed text is satisfactory.

Rule 11.—Strongly endorse the changes proposed, especially insofar as it expressly permits plea negotiations to include an item dealing with recommendation for or non-opposition to a particular sentence, or both. As drafted, this provision is optional and does not compel its use, but makes it available. Note, too, that the amendment to Rule 32(c)(1), allowing the judge to inspect a presentence report before plea if defendant consents, is essential to effective use of this option.

Rule 12.—Proposed text is satisfactory. *But note* a probable error in phrasing: paragraph (a) should read "the indictment *or* the information," rather than "the indictment *and* the information."

Rule 12.1.—This new rule appears sound.

Rule 12.2.—This new rule appears sound, but probably should be broadened to include inquiries in respect to ability to understand the proceedings and properly to assist in the defense (see 18 U.S.C. § 4244), as well as inquiries into whether a defendant who stands mute when called upon to plead does so through obstinacy or by Act of God or Providence.

Rule 15.—The proposed text is an improvement over the present text. Two suggestions are made:

1. In Rule 15(a), sentence 1, the phrase should read "taken and preserved for use at trial or *upon any hearing in the case.*" See Rule 15(e), permitting the deposition to be used "At the trial or upon any hearing." Depositions are often useful on pretrial motions.

2. The rule should indicate whether its use is limited to the geographical area of the District where the cause is pending, or whether the depositions may be taken in any District. Rule 17(f) (1) and (2) imply the latter, but it should be made explicit in Rule 15, perhaps by cross-reference.

Rule 16.—The proposed text is considered sound, with the exception of one troublesome phrase: "which the government *intends* to offer in evidence;" and "which the defendant *intends* to offer in evidence," and similar phrases keyed to "intent."

This phrase appears at least in the following places:

16(a)(1)(A)
16(a)(1)(C)
16(a)(1)(E)
16(b)(1)(A)
16(b)(1)(B) (twice)
16(b)(1)(C)

Decisions on the matter of intention to offer particular proof, or to call a particular witness, and the like, are not usually made far enough in advance to enable this question to be dealt with effectively on discovery motions.

A more realistic expression would be in terms of proofs, evidence or witnesses which the government or a defendant "desires to have available to offer or call", without committing the party to an "intention" to offer or call.

Data or witnesses not disclosed could not be offered or called at all. Those disclosed could be used or not, as the occasion calls for.

On the *merits* of the proposed changes, it is felt that the requirement for disclosure of the names of witnesses, except in the case of a defense of alibi, is unwise and should *not* be adopted.

Rule 17.—The change in text is desirable.

Rule 20.—The proposed text (which has the effect of eliminating the need for paragraph (e) of the present rule) is satisfactory.

Rule 29.1.—The text of this new rule seems undesirable. Note that there is now no rule or statute as to *opening* statements, and extremely little case law on the subject. If the subject is to be dealt with in the Rules at all, the entire subject should be reviewed comprehensively rather than to adopt a new rule dealing with no more than the sequence of closing arguments that adds an extra step. This rule should not be adopted.

Rule 32.—In paragraph (a) (1), the present sentence addressed to commitment of the defendant or continuing or altering bail should be retained.

In paragraph (C) (3) (A), (B) and (C), the provisions for disclosure are felt to be impractical and unwise. They are bound to generate additional and needless workload which neither the bench nor the probation service is staffed to handle.

A better approach, which would achieve the same ends, would be to authorize the sentencing judge, at his option, to either (1) permit inspection of such parts of the presentence report as appropriate, or (2) review at the time of sentence with defendant and his attorney such information in the report as he is taking into account in deciding what the sentence should be.

The proposed rule provisions are too restrictive as to what may be retained from disclosure. There have been actual instances where defendants have unexpectedly lied to the court at sentence time about various events in his history, and which could only be tracked down and confirmed because the report contained data not known to defendant. If there is disclosure of seemingly routine data in such a case, there will be no effective means to detect potential falsehoods.

In all other respects, the text of proposed Rule 32 is satisfactory.

Rule 43.—The proposed text is satisfactory, with one exception:

The rule should allow a defendant who is represented by counsel to authorize counsel to enter a plea of not guilty without his presence being required, on written consent of the defendant indicating that all matters to be brought to his attention at arraignment have been reviewed with and explained by his counsel. This is on the fundamental precept that no accused can be prejudiced by the entry of a plea of not guilty.

UNITED STATES COURT OF APPEALS,
EIGHTH CIRCUIT,
St. Louis, Mo., March 18, 1975.

Hon. WILLIAM L. HUNGATE, MC,
Chairman, Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR BILL: Many thanks for your letter of March 13, 1975. I shall be prepared to testify on March 26 as a member of the advisory committee on Federal Rules of Criminal Procedure.

Judge Frank Kaufman of Maryland has authorized me to file the enclosed correspondence with respect to options available to the trial judge under plea agreement procedures incorporated in proposed Rule 11(e). In reading the responses from trial judges across the country who have expressed reservations about the Rule, I note a common thread of concern that they not be compelled to engage in plea bargaining to any greater degree than they feel is necessary in their particular situation. As I pointed out to Judge Kaufman, the proposed Rule fully accommodates this concern. The purpose of Rule 11(e) is not to mandate plea agreements but to protect the defendant and the public by procedural safeguards where plea bargaining is practiced.

I appreciate very much the cooperation which I received from Mr. Hutchison when I visited the Judiciary Committee office last week.

With highest regards,
Sincerely,

WILLIAM H. WEBSTER,
U.S. Circuit Judge.

U.S. COURT OF APPEALS,
EIGHTH CIRCUIT,
St. Louis, Mo., February 28, 1975.

Hon. FRANK A. KAUFMAN,
United States District Judge,
Baltimore, Md.

DEAR FRANK: After our telephone conversation, I touched base with Professor Remington to be sure that what I said to you comported with his understanding of the application of proposed Rule 11(e). I today learned that Judge Northrop has written to Congressman Hungate expressing the concern and opposition of the judges of your district to the proposed rule.

I find that many judges throughout the country perceive the proposed rule as somehow requiring them to permit plea agreements in their courtrooms to the full extent authorized by the rule. This is simply not the case, and it's probably the fault of those of us who drafted the rule that the reservation of discretion in the trial judge is not more apparent. As you know, the rule contemplates four distinct types of plea agreements: (1) the reduction of the charge itself; (2) the dropping of some of multiple counts; (3) an agreement to recommend a particular sentence; and (4) an agreement for a particular sentence. The first two categories present no real problem, as almost all judges permit prosecutors to reduce charges or drop counts, provided the judge is left enough authority to deal appropriately with the defendant. Most judges do not even consider this to be plea bargaining. (In fact there is a pending case in the Fifth Circuit in which it is contended on constitutional grounds that trial judges have no power to prevent the prosecutor from reducing the charge or dropping counts.) The main distinction is between the third and fourth categories. It was the intention of the drafters that an agreement to recommend would be consummated upon the prosecutor making the recommendation. In other words, the acceptance of that agreement did not bind the trial judge to impose the recommended sentence, nor would he be required to permit the defendant to withdraw his plea if the trial judge determined to assess a heavier sentence, so long as the defendant understood the limited significance of the agreement to recommend. The fourth category, which calls for a stated term under agreement, does impose upon the trial judge the obligation to permit the defendant to withdraw the plea if the trial judge determines not to accept the agreement.

We thought it was reasonably evident that a trial judge could make it clear to the prosecutor that he was not interested in receiving plea agreements under category four, or even category three, if that were in fact the case. Even a prose-

cutor who was permitted to tender plea agreement under category four would soon learn what ranges of sentences were likely to be rejected by the trial judge.

It was our conclusion that the trial judge was thus accorded complete discretion to preclude plea bargaining in his court, to accept certain types of plea bargaining or to permit the entire range of plea bargaining, depending upon the state of his docket, the reliability of the prosecutor and the trial judge's own sense of propriety. I'm not sure what practice is followed in your district, but I gathered in our conversation that you presently permit the prosecutor to make recommendations, provided they are not binding upon the court. It seems to me that this is identical to category three under the proposed rule and should present no problem at all to you. A word to the prosecutor should be sufficient to keep him from embarking on pleas under category four, if that happens to be your view of things.

Our several discussions on this subject have been very helpful to me, and I hope you'll send along any reactions to the contents of this letter.

Sincerely,

WILLIAM H. WEBSTER,
U.S. Circuit Judge.

U.S. DISTRICT COURT,
FOR THE DISTRICT OF MARYLAND,
Baltimore, Md., March 12, 1975.

Hon. WILLIAM H. WEBSTER,
United States Circuit Judge, United States Court & Customs House,
St. Louis, Mo.

DEAR BILL: I greatly appreciate your very full letter of February 28, 1975 with regard to proposed Federal Criminal Rule 11(e). From my point of view as an individual I find myself wholly in favor of proposed Federal Criminal Rule 11(e) provided that the House Committee Report, or some document possessing equal status, sets forth that the Rule contemplates four distinct types of agreement and then goes on to include what you have set forth in your said February 28th letter. As you know, I have been most concerned with the third type of plea agreement. If the new Rule permits that third type of plea agreement to be handled as you indicate, I not only have no problem with the new Rule but am affirmatively in favor of it.

In your February 28th letter you have referred to Judge Northrop's recent letter to Congressman Hungate. As Judge Northop stated in that letter, many judges of this Court would prefer to see the Rule left alone and are concerned about other questions in addition to the one upon which I have focused. The individual views of a number of the judges of this Court have been set forth at length in correspondence with Congressman Hungate. Accordingly, I want to stress that the views I hold are mine alone and do not reflect the views of all of the judges of this Court. Since, as you know, I have corresponded in the past with Congressman Hungate concerning my worries about proposed new Rule 11(e), I will be glad, if you want me to do so, either to write to Congressman Hungate directly and set forth in a letter to him the views I have expressed herein or to have you send to him, if you prefer, copies of our correspondence.

I certainly have enjoyed discussing and corresponding with you about these matters and hope that I will see you soon again.

Best regards.

Sincerely,

FRANK A. KAUFMAN,
U.S. District Judge.

ARNOLD & PORTER,
Washington, D.C., March 27, 1975.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, House Judiciary Committee,
Washington, D.C.

DEAR MR. CHAIRMAN: I enclose a copy of a statement with respect to proposed new Rule 16 of the Federal Rules of Criminal Procedure. I respectfully request that you include the statement in the record of the Subcommittee proceedings. I hope it will be of assistance to the Subcommittee and its staff.

I am a member of the Committee on Rules of Criminal Procedure and Evidence of the Criminal Justice Section of the American Bar Association. I fully support the statement made to your Committee by Alan Y. Cole on March 24, 1975. My statement is intended to supplement his and to consider certain points not touched on in his statement.

I have written and lectured on the subject of discovery in federal criminal cases. I am a former Assistant United States Attorney for the District of Columbia and am presently engaged in the private practice of law.

With best regards.

Sincerely yours,

DANIEL A. REZNECK.

STATEMENT OF DANIEL A. REZNECK

Proposed new Rule 16 is a step forward in expanding the discovery rights of both prosecution and defense. It adopts a number of the ABA Standards Relating to Discovery and Procedure Before Trial.

On the other hand, the proposed rule falls short of the ABA Standards in important respects. And it leaves open some major discovery issues, which can and should be resolved by the rule-making process. The following critique of proposed Rule 16 is intended to point out possible changes and clarifications in the Rule:

1. Proposed 16(a)(1)(A), dealing with defendants' statements, clarifies current case law in one important respect: it makes clear that the defendant has a *right* to his own statements, as the better-reasoned decisions under the present Rule have held and the ABA Standards mandate. Proposed 16(a)(1)(A) is unsatisfactory in other respects, however:

(a) It limits discovery of a defendant's oral statements to those which the prosecution intends to offer at trial. There is no such limitation on discovery of his *written* statements, which are producible regardless of whether the prosecution plans to use them. This distinction is hard to support. The defendant needs his oral statements for the same reasons as his written ones—not merely to see what will be offered against him, but, *inter alia*, to help decide whether to testify and to discover possible leads to other evidence. In addition, the Advisory Committee Note justifies discovery of written statements as contributing "both to an informed guilty plea practice and to a pretrial resolution of admissibility questions." (p. 56). Both factors are equally applicable to oral statements.

(b) The new Rule leaves deliberately unclear (see Advisory Committee Note at pp. 57–58) whether "statements" in 16(a)(1)(A) is to be construed in accordance with the Jencks Act definition, *i.e.*, applicable only to "substantially verbatim" and "contemporaneously recorded" statements. There is no justification for using the Jencks Act definition in this context. The Rule ought to make clear that "statements" here has a broader meaning than under the Jencks Act, *i.e.*, it extends beyond "substantially verbatim," "contemporaneously recorded" matters. The reason for the limited scope of "statements" under the Jencks Act is that statements are used there for the purpose of impeachment at trial; the "substantially verbatim," "contemporaneously recorded" standard may help to assure that a witness will be impeached only on the basis of an accurate rendition of what he has said. That rationale for the Jencks limitation has no place in a discovery rule, since the purpose of discovery is not limited to impeachment of witnesses, but is to help the defendant's counsel prepare a proper defense. Many cases recognize this, and order discovery of all defendant statements without regard to the Jencks Act definition. The majority of the committee which drafted the ABA Standards favored the broader definition. In any event, there is no excuse for leaving the matter deliberately unclear; it ought to be resolved in the Rule one way or the other.

(c) The proposed Rule further limits discovery of oral statements to those made by the defendant to a person known to him to be a government agent, in response to interrogation. Thus it apparently would rule out discovery of oral statements made to undercover agents or to private citizens, even if the government intends to offer them in evidence at trial. The better-reasoned decisions have held that statements are discoverable, whether or not made to a known agent of the government. Judge Gasch so held in *United States* v. *Baker*, 262

F. Supp. 657, 671–72 (D.D.C. 1966). In terms of the purposes of a discovery rule, this is another dubious distinction in the proposed Rule. From the standpoint of the defendant's counsel in preparing for trial, it is just as important to know the substance of statements the defendant made to persons not known to be government agents. If anything, the defense needs this information even more, because the defendant may not be able to recall making a statement to such a person; he is much more likely to recall what he said to a known government agent.

(d) For unexplained reasons, the proposed Rule omits the provision in an earlier draft giving the defendant the right to discovery of statements of co-defendants which the prosecution intends to offer in evidence at trial. The earlier provision reads as follows:

"Upon motion of a defendant the court shall order the attorney for the government to permit the defendant to inspect and copy or photograph any written or recorded statement of a co-defendant which the government intends to offer in evidence at the trial; and the substance of any oral statement which the government intends to offer in evidence at the trial made by a co-defendant whether before or after arrest in response to interrogation by any person known to the co-defendant to be a government agent."

The omitted provision was in accord with the ABA Standards (§ 2.1(a)(ii)). The reasons for the provision were stated by the Advisory Committee in a Note to the earlier draft as follows:

"It is added to make it possible to conform to the constitutional requirements announced in *Bruton* v. *United States*, 391 U.S. 123 (1968). The Bruton decision held that under some circumstances it was constitutional error to try one defendant in a situation where a codefendant's statement implicating the first defendant was before a jury, even though the court had carefully instructed the jury that the statement was only admissible against the codefendant. If the defense is to be required to make a motion for severance prior to trial or a motion to delete prejudicial material from the codefendant's statement, he must have access to the statement. See American Bar Association Standards Relating to Joinder and Severance § 2.3 (Sept. 1968 supplement). Because the primary purpose of the requirement is to avoid prejudice at trial, the duty of disclosure is limited to those statements, either written or oral, which the government intends to introduce in evidence at trial. See American Bar Association Standards Relating to Discovery and Procedure Before Trial § 2.1(a)(ii)(1969)."

It may be added that, since each defendant is entitled under the proposed Rule to his own statements as of right and there is nothing to prevent defense counsel from exchanging them, there is no reason why the defendant should not be allowed direct access to statements of his codefendants. The omitted provision should be restored to the Rule.

2. The proposed new Rule provides both prosecution and defense the right to a list of the names and addresses of witnesses whom the other side intends to call in its case in chief. But the proposed Rule departs from the ABA Standards in not providing for a right to pretrial discovery of witness statements and their grand jury testimony. The ABA would afford such disclosure as of right, subject to the court's protective order power. (§§ 2.1(a)(i) and (a)(iii)). The proposed new Rule leaves the matter unclear. It does not require such disclosure, but the Advisory Committee Note states that it does not "preclude the parties from agreeing to disclose statements before trial." (p. 60) Pretrial disclosure of witness statements and grand jury testimony is clearly the better practice. Access to these statements and testimony is essential for proper cross-examination at trial, as well as helping to expedite trials. It is better to adopt a rule of disclosure than to leave the matter up in the air.

3. Proposed 16(a)(2) perpetuates the present absolute privilege from discovery for prosecution "work product," indeed it seems to expand the reach of this absolute privilege somewhat by specifying that it covers the "work product" of the government attorney. (Advisory Committee Note, p. 61). There is little justification for applying principles of "absolute privilege" to "work product" problems. (See Rezneck, *The New Federal Rules of Criminal Procedure*, 54 Geo. L. J. at 1281–82 (1966)). This is not done in the Civil Rules, where the "work product," even of counsel, is a qualified privilege capable of being overcome on a sufficient showing of need. *A fortiori*, the same should be true in a criminal case, where life or liberty are at stake. The "work product" privilege in the ABA Standards is much narrower than in the proposed Rule, applying only to "the opinions, theories or conclusions" of the prosecution. (§ 2.6)

4. The proposed Rule passes up the opportunity to clarify the question of discovery of grand jury testimony either pretrial or at trial. It leaves this matter to be decided under Rule 6. Rule 6 has been interpreted in a variety of ways in different jurisdictions, and the law on discovery of grand jury testimony is in disarray. This would be a good opportunity to settle the issue, as the ABA Standards do, by making the grand jury testimony of the prosecution's intended witnesses discoverable as of right by the defendant prior to trial.

5. The proposed Rule does not clarify any of the numerous problems arising under *Brady* v. *Maryland*, 373 U.S. 83 (1963), as to the prosecution's duty to disclose exculpatory material. The Advisory Committee states that it decided not to codify the Brady rule. (p. 59) Although there is justification for allowing the contours of *Brady* to be decided on a case-by-case basis, the new Rule could at least make it clear that *Brady* does create pretrial discovery rights, a point which a number of courts have not yet accepted.

WAYNE STATE UNIVERSITY,
Detroit, Mich., April 17, 1975.

Congressman WILLIAM HUNGATE,
Chairman, House Subcommittee on Reform of Federal Criminal Laws, U.S. House of Representatives, Washington, D.C.

DEAR CONGRESSMAN HUNGATE: I want to express my opposition to the proposed change in Federal Rule of Criminal Procedure (FRCP) 32(a)(2) which adds the following: "There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere."

Rule 32(a)(2) presently requires the sentencing judge to inform the trial-convicted defendant to his right of appeal under F.R.C.P. 4(b); there is no guideline with regard to the judge's obligation to inform the plea-convicted defendant of this right provided to *all* convicted defendants. Filling the void in existing Rule 32(a)(2) by urging judges to hide the right to appeal from 85–90% of the defendants convicted in Federal courts does not further the cause of justice.

Rather than adding language to dissuade those judges desirous of informing all defendants of their right to appeal, Congress should add language requiring that judges inform *all* defendants of their right to appeal under 4(b).

The Advisory Committee Notes accompanying the transmittal of the proposed amendments to Congress sought to justify the change in Rule 32(a)(2) on the ground that requiring "The court to advise the defendant of a right to appeal after a plea of guilty, accepted pursuant to the increasingly stringent requirements of Rule 11, is likely to be confusing to the defendant." I fail to perceive how informing a defendant of his right to appeal will be confusing to him. Certainly, if he is not informed of his right to appeal, he is likely to be ignorant of his right to appeal and when he learns of other convicted defendants who have exercised the right to appeal after they have been informed of that right by the trial judge, he is likely to be very confused about the virtues of our criminal justice system and the concept of equal protection.

The Advisory Committee Note supports its proposal by citing to the ABA Standards Relating to Criminal Appeals 2.1(b) (approved Draft, 1970) which similarly requires the sentencing court to advise only the trial-convicted defendant of his right to appeal. However, the next ABA Criminal Appeal Standard, 2.2(b) imposes a duty on defense counsel to advise a defendant of his right to appeal. This applies to all convicted persons. On the other hand, The Federal Rules do not impose such a duty on the lawyer who represents a plea-convicted defendant, and there is no reason to assume that all lawyers will voluntarily provide such advice. The A.B.A. Commentary to Rule 2.2 notes that "Cases are accumulating . . . where defendants have been substantially abandoned by their lawyers at the conclusion of the trial proceedings so that the defendants lost the opportunity in normal course to have appellate review." ABA Standards at 48.

Thus, the Advisory Committee citation to the ABA Report as supportive of its change in Rule 32(a)(2) is misleading: the ABA Report does not support hiding the right to appeal from a plea-convicted defendant.

The Advisory Committee Note finds a potential for confusion because "such advice following a sentence imposed after a plea of guilty will merely tend to build false hopes and encourage frivolous appeals, with the attendant expense to the defendant or the taxpayers."

This assumes, without any supporting data, that appeals by all plea-convicted defendants are per se frivolous, since under the proposed amendment no plea-convicted defendant is likely to be informed of his right to appeal. Such an assumption is contradicted by U.S. Supreme Court decisions reversing plea convictions:

> A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void. *Machibroda* v. *United States* 368 U.S. 487, 492 (1962).
>
> Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect coverup of unconstitutionality. *Boykin* v. *Alabama* 395 U.S. 238, 242–43 (1969).
>
> [W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled. *Santobello* v. *New York* 404 U.S. 257, 261–62 (1971).

The proposed amendment to Rule 32 will facilitate hiding the right to appeal from defendants who plead guilty because of threats, ignorance or unfulfilled promises—substantial constitutional grounds for appeal.

Accordingly, I urge you to, at the minimum, strike the proposed amendment to FRCP 32(a)(2), and if possible, to add language requiring the sentencing judge to inform every convicted defendant of his right to appeal under FRCP 4(b).

Sincerely,

PAUL D. BORMAN,
Professor of Law.

U.S. COURT OF APPEALS,
EIGHTH CIRCUIT,
Kansas City, Mo., April 4, 1975.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN HUNGATE: Judge Mehaffy has forwarded me your letter of January 27, 1975, inviting comments on the proposed amendments to the Federal Rules of Criminal Procedure. I have been delayed in considering these proposed rules and have just finished an analysis of them. I find they are a decided improvement over the existing rules and should aid in shortening the time of trial and in assuring a fairer trial.

I am therefore pleased to give my full endorsement to the changes. The only one I have some reservations about is the disclosure of the presentence report under Rule 32, as this could dry up areas of information that would be open only to confidential communications. Under the rule I don't know how well the confidential communications can be in practice. Moreover, once it is known that a presentence report is subject to full disclosure of the defendant absent a court ruling on confidentiality, the parties will at least be put on notice so that it conceivably could work out satisfactorily in practice without having too much adverse effect on the objectivity of the report.

Warm regards.

Sincerely,

FLOYD R. GIBSON,
Chief Judge.

COUNTY OF SAN BERNARDINO,
OFFICE OF THE DISTRICT ATTORNEY,
San Bernardino, Calif., April 25, 1975.

Re Proposed Amendments to Federal Rules of Criminal Procedure.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR SIR: The Board of Governors of the State Bar of California has authorized the undersigned as Chairman of the State Bar Standing Committee on Criminal Law and Procedure, to forward directly to you for you and your Committee's consideration, the commentary and analysis of the pending legislation involving the Federal Rules of Criminal Procedure.

The Board of Governors has not had an opportunity to review the work of my Committee, but feel as I do, that the legislation is of such great importance that the comments of the State Bar Committee should be brought to your attention.

The enclosed Report has received substantial attention from the full Committee and the work of the reporter, Robert E. Hinerfeld, speaks for itself as to the effort and concern of the full Committee.

I hope the material furnished is of assistance to your Committee.

Thank you for the opportunity.

Sincerely,

JAMES M. CRAMER.

MURPHY, THORNTON, HINERFELD & CAHILL,
Los Angeles, Calif., April 28, 1975.

Re State Bar Committee on Criminal Law and Procedure—Report to Board of Governors on Proposed Amendments to Federal Rules of Criminal Procedure.

JAMES M. CRAMER, Esq.,
District Attorney, County of San Bernardino, 351 North Arrowhead Avenue, San Bernardino, Calif.

DEAR JIM: Under date of 7 February 1975, on behalf of our subcommittee, I submitted an interim letter-report summarizing and commenting upon the proposed amendments to Federal Rules of Criminal Procedure which were transmitted to Congress by the Chief Justice on 22 April 1974. See 62 F.R.D. 271. These proposed amendments have been under study by Congress since last summer. My interim report covered the amendments through Rule 15. This report covers the balance of the proposed amendments (Rules 16, 17, 20, 32, and 43).

Copies of this letter are being transmitted concurrently to the entire Committee on Criminal Law and Procedure of the State Bar of California. Pursuant to instructions from the Board of Governors which you have communicated to me, I am also sending two copies to Representative William L. Hungate, Chairman, Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives, which is presently studying the proposed amendments to the Rules, and one copy each to Representative Charles Wiggins, Don Edwards, and George Danielson, members of the Committee on the Judiciary.

The first rule discussed below is clearly the keystone in any revised structure of federal criminal procedure:

RULE 16. DISCOVERY AND INSPECTION

Under the former rule, a defendant had the qualified right, upon motion and order, to inspect (i) copies of his own written or recorded statements in the government's possession, (ii) scientific reports and the like relevant to the case which were in the government's possession, (iii) recorded grand jury testimony of the defendant, and (iv) copies of material documents in the government's possession. If the defendant obtained a court order implementing that right, but only in that circumstance, then the government had certain reciprocal rights of discovery against the defendant: i.e., upon motion of the government and order of the court, the government might inspect and copy documents and things in the defendant's possession which the defendant expected to produce at trial, provided that the government could establish that such documentary or real evidence was material to the government's preparation and its request was reasonable. The government's conditional right of inspection did not extend to the defense counsel's work product except for scientific or medical reports.

Under the proposed revision of the rule, discovery generally proceeds without court orders. Moreover, the government's right of discovery is entirely independent of the defendant's discovery rights against the government. Thus, the government may demand discovery from the defendant without prior exercise by the defendant of his discovery right.

1. Disclosure of Evidence By the Government

1.1 Defendant's Statements

The defendant has the unqualified right under the proposed rule to discover not only his own written or recorded statements possessed by the government, but also the substance of any oral statement of the defendant which the government

intends to offer at trial, whenever made, provided that the defendant knew when he made the statement that he was talking to a government agent (i.e., statements made by the defendant to an undercover agent are not discoverable under Rule 16, even if the government plans to use the evidence in its case-in-chief). A qualified right to discover grand jury statements made by agents of a fictitious entity defendant is recognized for the first time, subject to motion and order (not as a matter of right). Thus, a corporate or unincorporated association defendant may seek an order discovering relevant recorded testimony of any grand jury witness who—either at the time of the acts charged in the indictment or at the time the grand jury testimony was given—was a 'talking agent' of the defendant, i.e., one who was so situated as an officer or employee of the defendant as to have been able legally to bind the defendant in respect to the activities involved in the criminal charges.

1.2. Documentary and Real Evidence

Upon the defendant's request, the government must provide him with a copy of the defendant's prior criminal record then available to the prosecutor. The government must also comply with the defendant's request to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, to the extent that such things are in the possession or under the control of the government—provided that such things are also material to the preparation of his defense *or* such things are intended for use by the government as evidence-in-chief at trial *or* if such things were obtained from or belong to the defendant. In addition, upon request the defendant also has the right to inspect, copy, and photograph any results or reports of physical or metnal examinations and of scientific tests or experiments made in connection with the case—provided that such things are in the government's possession, custody, or control and the existence thereof is known (or by the exercise of due diligence should be known) to the prosecutor.

1.3. Government's Witness List

For the first time in noncapital cases, the defendant may have upon request the names and addresses of all witnesses whom the prosecutor intends to call in the government's case-in-chief, together with any record of prior felony convictions of any such witness known to the prosecutor. However, if the defendant invokes his right to a witness list, then the government's conditional right to perpetuate the testimony of its witnesses under Rule 15 becomes absolute. Failure of the government to call a witness on its pretrial list is not a ground for comment to the trier of fact.

1.4. Preservation of Grand Jury and Jencks Act Prohibitions Upon Discovery

Except to the extent that disclosure is required of the government in the foregoing provisions, Rule 16 does not authorize discovery or inspection of reports, memoranda, or other internal documents made by the prosecutor or other government agents in connection with the investigation or prosecution of the case. Moreover, except as permitted in the Jencks Act (18 U.S.C. § 3500), Rule 16 does not permit the disclosure to the defendant of the statement of any government witness, actual or prospective. Finally, except as provided in Rule 6 and that part of this rule relating to defendant's statements, the Rules of Criminal Procedure do not relate to discovery or inspection of recorded grand jury proceedings.

2. Disclosure of Evidence By the Defendant

2.1. Documentary and Real Evidence

Upon request of the government, if the defendant intends to introduce them in his case-in-chief at the trial, the defendant must allow the government to inspect and copy or photograph the same classes of documentary and other tangible evidence described above in defining the defendant's discovery rights against the government—excepting only that the government may not compel the defendant to permit inspection of any buildings or places (presumably excepting for the possibility of a search warrant)—which are in the defendant's possession, custody, or control. The government has the same rights against the defendant as the government has against the government to inspect, copy, and photograph the results or reports of examinations and scientific tests or experiments—provided that such results or reports are in the defendant's possession or control *and* that the defendant intends to introduce such evidence in his case-in-chief at trial *or* such things were prepared by a witness whom the defendant intends to call at

the trial and the results or reports relate to the testimony of the intended defense witness.

2.2. Defendant's Witness List

The government has a reciprocal right to discover a list of the names and addresses of the defendants intended case-in-chief witnesses. Similarly, a request therefor by the government triggers an absolute right of the defendant to perpetuate the testimony of that witness under Rule 15. As with the government's witness list, the failure of the defendant to call a witness on his list may not provide a basis for drawing any adverse inference at the trial.

2.3. Preservation of Defense Work Product

Excepting for scientific or medical reports, the disclosure obligations of the defendant under Rule 16 do not require the defendant to disclose any reports, memoranda, or other internal defense documents made by the defendant, his attorneys, or his agents in connection with the investigation or defense of the case. The defendant's disclosure obligation under Rule 16 does not extend to statements made by the defendant, by government or defense witnesses, or by prospective government or defense witnesses, if those statements were made to the defendant, his attorneys, or to his agents.

3. Continuing Duty to Update Discovery

Before and during trial, both the prosecution and defendant have a continuing duty to notify the other party, his attorney, or the court of the existence of additional material or witnesses subject to discovery or inspection to the extent that such evidence or material was either previously requested by a party or ordered by the court.

4. Protective Orders and In Camera Proceedings

Both sides may seek prtoective orders at any time, on a "sufficient showing" to deny, restrict, or defer discovery or inspection and the court may make such order as appropriate. If a party so requests, the showing on a motion for a protective order may be made, in whole or in part, in a written statement disclosable only to the judge. Such *ex parte in camera* statements must be sealed and preserved in the court record and made available to any reviewing court.

5. Sanctions for Non-Compliance with Discovery

Upon the court learning at any time during the course of the proceedings that a party has failed to comply with Rule 16, the court may (i) order that party to comply, (ii) grant a continuance, or (iii) prohibit that party from introducing the evidence not disclosed. In addition, the court may make such other order as it deems just under the circumstances, including an order affecting the time, place, and manner of making discovery and inspection with such terms and conditions as are just.

6. Alibi Witness Rule Not Affected

Rule 16 does not purport to deal with the problem of disclosure of alibi witnesses. That matter is covered by new Rule 12.1.

COMMENT ON RULE 16 AMENDMENTS

7. The New Discovery Rule Fails To Attempt To Resolve the Basic Conflict Between the Jencks Act and the Rule of Brady v. Maryland: The Sporting Theory of Justice Remains

At the outset, it should be conceded that the proposed revision of Rule 16(a) constitutes a great step forward for discovery by the defendant of some features of the prosecutor's intended case-in-chief. But from the perspective of criminal procedure in the courts of the most populous State in the nation, the proposed changes in Rule 16 are grossly inadequate in eliminating the sporting theory of criminal litigation in the federal courts. Moreover, in an obvious trade-off of defendant's rights for more government disclosure represented by the amendments, Rule 16(b) unreasonably invades the defendant's right of silence and his right to decide whether and to what extent he will put on any defense after the government has presented its case.

In the early post-McCarthy era (1957) when the Jencks Act (18 U.S.C. § 3500) was enacted, there seems to have been unreasoning fears in the Congress, doubtless stimulated by skillful lobbying efforts of J. Edgar Hoover, the late Director

of the Federal Bureau of Investigation, that the Supreme Court's eminently reasonable decision in *Jencks v. United States*, 353 U.S. 657, 77 S.Ct. 1007 (1957) would permit the forces of evil improperly to rummage through the government's investigative files under the guise of preparing for cross-examination of prosecution witnesses at trial. The statutory effects of this anti *Jencks* decision mind set have been plaguing the federal courts for many years in their efforts to make sense out of a statutory prohibition upon the disclosure of essential litigation information, pretrial disclosure of which is taken for granted in the civil practice of every State and federal court (and in the criminal procedure of California).

Five years after the Jencks Act was adopted, the Supreme Court decided a Constitutional criminal procedure case arising in the State courts under the Fourteenth Amendment Due Process Clause. This case and its ancillary cases are ultimately incompatible with the philosophy of Section 3500.

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1962); *Giles v. Maryland*, 386 U.S. 66, 87 S.Ct. 793 (1967). *Brady* and *Giles* recognized a broad and fundamental principle of Anglo-American criminal jurisprudence. Although we believe that our adversary system of ascertaining criminal guilt is the most effective one for determining the truth of an allegation, we also recognize that the imbalance in power and resources which exists between the government and the accused threatens an unfair sporting contest with liberty and reputation at stake Therefore, to avoid a miscarriage of justice, upon demand, the prosecutor must make available to the accused significant exculpatory evidence.

Although decided by the so-called "Warren Court", the *Brady* principle has been elaborated not only by the "Burger Court", but also by Chief Justice Burger himself. In *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 766 (1972), the Chief Justice wrote:

> . . . *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1962), held that suppression of material evidence justifies a new trial "irrespective of the good faith or bad faith of the prosecution." See ABA, Standards Relating to the Prosecution Function and the Defense Function, § 3.11(a). When the "reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of evidence affecting credibility falls within the general rule. *Napue, supra*, 269, 79 S.Ct. at 1177, 3 L.Ed2d 1217 [*Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959)].

Since *Brady* was decided, prosecutors and courts have faced the difficult challenge of determining when and to what extent *due process of law* requires the prosecutor to disclose evidence to the defendant which the prosecutor not only has no intention of using himself, but evidence which may tend to undermine the persuasiveness of his case against the accused.

Although *Brady* and *Giles* require the prosecutor to turn over to the defendant considerably more than witness statements—indeed any evidence which significantly might tend to exculpate the defendant—codification of a meaningful disclosure requirement in Rule 16 would go a long way to assure the due process of law in federal criminal prosecutions required by *Brady*. A list of intended witnesses does not accomplish the task. Rule 16 should require not only that the government disclose before trial the substance of the anticipated testimony of the prosecution witnesses—so that the defendant can prepare for trial or determine whether to plead guilty—but also anything which the prosecutor knows (or reasonably should know) about his case-in-chief witnesses relevant to determining the truth of the criminal charges against the accused. See, e.g., *Giglio v. United States, supra* (duty to disclose a leniency understanding with a principal government witness); *United States v. Gerard*, 491 F.2d 1300 (9th Cir. 1974) (disclosure required of implied threat of prosecution of government witness); *United States v. Partin*, 493 F.2d 750 (5th Cir. 1974) (improper suppression of financial inducements paid by the government to its witness).

A truly liberal discovery rule would obviate many appellate and collateral attack issues raised under *Brady* and *Giglio*. Moreover, it would facilitate the disposition of more criminal cases without trial. Finally, defendants would be able better to prepare to defend themselves if they go to trial, and criminal trials could be conducted with a minimum investment of judicial resources, by eliminating need for delays often required under the sporting theory of justice to permit adequate cross-examination and to develop necessary defense evidence once the true thrust of the government's case has been disclosed at trial.

Except for a small minority of cases in which a protective order is indicated upon an appropriate prosecution showing, the prosecutor should be required by Rule 16 (and Rule 6, to the extent that grand jury transcript is involved) to

make his file available to the defendant's counsel before trial. That is essentially the procedure which has worked in California. See, e.g., Cal. Penal Code § 938.1 (availability of the entire grand jury transcript); *People v. Riser*, 47 Cal.2d 566, 305 P.2d 1 (defendant's right of discovery during trial); *Powell v. Superior Court*, 48 Cal.2d 704, 312 P.2d 698 (1957) (defendant's right of pretrial discovery). Compare the proposed California Criminal Procedure Code[1] sections 9295, 9297, and 10,001, which would liberalize those rights.

The Advisory Committee notes on the proposed revision of Rule 16 reveal a conscious decision "not to codify the *Brady* rule". However, the Advisory Committee later, somewhat inconsistently, cites *Brady* because it "underscores the importance of disclosure of evidence favorable to the defendant." 62 F.R.D. 271, 311. Experience under *Brady* and its progeny has demonstrated convincingly that most prosecutors—who are generally caught up to some extent in the adversary process and motivated by the desire to "win"—are not objective judges on what evidence in their exclusive possession is exculpatory. Even the trial judge often lacks the special factual knowledge to make that judgment without the aid of defense counsel. Cf. *Alderman v. United States*, 394 U.S. 165, 89 S.Ct. 961 (1969).

Thus, the basic question, which is not adequately dealt with in Rule 16 nor sufficiently addressed in the explanatory notes of the Advisory Committee, is why the *Jencks Act-Brady* schizophrenia should be perpetuated in the revised Rules. See, e.g., the Advisory Committee's inherently contradictory observations about the work-product doctrine properly protecting the prosecutor's file and the inconsistent effect of *Brady* on that rule of nondisclosure. 62 F.R.D. 271, 313–314. Our State Bar Committee believes that Congress now has the opportunity and the duty to reconsider the balance struck by the Advisory Committee on the Federal Rules of Criminal Procedure.

The fear that too much discovery will unreasonably facilitate the importuning of government witnesses is no longer a valid reason for adopting a niggardly policy of discovery for defendants charged with federal crimes. In addition to the well-financed witness protection program (see, e.g., Orr Kelly, "Government Witnesses in Danger Given New Lives", The New York Times, 26 April 1975; Pub. L. 91–452, Title V, §§ 501–504, Oct. 15, 1970, 84 Stat. 933), the proposed amendments to Rules 15 and 16 would allow the government to perpetuate the testimony of any witness it reasonably feared to be the potential target of obstruction of justice (18 U.S.C. § 1503).

Moreover, to the extent that a restrictive policy on criminal discovery for defendants is premised upon the unarticulated belief that defendants and their counsel will fabricate fraudulent defense designed to negotiate a path through the interstices of the prosecution's intended case, the policy is inconsistent with allowing any discovery at all. Moreover, such a policy implicity accuses the entirety of the federal criminal defense bar of unethical and/or criminal proclivities. Finally, to the extent that federal criminal discovery assumes a parade of imaginary horribles im meaningful liberal discovery is allowed to defendants, the Federal Rules ignore the reality of California criminal procedure.

Liberal criminal discovery in the State courts of California has worked well and without a break-down in the search for truth in the criminal justice system for nearly a generation. In view of California's polyglot population and its diversity of urban and rural settings (both densely populated metropolitan areas and small, rural communities), California's experience with liberal criminal discovery would seem to have provided the Congress with a valid laboratory test of full-blown criminal discovery. Now that Congress has seen fit to exercise its power of legislative oversight over the Federal Rules of Criminal Procedure, the sense of our State Bar Committee is that Congress should use this opportunity to resolve the *Jencks Act-Brady* conflict in a manner consistent with California criminal discovery procedure: give the defendant a pretrial opportunity to know the case which he must meet on pain of loss of his liberty and/or his reputation.

Rule 16, as it would be amended in the rule promulgated by the Supreme Court, shrinks from meeting that challenge.

The 1966 amendment to Rule 16 created the government's conditional discovery right. Because the government's right of discovery does not accrue under the current rule unless and until the defendant invokes discovery under the rule, some lawyers felt that the rule at least gave obeisance to the accused's Fifth Amendment privilege. Of course, as the Advisory Committee recognizes, Mr.

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[1] Joint Legislative Committee for Revision of the Penal Code, Penal Code Revision Project Staff Draft, The Criminal Procedure Code (1975).

Justice Black and Mr. Justice Douglas believed in 1966 that even a conditional right of governmental discovery offended the privilege. See 62 F.R.D. 271, 315. Now the proposed rule cuts the cord between government and defense discovery, so that the latter cannot justify the impact of the former on the defendant's Fifth Amendment privilege. The government may compel the defendant to disclose his case before trial without regard to any *quid pro quo* being sought or received.

The Advisory Committee has not set out much, if any, of a case for compelling the accused to telegraph his defense to the prosecution. Indeed, the notes to the Rule 16 amendments are totally silent on the utter impracticality of requiring the defendant to commit himself to a theory of defense and make disclosure hereon before trial when he cannot discover the content of the statement of any intended prosecution witness. See 62 F.R.D. 271, 314–315.

8. Disclosure of Evidence By the Government Is Unreasonbly Circumscribed By Rule 16(a)

The principal criticisms of proposed Rule 16(a) have been presented (§ 7, *supra*). No reason appears to our State Bar Committee, and none is stated in the Advisory Committee's notes, for preserving the Jencks Act prohibition upon disclosing a prosecution witness' statements unless and until he has testified on direct examination by the government. Nor does any reason appear in 1975 for limiting defense discovery of government witness statements to those which are verbatim or substantially verbatim. See 18 U.S.C. § 3500(e). Such a restrictive rule places a premium upon the ingenuity, energy, and agility of defense counsel to formulate a defense strategy in the midst of a jury trial. Curiously, we deplore that sporting philosophy in the civil litigation practice, when money and property, not liberty is at stake. See, e.g., Rules 26–37, Federal Rules of Civil Procedure.

Before we will force either a plaintiff or defendant in a civil case to go to trial over money, we give him a full complement of discovery tools and attempt by the discovery and pre-trial order process to refine the factual issue so that there will be a minimum of surprise at trial. On the criminal side, we give the plaintiff (the government) more powerful tools than any civil litigant has to obtain evidence before trial. The *ex parte* grand jury process (Rule 6, F.R.Crim.P.) and the one-sided application of the immunity power[2] gives the prosecutor the assurance that he will have his case prepared before he sets foot in the courtroom. However, the accused is not permitted even an inkling of what the prosecution witnesses will say (Rule 16(a))—or any notion of what they have previously said (18 U.S.C. § 3500(a))—until the witnesses have testified at trial. The Advisory Committee recognized the policy considerations indicating the desirability of liberal discovery for defendants (62 F.R.D. 271, 308–309). But it failed to implement that policy in its compromise of prosecution and defense interests.

Following are some particularized criticisms of Rule 16(a).

8.1. Statements of An Entity Defendant.

Rule 16(a)(1)(A) would expand the class of statements of the defendant discoverable by the accused. However, even within the arbitrary gestalt adopted by the Advisory Committee, no reason appears to restrict discovery of the statements of "talking agents" of a corporate defendant, for example, to statements made before the grand jury. If the prosecutor has any statement of such a person which can be used in the government's case-in-chief to bind the corporation at trial, the defendant should have a copy of the statement on demand.

8.2. List of Witnesses With Felony Convictions.

Rule 16(a)(1)(E) would oblige the prosecutor to accompany his witness list with "any record of prior felony convictions of any such witness which is within the knowledge of the attorney for the government". The purpose of supplying defense counsel with the felony record of a prospective prosecution witness is to enable the defendant to impeach the government's witness at trial. Why

[2] See 18 U.S.C. §§ 6001 *et seq.* So far no federal court has felt it had the power to remedy the injustice of giving the prosecutor but not the defendant the power to unseal the lips of a witness claiming the Fifth Amendment privilege, although significant due process (Fifth Amendment) and compulsory process (Sixth Amendment) arguments indicate that the immunity power cannot be unilateral in application. *See, e.g., Earl* v. *United States*, 361 F.2d 531, 534 fn. 1 (D.C. Cir. 1966), *cert. den.* 388 U.S. 921, 87 S.Ct. 2121 (1967); *United States* v. *Jenkins*, 470 F.2d 1061, 1063–64 (9th Cir. 1972); *United States* v. *Smith*, 436 F.2d 787 (5th Cir. 1971); *United States* v. *Ahmad*, 347 F.Supp. 912 (M.D.Pa. 1972).

then not require the prosecutor to accompany the required witness list with a written statement detailing all other matters known to the prosecutor which might bias the testimony of a prosecution witness in favor of the prosecution, viz., all matters of benefit or threat from the government affecting the witness. Such matters must be disclosed upon demand, in any event, as a matter of Constitutionally defined due process of law. *Giglio* v. *United States*, 405 U.S. 150, 92 S.Ct. 763 (1972). Therefore, why not regularize the disclosure with the disclosure of matters (felony record) which may have less significance in affecting the credibility of a prosecution witness?

8.3. Grand Jury Transcripts.

Rule 16(a)(3) disclaims any intention of affecting the discoverability of grand jury transcripts, leaving that matter to Rules 6 and 16(a)(1)(A). The Advisory Committee notes indicate that Rule 16 generally is intended to:

> . . . prescribe the minimum amount of discovery to which parties are entitled. It is not intended to limit the judge's discretion to order disclosure of grand jury minutes where circumstances make it appropriate to do so. 62 F.R.D. 271, 308.

This vague statement of general principle is not a satisfactory treatment of the grand jury transcript issue. No lawyer with significant federal prosecution experience can urge with sincerity the argument that any significant need remains for grand jury secrecy once an indictment has been returned. In fact, the new rule of evidence is that the prosecutor may offer at trial the grand jury testimony of his own witness, not merely for impeachment on a claim of surprise, but as substantive evidence of the fact declared in the grand jury testimony of a later recanting witness. See Rule 801(d)(1), Rules of Evidence for United States Courts & Magistrates. If the grand jury evidence was relevant to the grand jury before it voted to indict, then it is relevant in the discovery sense (see Rule 26(b)(1), Federal Rules of Civil Procedure) to the accused's trial preparation. To the extent that special problems might arise in a rare case requiring continued transcript secrecy, the protective order mechanism (Rule 16(d)(1)) can accommodate the problem.

The general rule should be that the grand jury transcript is available to the defendant once he is charged if not generally available as a public record. California and other States have lived with such a rule for many years. See, e.g., Cal. Penal Code § 938.1.

9. Compelled Disclosure of Evidence by the Defendant Before He knows the Prosecution's Case Is Impractical and Constitutionally Dubious.

9.1 Defense Information Subject To Disclosure.

There is a fundamental oversight in Rule 16(b) and in the Advisory Committee's notes thereon. Nothing is said in the text of the rule nor in the commentary on the practical problem of how a defendant determines what evidence, if any, he will introduce in his case-in-chief before the prosecution has even put its first witness on the stand. The failure of Rule 16(a) to provide discovery of the substance of the government's evidence—excepting for statements made by the defendant to a *known* government agent (Rule 16(a)(1)(A))—puts the defendant in the position under Rule 16(b) of having to gamble on how he will defend against a prosecution case of unknown content.

There may be no need to put in any defense, if the doctrine of reasonable doubt requires an acquittal at the close of the government's case-in-chief. See Rule 29(a) F.R.Crim.P. On the other hand, if defense counsel know that a contingent defense strategy must be disclosed to the prosecutor before the prosecutor has revealed the strength or weakness of his case, lawyers for the accused will be induced to delay preparing a defense until the prosecution is about to rest its case in order to avoid having to give the government a preview of anticipated gaps or weak points in the government's proof.

Thus, unless and until substantive pre-trial disclosure of the government's case-in-chief is required, it is unreasonable to oblige the defendant to determine and disclose his defense before the government has rested. While the amended version of Rule 16(a) is helpful in revealing the names and addresses of prosecution witnesses, it does not assure the defendant of the substantive information to be presented at the trial, on which he can formulate a defense, if any is available beyond effective cross-examination of government witnesses and the argument of the doctrine of reasonable doubt.

9.2 The Constitutionality of Rule 16(b)

The question of the constitutional validity of compelling substantial pre-trial disclosure of defense evidence as the price for going to trial at all is one too large for adequate treatment in this report, given the limited time available before the Congress intends to act. Suffice it that the comments on the problem by the Advisory Committee are not adequate to put such doubts to rest. For example, nothing is said in the commentary on the argument that by pleading not guilty, the accused obliges himself to disclose a defense—and thereby give evidence before trial which may be used against himself—whereas if he pleads guilty, his Fifth Amendment privilege of silence remains substantially intact.[3]

However, until Rule 16(a) is significantly liberalized, the impracticality of Rule 16(b) is a sufficient reason not to risk a Constitutional test of compulsory pre-trial discovery from the defendant.[4]

RULE 17. SUBPENA

Former Rule 17(f)(2) restricted the place for taking a criminal case deposition to one convenient to the witness. The revised rule permits the deposition to be ordered and a subpoena to require attendance of the witness at "any place designated by the trial court."

COMMENT ON RULE 17 AMENDMENT

The liberalization of the choice of place for a criminal deposition is consistent with the nationwide service of trial subpoenas traditional in federal criminal practice (Rule 17(e)) and is desirable, provided that trial judges are careful to see that a deposition subpoena is not used to harass witnesses by making them travel unnecessarily to inconvenient places.

However, it would seem that Rule 17(f)(1) might be modified concurrently to avoid the need to obtain issuance of the deposition subpoena from a court in a foreign district. Since the trial court has nationwide criminal process, it should be able to issue the deposition subpoena returnable in a foreign district at the same time that it authorizes the deposition in a foreign district, thereby eliminating an unnecessary mechanical procedure for counsel and another court. Enforcement by contempt could be in the trial court just as it is in the case of grand jury or trial subpoenas.

RULE 20. TRANSFER FROM THE DISTRICT FOR PLEA AND SENTENCE

Rule 20 provides an expeditious method for disposition without trial of a criminal charge by a defendant or juvenile located in a district other than the charging district. However, for Rule 20 to operate under present practice, the defendant must be "arrested or held" in the foreign district. The proposed revision of Rule 20 would permit disposition of a charge pending in a foreign district if the defendant or juvenile is "arrested, held, *or present*" [emphasis added] in the foreign district. Thus, a warrant of arrest would no longer be a condition precedent to Rule 20 treatment.

COMMENT ON RULE 20 AMENDMENT

The elimination of an arrest as a condition of disposition of a federal criminal charge other than by trial in a foreign district is a desirable step. It is consistent with the change proposed in Rule 4, which reverses the current presumption of a warrant of arrest in favor of a presumption that issuance of a summons is the usual manner of bringing the defendant within the personal jurisdiction of the district court.

RULE 29.1. CLOSING ARGUMENT

This is a new rule which codifies the final argument practice in the federal and State courts in the Central District of California. The prosecution opens, the defense replies, and the prosecution rebuts.

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[3] Rule 11(f) only requires that the court accepting a guilty plea satisfy itself "that there is a factual basis for the plea." The court is not required to cross-examine the accused on all possible crimes related to the transaction on which the plea of guilty is tendered.

[4] Statutory revision of the defense counsel's work product privilege (Rule 16(b)(2)) may be indicated if the Supreme Court reverses the Ninth Circuit's holding in *United States* v. *Brown*, 501 F.2d 146, 151–157 (9th Cir. 1974), *certiorari* granted *sub nom. United States* v. *Nobles*, —— U.S. ——, 95 S.Ct. 801 (1975).

COMMENT ON NEW RULE 29.1

It is difficult to understand why this proposal has not been the uniform practice nationally, because it comports with the theory of civil pleading and appellate briefing practice in concisely stating factual and legal issues. However, the writer understands that some jurisdictions, e.g., the State of New York, have followed the procedure of defense final argument followed by a prosecution final argument. That practice requires the defendant to speculate on the prosecutor's arguments which he must meet. The proposed uniform federal rule is clearly an improvement.

RULE 32. SENTENCE AND JUDGMENT

Provision for modification of bail status between conviction and imposition of sentence in Rule 32(a)(1) is stricken. That subject is treated in Rule 46(c) and in 18 U.S.C. § 3148.

The court's obligation to advise a defendant upon imposition of a criminal judgment that he has a right to appeal therefrom is expressly limited, eliminating the question whether the court must advise the defendant of his right to appeal when he has been convicted upon a plea of guilty or nolo contendere.

If the court desires to impose sentence without the aid of a presentence investigation and report from the probation service, the court must state on the record its reasons for dispensing with the preferred practice. A presentence report is now expressly authorized to be prepared for and read by the court before conviction, provided that the defendant gives his written consent. This new feature of the rule is intended to give the court the kind of information it may require intelligently to approve or disapprove of a proposed plea bargain which includes a specific sentence commitment by the court (see Rule 11(e)(2)).

The amended rule clarifies the right of the defendant or his counsel to see all of the presentence investigation report exclusive of any recommendation as to sentence. That right, however, is qualified in the case where the court believes the report "contains diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons . . . ." Rule 32(a)(3)(A). However, if disclosure is prevented by court order for any reason, then the court must "state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant or his counsel an opportunity to comment thereon. The statement may be made to the parties in camera." Rule 32(a)(3)(B).

If copies of the presentence report are made available to counsel for the parties, upon imposition of judgment, the copies must be returned to the probation officer. Neither the defendant nor counsel for the government or defendant may make copies of the report.

COMMENT ON RULE 32 AMENDMENTS

By clearly stating that the court need not advise a defendant of his right of appeal after judgment upon conviction by plea of guilty or nolo contendere, the Advisory Committee believes frivolous appeals motivated by confusion will be less likely. 62 F.R.D. 271, 322. However, the need for knowledge of the right to an appeal may be even clearer when the circumstance for appealing is esoteric. Thus, if a defendant is sentenced illegally (see Rule 35), or if he is sentenced after denial of a motion in arrest of judgment (Rule 34), there may be an even more pressing indication for advice of his right to appeal, than in the ordinary case where the defendant has been sentenced after conviction by a jury. Therefore, the new second sentence in Rule 32(a)(2) is probably an unfortunate restriction upon the court's duty of advice incident to preserving appellate jurisdiction for the defendant

Serious questions of due process are raised by the provisions concerning disclosure *vel non* of the presentence report (Rule 16(a)(3)). It is difficult to discern why information reported to the court for sentencing, which may have a greater impact on the future life of the defendant than any evidence relevant to the question of guilt or innocence, should be subject in any circumstance to *ex parte* presentation to the court. In the writer's judgment, the reliability of

the information used by the court for determining a criminal judgment is at least as important as the reliability of evidence collected by the government in order to prosecute the accused.

The overwhelming majority of federal criminal cases are disposed of without a trial. Therefore, in most cases, the quality of the evidence of guilt is less important to the accused than what the prosecutor, the investigative agency, and the friends and acquaintances of the defendant tell the probation officer about him. A distillation of that hearsay is reported to the court by the probation officer in his presentence report. If the adversary system is deemed essential to the correct adjudication of guilt, it would seem that our procedures for testing hearsay affecting sentence should be no less jealously guarded.

The balance of competing interests seems to favor disclosure of all material submitted to the sentencing judge and considered by him in determining his judgment, including any recommendation by the probation officer as to sentence. If hearsay evidence from an unidentified informer of the most impeccable credentials is not sufficiently trustworthy for a trier of fact, unattributed hearsay should not be allowed to form the basis for a commitment to federal prison. Lawyers experienced in federal criminal practice are familiar with the simplistic characterizations of some defendants given by certain law enforcement agencies to probation officers and judges. For example, how many defendants have been classified in the same year in the same city as the "largest drug pusher in town", or some similar conclusory label which has no known—or even knowable—basis in fact. How much unverified criminal "intelligence" data has prejudiced defendants' rights in the federal sentencing process? The unattributed intelligence source provides a useful tool for a law enforcement agency possessing unlawfully obtained evidence (electronic surveillance material, for example) to use that evidence at minimum risk in the sentencing process.

If information submitted in a presentence report is of the sort that it "might seriously disrupt a program of rehabilitation", then the remedy may be to disclose that information to the accused's counsel with the understanding that he will use his discretion in deciding the extent to which he will impart the raw data to his client. The court should not be allowed to edit, either orally or in writing, a *summary* of the information on which it will rely in imposing sentence. To allow that practice is to invite the exercise of *unreviewable* discretion not only on what the sentence may be, but also on the facts which justify the sentence. The defendant or his counsel must know what is before the court and motivating the sentence if the sentence is to have the appearance of legitimacy. Under the present state of the law on the non-reviewability of federal sentences, no reviewing court (nor any other neutral party) will ever have the opportunity to verify the accuracy and completeness of the judge's summary of the sensitive information on which he relied.

Rule 32(c)(3)(E) prohibits counsel from having copies of the presentence report. It is unclear whether counsel may even make notes of what he sees in the report. It would seem that a protective order would be a more appropriate manner of accommodating the defendant's lawyer's need to have reasonable access to the contents of the report, with restrictions on the extent to which counsel might disclose the contents. The proposed rule would place a premium on counsel having a photographic memory, hardly a relevant criterion for an effective advocate in the federal courts.

There are legitimate post-sentence judicial uses of the data in the presentence report. Counsel may need such information to prepare and argue a motion for modification of sentence. Rule 35, F.R. Crim.P. Such motions need not be filed until all appellate review has ended—often one or two years after counsel has read the probation officer's report. Rule 32 should not require counsel to visit the court's chambers or the probation officer in order to refresh counsel's recollection sufficient to prepare the motion.

RULE 43. PRESENCE OF THE DEFENDANT

Two principal changes are effected in the revision. Most important is the modification to recognize the constitutional alternatives available to a court confronted with an obstreperous defendant. Exclusion from the courtroom is expressly permitted by the amendment. See *Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057 (1970). The second change is the recognition that the defendant's presence is no longer necessary at a conference or argument upon a question of law.

COMMENT ON RULE 43 AMENDMENTS

The revision of the rule on the required presence of the accused to conform with the *Allen* decision is probably beneficial, provided that the federal courts understand that it is only in the most extreme circumstances that the remedy of exclusion is indicated. The continued presence of the acting out defendant must be interfering with the orderly judicial process before the trial should be conducted out of the presence of a non-consenting defendant.

Permitting defendants to be absent during conferences and legal argument is desirable to the extent that it avoids the unnecessary expenditure of travel funds and/or loss of wages required by compelling a defendant to attend hearings on matters often of little interest or direct concern to him.

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I understand that the Board of Governors of the State Bar of California will consider this report, including the portion dealing with the amendments to the Rules through Rule 15 (dated 7 February 1975) at its next meeting (9 May 1975) and that the Board's action thereon will be communicated promptly to the appropriate members of the House of Representatives and the Senate.

Copies of this report are being mailed concurrently to the four Congressmen menioned at the beginning of this letter (*supra* at pp. 1–2), accompanied by copies of my report dated 7 February 1975. Copies of this report only are being mailed to each member of the Committee on Criminal Law and Procedure and to the Board of Governors (attention Mr. William Eades).

Respectfully submitted,

ROBERT E. HINERFELD,
Reporter on the Proposed Amendments To the Federal Rules of Criminal Procedure for the Committee on Criminal Law and Procedure, State Bar of California.

MURPHY, THORNTON, HINERFELD & CAHILL,
Los Angeles, Calif., February 7, 1975.

Re State Bar Committee on Criminal Law and Procedure—Report to Board of Governors on Proposed Amendments To Federal Rules of Criminal Procedure.

JOSE C. ORTEGA, Esq.,
Executive Director, Model Cities Center for Law and Justice, Los Angeles, Calif.

DEAR JOE: Last June, our subcommittee was asked to report on the proposed amendments to the Federal Rules of Criminal Procedure which were transmitted to Congress by the Chief Justice on 22 April 1974, to become effective on 1 August 1974. The request for a report was received by our subcommittee on 11 June 1974, an inadequate time in which to digest and comment upon this substantial modification of the rules. Happily Congress came to our rescue with a bill enacted shortly before 1 August 1974, delaying the effective date for one year in order to give Congress time to consider whether the proposed rules should be ratified or modified by Congress.

You have requested that I prepare a report for consideration by our subcommittee. I have reviewed the proposed amendments. Following is a brief summary of the effect of the amendments and my comments.[1] The Supreme Court's order and the proposed rules have been published at 62 F.R.D. 271, along with the notes of the Advisory Committee.

RULE 4. ARREST WARRANT OR SUMMONS UPON COMPLAINT

The presumption under the old rule was that a warrant of arrest issued as a matter of course when a criminal complaint was approved by the federal magis-

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[1] For the most part, the summaries of the rules affected by the proposed amendments are limited to the new features which would be introduced to the rule. To the extent that features of the old rule would be carried forward into the amended rule, no summary or comment is offered.

This report covers those amendments through Rule 15. A second installment will cover Rule 16 to the end.

trate. A summons issued only if the government's attorney requested it in lieu of a warrant. The presumption is reversed in the new rule. A summons, rather than a warrant, now issues as a matter of course.

A warrant will issue if the defendant does not appear in response to the summons or if "a valid reason is shown" for issuing an arrest warrant. Such showing can be made either in the district in which the complaint was filed or in the district in which the defendant is found.

The new rule clarifies the requirements for commencing a federal criminal prosecution by complaint (rather than by grand jury indictment). Subsection (c) is new to Rule 4. It deals with the manner of ascertaining probable cause by the magistrate. It restates the Supreme Court decisional law that hearsay evidence is sufficient to support a finding of probable cause. The magistrate is empowered to require, if he chooses, the presence of the complainant who executed the affidavit in support of the criminal complaint and to take sworn oral testimony from the complainant and any other witnesses the complainant might produce before determining whether to issue either a summons or warrant of arrest. The magistrate is obliged, in the event of such an oral proceeding, to make either a record or summary thereof. Multiple summons or warrants are now permitted for the same defendant. The new rule takes no position on what constitutes probable cause, leaving that question to the decisional law: e.g., *Giordenello v. United States*, 357 U.S. 480 (1958); *Aguilar v. Texas*, 378 U.S. 108 (1964).

COMMENT ON RULE 4 AMENDMENTS

The objective of the change from a presumption in favor of a warrant of arrest to a presumption in favor of a summons is sound. Query whether it will be honored in the breach by a prosecutor's practice of seeking warrants as a matter of course by a showing of "valid reason" in the same manner that prosecutors tend to influence the amount of bail set on the filing of a criminal charge?

The provision authorizing expressly the power of the magistrate to take oral evidence on a criminal charge is desirable. It may state the existing inherent power of the magistrate, but by stating it expressly, some magistrates may be encouraged to look behind affidavits which are generally prepared by the United States Attorney's office to ascertain in questionable cases whether the live witness sounds as convincing as his affidavit, drafted by a lawyer, which he has signed. It might be desirable to expand this provision to resolve the implicit issue whether the about-to-be-accused person has a right to attend that oral hearing and cross-examine the complainant.

RULE 9. WARRANT OR SUMMONS UPON INDICTMENT OR INFORMATION

Parallel changes are made in the procedure for issuing a summons rather than a warrant when the criminal proceeding is initiated, or carried forward after criminal complaint, by indictment or information. The summons is now the favored form of process. Multiple summonses or warrants are likewise authorized for one defendant.

The indictment carries with it a conclusive presumption of probable cause. The information will permit a summons if it is supported by oath. However, the Advisory Committee observes that if a warrant is requested by the government upon an information, "good practice" indicates that the request should be accompanied by an affidavit setting out probable cause to support the information. This suggestion is not embodied in the amended rule.

COMMENT ON RULE 9 AMENDMENTS

It would have been advisable for the amendment to Rule 9 to require a sworn showing of probable cause in support of a prosecution request for a warrant upon a criminal information. No sound reason appears for leaving that matter to the willingness of the prosecutor to abide by the Advisory Committee's recommendation on "good practice". A criminal information is simply a charge signed by the prosecutor who has no personal knowledge even of the hearsay evidence which might constitute probable cause.

RULE 11. PLEAS

Substantial changes and new procedures are introduced with the amendment to Rule 11. The same three pleas are still recognized, viz. Not Guilty, Guilty, and

Nolo Contendere. However, a standard, albeit vague, is enunciated for the first time on whether the court should accept the *nolo* plea, and a detailed plea bargain structure is specified, legitimizing in the Federal Rules for the first time the practice which has been recognized in the American Bar Association Standards for Criminal Justice and in State practice.

The *nolo contendere* plea is still subject to consent of the court. But now, the rule provides a standard for granting or denying consent: the plea shall be accepted by the court "only after due consideration of the views of the parties and the interest of the public in the effective administration of justice." Of course, if the plea is offered by the accused, the only party whose view might be relevant thereafter is the prosecutor's. Under the old rule, it was the well-known policy of the Department of Justice to oppose all *nolo* pleas. However, federal judges frequently would inquire whether the prosecutor was sincere in his opposition in that case or merely submitting a *pro forma* opposition in accordance with Department policy. The new rule should have the effect of eliminating the indiscriminate opposition by the government to all *nolo* pleas. However, the rule shrinks from enunciating meaningful criteria for determining whether the public interest indicates acceptance of a *nolo* plea—factors such as exposure of the defendant to civil liability arising from a plea of guilty.

The rule also spells out the procedure for taking a plea of guilty, or *nolo contendere*, consistent with the practice elaborated in the recent decisions to assure that the defendant understood the nature of the criminal charge and the legal consequences of that plea, viz. waiver of his rights to trial of any kind, and the maximum and minimum potential sentences. In addition, the rule requires the court to inquire of the accused personally to be certain that his plea of guilty is voluntarily given and not the result of improper pressures upon him. In addition, the court must inquire about the defendant's understanding of the connection, if any, between his desire to plead guilty and any discussion which may have occurred between his attorney and the attorney for the government.

Finally, the rule elaborates a detailed procedure for overt plea bargaining between the prosecutor and defendant. At the first stage of that procedure, the court "shall not participate in any such discussions." However, the rule requires any plea agreement between the parties to be disclosed in open court when the plea is offered. At that point, the court may accept or reject the plea agreement made by the prosecutor and defendant—or, the court may defer decision on that question until a presentence report is available. If the court accepts the plea agreement, then the court must inform the accused that it will dispose of the prosecution in a manner no less favorable to the accused than the contents of the plea bargain. If the court rejects the agreement, then the court must advise the defendant personally in open court of such rejection and further advise him that he may withdraw his tendered plea. If the defendant elects not to withdraw his plea, notwithstanding rejection by the court of the plea agreement, then the court must inform the accused that disposition of the case may be on terms less favorable than contemplated in the agreement between the prosecutor and defendant.

As with discussions incident to negotiation of the compromise and settlement of civil causes of action, in the event that the plea bargain negotiations fail, matters disclosed by the defendant incident to the negotiations, including his tendered plea of guilty, are inadmissible in any civil or criminal proceeding.

Notwithstanding acceptance of the plea, the court must satisfy itself before entering judgment thereon that there is a factual basis for the plea. The rule does not specify the nature or circumstances of the inquiry to be made. A use immunity provision prevents use in any civil or criminal proceeding against the accused of any statement made in connection with any of the foregoing pleas or offers.

Finally, the rule requires a verbatim record of the proceedings in which the court took each of the required steps.

COMMENT ON RULE 11 AMENDMENTS

The general overhaul of Rule 11 is salutary, formalizing procedures adopted on an *ad hoc* basis by certain federal judges over recent years. The most important contribution of this new rule is the legitimization in federal practice of plea bargaining. Incident to that step, the rule provides a formal procedure for bargaining, making it clear that the judge has a role in the process after the lawyers for the parties have struck a conditional agreement—subject to the

court's approval. In the event that the bargain is not accepted by the court, the accused has the opportunity to reconsider whether to go to trial or take his chance with an alternative disposition acceptable to the court and the prosecutor.

Plea bargaining is thereby brought out in the open and subjected to control by the court. One ancillary benefit of a formalized plea bargaining should accrue to third parties who are affected by plea bargains: viz. other accuseds against whom the plea bargaining defendant may agree to testify for the prosecution. Such persons have the right under the Fifth Amendment Due Process Clause to knowledge of any leniency agreement between the prosecutor and the witness. *Giglio* v. *United States*, 405 U.S. 150, 92 S.Ct. 763 (1972). By putting the entire plea bargain on the judicial record, Rule 11 should make the prosecutor's compliance with the rule of *Giglio* a matter of course.

To the extent that Rule 11 enunciates a use immunity rule covering statements made by the defendant incident to the plea bargaining process, it seems ambiguous whether it intends to cover State as well as federal proceedings. Rule 11(e)(6) purports to embrance "any civil or criminal proceeding against the person who made the plea or offer". The Advisory Committee Note indicates that it is taken from the proposed Rule 410, Rules of Evidence for United States Courts and Magistrates (Nov., 1971). Its language is not dissimilar from the general use immunity statute (18 U.S.C. §6002) which does apply federal immunity orders to State proceedings. *Kastigar* v. *United States*, 406 U.S. 441, 92 S.Ct. 1653 (1972). Cf. *Murphy* v. *Waterfront Comm. of N.Y. Harbor*, 378 U.S. 52, 84 S.Ct. 1594 (1964). Rule 410 is also silent on the State-federal question. Although the notes to Rule 410 elaborate an evidentiary policy which would be inconsistent with State courts utilizing evidence of plea bargain statements in federal court, the notes are silent on the question whether the federal use immunity restricts State court evidentiary use. While the language of Rule 11(e)(6) is sufficiently broad to embrace State courts, it would have been better for the Advisory Committee Notes to treat the point directly.

RULE 12. PLEADINGS AND MOTIONS BEFORE TRAIL; DEFENSES AND OBJECTIONS

Any relief which the court might grant before trial of the general issue *may* be raised by pretrial motion, not merely defenses or objections (the former rule). The motion may be oral or written in the judge's discretion.

Certain motions *must* be raised before trial: defenses and objections based upon defects in the institution of the prosecution, or based upon defects in the indictment or information (excepting jurisdiction of the court or sufficiency of the criminal charge to constitute an offense—which shall be noticed by the court at any time); motions to suppress evidence; requests for discovery under Rule 16; and requests for severance of charges or defendants under Rule 14. The time for hearing such motions and requests may be set by court order at the time of arraignment or as soon thereafter as practicable, unless otherwise provided by local court rule. If necessary, the time for making the motion or request may, if necessary, be prior to the time for hearing of the motion or request.

At the arraignment or as soon as thereafter as practicable, the government may give notice to the defendant of its intention to use specified evidence at trial. The purpose of such notice is to afford the accused an opportunity to raise objections thereto prior to trial by motion as provided in this rule by pretrial motion to suppress. A complementary provision allows the defendant, acting in a similar time frame, to request such notice of intention of the government to use certain evidence at trial, in order to give the defendant an opportunity to file a pretrial motion to suppress such evidence. However, the defendant's right of inquiry is restricted to evidence which the government intends to use only in its case-in-chief at trial, provided further that such evidence is of the sort that the defendant may be entitled to discover under Rule 16 and any relevant limitations on discovery in that rule.

Unless the court orders that ruling on a pretrial motion shall be deferred until the trial of the general issue or until after verdict, such motions shall be determined before trial. Where factual issues are involved in determining the motion the court is obliged to state its essential findings on the record.

Failure of a party to raise defenses or objections or to make requests within the time frame specified in this rule, including any extensions made by the

court, shall constitute a waiver by the party, but the court may grant relief from the waiver for cause shown.

All proceedings at the hearing shall be recorded verbatim including such findings of fact and conclusions of law as are made orally.

COMMENT ON RULE 12 AMENDMENTS

There are two significant features of the proposed amendment to Rule 12. One is the clarification of the question of the proper timing for filing motions to suppress or exclude evidence, whether for reasons of invasion of Fourth Amendment rights (a motion pursuant to Rule 41) or to test Fifth Amendment rights infringement questions (e.g., *Miranda* issues). The object is to hear and determine those questions if possible before the trial of the general issue of guilt. Therefore, compulsory pretrial motions will hereafter include suppression and exclusion motions.

The second important novelty in the amended rule is the creation of a procedure whereby the government is encouraged to flag any suppression or exclusion issues which might impede the orderly presentation of the trial by giving the defendant sufficient warning that questionable evidence may be offered at trial so that the accused may litigate the legality of the government's intended evidence before the trial begins. The complementary right of the defendant to request whether the government will use certain evidence at trial provides the accused for the first time with a formal device to prevent surprise and unnecessary delays in the trial which heretofore could be accomplished only by discretionary informal cooperation by the prosecutor.

The defendant's right to request whether the government will offer certain evidence of questionable legality must be read in the context of the Organized Crime Control Act of 1970 (Pub. L. 91–452, Title VII, § 702(a)) provision regarding litigation on the sources of evidence. 18 U.S.C. § 3504. Subsection (a)(1) of that statute permits a party to any federal proceeding, including a criminal prosecution, to raise the issue by a claim that evidence is inadmissible because it is the primary product of an unlawful act (generally one involving electronic or related surveillance as defined in 18 U.S.C. § 2510(5)). Upon the assertion of such a claim, the party opposing the claim of inadmissibility for such reason must affirm or deny the occurrence of the alleged unlawful act. See also the statutory obligation of the government to supply each party at least 10 days before trial with a copy of the application and order for any court authorized electronic surveillance, as a condition of admitting evidence from such evidence from such sources at trial. 18 U.S.C. § 2518(9). The combined impact of the accused's statutory right to inquire into the government's possession of certain kinds of unlawfully obtained evidence, his right to pretrial notice of court ordered electronic surveillance, and the accused's proposed right to request whether the government will use evidence of questionable legality in its case-in-chief should strengthen the defendant's ability to obtain a fair judicial airing of some Constitutional and statutory admissibility questions which formerly may not have surfaced in a timely fashion or at all.

The procedural rights of the government and defendant concerning notice of government intention to use certain evidence seem unnecessarily ambiguous, because they are framed in permissive rather than mandatory language. Neither prosecution nor defense is obliged to utilize this informational remedy. No consequences are specified for failure to give or to request such notice. The Advisory Committee believed that permissive language would suffice to encourage prosecutors to give notice of intention to use certain evidence; also, the Committee made the cryptic observation "that judges have ways of insuring compliance." The problem is less clear where the accused is charged by himself. However, in a multi-defendant conspiracy case, counsel for one defendant may have no way of knowing what evidence the government has in its possession from another defendant—evidence which the government will offer at trial against all alleged conspirators.

The Advisory Committee's reference to the defendant's expanded discovery rights under the proposed amendment to Rule 16 (see discussion, *infra*), does not answer the pretrial motion to suppress problem in conspiracy cases, because the defendant's right to discover statements is still limited by the amended rule, as in the old rule, to his own statements.

The provision in the amended rule on the timing of hearing of pretrial motions gives the first formal recognition to the omnibus pretrial hearing which

was introduced in the Southern District of California without express permission therefor in the Rules. It is permissive rather than mandatory, so that the federal courts may experiment nationally with the procedure and determine the classes of cases in which an omnibus hearing is appropriate.

To the extent that the amended rule allows the court by order to defer hearing and ruling on compulsory pretrial rulings, including motions to suppress, a risk is created that the grant of such a motion after conviction might preclude retrial of the defendant because of the tainting effect the possession of unlawfully obtained evidence might have on the entire prosecution. Such effect may be avoided if the illegality and inadmissibility of the evidence is determined before trial (e.g., by assigning a new prosecutor who has been insulated from any tainted evidence or the fruits thereof. Cf *Hastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653 (1972); *United States v. McDaniel*, 482 F.2d 305, 311–312 (8th Cir., 1973). See also: *United States v. Marder*, 474 F.2d 1192, 1195–1196 (5th Cir., 1973)).

The Advisory Committee wisely urges that the courts use caution in deferring consideration of motions to suppress until after trial in order to avoid this result. Since the hearing of suppression motions rarely will be as time consuming as the trial of the general issue and irretrievable taint may prejudice retrial, it might have been better to qualify the discretion of the court to postpone such motions with cautionary language in the rule rather than by the less compelling comment of the Advisory Committee.

RULE 12.1. NOTICE OF ALIBI

This rule is an entirely new addition to federal criminal jurisprudence. It requires a defendant intending to rely upon the defense of alibi to give pretrial written notice of such intention by filing with the clerk and serving a notice of such intention upon the government. Thereupon, the government must give written notice to the defendant of the specific time, date and place at which the offense is alleged to have been committed. Then the defendant must inform the prosecutor in writing of the specific place he claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom the defendant intends to rely to establish the alibi. Thereafter, the prosecutor must give written information to the defendant of the names and addresses of the witnesses upon whom the government intends to rely to establish the accused's presence at the scene of the alleged offense. Each side has a continuing duty, both before and during trial, to notify the opponent of the identity of any additional witness required to be disclosed under this rule. The court may fix the time within which such information exchange shall be accomplished.

The court has the discretion to exclude the testimony of any witness whose identity should have been disclosed by reason of this rule, but application of the rule may not limit the defendant's right to testify in his own behalf. Moreover, for good cause shown, the court may grant an exception to any of the requirements of this rule.

COMMENT ON NEW RULE 12.1

The Advisory Committee notes that this rule has been under consideration for the federal courts in various forms since 1943. It is a compromise between prosecution and defense arguments on the merits and pitfalls, both practical and Constitutional, of requiring a defendant to telegraph his defense to the prosecution where alibi evidence will be tendered at trial.

The Constitutional problems of an alibi notice rule have been considered by the Supreme Court under differing State statutes: *Williams* v. *Florida*, 399 U.S. 78, 90 S. Ct. 1893 (1970); *Wardius* v. *Oregon*, 412 U.S. 470, 93 S. Ct. 2208 (1973). Where reciprocal discovery is available to the defendant, validity seems more likely. However, the Supreme Court has not considered the Constitutional implications of a rule which threatens a sanction if the defendant elects not to comply with the rule. In an attempt to meet this unresolved problem, the proposed rule gives the court a discretionary safety valve to make exceptions from the requirement of the rule in particular cases.

One problem of fairness suggested by the new rule which is not raised by the Advisory Committee is the absence of any obligation of the government to advise the defendant of the identities of intended rebuttal witnesses on the alibi issue. If the rule is justified at all to give the prosecution a fair opportunity

to develop evidence on the reliability of alibi witnesses, it would seem that the defendant should have as much notice as possible of witnesses who will be presented by the government to impeach his alibi witnesses. The government's obligation to give notice is limited under the rule to witnesses who will tend to place the accused at the time and scene of the crime, but not witnesses who rebut the alibi defense.

RULE 12.2 NOTICE OF DEFENSE BASED UPON MENTAL CONDITION

This is another new rule. If a defendant intends to rely upon the defense of insanity at the time of the alleged crime, he must give written pretrial notice thereof to the court and government. Failing such notice, the defense of insanity may not be raised at trial; however, for cause shown, the court may allow additional time for trial preparation or make other appropriate orders. If a defendant intends to introduce expert testimony relating to mental disease, defect, or other condition bearing upon the issue of whether he had the required mental state to commit the offense charged, he must also give written notice of such intention. In respect to this obligation, the court is also empowered to allow additional time for trial preparation or to make other appropriate orders in the event the defendant has not complied.

In an appropriate case, the court may require the defendant to submit to a psychiatric examination by a court designated psychiatrist, upon motion of the government.

If the defendant fails to give notice re intention to use expert testimony on mental condition or fails to comply with a court order to submit to psychiatric examination, the court may exclude any expert witness tendered by the accused on the issue of his mental state.

COMMENT ON NEW RULE 12.2

The rule does not deal with the compentency of the accused to stand trial. See, e.g., 18 U.S.C. § 4244. Like Rule 12.1, this is a new step in imposing obligations upon an accused to disclose an anticipated defense to the prosecution to aid the prosecution in preparing to meet the defense. However, it goes further than Rule 12.1 in that it exposes the accused to interrogation by a court designated psychiatrist in advance of trial. The problems of the Fifth Amendment compulsory self-incrimination privilege are not dealt with at all in the text of the rule. The Advisory Committee has treated the problem cursorily, as follows:

> . . . Any issue of self-incrimination which might arise can be dealt with by the court as, for example, by a bifurcated trial which deals separately with the issues of guilt and of mental responsibility.

Several problems appear to be ignored by this casual treatment of the defendant's right of silence. First, to the extent that defense counsel plans to use expert opinion evidence on the mental aspect of the crime—e.g., diminished capacity—bifurcation is unlikely since the potential expert evidence will relate to determination of an element of the crime charged. Bifurcation of the trial of essential elements of the offense charged seems unwieldy at best. Second, the rule fails to define any limits for "an appropriate case" in which the government may move the court to appoint a psychiatrist to examine the defendant. Since the rule does not impose any limitation on access to the psychiatrist's report or any information which he derives from his interviews with the accused, the prosecutor can use the psychiatrist appointment procedure as a device to obtain evidence or leads to evidence against the defendant.

In summary, this rule evidences a lack of sufficient analysis and treatment of the Fifth Amendment conflicts likely to result from its adoption, at least to the extent that it is purposed primarily to create the conditions for appointment of a psychiatrist to interview the accused at the request of the prosecution.

RULE 15. DEPOSITIONS

Formerly, upon a showing by the defendant only, that a defense witness' testimony had to be taken by deposition "in order to prevent a failure of justice", the court had discretion to order a deposition to be taken at any time after the filing of the indictment or information, upon notice to the parties. In addition, the court could order the deposition of a witness committed in lieu of bail, upon application of the witness, as a condition of discharging the witness from custody. The new rule enables the government also to take depositions

of its own witnesses, upon order of the court upon a less stringent test of necessity and for a number of new reasons not recognized for depositions sought to be taken by defendants under the old rule.

The test for obtaining an order for deposition is changed to read: "[W]henever due to special circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial . . .". Any party to a criminal proceeding may invoke the deposition procedure. The rule no longer expressly limits the deposition procedure to the post-indictment (information) time frame. However, this may not imply that the deposition procedure is available immediately following arrest and before indictment because of the 1972 amendment to Rule 1 (governing the applicability of the Federal Rules of Criminal Procedure).

Unless the defendant in custody waives his right in writing, he must attend the deposition. If in custody, he must be brought there at government expense. If not in custody, the defendant has a right to attend the deposition upon request subject to such terms as may be fixed by the court. But his failure to attend after notice and tender, if required, of his travel and subsistence expenses, will be a waiver of his right to attend. If the deposition is at the instance of the government, or at the instance of a defendant unable to bear the expenses of the deposition, the court may direct that the government pay the expenses of travel and subsistence not only of defendant's counsel but also of the defendant.

The procedure for the deposition is incorporated from the Federal Rules of Civil Procedure, except as otherwise provided in the Criminal Rules (See, e.g., Rule 17 governing subpoenas). No deposition of a defendant is allowed without his consent. The scope and manner of examination and cross-examination is limited to what would be permitted at trial (i.e., not as in a civil deposition for discovery purposes). The government must make available to the defendant or his counsel for examination and use at the deposition proceeding any statement of the witness which is in the possession of the government and to which the defendant would be entitled at the trial. Unlike oral depositions, all objections, and the grounds therefor, must be stated at the deposition.

Permitted use of a criminal deposition is substantially broadened by the amended rule. The old rule essentially restricted use of the deposition as substantive evidence to the conditions of witness unavailability and for impeachment of trial testimony of the witness, as in a civil case. The amended rule permits the deposition to be used by either side of the case at trial not only to impeach the trial testimony of the deposition winess, but also as substantive evidence in the following situations: where the deponent (1) is exempted by ruling of the judge on the ground of privilege from testifying concerning the subject matter of his deposition; (2) persists in refusing to testify concerning the subject matter of his deposition despite an order of the judge to do so; (3) testifies to a lack of memory of the subject matter of his deposition; (4) is unable to be present or to testify at the hearing because of death or existing physical or mental illness or infirmity; or (5) is absent from the hearing and the proponent of his deposition has been unable to procure his attendance by process or other reasonable means.

In general, a deponent is not deemed unavailable, within the meaning of this rule if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the deposition for the purpose of preventing the witness from attending or testifying.

The rule does not preclude the taking of depositions upon stipulations of the parties with the consent of the court either orally or upon written questions.

COMMENT ON RULE 15 AMENDMENTS

This rule is an elaboration of a procedure enacted by Congress in the Organized Crime Control Act of 1970. 18 U.S.C. § 3503. That statute permitted depositions of prospective witnesses of a party "[w]henever due to exceptional circumstances it is in the interests of justice" to take and preserve testimony. When the government seeks the order for a deposition under the statute, the motion must contain certification by the Attorney General or his designee that the legal proceeding is "against a person who is believed to have participated in an organized criminal activity." The amended rule eliminates the need for such a government claim before the prosecution can invoke the deposition process.

There is an area of potential difficulty presented by the government's right to depose its prospective witness who may never appear at the trial. If at the time

the deposition is taken, defense counsel has not been informed of the government's theory of its case or of the full implications of the deponent's testimony, the defendant will be deprived of the opportunity of effective cross-examination of the deponent. If the witness had testified at the trial when the defendant's counsel were operating under a similar disability, further cross-examination would usually be possible by recalling the government witness to the stand. Under the amended rule, the government need only supply the defendant at the deposition with those statements of the deponent which would be discoverable at the trial. See, e.g., the Jencks Act, 18 U.S.C. § 3500. Perhaps the remedy would lie in broader discovery for the defendant in a deposition situation than would be available under the amended Rule 16.

Such broader discovery might require disclosure of the statements of other prospective government witnesses whose testimony relates to the testimony of the deponent. In addition thereto, or in the alternative, the government might be required to make a detailed representation on the record of the relevancy of the deponent's testimony before cross-examination commences at the deposition.

The balance of my report, commencing with the important changes in the discovery rule (Rule 16), will follow shortly.

Sincerely,

ROBERT E. HINERFELD.

[From the New York Times, Apr. 26, 1975]

GOVERNMENT WITNESSES IN DANGER GIVEN NEW LIVES

(By Orr Kelly)

WASHINGTON, April 25.—That new family moving in down the street. Who are they?

The odds are that they are just a normal American family setting up housekeeping in a new community or neighborhood.

But twice each day, on the average, a family with an entirely new identity—furnished by the Federal Government—moves into a new neighborhood to begin a new life.

The new identity is days, perhaps only hours, old. Children are good at playing this game, but they may have trouble remembering their new names when they go off to school.

The witness relocation program, operated for the Justice Department by the United States Marshal's Service, began almost by accident seven years ago. Since then, it has burgeoned into an $11-million-a-year operation that will move some 700 witnesses and their families to new homes this year.

Federal prosecutors say that the program, which reportedly has a perfect batting average so far for protecting witnesses from retaliation, has been a key element in the Government's effort to crack down on organized crime.

DEMONSTRATED DANGER

For the witnesses, the program offers a high degree of protection from a threat that has been demonstrated repeatedly.

In Las Vegas recently, a man was offered a chance to assume a new identity, but refused it. When he opened the door of his motel room, he was decapitated by a blast from a shotgun.

A New England lawyer was warned that his life was in danger, but refused to move to another city. A bomb planted in his car exploded when he turned the ignition key, crippling him for life.

Linda Kuzmack, an aide to Gerald Shur, who runs the Criminal Division's part of the operation in the Justice Department, recalled another case.

"Shall we tell him about the doorknob?" she asked Mr. Shur.

"This guy had been relocated safely," Mr. Shur said, "but there was a death in his family and the marshals took him back to his old home city to the funeral. When it was over, he was told to go to his new home. Instead, he went back to where he used to live. When he turned the doorknob, a bomb went off and killed him."

SOME ARE PROSPEROUS

John Cameron, associate director of the Marshal's Service in charge of witness security emphasized in an interview that instances in which witnesses have been

harmed—through their failure to take the advice of the marshals—were rare exceptions, and in no case had a witness's enemies succeeded in tracking him down and harming him.

In most cases, he said, the more than 1,100 witnesses given new identities so far are safe and, in some cases, prosperous.

But getting into the program can be an abrupt and traumatic episode for a family.

Often, Mr. Shur said, a person with knowledge about a crime will suddenly agree to tell what he or she knows in a meeting with a United States attorney or a lawyer for an organized crime strike force.

"Linda or I may get a call at night or on the weekend," Mr. Shur said, "from a U.S. attorney who says he's just turned a witness and he's afraid the person may be beaten or killed over the weekend."

A single call to Mr. Cameron's office in Falls Church, Va., can provide immediate protection before the witness leaves the prosecutor's office.

But before a person can be taken into the program, approval from an assistant attorney general is needed, since each case may involve spending several thousand dollars.

The marshals immediately move the person to a so-called safe house, where a special guard is not needed, and one of Mr. Cameron's 15 relocation specialists moves in to learn everything he needs to know to make the change in identity successful.

"First we put him into a safe area, check his background, education, any medical problems. We go into everything that might be a problem to him or to us in his new location.

"He has to sever all ties and become a new individual and he has to make a decision he wants to do this," Mr. Cameron said.

In cases where the danger seems great, the witness may be whisked off to a safe place while a marshal goes to his home, gets his wife and picks up the family's children at school.

"They just do not go back home. It's just that quick," Mr. Cameron said. And although Mr. Cameron tends to talk of "he" and "him," many women witnesses have been relocated, and in some cases, both a husband and wife have been witnesses.

NAMES CHANGED LEGALLY

In one recent case, he said, a husband and wife were relocated from Gary, Ind., to Fort Worth, Tex. The husband got involved with a truck hijacking gang and was killed by his new associates. For protection, his wife was moved a second time and given still another new identity.

In every relocation, Mr. Cameron said, one of the first steps is to arrange to have the names of the family members legally changed so that when they tell people their new names they will be telling the truth.

Then comes the question of where they can safely move and make a living.

Sometimes, Mr. Cameron said, the fact that a person has agreed to testify in one trial may put him in danger from many others who fear he may also tell what he knows about them. One of the biggest jobs of the relocation specialists is to ferret out these other sources of danger.

Some witnesses have complained that they can't live safely anywhere in this country, so in a few cases, the marshals have found them new homes abroad.

In most cases, however, the major consideration in relocating a witness is finding a job for someone who has no background and can't get a single reference.

Mr. Shur helped solve this problem several years ago when he asked the United States Chamber of Commerce to help him set up meetings with small groups of businessmen around the country to talk about organized crime.

"SEND ME ANOTHER ONE"

After Mr. Shur talked for a couple of hours, his listeners would ask what they could do to help.

Now, there are some 150 businesses around the country that will accept people with no references except for the word of the marshals on their background.

"I was turned down only twice," Mr. Shur said. "These businessmen have employed hundreds of people.

"One man called the other day and said, 'Your boy is going to jail but I want you to send me another one.' "

When a witness arrives in his new community, he has far less plastic in his wallet than most people in our credit card society. The marshals arrange for a Social Security card in his new name and a driver's license if he had a valid one before, but they provide only the minimum necessary for the witness to get by in his new life.

But even this can be difficult and hundreds of persons throughout the country have cooperated with the marshals in creating new backgrounds for relocated families.

School officials take records from schools that relocated children had attended and create new records, complete to the written notes of teachers. These records are forwarded to the children's new school. They are accurate except that they come from a school different from the one listed.

FRAUDULENT ENGINEER

If the witness had a college degree or a professional license, the marshals will provide him with credentials in his new name. But they won't provide him with anything he didn't legitimately have before. And they won't help him establish a charge account or get a credit card even if he had credit and credit cards before.

"We had a fellow who claims he was a civil engineer and he asked that we get him a new license," Mr. Cameron said. "When we dug in, we found he didn't even have a college degree. He was upset when he found we weren't going to perpetuate his fraud and get him a new license because he wasn't entitled to the one he had."

The sometimes inflated expectations of witnesses have been one of the biggest problems in the program.

By the very nature of the operation, it is difficult to find out how well it works with regard to individual satisfaction. Two years ago, however, one relocated witness, Jerald Martin Zelmanowitz, complained bitterly in testimony before a Senate subcommittee that promises made by the Federal agents, with whom he had dealt before he testified against an organized crime figure, had not been kept.

Mr. Zelmanowitz seems, however, to have received just the minimum kind of help that Mr. Cameron says is routine. The problem apparently arose because of promises Mr. Cameron says were made before the marshals took over.

Mr. Zelmanowitz has a suit pending against the Government, and neither Mr. Shur nor Mr. Cameron would go into details about his case. But Mr. Cameron asknowledged that there had been instances in which witnesses said they had been promised much more than the Government delivered.

STRICT NEW GUIDELINES

"I don't want to put the finger on anybody, but there have been some misunderstandings," Mr. Cameron said.

As a result, the department issued stern new guidelines in January, warning that no one except a member of Mr. Cameron's operation was permitted to explain the program to a witness or to make any promises.

In addition to his new identity and help in finding a job, the witness gets a place to live and subsistance payments of up to $1,000 a month (more in exceptional circumstances).

Mr. Cameron's goal is to process each witness, from the relocation specialist's first talks with him to the time his subsistence payments end, within 90 days. In some cases, however, especially when the witness must return frequently to what Mr. Cameron refers to as the "danger area" for court appearances, the period may run significantly longer.

While the vast majority of witnesses who have been relocated have successfully adjusted to their new lives—one has even become a millionaire—some of the families face difficult personal and emotional problems.

What about teen-agers who are in love? Can anything be done to ease the pain of an abrupt, perhaps unexplained, disappearance? Mr. Shur and Mr. Cameron shrug. Not much.

And what about a divorced father whose former wife has been relocated with their children and her new husband?

"The previous husband wants to see the children. What does he do? He's in a bind because we're not going to tell him where they are," Mr. Cameron said. "And we can't arrange a visit because someone else would know and who knows which side he's on. Some cases have developed that are very difficult.

"In a case like this, about all you can possibly do is relay the wishes to the wife and then relay back to him what perhaps could be worked out. It's between them if they can work it out."

[From Journal of Missouri Bar, January–February 1975]

The New Rules of Criminal Discovery in Missouri

(By Joseph J. Simeone)

I.

On October 9, 1973, the Missouri Supreme Court adopted new rules for pre-trial discovery in criminal cases effective July 1, 1974.[1] These new rules represent the apogee of pre-trial discovery in criminal cases in the history of Missouri and may well be the most liberal of any state in the nation. They certainly go far beyond the traditional rules, the Federal Rules of Criminal Procedure, and in some instances are even more liberal than the rules relating to civil discovery. The purpose of this comment is to discuss briefly the thrust of the new rules and the changes made in the present law.

Discovery in criminal cases has a broad connotation. Discovery in such cases exists in at least the following: (1) the indictment or information which shall be a "plain concise and definite written statement of the essential facts constituting the offense charged";[2] (2) a bill of particulars;[3] (3) the right to a preliminary hearing in a felony case before a magistrate;[4] (4) the affirmative obligation of the state to disclose evidence favorable to the accused;[5] (5) the request for material to be used in aid of cross-examination;[6] and (6) the subpoena duces tecum.[7]

However, pre-trial discovery in the context of the revised rules is more limited and deals with the right of a party to obtain information after the information or indictment is filed and prior to trial.

In this sense discovery in criminal cases has had a long history. For several hundred years, and even until the end of the first half of this century, the rules were simple and absolute. A defendant charged with an offense was not, except in a few recognized instances, entitled to pre-trial discovery.[8] The English judges were "clear" that at common law the defendant is not entitled to discovery because it "would subvert the whole system of criminal law" and would be "dangerous in the extreme."[9] This philosophy was carried into modern practice and was eloquently stated by Judge Learned Hand in *United States* v. *Garsson*:[10]

> Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advantage have the whole evidence against him to pick over at his will and make his defense, fairly or foully, I have never been able to see. . . . Our dangers do

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[1] Published in 29 J. of Mo. Bar 554–559 (Nov.–Dec. 1973).
[2] Rule 24.01, Rules of Criminal Procedure.
[3] Rule 24.03.
[4] Rule 23.02.
[5] *Brady* v. *Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *Giglio* v. *United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); *State* v. *Thompson*, 396 S.W.2d 697 (Mo. banc 1965).
[6] *See State* v. *Smith*, 431 S.W.2d 74, 81–82 (Mo. 1968).
[7] Rule 25.19.
[8] The exceptions are the indictment or information, the names of prosecution witnesses. Rule 24.17 requires that the names of all material witnesses for the prosecution shall be endorsed therein. Cf. 18 U.S.C.A. § 3432. The United States is required to furnish a list of witnesses only in capital cases.
[9] *The King* v. *Holland*, 100 Eng. Rep. 1248 (1792).
[10] 291 F. 646, 649 (D.C.S.N.Y. 1923).

not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need fear is the archaic formalism and the watery sentiment that obstructs, delays and defeats the prosecution of crime.

Even as late as 1953, two legal giants were of opposing views. The Supreme Court of New Jersey, speaking through Chief Justic Vanderbilt, denied the defendant access to statement of witnesses and the statement made by the defendant.[11] The Chief Justice stated: "In criminal proceedings long experience has taught the courts that often discovery will lead not to honest fact-finding, but on the contrary to perjury and the suppression of evidence. Thus the criminal who is aware of the whole case against him will often procure perjured testimony in order to set up a false defense." [12] In a stinging dissent Judge [later Justice] Brennan criticized that "old hobgoblin perjury" as blocking discovery, and stated he was unable to reconcile the "anachronistic apprehension that liberal discovery" would bring "serious" and "sinister" dangers of perjury with modern civil practice.[13]

Within a few short years the whole thrust changed. What did not occur in almost two hundred years was accomplished in less than twenty. Oddly, the liberalization was not accomplished by the decisions of the Supreme Court of the United States, but by rules and statutes of the states, and strangely the states have more liberal rules on discovery than the Federal Rules of Criminal Procedure.[14]

The American Bar Association Project on Minimum Standards for Criminal Justice has proposed more permissive discovery practice for criminal cases "than is provided by applicable law in any jurisdiction in the "United States." The scope of discovery "should be as full and free as possible consistent with protection of persons, effective law enforcement, the adversary system, and national security." [15]

II.

The momentum came to Missouri. On March 17, 1972, the Criminal Discovery subcommittee of The Missouri Bar Criminal Law Committee approved suggestions for changes in the Missouri Rules relating to criminal discovery, and with some changes and omissions, the rules were adopted by the Supreme Court. Prior to the effective date of the new rules, there were few rules and statutes relating to discovery in criminal cases. They dealt with depositions by the defendant and the state, subpoenas duces tecum, the defendant's statement or confession and reports of physical or mental examinations in the possession of the state.[16] Grand jury transcripts were not to be disclosed for purposes of discovery.[17]

The new rules repeal former Rules 25.10 (deposition by defendant), 25.11 (deposition by defendant—how taken), 25.12 (deposition—when admissible), 25.13 (deposition by state—when and how taken) and 25.195 (discovery of defendant's statements and reports). The new rules amend Rule 24.24 relating to grand jury proceedings and establish 16 new rules relating to depositions and discovery by both the defendant and the state.

The rules lay to rest many of the problems which have plagued Missouri courts forced to determine if the failure to produce certain items rendered a given trial "fundamentally unfair." The peremptory wording of the rules removes the necessity of articulating standards for declaring abuses of discretion by the trial court.

The subcommittee's report comments that discovery, whether civil or criminal is predicated on the proposition that it exposes the truth, allows a party to prepare

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[11] *State v. Tune*, 13 N.J. 203, 98 A.2d 881 (1953).

[12] 98 A.2d at 884.

[13] 98 A.2d at 894. The tide began to change with *State v. Johnson*, 28 N.J. 133, 145 A.2d 313 (1958), where the court permitted the pre-trial inspection of a confession. *See* Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth*, 1963 WASH.U.L.Q. 279 (1963).

[14] Rules 15, 16, 17. Proposed amendments were to take effect August 1, 1974, but have been postponed by Congress.

[15] Standard 1.2, A.B.A. Standards Relating to Discovery and Procedure Before Trial.

[16] Rules 25.10, 25.11, 25.12, 25.13, 25.14, 25.15 (depositions), 25.19 (subpoena duces tecum), 25.195 (statements or reports of examinations).

[17] Rule 24.24.

for trial and eliminates surprise.[18] The new rules are applicable only to *felony cases* and commence "upon the filing of the indictment or information." Rule 25.30. Motions for discovery must be made "not later than twenty days after arraignment in the court having jurisdiction to try the offense charged." Rule 25.31. Answers must be filed within *ten days* after the motion. The *trial* court, however, may extend the times. Rule. 25.31.

III.

The heart of the new rules is found in Rule 25.32. It deals with disclosure by the state. That Rule, except for a protective order under Rule 25.40, requires the state to disclose to the defendant without court action the following items:

(1) (a) The names and last known addresses of persons whom the state intends to call as witnesses at any hearing or at the trial;[19]

(b) the written or recorded statements[20] *and existing memoranda reporting or summarizing the oral statements of witnesses;*[21]

(2) (a) any written or recorded statements and the substance of any oral statements made by the defendant, or a codefendant;

(b) a list of all witnesses to the making of such statement;

(c) a list of all witnesses to the acknowledgement of such statements and

(d) the last known addresses of such witnesses;[22]

(3) portions of any existing transcript of grand jury proceedings which relate to the offsense with which the defendant is charged, containing testimony of the defendant and the testimony of persons whom the state intends to call as witnesses;[23]

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[18] Judge Frankel, in *United States* v. *Projansky*, 44 F.R.D. 550 (S.D.N.Y. 1968), examines the old myths and finds them unpersuasive in modern criminal practice. The ABA Committee reappraised the traditional, historical view of criminal discovery and found them wanting. ABA Standards, Discovery and Procedure Before Trial, 2–3 (1970).

[19] Rule 24.17 which requires that witnesses be endorsed on the indictment or information has not been repealed by the new rules. It would seem that Rule 24.32(1) would be satisfied if Rule 24.17 is complied with.

[20] In the new Civil Rules to become effective Jan. 1, 1975, there is no such broad disclosure rule. Statements of witnesses are obtainable "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. Rule 56.01. 30 J. OF MO. BAR 176, 177–178 (1974).

This rule, of course, drastically changes the law in Missouri. While statements of witnesses at one time were discoverable, *State* v. *Tippett*, 317, Mo. 319, 296 S.W. 132, 135 (1927), this rule was overruled within three years. *State ex rel. Page* v. *Terte*, 324 Mo. 925, 25 S.W.2d 459 (banc 1930); *State ex rel. Missouri Pacific R. Co.* v. *Hall*, 325 Mo. 102, 27 S.W.2d 1027 (banc 1930)—overruling *Tippett*; *State* v. *Richetti*, 342 Mo. 1015, 119 S.W.2d 330, 344 (1938); *State* v. *Brown*, 360 Mo. 104, 227 S.W.2d 646, 650 (1950); *State* v. *Simon*, 375 S.W.2d 102, 104 (Mo. banc 1964). If without the statement the trial would be fundamentally unfair, the court has discretion to require production. *State* v. *Aubuchon*, 381 S.W.2d 807, 814 (Mo. 1964); *State* v. *Berry*, 451 S.W.2d 144, 147 (Mo. 1970).

[21] The phrase "Existing memoranda reporting or summarizing the oral statements of witnesses" is broad enough to include police reports containing oral statements of witnesses. It would seem also broad enough to include "warrant office" reports. This new rule also drastically changes the present law. *State* v. *Gilliam*, 351 S.W.2d 723, 727–728 (Mo. 1961), cert. den. 376 U.S. 914 (1964); *State* v. *Cochran*, 366 S.W.2d 360, 361 (Mo. 1963), cert den. 375 U.S. 981 (1964); *State* v. *Hale*, 371 S.W.2d 249, 253 (Mo. 1963); *State* v. *Yates*, 442 S.W. 2d 21, 26 (Mo. 1969) [police reports]; *State* v. *Cody*, 379 S.W.2d 570, 574 (Mo. 1964) [warrant office statements].

[22] Rule 25.195 effective Dec. 1, 1965 (now repealed), provided that upon motion the court may order the state to "permit the defendant" to inspect and copy any relevant written or recorded statement or confession made by the defendant. *State* v. *Scott*, 479 S.W.2d 438 (Mo. banc 1972)—trial rendered fundamentally unfair when defendant was refused inspection of the substance of the oral statement made to police officer. Court relied on language in *State* v. *Johnson*, 28 N.J. 133, 145 A.2d 313, 315, 316 (1958).

[23] The trial court has discretion to permit inspection of testimony before the grand jury. *State ex rel. Clagett* v. *James*, 327 S.W.2d 278, 282 (Mo. banc 1959); *State* v. *Cusumano*, 372, S.W.2d 860, 867 (Mo. 1963). Formerly, however, the inspection was not a matter of right, and defendant was not entitled to inspect the grand jury transcript for purposes of discovery or as a substitute for taking depositions. *State* v. *McCaine*, 460 S.W.2d 618, 620 (Mo. 1970). The new rule amends Rule 24.24 by deleting the last two sentences which state in substance that disclosure of transcripts shall not be permitted for purposes of discovery or as a substitute for taking depositions of witnesses. Rule 24.24 before amendment also provided that if inspection were permitted of the transcript, the transcript shall not include the deliberations or opinions of grand jurors and not facts which would be inadmissible at trial. Presumably, under the new rule, the transcript could not reveal the deliberations or opinions of the grand jurors, § 540.320, RSMo. Quere—are facts inadmissible at trial now discoverable?

(4) any existing transcript of the preliminary hearing and of any prior trial of the defendant if the state has such transcript in its possession or if it is available to the state;[24]

(5) reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and scientific tests, experiments or comparisons;[25]

(6) books, papers, documents, photographs or objects which the state intends to introduce into evidence at "the hearing or trial," or such books, papers, documents, etc. which were obtained from or belong to the defendant;

(7) any record of prior criminal convictions of persons the state intends to call as witnesses;[26]

(8) if there has been any photographic or electronic surveillance (including wiretapping) [of witnesses?] relating to the offense or of conversations to which the defendant is a party, or of his premises, the disclosure is to be in the form of a written statement by the prosecutor stating the facts pertaining to the time, place and person making the same;[27]

(9) any material or information in the possession of the state which tends to negate guilt of the defendant, or mitigate the degree of the offsense, or reduce the punishment.[28]

A request under this Rule must be made by serving a copy of the request upon the "counsel for the state" and each defendant to be tried jointly with the defendant. The request is to be made in the circuit court—"the court having jurisdiction to try the case." Rule 25.32(B).

This Rule substantially conforms to Standard 2.1 of the American Bar Association's Standards Relating to Discovery and Procedure Before Trial.

Matters not covered by Rule 25.32 may be required to be disclosed upon written motion in the court having jurisdiction to try the case, if the motion specifies the material or information sought to be disclosed and the court finds the request to be reasonable.[29] Rule 25.33(A). If, however, information is in the possession of "other governmental personnel," the state is to use due diligence "to cause such material to be made available to the defense. . . ." This Rule serves to cover any other matters not covered by Rule 25.32, such as the contents of electronic surveillance, physical or mental examinations of witnesses for the prosecution, and in some instances the identity of an informer. Cf. Rule 25.39(B).

IV.

Certain matters are not subject to pretrial disclosure. Rule 25.39 provides that (1) "work product," legal research, correspondence, reports containing opinions, theories or conclusions of counsel or the investigative staff, is not to be disclosed. (2) Where an informant's identity is a prosecution secret, and failure to disclose will not infringe upon constitutional rights of the defendant, or where disclosure is not essential to a fair determination of the cause, the identity of an informant is not subject to disclosure.[30] If an informant is to be produced at a hearing or

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[24] There is no requirement, except in cases of homicide, Rule 23.12, § 544.370, RSMo, that evidence at a preliminary hearing be reduced to writing. *State* v. *Benison*, 415 S.W.2d 773, 776 (Mo. 1967); *State* v. *McCaine*, 460 S.W.2d 618, 621 (Mo. 1970).

[25] Former Rule 25.195 authorized discovery of "physical or mental examinations" in the possession of the state. No distinction is made under the new rule as to negative or positive results.

[26] Will the prosecutor have to conduct an investigation to determine this information? The committee report indicates not. The rule is designed to prevent concealment of such information. What is the effect if the State fails to comply with the request?

[27] Does this Rule include a disclosure of the substance of the conversations overheard, or only the facts pertaining to the time, place and person making the surveillance? Presumably not, and the Committee so intended. After the basic information is obtained, the accused would have to proceed under Rule 25.33.

[28] This emanates from *Brady* v. *Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1962). The rule goes further, however, in that it makes pre-trial disclosure of such material mandatory. It conforms to Supreme Court Rule 4, DR7-103(B)—"A public prosecutor . . . shall make timely disclosure . . . of the existence of evidence . . . that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. See also *State* v. *Brooks*, 513 S.W.2d 168 (St. L. App. 1974).

[29] Based on Standard 2.5, ABA Standards. Rule 25.33 omitted subsection (b) of Standard 2.5 which authorizes the court to deny disclosure if there is substantial risk of harm to any person.

[30] Rule 25.39 is based on ABA Standard 2.6. However, Standard 2.6 reads: "Disclosure of an informant's identity shall not be required where his identity is a prosecution secret *and* a failure to disclose will not infringe the constitutional rights of the accused." For a recent case dealing with identity of informants, see *State* v. *Taylor*, 508 S.W.2d 506 (Mo. App. 1974).

trial, disclosure "shall not be denied. . . ." Rule 25.39(D). (3) Material or information which involves a substantial risk of prejudice to national security is not to be disclosed unless a failure to disclose will infringe upon the constitutional rights of the accused and whre the disclosure prevents a fair determination of the cause.

V.

Under the Rules, discovery in criminal cases is a "two-way street" subject only to "constitutional limitation."[31] The new rules provide that the defendant also must disclose material and information. Although the title of Rule 25.34 is "Disclosure by Defendant to State *Upon Court Order* Without Exercise of Discretion by Court" (emphasis added), the Rule provides that upon *written request* by the state the defendant shall disclose to the state the following material or information within his possession or control:

(1) Reports or statements of experts made in connection with the case, including results of physical or mental examinations, scientific tests or experiments which the defense intends to introduce into evidence. The one exception in the Rule is that any reports containing statements made by the defendant are not to be disclosed.[32]

(2) The names and last known addresses of persons, other than defendant, whom the defendant intends to call as witnesses at "any" hearing or trial, together with their written or recorded statements and any existing memoranda summarizing or reporting their oral statements.[33]

(3) Those parts of any books, papers, documents, photographs or objects which the defendant intends to introduce in evidence, except such as contain statements of the defendant.

(4) If the defendant intends to rely on the defense of mental disease or defect, this must be disclosed to the state. § 552.030(2), RSMo.

(5) If the defendant intends to rely on alibi as a defense, and the state in its "motion" [request?] specifies the time, date and place of the crime, the defense of alibi is to be disclosed and the defendant must give specific information "as to the place at which the accused claims to have been at the time of the alleged offense *and* the names and addresses of the witnesses by whom he proposes to establish such alibi."[34]

This whole Rule is an innovation in Missouri. The defendant has never before been required to disclose, in advance of trial, the materials and information covered in Rule 25.34.

As in the case of disclosure by the state to the defendant upon court order (Rule 25.33), the state may file a motion in the court having jurisdiction to try the case requesting the defendant to disclose material and information not covered by Rule 25.34. Rule 25.35(A). Furthermore, the state may move, "subject to constitutional limitations" "and any other safeguards deemed appropriate" for an order to require the defendant to (1) appear in a lineup, (2) speak for purposes of identification, (3) be fingerprinted, (4) pose for photographs not involving the reenactment of a scene, (5) try on articles of clothing, (6) provide a sample of handwriting, (7) submit to the taking of specimens from the fingernails, (8) submit to taking samples of blood, hair, and other materials of his body, and (9) submit to a reasonable physical or medical intrusion of his body.[35]

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[31] Nowhere do the Rules clarify "subject to constitutional limitations."

[32] Based on Standard 3.2. This would include reports of ballistic tests, physical examinations and handwriting analyses. Are such disclosures subject to constitutional limitations? "The issue is far from settled." ABA Standards at 98; See Wilder, *Prosecution Discovery and the Privilege Against Self-Incrimination*, 6 AM.CR.L.Q. 3, 12–13, 16–20 (1967). How does the defense counsel know in advance what he will introduce into evidence? However, there is a continuing duty to disclose under Rule 25.37.

[33] This provision does not appear in the ABA Standards.

[34] This is new to Missouri. The disclosure of an alibi defense was upheld in *Williams v. Florida*, 399 U.S. 78 (1970).

[35] Based on ABA Standard 3.1. For a collection of decisions authorizing such intrusions, see ABA Standards at 95–96. *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966).

This Rule is a counterpart of Rule 25.34. Under this Rule, unlike Rule 25.34, the state is not entitled to disclosure as a matter of right. Missouri has been sensitive to the rights of the accused in these areas.[36]

In the order directing discovery under the Rule, the court is to specify the material and information to be disclosed, the time and manner of disclosure, and shall make the grounds for its decision a part of the record. If requested "by any party" the court is to hear evidence on the need for discovery, and the defendant is entitled to counsel during any such disclosure.

VI.

The manner of making disclosure is covered by Rule 25.36. Disclosure under Rules 25.32-25.35 is to be made in a manner agreed upon by the state and the defendant or by the party making disclosure, by notifying opposing counsel that the material and information may be inspected, obtained, tested, copied or photographed at a specified time and place.[37]

Under Rule 25.37, there is a continuing duty to disclose after complying with a request or order of court. If a party discovers information which he would have been required to disclose under a request or order, he is bound to furnish such additional information to opposing counsel.[38]

In addition to specific exceptions relating to matters which are not subject to disclosure, the court under Rule 25.40 is authorized, at any time upon motion and for good cause, to make a protective order. Such protective order may deny specified disclosures, or restrict, defer or regulate such disclosures.[39] The court may also be authorized to excise certain nondiscoverable parts or portions contained in discoverable material, and seal, impound or preserve the excised portions. Rule 25.40(B).[40] Provision is made for *in camera* proceedings. Rule 25.40(C).[41]

VII.

Finally, the new rules contain an attempt to solve the problem of enforcement to which the civil rules have devoted much consideration. See Civil Rule 61. Rule 25.45 provides that the court, when notified of noncompliance with a rule or order, may order such party to make disclosure of the material or information, grant a continuance, exclude such evidence, or "enter such orders as it deems just under the circumstances." Although the Rule does not specifically state, Rule 25.45 impliedly includes dismissal of the charge.

Willful violations of the rules subject counsel to "appropriate sanctions by the court."

The Rule is applicable to both the state and the defendant. The matter of exclusion of defense evidence for failure to comply with a request or order may cause some problems.

A number of the new rules pertain to depositions,[42] but they do not represent significant changes from the prior rules.[43] The only point that merits notice is the effort to clarify the admissibility of depositions taken by the state. Formerly, depositions taken by the state and by the defendant were admissible on the same basis. Now, the depositions taken by the state are admissible only if (1) the witness is dead, or (2) the state has made a good faith effort to obtain the presence of the witness but has been unable to procure his attendance. Rule 25.44.

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[36] *See e.g. State v. Horton*, 247 Mo. 657, 153 S.W. 1051, 1053 (1913); *State v. Carenza*, 357 Mo. 1172, 212 S.W.2d 743, 744 (1948); Cf. *Blydenburg v. David*, 413 S.W.2d 284 (Mo. banc 1967) [breath test authorized under §§ 564.441–564.444]; *State v. Stevens*, 467 S.W.2d 10, 15–16 (Mo. 1971) [withdrawing blood sample].

[37] Who is to bear the cost of copying or photographing?

[38] Based on ABA Standard 4.2.

[39] Based on ABA Standard 4.4.

[40] Based on ABA Standard 4.5.

[41] The wording of Rule 25.40(C) is awkward—"(C) At any proceeding for showing cause for denial, regulation, restriction or deferment of disclosure, or any portions thereof, that such be made in camera, with a record made of such proceeding and the entire record of such in camera proceeding shall be sealed, impounded and preserved in the records of the court, to be made available to a reviewing court in the event of an appeal." Compare, ABA Standard 4.6.

[42] Rules 25.41, 25.42, 25.43, 25.44.

[43] Rules 25.11, 25.12, 25.13.

The deposition obtained by the defendant may be used in many other instances. Rule 25.42. The new rule is designed to ensure conformity with the standards of the Confrontation Clause as applied to the states.[44]

The new rules, however, do not provide solutions to all problems. For example, they are silent relative to interrogatories upon an adverse party.[45] They do not provide that the attorney for the defendant is entitled to a pre-sentence report, and do not indicate how an accused financially unable to obtain discovery may do so.

However, the new rules represent the farthest departure from the traditional adversaries scenario for criminal trials yet attempted in Missouri, and perhaps in other state. The burden in discovery matters has been shifted largely from the defendant—hitherto bound by requirements of particularized need and a showing of fundamental unfairness—to the state which must now advance reasons when seeking a denial or restriction on discovery. The new rules have also, for the first time, imposed obligations upon the defendant to disclose matters which hitherto he did not have.

It will be interesting to see what the future holds.

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[44] *Pointer* v. *Texas*, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965); *California* v. *Green*, 399 U.S. 149, 90 S. Ct. 1930, 26 L. Ed. 2d. 489 (1970).

[45] *State* v. *Cox*, 352 S.W. 2d. 665, 673 (1961).